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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. HALL LYCURGUS JOHNSON, Defendant and Appellant.	B281511 (Los Angeles County Super. Ct. No. BA450706)

APPEAL from the judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed in part, vacated in part, and remanded with directions.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Hall Lycurgus Johnson appeals from the judgment entered following his convictions by jury on count 1 – human trafficking of a minor for a commercial sex act (Pen. Code, § 236.1, subd. (c)(1)),[1] two counts of lewd act upon a child (§ 288, subd. (a); counts 2 & 3), count 4 – kidnapping for child molestation (§ 207, subd. (b)), and two counts of forcible rape (§ 261, subd. (a)(2); counts 5 & 6). We affirm, except we vacate appellant's sentence and remand for resentencing.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that during September 2016, 12-year-old A.S. was living at the Hollywood Shelter. A 16-year-old girl there introduced A.S. to prostitution.

On September 9, 2016, close to midnight, A.S. decided to leave the shelter and began walking. She eventually entered a vehicle driven by a White man and had sex with him. Later, she walked around and eventually stood at a corner. As A.S. crossed the street, a car drove past her. She testified she turned away "because I was so weirded out by how he turned." By "weirded out," A.S. meant she was "freaked out" and scared.

When A.S. walked away from the shelter, she saw "C" (later identified as appellant) driving a car back and forth. When she first saw appellant, he was staring at her and "looking all mad." A.S. did not know appellant and had never seen him before. Appellant "looked [at A.S.] mad" as he drove past her. When A.S. said "mad," she meant "angry," and when she saw appellant looking at her that way, she was afraid. She got

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[1] Subsequent section references are to the Penal Code.

"weirded out" and tried walking in a different direction to get away from appellant and the car. However, the car exited a parking lot, appellant rolled down a window, and he began staring at A.S. When appellant began staring at her, it made her feel "way more scared" because appellant was Black and the girl at the shelter had told her to "stay away from all Black guys."[2]

A.S. wanted appellant to leave her alone so she began walking with another male whom she did not know, pretending she was with him. However, appellant, the sole occupant of the car, told A.S. to "get in the car" and she did. A.S. entered the car because she believed that if she ran, appellant would catch her because he was in a car. A.S. testified she did not like the situation but thought the best thing to do was "[to] get in the car and deal with it."

Appellant first drove A.S. to a store, obtained cigarettes inside, then returned to the car. Around 3:00 a.m., and during the period before appellant returned to the car, A.S. remained in the car and did not ask for help. She explained, "I just wanted to stay where I was and then act calm so nothing would happen" and "you never know what happens." When appellant returned to the car, he told A.S. they were going to his house. She did not know what was going to happen there. She did not ask appellant, who identified himself only as "C," to take her there.

After appellant drove A.S. to his apartment, the two entered; no one else was inside. Appellant closed the door. She was still afraid because she was in the apartment of someone she did not know. A.S. testified that the two "just laid on the bed and he just turned on the radio and the whole time I was just staring

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[2] A.S. did not testify what her race was.

at the ceiling." The two started listening to music and appellant asked if she knew how to braid hair. A.S. replied yes, he told her to braid his hair, and she complied. A.S. later lay in appellant's bed. She testified appellant and her "just started hugging and we just fell asleep." Nothing more happened.

A.S. initially testified that the next morning, on September 10, 2016, appellant told A.S. to shower, get dressed, and prepare to leave. She complied. Appellant gave her a cell phone and told her to keep in contact. He also gave her five or six condoms. A.S. waited for appellant to get dressed, then waited in the car about three minutes while appellant was in the apartment. A.S. testified she had said that one reason she did not leave appellant, "for example, when [she was] outside of the apartment," was she thought something might happen to her if she tried to get away.

Later, A.S. provided additional testimony about the above night and morning with appellant, including testimony appellant engaged in sexual intercourse with her, as discussed below. A.S. testified that on the night she came to appellant's house, she told him she was 12 years old. She testified she wanted appellant to know she was 12 "so maybe I can leave." She also told him she had been living in a group home. A.S. testified that after she told appellant she was 12 years old, she was not "able to leave."

The next morning (September 10, 2016), appellant engaged in vaginal intercourse with A.S. in his apartment. This was the only time appellant had had sex with her. A.S. did not want to have sex with appellant. The following occurred during cross-examination of A.S.: "Q What did [appellant] do immediately before the sex act, sexual contact? [¶] A He just sat on the bed and then we just stayed quiet. [¶] Q And then you had the sexual contact? [¶] A And then he asked me and then

I just stayed quiet." Appellant did not hold her down[3] or threaten her. A.S. testified she "didn't want to do it," she was "a little bit afraid of him," but she did not tell appellant she was afraid.

A.S. testified she let appellant have sex with her because "I just wanted to get it over with so we won't do it later on." The prosecutor asked if A.S. was afraid, and she replied, "Something like that." Although A.S. testified she had had sex once with appellant in the morning, she also testified that after appellant had sex with her and while it was night, he told her he was in his 40s.

The prosecutor asked if appellant did anything that made A.S. afraid. A.S. replied yes and said appellant's face was scary. According to A.S., appellant had a face that looked like the character "Grinch" in the movie "The Grinch That Stole Christmas." A.S. did not like the movie because it made her afraid. When appellant smiled at her, he looked like the Grinch. A.S. testified she told Los Angeles Police Detective Timothy Stack both that appellant scared her when he smiled like the Grinch, and that appellant was scary.[4]

While at appellant's residence, A.S., using the phone appellant had given to her, called her mother who lived in Arizona. A.S. talked with her mother when appellant was not looking, otherwise something might have happened. A.S.

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[3] A.S. did not testify as to whether there was any size disparity between her and appellant.

[4] We discuss the following facts that occurred after appellant's alleged rapes of A.S. as pertinent to the issues of whether those sexual acts were nonconsensual and whether she had the requisite fear.

thought appellant would get mad, do something, and A.S. might get hurt.

A.S. called her mother so her mother could tell her what to do. A.S. did not know what to do to get herself out of the situation. A.S.'s mother told A.S. to leave the house because "that person can do whatever they want to do in their house." A.S. testified she did not follow her mother's advice but "waited until the right time." A.S. did not feel she had the opportunity to get away from appellant.

Appellant and A.S. eventually drove from his apartment to a motel. Appellant entered a motel room and remained inside about 30 minutes. A.S. did not leave the car because she did not want to leave. Other people were entering and exiting the location but A.S. did not try to get their help. However, A.S. was not okay with being with appellant.

Appellant later drove A.S. to a location near a laundromat. He told her to put on various clothing and a wig, and she complied with his instructions. Appellant picked up his cousin near the laundromat. Appellant told A.S. to sit in the back and she complied. Appellant drove them about a block away from the laundromat.

A.S. testified appellant told her to walk to the laundromat area, stand there, and "work for him by . . . prostituting." This was the first time appellant mentioned anything about his wanting A.S. to engage in prostitution for him. A.S. did not really want to do it. Appellant told her rules to follow while she was working. One was, "don't talk to Black guys."

A.S. exited the car and began walking to where appellant had told her to go. A.S. did this, planning to walk away when appellant stopped watching her. She was trying to find a way to

escape the situation. Appellant later drove her to the laundromat area.

A.S. was on the street working for appellant that day and night. She eventually went with a light-skinned Black man named "Cash" to his house. A.S. called appellant and told him she was leaving with Cash. Appellant became upset and hung up the phone.

Cash and A.S. went to a motel room. Two women were there, one of whom knew appellant. A.S. testified she called her mother and "told her that I had [gotten] away from [appellant]." A.S. also testified she told her mother that appellant "had made me go prostitute for him." A.S. told the women she was 12 years old, came from a group home, and needed help to return. The woman who knew appellant got on the phone and threatened him.

A.S.'s grandmother (Grandmother), testified as follows. About September 10, 2016, Grandmother learned A.S. was in trouble. Grandmother was given a phone number, she called it, and a man answered. Grandmother heard A.S.'s voice in the background. The man gave Grandmother an address where Grandmother could pick up A.S. The man told Grandmother that A.S. was "with these girls who are crazy." The man identified himself by various names.

The women at the motel escorted A.S. to a restaurant. A.S.'s grandmother arrived and A.S. ran outside the restaurant and hugged her. A.S.'s father also arrived. A.S. gave to her father the phone appellant had given to her and that she had possessed the entire time. A.S. told her father she had been used for prostitution and appellant had had sex with her even though she had not wanted to do it.

A.S.'s father (Father), testified as follows concerning the incident. The phone A.S. gave to him rang, showed that a person named "C" was calling, and Father answered. The caller was a man. The man said he had A.S. and had picked her up in Hollywood. Father told Detective Stack, "C told [Father] that [C] picked up A.S. to see if he could take her somewhere safe." Father testified he asked the man if he was trying to pimp A.S. "C" said no and said she was too young. "C" also said he wanted his phone back. "C" denied he had had sex with A.S. The caller identified himself as "Baby Trigger." At some point, "C" texted, "You got her, keep her" and "That's not my phone."

A.S.'s grandmother took A.S. to the police station. A.S. testified she told Detective Stack appellant made her work as a prostitute. Everything A.S. told Detective Stack was true. A.S. also testified it was a little embarrassing for her to tell the detective everything that had happened and to tell the jury about the sexual intercourse.

Detective Stack testified he was assigned to the police department's human trafficking unit, he investigated the present case, and, during the night between September 10 and 11, 2016, he conducted a tape recorded interview of A.S. at the police station. During the interview, A.S. told him appellant twice had had sexual intercourse with her, i.e., once when she initially arrived at the apartment while it was still dark, and once in the morning. A.S. also said she orally copulated Cash in his house.

About 2:10 a.m. on September 11, 2016, a registered nurse conducted a sexual assault examination of A.S. and collected swabs from her vagina and vulva. A criminalist found appellant's DNA in samples taken from the swabs.

Detective Stack testified the phone A.S. gave to Father had an entry consisting of the question, " 'Who dis[?]' " The reply was, " "Ya daddy n da street.' " The phone had an Instagram account and the account holder was listed as "King Y.P.C. Da Great." One record from that account said, "Married to the game." The account contained a photograph of A.S. taken on September 10, 2016.

Detective Stack searched appellant's car and found inside a notebook containing a page that said, "Young Pimpin' Curt." The page reflected dollar signs and a crown with the word "King" below the initials "Y.P.C." Stack searched appellant's apartment and found inside a document bearing the initials "Y.P.C." and the words "Young Pimpin' Curt." The document also reflected a crown with the word "King" in it, immediately above the words "Young Curt."

Detective Stack, an expert in human trafficking involving prostitution, pimping, and pandering, testified as follows. Pimps called themselves "daddy." Dollars signs were symbols associating pimps with human trafficking. Crowns symbolized a higher level of stature "within the organization." The phrase "[m]arried to the game" indicated allegiance to the world of human trafficking and prostitution.

There were customs, practices, and rules of prostitution. It was customary for a pimp to have sex with a newly-acquired "worker" and for a pimp to communicate with the prostitute via a cell phone. One rule was a prostitute was not to talk to Black males; to do so was regarded as a betrayal of the pimp. Another rule required the prostitute to respect her pimp. If she disrespected him, she would be disciplined, including being beaten or killed.

Appellant presented no defense evidence.

ISSUES

Appellant claims (1) insufficient evidence of lack of consent supports his convictions on counts 5 and 6, (2) the trial court reversibly erred by denying his motion for a new trial, and (3) the court erroneously imposed "One Strike law" sentences on counts 4 and 5. Respondent also makes claims of sentencing error.

DISCUSSION

1. SUFFICIENT EVIDENCE SUPPORTS APPELLANT'S CONVICTIONS ON COUNTS 5 AND 6.

Appellant claims insufficient evidence of A.S.'s lack of consent supports his convictions on counts 5 and 6. We reject the claim. When assessing the sufficiency of the evidence, we " 'review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that *a reasonable trier of fact* could find the defendant guilty beyond a reasonable doubt.' " (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126.) "Our power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment." (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181–1182.)

As to each of counts 5 and 6, the jury convicted appellant of the forcible rape of A.S., in violation of section 261, subdivision (a)(2).[5] "[T]he prosecution is required to demonstrate that the act of sexual intercourse was accomplished against the person's *will* by means of . . . fear of immediate and unlawful bodily injury." (*People v. Iniguez* (1994) 7 Cal.4th 847, 856 (*Iniguez*).)[6]

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[5] Section 261, subdivision (a) states, in relevant part, "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of . . . fear of immediate and unlawful bodily injury on the person." The court's instruction to the jury concerning the rape allegations (counts 5 & 6) stated that, to prove them, the People had to prove, inter alia, "[A.S.] did not consent to the intercourse." The instruction also stated, "To consent, a woman must act freely and voluntarily and know the nature of the act." There is no dispute these were correct statements of the law (see § 261.6). The source of the instruction is not clearly identified, but appears to be CALCRIM No. 1000.

The People's theory during jury argument was appellant committed a violation of section 207, subdivision (b) (count 4) even before appellant and A.S. arrived at his apartment. The prosecutor argued appellant's hugging A.S. while getting ready to rape her was a lewd act and there were two counts alleging violations of section 288, subdivision (a), based on his touching her body for purposes of sexual arousal. The prosecutor also argued appellant raped her once at night, once in the morning, "then put her out on the track for human trafficking."

[6] Because we conclude *post* there was sufficient evidence of duress and the requisite fear, we need not discuss whether the act was accomplished by additional means. (Cf. *Iniguez*, *supra*, 7 Cal.4th at p. 859, fn. 7.)

"[T]he element of fear of immediate and unlawful bodily injury has two components, one subjective and one objective. The subjective component asks whether a victim genuinely entertained a fear of immediate and unlawful bodily injury sufficient to induce her to submit to sexual intercourse against her will. In order to satisfy this component, the extent or seriousness of the injury feared is immaterial. [Citation.]

"In addition, the prosecution must satisfy the objective component, which asks whether the victim's fear was reasonable under the circumstances, or, if unreasonable, whether the perpetrator knew of the victim's subjective fear and took advantage of it. [Citation.] The particular means by which fear is imparted is not an element of rape." (*Iniguez*, *supra*, 7 Cal.4th at p. 857.)

The facts of *Iniguez* are instructive. Mercy P. (Mercy) spent the night before her wedding at the house of Sandra S. (Sandra), a close family friend whom Mercy considered an aunt. The defendant was Sandra's fiancé whom Mercy had met for the first time that night. Mercy slept on the couch in the living room. In the middle of the night, Mercy, who had been sleeping on her stomach, woke up and saw the defendant naked and approaching her from behind. The defendant, without speaking, pulled down Mercy's pants and engaged in sexual intercourse. He subsequently walked back to a bedroom.

Mercy weighed 105 pounds and the defendant weighed 205 pounds. Because Mercy was afraid, she did not attempt to resist, escape, or do anything. In fact, she was so afraid, she " 'just laid there.' " (*Iniguez*, *supra*, 7 Cal.4th at p. 851.) Mercy told law enforcement she just froze because the defendant had been drinking and he was a complete stranger. She said "[s]he

was afraid that if she said or did anything, [the defendant's] reaction could be of a violent nature. So she decided just to lay still, wait until it was over with . . . . " (*Id.* at p. 852.)

Our Supreme Court held that these facts supported the jury's finding that the sexual assault was accomplished by fear of immediate and unlawful bodily injury. Of particular significance, *Iniguez* stated, "[T]he prosecution was not required to elicit . . . testimony [from the victim] regarding what precisely she feared. 'Fear' may be inferred from the circumstances despite even superficially contrary testimony of the victim." (*Iniguez*, *supra*, 7 Cal.4th at p. 857.) Our high court stressed, "[t]here is no requirement that the victim say, 'I am afraid, please stop,' when it is the defendant who has created the circumstances that have so paralyzed the victim in fear and thereby submission." (*Id.* at p. 859.) In sum, our Supreme Court instructed that the fact finder may consider the totality of the circumstances, including the facts and circumstances *after* the sexual intercourse, to determine whether there was substantial evidence of the requisite fear. (*Id.* at pp. 856–858.)

Turning to the facts here, we note there was substantial evidence that A.S. was in fear of unlawful bodily injury. Appellant was a pimp. He was in his 40s; she was a 12-year-old child. Appellant created the situation that inflicted fear and paralysis upon A.S. Appellant cased the area of the shelter and preyed upon A.S. to work as a prostitute for him. He had sex with her, which was customary for a pimp intending to employ a new "worker," and he later made her a victim of human trafficking.

There was substantial evidence A.S. feared immediate and unlawful bodily injury on her person from appellant from the

time he first began looking at her angrily to the time she escaped after he, upset, hung up the phone in her face. He was essentially controlling her the entire time, including by his commands with which she complied, and during her effective confinement in his apartment.

The period during which she was thus afraid included the period up to and including the time of his acts of sexual intercourse with her. She earlier had resolved to remain calm so nothing would happen and she testified "you never know what happens." She thought something might happen to her if she tried to get away. Prior to at least one of the acts of sexual intercourse, A.S. secretly talked with her mother, thinking appellant would become angry and might hurt A.S. if she talked openly with her mother. A.S. testified she did not want to have sex with appellant. She also told that to her father.

A.S. testified appellant's face made her afraid and he was scary. She never testified appellant said: there was no cause to fear him, he would not hurt her if she disobeyed him, she was free to leave at any time, or she was free not to have sex with him. A.S. never testified the acts of sexual intercourse were consensual acts of prostitution or that appellant paid her money for the acts.

A.S.'s requisite subjective fear was also objectively reasonable. These events did not occur in a vacuum. There is no dispute appellant committed kidnapping for child molestation, a felony (§ 207, subd. (b); count 4). There was substantial evidence appellant committed that felony prior to his acts of sexual intercourse with A.S. There is no dispute that, at or about the time of those sex acts, appellant also committed violations of section 288, subdivision (a) (counts 2 & 3), each a felony. We note

that, in other contexts, our Legislature has deemed violations of sections 207, subdivision (b), and 288, subdivision (a), as felonies that are serious and violent. (§§ 667.5, subds. (c)(6), (14), 1192.7, subds. (c)(6), (20).)

Appellant falsely told Father that appellant picked up A.S. to take her somewhere "safe," falsely denied to Father that appellant had had sex with A.S. (her testimony and the DNA evidence belied that denial), and falsely denied that the phone appellant earlier had wanted returned to him was his; these falsehoods evidenced consciousness of guilt. A prostitute who was disrespectful to a pimp could be beaten or killed.

Just as in *Iniguez*, "[t]he jury could reasonably have concluded that under the totality of the circumstances, this scenario, instigated and choreographed by [appellant], created a situation in which [A.S.] genuinely and reasonably responded with fear of immediate and unlawful bodily injury, and that such fear allowed him to accomplish sexual intercourse" (*Iniguez*, *supra*, 7 Cal.4th at p. 859) with A.S. against her will.

Moreover, as discussed below, we reject on an additional ground, i.e., the evidence of duress,[7] appellant's sufficiency challenges to counts 5 and 6. The trial court, apparently using CALCRIM No. 1000, instructed the jury, "Duress means a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do or submit to something that she would not do or submit to otherwise. When deciding

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[7] Section 261, subdivision (a), states, "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (2) Where it is accomplished against a person's will by means of . . . duress."

whether the act was accomplished by duress, consider all the circumstances, including the woman's age and her relationship to the defendant." Relying on this correct statement of law, the jury could have reasonably concluded, based upon the substantial age difference between appellant and A.S. as well as the facts that he was stranger and a pimp, that A.S. submitted to the sexual acts under duress.

Thus, in light of the totality of the circumstances, we conclude as to counts 5 and 6, there was substantial evidence appellant's acts of sexual intercourse with A.S. were nonconsensual and he violated section 261, subdivision (a)(2), by committing the requisite acts under the following circumstance, i.e., "[w]here it is accomplished against a person's will by means of . . . duress" within the meaning of that subdivision. None of appellant's arguments compel a contrary conclusion.

2. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL.

On March 1, 2017, appellant filed a motion for a new trial as to counts 5 and 6 on the ground the verdicts were contrary to the evidence. (§ 1181, subd. 6.) The one-page memorandum of points and authorities supporting the motion cited pertinent law, i.e., *People v. Lagunas* (1994) 8 Cal.4th 1030 (*Lagunas*).

At the March 10, 2017 hearing on the motion, the court stated it had read it. The court commented the issue for appellant was whether "the victim was forced into the sexual contacts that she testified about. In other words, was this a rape by force or fear."

Appellant argued the issue was whether he used fear; he denied he used force. The court commented, "I thought it was, at the time, a count that was a difficult count for the prosecution." The court cited, quoted from, and discussed case authority pertaining to consent.

The court recited various evidence presented at trial and suggested the prosecutor's argument was "[appellant] just influenced her to have sex. He's a much older man and a much larger man than the victim. And she testified . . . that she felt she didn't have any choice." The court commented there was evidence she did not communicate to appellant that she did not want to have sex with him and "that's a sticking point here." The court later commented, "I would not have been surprised if the jury had found not guilty on the rape counts. They did not. They convicted. That's where we are." The court said, "I think I need to hear from you [the prosecutor] the argument that you believe supports the rape counts."

The prosecutor indicated in essence her argument was her jury argument. She denied she was arguing appellant used force; instead, she was arguing appellant instilled fear in A.S., causing her to do something she would not otherwise do. The prosecutor argued there was no consent.

The court characterized the prosecutor's theory as duress. The court quoted language of the pertinent jury instruction (apparently CALCRIM No. 1000) on the issues of force, duress, and fear. The court then stated, "To me, it's a close call. I'm inclined to deny the motion for a new trial. I think that it is a jury question and the jury decided the issue having been properly instructed, but I wanted to give you a chance to reflect on it

before I went forward. [¶] We've had that discussion and I am going to deny the motion for a new trial."

Appellant claims the trial court reversibly erred by denying his motion for a new trial. He argues the trial court, by its comments, "abrogated its role as a 'thirteenth juror' and adopted an improperly deferential position relative to the jury's decision." We reject the claim.

Lagunas stated, "In considering a motion for a new trial made on the ground of insufficiency of the evidence to support the verdict, the trial court independently weighs the evidence, in effect acting as a '13th juror.'[8] If the trial court, sitting as a '13th juror,' would have decided the case differently from the other 12 jurors and grants the motion for a new trial, there is no double jeopardy bar to retrial." (*Lagunas*, *supra*, 8 Cal.4th at p. 1038, fn. 6.)[9]

The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P.* (1979) 25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Moreover, "In the absence of evidence to the contrary, we presume that the court 'knows and applies the correct statutory and case law.' " (*People v. Thomas* (2011) 52 Cal.4th 336, 361; see *People v. Sangani* (1994) 22 Cal.App.4th 1120, 1138; Evid. Code, § 664.)

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8 Appellant's new trial motion effectively quoted this sentence in *Lagunas*.

9 An appellate court reviews a denial of a motion for a new trial for abuse of discretion. (*People v. Rices* (2017) 4 Cal.5th 49, 92.) There is no dispute that if the trial court employed the proper standard of review when considering appellant's new trial motion, the court's denial of the motion was not an abuse of discretion.

In the present case, the trial court read appellant's new trial motion with its discussion of *Lagunas*, identified pertinent issues, commented on the People's evidentiary difficulty at trial, and contributed its own pertinent case authority to the discussion. The court thoughtfully and independently considered and weighed the evidence, its relative strength or weakness, and the issues thereby presented. The court also conscientiously sought, explored, and evaluated the arguments of counsel in light of the court's own independent identification of pertinent law. All of this was superfluous if the trial court had been rubber stamping the jury's determinations or improperly deferring to the jury's decisions.

There is a difference between a court deciding whether it would have decided the case differently from the jury and a court simply deferring to jury decisions. "The trial court 'should [not] disregard the verdict . . . but instead . . . should consider the proper weight to be accorded to the evidence and then decide whether or not, in its opinion, there is sufficient credible evidence to support the verdict.' " (*People v. Davis* (1995) 10 Cal.4th 463, 524.) The trial court here stated, "To me, it's a close call," not "The jury made the call."

The record of the hearing, fairly read, demonstrates the court employed the correct standard of review when denying appellant's motion for a new trial. Appellant has failed to demonstrate trial court error and has failed to rebut the presumption the court knew and properly applied the correct standard.

3. THE MATTER MUST BE REMANDED FOR RESENTENCING.

During the sentencing hearing, the court, discussing its proposed sentence, indicated, inter alia, the court would impose as to counts 4 and 5, a prison sentence of 25 years to life pursuant to the One Strike law, i.e., section 667.61, subdivisions (e)(1) and (j)(2). The court also said counts 4 and 5 "combine under this authority." The court further said, "I would not impose any sentence on counts 2 and 3 because they're essentially the same action or act as the rape, the rape counts."

The court later orally pronounced sentence as follows. As to counts 4 and 5, the court, purportedly pursuant to section 667.61, subdivision (j)(2) of the One Strike law, "combine[d] sentence on those two counts to be 25 years to life."

On count 1, the court imposed a prison term of "one third the [midterm] of two years eight months . . . to be served consecutively." As to that count, the court stated, "This crime involved a separate intent on the part of the defendant."

As to count 6, the court stated, "an additional sentence of three years eight months is imposed, one third the [midterm] on that sentence, finding that to be a separate criminal act involving a separate intent of the defendant." The court added, "There were several hours of separation between the two rapes." The court did not orally impose a sentence on count 2 or count 3. The

court stated the total sentence was "25 years to life plus six years four months for the count 1 and count 6 consecutive sentences."[10]

A. Counts 4 And 5, And The One Strike Law.

Appellant claims the court erroneously imposed One Strike law sentences on counts 4 and 5. We agree. At the outset, we note the court stated it was "combin[ing] sentence on those two counts to be 25 years to life." Reasonably understood, the court's comment indicated the court was purporting to combine two matters (the sentences on counts 4 and 5), resulting in a single prison sentence of 25 years to life. As to counts 4 and 5, the court never stated it was declining to impose a sentence on one of those counts. In other words, the court was imposing concurrent sentences on those counts.[11]

Respondent concedes kidnapping for child molestation in violation of section 207, subdivision (b) (count 4) is not an offense specified in the One Strike law's list at section 667.61, subdivision (c), of offenses to which that law applies; therefore, the trial court erroneously imposed a One Strike law sentence on count 4. We accept the concession. We will vacate appellant's

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[10] The abstract of judgment differs from the oral pronouncement of sentence in a number of respects, but there is no need to detail them. It is well settled "[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) When an abstract does not reflect the orally pronounced judgment, this court has inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. (*Ibid.*) We will direct the trial court to file an amended abstract of judgment.

[11] The abstract of judgment reflects the court imposed concurrent sentences on counts 4 and 5.

entire sentence on all counts (cf. *People v. Stevens* (1988) 205 Cal.App.3d 1452, 1456–1458) and remand for resentencing on those counts, including count 4.

Respondent, citing *People v. Mancebo* (2002) 27 Cal.4th 735, 754 (*Mancebo*), concedes the trial court "could not impose a One Strike sentence on count 5 because the qualifying circumstances were not pled and proved as required by section 667.61, subdivision (o)." We accept the concession.

Imposition of the One Strike law sentence on count 5 was erroneous because the information failed to afford appellant "fair notice of the qualifying statutory circumstance or circumstances that [were] being pled, proved, and invoked in support of One Strike sentencing." (*Mancebo*, *supra*, 27 Cal.4h at p. 754.)[12] We will remand for resentencing on count 5.

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[12] "Adequate notice [in the information] can be conveyed by a reference to the description of the qualifying circumstance (e.g., kidnapping, tying or binding, gun use) *in conjunction with* a reference to section 667.61 or, more specifically, 667.61, subdivision (e), or by reference to its specific numerical designation under subdivision (e), or some combination thereof." (*Mancebo*, *supra*, 27 Cal.4th at p. 754, italics added.) The information in this case alleged counts 1 through 6, and count 4 alleged kidnapping to commit another crime (§ 209, subd. (b)(1)). After the presentation of evidence at trial, the court indicated it would amend the information to allege as count 4 that appellant committed kidnapping for child molestation (§ 207, subd. (b)) and the court indicated it would instruct accordingly (which it did). Neither the original information nor the information as effectively amended as to count 4 contained any of the required references to section 667.61 anywhere.

B. Counts 2 And 3, And Additional Issues.

Respondent argues without dispute the trial court erroneously failed to impose sentences on counts 2 and 3. We agree. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1469.) We will remand to permit the trial court to impose sentence on those counts.

We are confident the trial court will, following remand, consider to what extent, if any, (1) section 654 applies to each of counts 1 through 6, and (2) section 667.6, subdivision (d), applies to counts 5 and 6.[13] We express no opinion on these issues nor (except for our resolution of the parties' claims) do we express an opinion on what appellant's new sentence should be.

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[13] Respondent claims the trial court erred by failing to impose, pursuant to section 667.6, subdivision (d), a mandatory full, separate, and consecutive sentence on count 6, but respondent makes no such claim as to count 5. Since we are remanding for resentencing for independent reasons, there is no need to decide the issue as to count 6.

DISPOSITION

The judgment is affirmed, except appellant's sentence is vacated and the matter is remanded for resentencing consistent with this opinion. The trial court is directed to forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KALRA, J.*

We concur:

LAVIN, Acting P. J.

EGERTON, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.