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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ALEXANDER LINARES,<br><br>Defendant and Appellant. | B267709<br><br>(Los Angeles County Super. Ct. No. BA342569) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Curtis B. Rappe, Judge. Affirmed as modified, with directions.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Alexander Linares (defendant) appeals from the judgment entered after he was convicted of four felony counts alleging burglary and sexual assault. Defendant contends: (1) that the verdict in count 1 was unsupported by substantial evidence; (2) that it was error to admit photographs found in his wallet; (3) that the court erred by excluding defendant's statements made at the scene of the crimes, and that defense counsel rendered ineffective assistance by failing to urge admissibility under Evidence Code section 1240; (4) that the trial court abused its discretion by denying the jury's request to have a written copy of defense counsel's closing argument; (5) that the trial court erred in ordering the redaction of the victims' surnames, leaving only first names and last initials; (6) that defense counsel rendered ineffective assistance by failing to object to use of the term "rape kit"; (7) that the trial court erred by imposing enhancements under both sections 667.5, subdivisions (a) and (b), and that the subdivision (b) enhancements should be stricken; and (8) that clerical errors in abstract of judgment should be corrected.

We find that the trial court erred by imposing enhancements under both sections 667.5, subdivisions (a) and (b), but we agree with respondent that the subdivision (b) enhancements should be stayed, rather than stricken, and we modify the judgment accordingly. We also order the correction of clerical errors in the abstract. Finding no merit to the remaining contentions, we otherwise affirm the judgment.

## BACKGROUND

Defendant was charged with four felonies, as follows: two counts of assault with intent to commit a felony during the

commission of first degree burglary, in violation of Penal Code section 220, subdivision (b),[1] (counts 1 and 2); one count of lewd act upon a child under the age of 14, in violation of section 288, subdivision (a), (count 3); and first degree residential burglary, in violation of section 459 (count 4). The information further alleged that defendant had suffered nine prior serious or violent convictions, within the meaning of sections 667, subdivision (a)(1), and pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). It was also alleged that defendant had served six separate prison terms within the meaning of 667.5, subdivision (a), and five prison terms within the meaning of 667.5, subdivision (b). As to count 3, the information alleged pursuant to 667.61, subdivisions (a) and (d), that defendant committed the current offense during the commission of a burglary; and pursuant to section 667.71, that the defendant was previously convicted of kidnapping for sexual purposes.

A jury convicted defendant as charged, and found true the allegation that defendant committed count 3 during the commission of a burglary. In a subsequent bench trial, the court found true all the allegations regarding prior convictions and prison terms. The court then determined that the prior crimes had been part of a single prosecution and prison commitment in San Mateo County Superior Court No. SC037559A (the San Mateo case). The court thus set aside the true finding on all but one of the priors alleged under section 667, subdivision (a)(1), as well as all but one prison prior alleged pursuant to section 667.5, subdivision (a), and all but one alleged pursuant to section 667.5,

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[1] All further statutory references are to the Penal Code, unless otherwise indicated.

subdivision (b). The court left standing the true finding as to three counts of the San Mateo case, and entered a finding of not true as to the others. In addition, finding that count 4 was a lesser included offense of counts 1 and 2, the trial court dismissed count 4.

On October 9, 2015, the trial court sentenced defendant to prison for 34 years to life on count 1, comprised of 25 years to life as a third strike, plus five years pursuant to section 667, subdivision (a), based on count 1 of the San Mateo case (attempted murder); three years pursuant to section 667.5, subdivision (a), based on count 12 of the San Mateo case (kidnapping with the intent to commit rape); one year pursuant to section 667.5, subdivision (b), based on count 4 of the San Mateo case. As to count 2, the court imposed a term of 34 years to life, calculated as in count 1 which was stayed pursuant to section 654. As to count 3, the court imposed 84 years to life, comprised of a consecutive term of 25 years to life pursuant to section 667.71, tripled as a third strike, plus the prior conviction enhancements as calculated in counts 1 and 2. Defendant was given 3,064 days of presentence custody credits.

Defendant filed a timely notice of appeal from the judgment.

**Prosecution evidence**

In 2008, Samantha G. and Ricardo G., lived with their seven-year-old daughter Sereth, and three-year-old son in apartment A of a building within a complex on Park Paseo Lane, Los Angeles. Their building was located in the back of the complex, near Mission Road. At approximately 9:00 p.m. on June 22, Samantha followed her usual bedtime routine of lying down with her children in their upstairs bedroom for a while. She fell

asleep next to her son on his bed, on top of the blankets. Ricardo, who usually participated in the bedtime routine, remained downstairs until he later went to bed in the master bedroom, also on the second floor.

Samantha testified that she wore pajamas, a T-shirt, and underwear. Sometime after midnight, she woke up to someone touching her in the area of her vagina. She thought it was her son's leg at first because they had fallen asleep facing each other and hugging, so she went back to sleep. She is a heavy sleeper. She then felt the touching again in her vaginal area, but with more pressure. She could not see the hand she felt moving over her clothing. It hurt and she was upset. She looked toward the foot of the bed and saw a nearly naked man, whom she and Ricardo both later identified as defendant, lying on his side on the floor. Thinking it was Ricardo, Samantha stretched toward him, pulled up her pajamas, slapped him on the head, and told him to stop touching her. As she did this she felt a cap on defendant's head and asked why he was wearing a cap, and fell back to sleep.

Samantha woke again to the sound of her daughter crying. Sereth said "He's touching my private parts." Samantha got up, saw a naked man lying on Sereth's bed, and thought it was her husband, until he stood. Realizing it was not her husband, Samantha started hitting him, asked him what he was doing, and tried to hold him. The man pushed her away, opened the bedroom door, and left.

Ricardo, who woke to Samantha's screams, came out of his bedroom to see defendant running downstairs, naked from the waist down. He and Samantha followed defendant downstairs to the kitchen, where Ricardo grabbed him by the neck and fought

with him while Samantha called the police. During the struggle, defendant screamed and said, "I'm sorry, I thought it was my niece." Ricardo was holding him by the neck as the police arrived.

When Samantha returned to the children, Sereth was still crying and both children were scared. Sereth told Samantha that the man had claimed to be her dad and told her to keep quiet. She said he covered her mouth and then touched her private parts, in the area of her vagina. Sereth was wearing something on her top, but was naked from the waist down. There was a pair of adult size men's underwear and Sereth's pink underwear on her bed. Samantha later pointed out to the police, several pubic hairs on her daughter's legs near her vagina, which were then collected. Samantha later noticed that the bottom part of her own pajamas had been pulled down a bit, and were no longer resting on her waist.

Sereth testified that she was seven years old in June 2008. She remembered going bed one night and waking up with defendant next to her. She asked whether it was her father and he said, "Yes, go back to sleep." She tried going back to sleep, but felt tugging on her underwear, felt his hands on her legs taking off her pajamas and underwear, and then felt a body rubbing up and down on top of her on her "private section," her vagina. He did not wear underwear. She grabbed defendant's nose, and realizing it was not her father, screamed as he covered her mouth. Her mother woke up, and both parents chased him downstairs.

Forensic exams were conducted on Samantha, Sereth, and defendant. DNA swabs were taken, and the evidence and reports were packaged in separate "sexual assault" kits. Later DNA

tests revealed that the swabs of Sereth's genital area contained defendant's semen. Nurse practitioner Elsie Alfaro, who examined Samantha, testified to having observed swelling of the labia, small cuts, and bruising under the skin of Samantha's genital area. In Alfaro's opinion, the injuries were consistent with both sexual assault and the yeast infection Samantha had at the time, and could have been caused by either.

Samantha, Ricardo, and Sereth all testified that they had never seen defendant before that night. He did not have permission to enter their house. Samantha and Ricardo did not know how defendant had entered the apartment, as they always locked the doors and downstairs windows at night. To the right of the front entrance, there was a sliding patio door behind an iron railing, and there was a window to the left of the front door. Ricardo recalled locking both doors, closing the front window, and turning out the lights downstairs before going to bed. After the incident, the window was open, the window screen was newly torn, and all the downstairs lights were on. Samantha testified that the television and lamps were on and the bedroom door open when she and the children went to bed the night before. When she woke up, the door was closed and the television and lamps were off.

Defendant was holding his clothes in front of him when Ricardo confronted him. Samantha later found defendant's pants and removed his wallet. Inside were photographs of two adult women in provocative poses, and a copy of the famous photograph of the Vietnamese naked running girl. Investigators found a $100 bill, and other bills in or near the kitchen. Money (a $100 bill and some smaller bills) were missing from Ricardo's wallet,

which he had kept in his pants hung over an ironing board when he went to bed.

The prosecution presented evidence of two similar crimes committed by defendant. Brenda D. testified that in September 1993, when she was 19 years old, she lived with her father, sister, brother, and two nephews, in a one-bedroom apartment. One night she was alone in the bedroom, asleep in the upper bunk, when she was awakened by a sudden sensation of being touched on bare skin. A man she had never seen before was standing close to her legs, but he backed away when she saw him, and left the room when she screamed. Brenda's father and sister got up, and her father found the man in their bathroom. When the police arrived Brenda identified defendant as the man who touched her and he was arrested.

One morning in September 1994, Victoria S., her husband Juan, her brother, sister, and three daughters were asleep in their one-bedroom duplex apartment. About 2:00 or 3:00 a.m., while Victoria and Juan were sleeping next to each other on their mattress on the living room floor, Victoria woke after feeling a hand touching her stomach and trying to unbutton her shorts. When she touched the hand she knew that it was not her husband, so she told Juan that someone was trying to touch her. She jumped up, turned on the light, and saw a man later identified as defendant. Juan grabbed defendant, but believed his claim that he had intended to visit a friend, but made a mistake. Juan opened the front door to let defendant go, but Victoria stopped him saying defendant had been unbuttoning her shorts. When Juan opened the front door, he saw two boxes filled only with boys' underwear. Victoria's brother came in, and the two men held defendant until the police arrived and arrested

him. All windows and doors were locked when the family had gone to bed the night before, and after the incident, the living room window was open.

**Defense evidence**

Defendant's cousin, Merys Vasquez (Vasquez), testified that in June 2008, her mother, father, and brother lived in the same apartment complex as Samantha and Ricardo. Although the Vasquez family apartment was in a different building in the complex, it was also apartment A. The buildings in the complex looked the same, except that her mother's unit did not have a fenced patio in front or a sliding patio door, and was not near Mission Road. No woman other that Vasquez's mother lived there, and the only child in the household was Vasquez's 13-year-old brother. At that time, defendant stayed there periodically, spending some days there, other days with an aunt who lived elsewhere. The last time Vasquez saw defendant before the incident in 2008, she smelled alcohol on his breath. She thought it was the morning before the incident, but she was not certain about the day. Vasquez identified photographs of the front of her mother's unit window and the front of Samantha and Ricardo's unit, and agreed that her mother's front window looked different from Samantha and Ricardo's. Vasquez testified that the lighting conditions in the complex in 2008 were such that apartment numbers were not visible.

## DISCUSSION

### I. Substantial evidence supports count 1

Defendant contends that the evidence was insufficient to support his conviction of count 1, assault during the commission of a burglary, with intent to commit sexual penetration, in violation of section 220, subdivision (b).

As relevant here, sexual penetration means causing the penetration of a person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse, by any foreign object, or any part of the body, when the person is unconscious of the nature of the act because the person is asleep. (See § 289, subd. (d), (k)(1)-(k)(2); § 220, subd. (b).)

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) "An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 396.) "A defendant's specific intent to commit a crime may be inferred from all of the facts and circumstances disclosed by the evidence. [Citations.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1130, overruled in part on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "[B]ecause 'we *must* begin with the presumption that the evidence . . . *was* sufficient,' it is defendant, as the appellant, who 'bears the burden of convincing us otherwise.' [Citation.]" (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1430.) Reversal on a substantial evidence ground "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the

conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Defendant concedes that the evidence showed that he touched Samantha's "groin area," over her clothing, and that Samantha testified that she felt the pressure on her vagina. Nevertheless, he contends that the intent to penetrate remained unproven, because there was no evidence that defendant touched her *unclothed* vagina, or evidence that he did in fact penetrate her vagina. Defendant concludes from this argument that the evidence proved no more than an intent to touch her. Defendant also argues that because there was no penetration of the victims in the prior uncharged incidents, those incidents did not give rise to a reasonable inference that it was his intent to penetrate Samantha.

There is no merit to defendant's premise or his conclusions. Proof of an intent to commit sexual penetration requires no physical evidence of a sexual attack. (See *People v. Guerra*, *supra*, 37 Cal.4th at p. 1130 [rape[2]].) Moreover, there was evidence that defendant touched Samantha's vaginal area under her clothing: she felt pain and the touching on her legs and vaginal area. Afterward, Samantha noticed that her pajama bottoms had been pulled down, she felt pain in her vagina, and she had injuries consistent with sexual assault.

Simply entering the bedroom of a sleeping woman at night without consent and touching her genital area, or even just her shoulder, can give rise to a strong inference of an intent to rape

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[2] Sexual penetration in violation of section 289 and rape are different forms of the same crime, and courts often refer to section 289 penetration as "rape." (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1370.)

or commit some other sex crime, particularly when, as here, there is evidence the defendant committed other, similar crimes. (See *People v. Nible* (1988) 200 Cal.App.3d 838, 846-850.) Evidence of prior sex crimes need not be identical to be probative of intent or lack of accident. (*People v. Harris* (2013) 57 Cal.4th 804, 841.) Substantial evidence of a defendant's intent to commit rape was reasonably inferred in *People v. Hermes* (1946) 73 Cal.App.2d 947, from evidence that the defendant entered a sleeping woman's bedroom at 4:00 a.m. without consent, exposed his penis, and later admitted he "'might be walking down the street anywhere and have a sex desire and he was liable to break into a house and commit such an act.'" (*Id*. at pp. 958-959, 953.) In *People v. Padilla* (1962) 210 Cal.App.2d 541, an intent to rape was sufficiently supported by evidence of the defendant having entered a sleeping woman's bedroom at 5:30 a.m., where he pushed a handkerchief over her face, and when she screamed and struggled, he fled, leaving behind a pair of women's underwear. (*Id*. at pp. 542-544.) Even without additional evidence of sexual motivation, an intent to commit rape may be reasonably inferred when an unknown man enters a sleeping woman's bedroom, assaults her, but is deterred from further action by the woman's resistance. (See, e.g., *People v. Pendleton* (1979) 25 Cal.3d 371, 377; *People v. Nye* (1951) 38 Cal.2d 34, 37.)

In light of these authorities, even if we agreed with defendant that there was no evidence that he touched Samantha's unclothed vaginal area and no evidence that he penetrated her vagina, we would find substantial evidence that he intended to commit sexual penetration. Defendant, a stranger to Samantha, entered her bedroom at night without consent while she slept, demonstrated sexual interest by rendering

himself nude at least from the waist down, by touching her genital area, and by sexually assaulting Sereth after he was apparently deterred by Samantha's scolding and slap. Defendant had previously broken into homes and entered sleeping women's bedrooms to touch them. We conclude that substantial evidence supported defendant's conviction of count 1.

## II. Photographs

### *A. Relevance*

Defendant contends that the trial court abused its discretion in admitting the photographs of nude women and the Vietnamese girl, found in his wallet. He argues that the photographs were irrelevant, and that admitting them resulted in a denial of due process and a fair trial under the state and federal constitutions.

"The trial court has broad discretion in determining the relevance of evidence [citations] . . . ." (*People v. Heard* (2003) 31 Cal.4th 946, 972.) We review the trial court's ruling for an abuse of discretion (*People v. Harris* (2005) 37 Cal.4th 310, 337), and we may not disturb the trial court's ruling on the admissibility of evidence "'except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.' [Citation.]" (*People v. Goldsmith* (2014) 59 Cal.4th 258, 266.)

Defendant has not caused the exhibits to be transmitted to this court for review, but instead relies on the description of them given by counsel and the court at the time he objected to their admission as irrelevant and more prejudicial than probative. Defense counsel described them as "young girls in provocative stances" and the "Viet Nam photo -- the famous photograph of a young girl running." The prosecutor represented that two of the

photographs were of adult women in provocative poses but not naked.

Despite defendant's reliance on counsel's representations that the adult women were depicted in provocative poses, he now argues that there was "nothing 'sexual'" about them because they were "merely playboy-type" photographs, and because the photograph of the running Vietnamese girl was historic. Defendant also argues that the photographs were irrelevant or of no probative value because "having an interest in females" does not imply an intent to commit sex crimes; and he suggests that the possession of such photographs could have no tendency in reason to show that defendant's "drunken entry into a home was not the result of the mistaken belief it was the home of a relative."

Defendant frames the "basic issue" as the following abstract question: "[D]oes mere possession of photographs of historical nude figures or Playboy-type nudes *establish* an intent to commit sex crimes?" (Italics added.) If it does, defendant argues, possession of Playboy magazine photographs or the historic Viet Nam photograph would "effectively brand[] as sex criminals millions of men (and women) over the last half century."

The trial court did not conclude that the photographs *established* defendant's intent, as he asserts; rather, the court concluded that the photographs were *relevant* to the issue of defendant's intent. By equating "establish" with "relevant," defendant has effectively formulated a rule under which evidence would be considered relevant only if it is sufficient, by itself, to establish the fact for which it is offered. Defendant then

concludes that because the photographs were insufficient to establish intent, finding them relevant was absurd.

As defendant's rule is unsupported by authority, we instead apply Evidence Code section 210, which defines relevant evidence as evidence "having *any tendency in reason* to prove or disprove any disputed fact that is of consequence to the determination of the action." (Italics added.) "'The test of relevancy is whether the evidence tends, logically, naturally, or by reasonable inference to establish a material fact, not whether it conclusively proves it. [Citation.]' [Citation.] "'[T]o be admissible, evidence need not absolutely confirm anything. It is axiomatic that its weight is for the jury.' [Citation.]' [Citation.]" (*People v. Dellinger* (1984) 163 Cal.App.3d 284, 307.)

Here, the trial court viewed the photographs, considered the totality of the circumstances, and noted that the defense would suggest that defendant was in Samantha and Sereth's home by accident and thus did not intend to touch them in a sexual manner. We agree with the trial court that under such circumstances, photographs of a nude child, albeit historic, and of women in provocative poses would be probative of intent and lack of accident. Defendant has not shown that the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner.

Further, defendant has failed to demonstrate that admission of the photographs resulted in a miscarriage of justice. It is defendant's burden to do so under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). (*People v. Paniagua* (2012) 209 Cal.App.4th 499, 524.) Under the *Watson* test, "a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the

evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, at p. 836.) Defendant contends that the photographs were inherently prejudicial, but offers no discussion of prejudice until his reply brief, in which he concludes, without discussion of other evidence, that without the photographs, the People would have been unable to prove intent, and he would have been acquitted of the sex charges.

As we previously discussed, other evidence of defendant's intent was compelling. A stranger to Samantha and her family, defendant entered the bedroom at night without consent while she slept, rendered himself nude at least from the waist down, touched Samantha's genital area, and then sexually assaulted Sereth, leaving semen and pubic hairs as overwhelming proof of his act. Further, defendant's mistaken apartment defense was severely damaged by evidence that defendant had previously entered the bedrooms of sleeping women unknown to him, touched one on the bare legs, and the other on her stomach, while he tried to unbutton her shorts.

In addition, as respondent points out, the suggestion that defendant thought he was inside his aunt's home was proven false by the testimony of defendant's cousin that defendant's aunt was the only woman living in her apartment, and that the only child living with her was her 13-year-old son. Moreover, any such defense was wholly unsupported by substantial evidence, as no one testified that defendant was in fact mistaken about the apartment that night. Vasquez testified that although her mother's apartment was similar to the apartment of Samantha

and Ricardo, there were notable differences in that her mother's apartment had no fenced off patio or a sliding patio door.

We conclude that given the strength of the prosecution's case and the weakness of the defense, there is no reasonable probability that the result would have been different without the photographs.

***B. First Amendment***

Defendant contends that the photographs were admitted in violation of his First Amendment right to possess such material. As respondent observes, defendant has failed to preserve this issue, as he did not object on this ground in the trial court. A judgment may not be reversed by reason of the erroneous admission of evidence "unless [t]here appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) The rule applies to constitutional challenges, as well. (*People v. Riggs* (2008) 44 Cal.4th 248, 292.) Defendant relies on general authority that an objection may be excused if futile. (See, e.g., *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101.) However, he merely argues that because the trial court had already overruled objections on other grounds it would most certainly not entertain another objection. We do not presume futility from defendant's bare assertion that further objection would have been futile. (*People v. Merriman* (2014) 60 Cal.4th 1, 84.) As defendant fails to explain how the record supports this argument that the trial court would not entertain an objection on this ground, the futility exception does not apply. (See *People v. Valdez* (2012) 55 Cal.4th 82, 138-139.) Defendant has thus forfeited his constitutional challenge.

In any event, although there is no indication in the record that the trial court would not have entertained the objection, it is very unlikely that the court would have ruled in defendant's favor. There is no per se barrier to the admission of evidence simply because the evidence itself may be constitutionally protected. (*Dawson v. Delaware* (1992) 503 U.S. 159, 165.) "[S]uch evidence is admissible if relevant to some issue that is being tried." (*People v. Quartermain* (1997) 16 Cal.4th 600, 629, citing *Dawson*, *supra*, at p. 164.) As we have found no error in the trial court's ruling that the evidence was relevant to the issues of intent and accident, we would also find that the admission of the photographs was not prohibited by the First Amendment.

**III. Exclusion of defendant's statement**

Defendant contends that the trial court erred by sustaining the prosecutor's hearsay objections and excluding all statements that defendant made while fighting with Ricardo.

Although defendant suggests that the trial court excluded more than one statement, defense counsel's offer of proof included just the statement that he made a mistake, which he attempted to elicit from the several witnesses. On direct examination, Samantha testified that while defendant and Ricardo were fighting, defendant screamed, "I'm sorry, I thought it was my niece." When defense counsel asked Samantha what else she heard defendant say, the prosecutor objected. After Ricardo testified that he remembered hearing defendant say he was sorry, defense counsel asked what else defendant said. The court sustained the prosecutor's hearsay objection. Later, after Detective Teresa Curtis testified without objection that Samantha heard defendant pleading with Ricardo to let him go,

defense counsel asked the detective whether Samantha had told her that defendant said that he had made a mistake. The court sustained a hearsay objection to that question.

Defense counsel explained to the court that he was trying to elicit defendant's statement, "I'm sorry, it was a mistake," in order to show his state of mind. The trial court noted that defendant's statement, "I'm sorry, I thought it was my niece," was already in evidence, and ruled that it would be cumulative to add, "I'm sorry, I made a mistake." Defendant now contends that the statement was admissible as an excited utterance or spontaneous statement under Evidence Code section 1240, but concedes that defense counsel did not urge this ground of admissibility in the trial court, and that a party may not argue on appeal a theory of admissibility of evidence not raised at trial. (See *People v. Lightsey* (2012) 54 Cal.4th 668, 713.) He contends that any forfeiture of the issue should be excused on the ground that defense counsel rendered ineffective assistance by not arguing the grounds he now urges.

To prevail on an ineffective assistance claim, a defendant must not only demonstrate that his counsel erred, he must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) The reviewing court may proceed directly to the issue of prejudice if it is easier to dispose of an ineffectiveness claim on that basis. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241; see *Strickland v. Washington*, *supra*, at p. 687.)

We have already concluded that the mistaken apartment defense was wholly unsupported by substantial evidence,[3] and we do not discern how the addition of, "I'm sorry, I made a mistake" would add any support to that defense. The statement, "I'm sorry, I thought it was my niece," adequately conveyed defendant's mistaken belief that he had just sexually assaulted his niece. As defendant did not have a niece who lived in his aunt's similar-looking apartment, the statement, "Sorry, I made a mistake," would suggest no more than the mistaken belief which was already in evidence. We thus agree with the trial court that the statement was cumulative. The erroneous exclusion of hearsay evidence is harmless when the excluded evidence was "merely cumulative of properly admitted evidence" (*People v. Helton* (1984) 162 Cal.App.3d 1141, 1146.)

Defendant asserts that the excluded statement was not cumulative to other evidence received, but he does not contend that the court's ruling on that point was error, and does not explain how he came to his conclusion. Instead, defendant argues: "While he may have entered through the window, he would have explained that he did so because he was drunk, couldn't find a key and just wanted to get in bed." Defendant's offer of proof did not include such statements. Further, defendant does not contend that he was deterred from testifying by the court's rulings or by counsel error, and the record is devoid of any such indication.

Even if we agreed that the statement, "I'm sorry, I made a mistake," was not cumulative, there is no reasonable probability that the result would have been different had the statement been

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[3] See Discussion, section IIA, above.

admitted. Overwhelming evidence demonstrated that whatever his mistake, it was not in believing that he was in his aunt's apartment. Once inside the apartment, defendant turned on all first floor lights, giving him ample ability to see the apartment. He then proceeded upstairs where he took money from Ricardo's wallet, entered the children's room, which was illuminated by the lamps and television, again giving him another opportunity to see that it was not his aunt's apartment, as well as ample opportunity to see that Samantha was not his aunt and that neither her son nor Sereth was defendant's 13-year-old nephew or his mystery niece.

We conclude that there was no reasonable probability that the result would have been different if defendant had urged a different hearsay exception. Defendant has thus failed to meet his burden to demonstrate ineffective assistance of counsel. Further, given the overwhelming evidence of defendant's guilt and absence of mistake, we would find any erroneous exclusion of defendant's statement to be harmless beyond a reasonable doubt.

**IV. Jury request**

Defendant contends that the trial court abused its discretion by denying the jury's request to have a written copy of the defense attorney's closing argument.

"[A] trial court's inherent authority regarding the performance of its functions includes the power to order argument by counsel to be reread to the jury or to be furnished to that body in written form. The exercise of such power must be entrusted to the court's sound discretion. As a result, review must be conducted under the deferential abuse-of-discretion standard." (*People v. Gordon* (1990) 50 Cal.3d 1223, 1260, overruled on another point in *People v. Edwards* (1991) 54 Cal.3d

787, 835.) Whenever "a discretionary power is inherently . . . vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Respondent contends that defendant has forfeited this issue by failing to object. We agree. A party must object to the trial court's response to a jury question to preserve the issue on appeal. (*People v. Boyette* (2002) 29 Cal.4th 381, 430.) After reading the jury note to counsel, the trial court indicated that it intended to deny the jury's request, explaining that it would tell jury that closing argument was not evidence and that they were to confine their considerations to the evidence. The court asked counsel if there was any objection to its proposed response, and defense counsel replied, "No objection." Thus, defendant not only failed to object, he expressly waived any objection to the court's refusal and proposed explanation.

Furthermore, the trial court elaborated on its explanation to the jury, stating that it was not the court's practice to provide a copy of closing argument because, although it might help the jury to focus their deliberations, it was not evidence. The court also told the jury that providing one attorney's argument would then make it necessary to provide the other attorney's argument, which would take too much time. Although defendant now contends that some of these additional reasons were erroneous, he failed to object to them, or to request clarification or correction. Defendant's failure to object may be deemed tacit approval of the trial court's response to the jury. (*People v.*

*Kageler* (1973) 32 Cal.App.3d 738, 746; see *People v. Boyette*, *supra*, 29 Cal.4th at p. 430.)

In any event, defendant has not demonstrated an abuse of discretion. We have reviewed defense counsel's closing argument and note that nearly half the argument consists of mostly reading excerpts from the transcript of Samantha's 911 call, describing images in photographs (as exhs. B, C, D, and 48), and paraphrasing statements in the forensic nurse's report. The exhibits were available to the jury during deliberations. The rest of the argument consists of many confusing rhetorical statements and questions that defendant might have thought, said, or asked. As the prosecutor described it in his final summation: "Defense counsel got up here and essentially, in essence, kind of stepped in the shoes of the defendant and was asking questions as if it was the defendant inquiring about all of these different things. There is no evidence of that."

The trial court was justly concerned that if the jury had a copy of defendant's closing argument it would have to provide the prosecutor's argument as well, which would potentially result in an undue consumption of time. A trial court retains wide discretion to impose reasonable time limits during trial. (*People v. Marshall* (1996) 13 Cal.4th 799, 854-855.) And it is the trial court's duty to control all proceedings "with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." (§ 1044.) We conclude that the court's exercise of its discretion and duty was neither arbitrary, capricious, nor patently absurd.

Moreover, defendant has failed to demonstrate a miscarriage of justice. Defendant claims that it was respondent's burden to establish that the asserted error was harmless beyond

a reasonable doubt under the standard applied to federal constitutional error in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). On the contrary, an erroneous refusal to permit a readback of counsel's argument is reviewed for prejudice under the test of *Watson*. (*People v. Sims* (1993) 5 Cal.4th 405, 453, disapproved on another ground by *People v. Storm* (2002) 28 Cal.4th 1007, 1031-1032.) When the *Watson* test is applicable, it is the defendant's burden to demonstrate prejudice by establishing "a reasonable probability that error affected the trial's result." (*People v. Hernandez* (2011) 51 Cal.4th 733, 746.)

Defendant contends that defense counsel's argument was critically important because he had been prevented from offering evidence which would have explained why he was in Samantha and Ricardo's home, because the prior incidents did not involve penetration, and because his prior victims were not little girls. Defendant was not prevented from offering evidence to show why he was in Samantha and Ricardo's home; he was merely prevented from eliciting the cumulative out-of-court statement that he made a mistake.[4] Furthermore there was no reference in defense counsel's argument to the age of defendant's prior victims or the absence of penetration. Indeed, the only reference to the prior incidents was an imaginary conversation between defendant and a police officer in which counsel spoke as defendant, stating, "Officer, I've been in trouble before. Twenty-two years ago, but I've never done anything -- don't judge me on that." We can conceive of no prejudice from the jury's inability to review nonexistent points in an argument, or its inability to review argument about nonexistent evidence.

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**4** See Discussion, section III, above.

Defendant has not demonstrated the reasonable probability of a different result had the jury been given a copy of the argument, the same argument they heard in court. Moreover, if we were to apply the *Chapman* test, as defendant urges, we would still find any error harmless beyond a reasonable doubt, given the overwhelming evidence of defendant's guilt.

**V. Redaction of victims' names**

Defendant contends that the trial court erred in ordering the redaction of the victims' surnames, leaving only first names and last initials. Defendant argues that the trial court should have followed the procedures set forth in section 293.5, which authorizes courts to protect the privacy and identities of the victims of certain sex offenses by ordering that such victims be referred to as Jane Doe or John Doe, if the victim so requests and the court gives the admonition required by that section. (See *People v. Ramirez* (1997) 55 Cal.App.4th 47, 52-53.) Defendant contends that he was denied due process and a fair trial because there was no request by the victims, no reasoned decision on such a request, and no jury instruction such as CALCRIM No. 123 or CALJIC No. 1.12.[5]

Respondent contends that defendant has forfeited the claim, as he did not object to the surname redaction in the trial

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[5] CALCRIM No. 123 reads: "In this case, a person is called ((John/Jane) Doe/ <*insert other name used*>). This name is used only to protect (his/her) privacy, as required by law. [The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]" CALJIC No. 1.12 is substantially similar. Where section 293.5 is applicable, the trial court must give such an instruction sua sponte. (See § 293.5, subd. (b); *People v. Ramirez*, *supra*, 55 Cal.App.4th at p. 58.)

court. While defendant concedes he did not object or ask the trial court for an order or admonition, he contends that if the issue is deemed forfeited, defense counsel rendered ineffective assistance of counsel by failing to research the law and appropriate jury instructions.

Whether defendant claims that the trial court erred or that defense counsel erred, it is his burden, as the party challenging the judgment, to affirmatively demonstrate error. (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) As defendant has not shown that defense counsel was aware or unaware of the law and jury instructions relating to section 293.5, he has not demonstrated counsel error under this theory. (See *People v. Jenkins* (1975) 13 Cal.3d 749, 753-755.) Nor has defendant demonstrated error by the trial court. The trial court did not use Jane Doe, John Doe, or any other fictitious name, but merely called witnesses by their first names and last initials. Thus, under the plain language of section 293.5, that statute is inapplicable here. "It is a cardinal rule that courts may not add provisions to a statute. [Citations.]" (*People v. Hunt* (1999) 74 Cal.App.4th 939, 946.) As section 293.5 is inapplicable, the trial court was not required to follow its procedures, and did not err by failing to do so. Further, in the absence of a statute, rule or precedent, a trial court has the implied power to fashion any reasonable procedure or to alter any inconvenient practice. (*People v. Jordan* (1884) 65 Cal. 644, 646-647.) Thus, it follows that as section 293.5 is inapplicable, and defendant has pointed to no statute, rule or precedent forbidding the practice, the trial court had the inherent authority to use initials or abbreviated forenames to protect the privacy of victims and witnesses. (See, e.g., *People v. Cavallaro* (2009) 178 Cal.App.4th 103, 106, fn. 3.)

Counsel's failure to make an unmeritorious motion or request was not ineffective assistance. (See *People v. Price* (1991) 1 Cal.4th 324, 387.) Defendant contends that the redaction of last names at trial violates constitutional rights to a jury trial, confrontation, and due process. Defendant did not object to the practice or make a constitutional challenge below, and as he has not demonstrated error, the issue does not become cognizable on appeal as an additional consequence of trial court error. (See *People v. Partida* (2005) 37 Cal.4th 428, 435-439.) We further reject defendant's claim that defense counsel was ineffective by failing to make a constitutional argument below. Suggesting that counsel erred in failing to raise a confrontation claim, defendant compares the redaction of first names to the nondisclosure of the *identity* of a witness. (See, e.g., *Smith v. Illinois* (1968) 390 U.S. 129.) However, defendant makes no claim that he was kept ignorant of the identity of the witnesses or victims. As it does not appear on this record that defendant was denied reasonable pretrial discovery or access to witnesses as necessary to prepare a defense, there is no basis to find a violation of defendant's right of confrontation or due process due to the use of abbreviated names. (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1144-1146.) Further, under such circumstances defendant has not shown that any objection by counsel would have been sustained. "Counsel is not required to proffer futile objections. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 587.)

Defendant also argues that he suffered prejudice because the use of first names only implied that the victims and complaining witnesses so named were already proven to be defendant's victims, and suggested that the court believed that defendant was guilty and needed protection from him. Defendant

has pointed to no evidence that the jury drew such inferences, and the trial court instructed the jury that defendant was presumed innocent until proven guilty by the prosecution beyond a reasonable doubt, that the jurors were the sole judges of the believability of the witnesses, and that they were not to take a cue from the court's actions as to what the judge might believe. We presume the jurors followed these instructions and any possible prejudice was dispelled. (See *People v. Ramirez*, *supra*, 55 Cal.App.4th at pp. 58-59.)

Finally, defendant has not shown that the use of first names undermined the reliability of the verdicts. We have determined elsewhere in this opinion that the evidence of defendant's guilt was overwhelming, and no substantial evidence supported his defense of mistake. Under such circumstances, if defendant had established a claim of ineffective assistance of counsel, we would find beyond a reasonable doubt that the redaction did not affect the outcome in this case.

**VI. Rape kit**

Defendant contends that it was unduly inflammatory to refer "over and over" or "repeatedly" to the evidence packet prepared by the sexual assault nurse as a "rape kit." Defendant further contends that defense counsel rendered ineffective assistance by failing to object to the term, because it was not only inflammatory, but also unnecessary, as there were other, more neutral terms for the evidence, and defendant was not charged with rape.

Initially, we observe that defendant has failed to demonstrate that the term was repeated "over and over." He cites three occasions in the testimony of Detective David Cedeno when the term was used. Defendant has not shown that the term

was otherwise mentioned in the evidence, arguments, or instructions.

A defendant claiming ineffective assistance of counsel, must demonstrate that counsel's failure to object amounted to error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687.) We do not find that three references to the name of an evidence collection package, over five days of testimony to be so inflammatory or prejudicial that a failure to object to use of the name suggests that defense counsel was not functioning as effective counsel.

Moreover, defendant must demonstrate that counsel's failure to object to the term undermined the reliability of the verdicts. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 687-688.) Defendant merely argues that "the prejudicial nature of such a reference is obvious," and then concludes that it was harmful. Defendant otherwise makes no effort to demonstrate a reasonable probability that the outcome of the trial would have been different if Detective Cedeno had not used the term "rape kit" three times. Instead, overwhelming evidence established that defendant entered the family's home with intent to commit sexual penetration and that he sexually assaulted Sereth. We discern no reasonable probability that use of the term "rape kit" in this context affected the reliability of the verdicts.

**VII. Prior prison enhancements**

Defendant contends that the trial court erred by imposing additional terms of imprisonment under section 667.5, subdivisions (a) and (b), as both enhancements were based on the same prison term served after conviction of multiple felonies in San Mateo County.

"A prior separate prison term for the purposes of this section shall mean a continuous completed period of prison incarceration imposed for the particular offense alone or in combination with concurrent or consecutive sentences for other crimes." (§ 667.5, subd. (g).) As the evidence showed that defendant served a single prison term in the San Mateo case, only a single enhancement may be imposed under section 667.5. (*People v. Grimes* (2016) 1 Cal.5th 698, 739; *People v. James* (1980) 102 Cal.App.3d 728, 733.)

The three-year enhancement of section 667.5, subdivision (a), applies here, as the new offenses were violent felonies specified in subdivision (c), the prior separate prison term served was for one of the violent felonies specified in subdivision (c), and defendant committed the current offense within 10 years of his release.[6] Thus the one-year enhancement under subdivision (b) is inapplicable. (See § 667.5, subd. (b) [subdivision (b) applies "[e]xcept where subdivision (a) applies"].)

Defendant asks that each one-year enhancement imposed under section 667.5, subdivision (b), be stricken. Respondent agrees that the court erred in imposing enhancements under section 667.5, subdivision (b), but contends that the inapplicable enhancements must be stayed, not stricken. (See *People v. Brewer* (2014) 225 Cal.App.4th 98, 104 (*Brewer*); Cal. Rules of Court, rule 4.447.[7])

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[6] See section 667.5, subdivision (c), subparagraphs 14, 15, 16, and 21.

[7] California Rules of Court, rule 4.447 reads: "No finding of an enhancement may be stricken or dismissed because imposition of the term either is prohibited by law or exceeds limitations on

California Rules of Court, rule 4.447, applies to mandatory enhancements, those which must either be imposed or stricken. (*People v. Lopez* (2004) 119 Cal.App.4th 355, 365.) When such an enhancement "is barred by an overriding statutory prohibition . . . and [in] that situation only -- the trial court can and should stay the enhancement. [Citations.]" (*Ibid.*; see also *Brewer*, *supra*, 225 Cal.App.4th at p. 104; see, e.g., *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1127-1130 [multiple firearm enhancements under sections 12022.53 and 12022.5].) Section 667.5, subdivision (b) enhancements are mandatory (*People v. Langston* (2004) 33 Cal.4th 1237, 1241), and in this case, were barred by section 667.5, subdivision (g), and the application of subdivision (a). We agree with respondent that defendant's reliance on *People v. Jones* (1993) 5 Cal.4th 1142, 1153, *People v. Langston*, and *People v. Jordan* (2003) 108 Cal.App.4th 349, 368, is misplaced, as those authorities did not involve or discuss the proper remedy under these circumstances or the application of California Rules of Court, rule 4.447. Thus, the correct procedure here is "'to impose a sentence on the barred enhancement, but then stay execution of that sentence.'" (*People v. Walker* (2006) 139 Cal.App.4th 782, 794, fn. 9.)

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the imposition of multiple enhancements. The sentencing judge must impose sentence for the aggregate term of imprisonment computed without reference to those prohibitions and limitations, and must thereupon stay execution of so much of the term as is prohibited or exceeds the applicable limit. The stay will become permanent on the defendant's service of the portion of the sentence not stayed."

**VIII. Correction of abstract**

Defendant points out that the enhancements orally imposed by the trial court under section 667.5, subdivision (a), were erroneously noted in the abstract of judgment as having been imposed pursuant to "PC 667(A)." The trial court is directed to prepare an amended abstract which conforms with the oral statement.

**DISPOSITION**

The judgment is modified to stay the one-year enhancements imposed under section 667.5, subdivision (b). The superior court is ordered to amend the abstract of judgment to reflect this modification, and to correct the statutory authority for the three-year enhancements imposed pursuant to section 667.5, subdivision (a), but erroneously stated as "PC 667(A)." The superior court is directed to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT