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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIE T. SHIPLEY, JR., Defendant and Appellant.	B279067 (Los Angeles County Super. Ct. No. BA437521)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed as modified.

Nancy J. King, 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, Marc A. Kohn, Joseph P. Lee and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Willie T. Shipley, Jr. was charged and convicted of multiple counts of rape and other forms of sexual assault involving multiple victims. He contends his constitutional rights to due process and a fair trial and to confront his accusers were violated by the introduction of the preliminary hearing testimony of one victim and by the introduction of evidence of an uncharged sexual assault. He further contends the prosecution failed to establish that it exercised due diligence in attempting to locate the witness whose preliminary hearing testimony was read to the jury. He also contends the trial court abused its discretion in overruling his Evidence Code section 352 objection to the evidence of the uncharged crime. Respondent contends the court failed to impose certain mandatory assessments. We conclude that the evidence was properly admitted, modify the judgment to include the omitted assessments, and otherwise affirm.

A. *Information*

Appellant was charged by information with 12 felony offenses: the forcible rape of Monica F. in 2015 (Pen. Code, § 261, subd. (a)(2),[1] counts 1 and 10); the forcible rape of Sendy C. in 2014 (counts 2 and 9); the kidnapping of Sendy C. for purposes of rape (§ 209, subd. (b)(1), count 3); the forcible rape of Kassie M. in 2009 (counts 4, 8, and 9); the forcible rape of Graciela V. in 2010 (count 5); sexual penetration by a foreign object of Graciela V. (§ 289, subd. (a)(1)(A), count 6); forcible oral copulation with Graciela V. (§ 288a, subd. (c)(2)(A), count 7); sexual penetration by a foreign object of Monica F. (count 11); and the robbery of Monica F. (§ 211, count 12). It was further alleged that as to counts 1, 2, and 4 through 11, appellant committed the offenses

[1] Undesignated statutory references are to the Penal Code.

against more than one victim. It was also alleged that with respect to counts 2 and 9, appellant kidnapped the victim, substantially increasing the risk of harm to her within the meaning of section 667.61, subdivision (c). Finally, it was alleged that with respect to counts 1, 10, and 11, appellant used a dangerous or deadly weapon or firearm.[2]

B. *Evidence at Trial*

1. *Prosecution Case*

a. *Victim Testimony*

Monica F. met appellant at a gas station in April or May 2015. They exchanged telephone numbers. A month later, appellant texted Monica to invite her to a "big party" in Hollywood. When she and her friends arrived at the location, there were only three people there, plus appellant. Monica sat and talked with appellant by the pool, but when he exposed himself and attempted to kiss her, she said "no" and that she did not want to "do that." Later, under the guise of showing her where the bathroom was, appellant led her to a bedroom, shut the door, sat her down on the bed, threw himself on top of her and started kissing her and touching her vaginal area. His fingers penetrated her. Monica again said she did not want to have sex with him. Appellant lifted himself, took his shirt off and slammed a gun down on a table near the bed. Monica said "no" again, but became afraid when appellant reached in the direction of the gun. She closed her eyes and felt appellant's penis inside

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[2] An allegation that appellant personally used a firearm within the meaning of section 12022.53, subdivision (b) in committing the alleged robbery (count 12) was dismissed by the court.

her. She told him to get off and managed to push him off after several attempts. She told him he needed to use a condom. When appellant left to find one, Monica went into the bathroom and discovered her cell phone was dead. She went downstairs, but could not convince her friends to leave. Monica ran up to the bedroom to retrieve her cell phone. Appellant followed her, again placed the gun on the bedside table, and forced her to have intercourse, this time using a condom. When she told him to stop and tried to turn away, he gestured toward the gun. Monica did not scream for help because she was afraid appellant would hurt her friends. After ejaculating, appellant unsuccessfully tried to force Monica to perform oral sex.

After sexually assaulting Monica, appellant accused her of taking money from him and slammed the gun down on a counter. Later, when Monica and her friends tried to leave, he blocked the doorway, pushed her and grabbed her purse. Monica borrowed her friend's phone to call 911. When Monica got her purse back, after police arrived and arrested appellant, her cell phone and $90 were missing.

Sendy C. testified that on July 19, 2014, she went to a bar in downtown Los Angeles with her two cousins. She met appellant, and they danced. He bought her a drink. When the bar was closing, she went with appellant and his friends to a nearby pizza restaurant. Afterward, she got into appellant's friend's car expecting to be taken back to the bar to meet her cousins. Instead, the driver took her to appellant's apartment. During the drive, Sendy repeatedly asked to be dropped off. She called her boyfriend, but when she tried to talk, appellant grabbed her phone and started acting angry. He told her to "shut up." He also prevented her from calling 911 by grabbing her

phone. When appellant's friend parked near appellant's apartment, Sendy tried to run. Appellant grabbed her and Sendy, who was only four feet, eleven inches tall, became afraid. She went with appellant inside his apartment. Once inside, she said "you don't have to do this." Appellant pulled her pants and underwear down and put on a condom. Sendy ran screaming to the door, but could not open it. Appellant told her to "shut up" and put his hand over her mouth. He grabbed her and threw her on the floor. She stopped screaming because she "didn't want to die." Appellant then put her on his bed face down, and put his penis in her vagina while she quietly cried. Appellant stayed on top of her after he ejaculated. Sendy did not move because she did not want to anger him. A short time later, appellant had intercourse with her again.

At the preliminary hearing, Graciela V. testified that she met appellant in October 2010, when she was 21, on a street near her gym. She gave him her telephone number and they called and texted each other in the weeks that followed. On October 19, 2010, she called appellant because she was upset and wanted to talk to someone, and went with him to his house. There were other people in the house at the time. Graciela and appellant went to his room to continue their conversation. Appellant suddenly became aggressive and grabbed her. Graciela told him to stop and said she wanted to go home. Appellant pushed her to the floor. She managed to get away from him and run to the door, but it was locked. She screamed and pounded on it. Appellant told her to shut up, called her "bitch" and "whore," and pushed her down on the bed. She begged him to stop. He forced her to perform oral sex on him. He pulled off her sweatpants and put his fingers inside her vagina, before inserting his penis into

her vagina. She cried and repeatedly asked him to leave her alone. After he finished, he continued to behave aggressively toward her; she was afraid he was going to beat her but instead, he showed her some paperwork that he claimed established he was disease free.

Officers Christian Olivos and Jose Vizcarra, who interviewed Graciela on October 19, recalled she was shaken and crying. Shamsah Barolia, a nurse practitioner, testified she conducted an examination of Graciela early in the morning on October 20, 2010. Graciela told Barolia that appellant called her a "bitch," told her to "shut up," forced her head to his penis, pulled down her sweatpants, and put his penis inside of her.

Kassie M. testified that she met appellant at a gas station in Lakewood in January 2009, when she was 22. They exchanged telephone numbers. Appellant called and invited Kassie to a "get together" at his apartment. Appellant was alone in his apartment when she arrived with her baby. After they bought and drank some brandy, appellant followed her into the bathroom and started fondling her. Kassie objected, telling him she was not there for that. But he pushed her toward the mirror, pulled down her pants and put his penis in her vagina. After appellant ejaculated, Kassie went to attend to her baby. She did not believe appellant would let them leave. Later, appellant grabbed her by the hair, pushed her down on a mattress and had intercourse with her again. Kassie started crying. She did not fight because she was concerned about what might happen to her baby. Kassie went to the police to report appellant's conduct, but after appellant called her, apologized and said he did not want

his life ruined, she told the police she wanted to drop the charges.[3]

b. *Evidence of Uncharged Offense*

Gloria Tatum testified that on October 26, 2006, Adrianna O., her roommate, came home "shocked" and "in another world." Adrianna said: "They raped me." Tatum asked "who?" Adrianna became teary and said "Junior." Tatum knew appellant as "Junior." Tatum and her sister went to appellant's home, a block away, to confront him, but he did not answer the door. Tatum called the police. The officers who responded, Brian Churchill and Christopher Jongsomjit, testified and described Adrianna as "very upset" and crying. Adrianna was taken for a rape exam. Page Courtemanche, the nurse practitioner who examined Adrianna, testified that Adrianna was tearful and shaking. She had abrasions and lacerations on her neck and arm, and tenderness in her hip. Courtemanche took swabs of secretions on Adrianna's body. The swabs were tested and appellant's DNA was found.

C. *Defense Evidence*

Appellant's stepfather, Calvin Robinson, testified that in October 2010, he was living with appellant. He recalled appellant coming home with a young woman, introducing her,

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[3] All four women immediately told friends or family and law enforcement personnel that they had been raped by appellant, and all underwent sexual assault examinations, which included taking swabs for forensic examination. Appellant's DNA was found on or inside all four women. Appellant told the nurse who swabbed him to obtain DNA for testing purposes that he "finger-banged" Graciela.

and taking her to his bedroom. The woman came downstairs once to use the bathroom and then returned upstairs. Robinson heard no yelling, door pounding or other commotion. Robinson testified that appellant's bedroom door had no locks or latches.

D. *Verdict and Sentencing*

The jury found appellant guilty on all 12 counts. It found that appellant kidnapped Sendy, and that the kidnapping increased the risk of harm to her. It found the multiple victim allegation to be true as to counts 1, 2, 4, 5, and 8 through 10 (forcible rape and sexual penetration), but not as to count 7 (oral copulation). It found the use of a weapon allegation with respect to counts 1, 10 and 11 to be not true.

The court sentenced appellant to a term of 125 years to life, plus six years, and gave presentence custody credit of 584 days. The court imposed the following fines: a $300 restitution fine pursuant to section 1202.4, subdivision (b); a $30 criminal conviction assessment for court facilities pursuant to Government Code section 70373, subdivision (a); a $40 court operations assessment pursuant to section 1465.8, subdivision (a)(1); and a sex offender fee of $300 pursuant to section 290.3. This appeal followed.

DISCUSSION

A. *Admission of Preliminary Hearing Testimony*

1. *Background*

Before the preliminary hearing testimony of Graciela V. was read into evidence, the prosecution called Gregory Hernandez, a senior investigator for the District Attorney's office, to describe his efforts to locate her. Hernandez testified that he

attempted to find Graciela between August 23 and 30, 2016.[4] He went to her last known address and was told by her brother-in-law that she was no longer living there. Hernandez obtained Graciela's cell phone number and spoke to her once on the morning of August 23. She said she would not be coming to court, that she wanted to get the incident "behind her," that she did not believe testifying would benefit her, and that Hernandez could not make her testify. After that conversation, Hernandez called Graciela's cell phone multiple times from different numbers, but she did not answer his calls. After discovering the identity of her boyfriend and his cell phone number and address, Hernandez called the boyfriend and went to his home twice. The boyfriend did not respond to his calls; Hernandez did not find him at his home address. Hernandez also attempted to obtain information on Graciela or her whereabouts from multiple websites, and left messages for her to contact him with multiple family members.

After hearing this testimony, defense counsel contended the investigator "threw in the towel too early." The prosecutor observed that even had Graciela been located, Code of Civil Procedure section 1219 prevented the court from holding her in contempt for refusing to testify.[5] The court took the matter under submission.

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[4] Jury selection in the trial began August 23, 2016; the first witness was called August 31; the last witnesses were called September 13; closing arguments concluded September 15.

[5] Code of Civil Procedure section 1219, subdivision (b) provides: "Notwithstanding any other law, a court shall not imprison or otherwise confine or place in custody the victim of a

Before the court ruled, the prosecution re-called Hernandez. Hernandez testified that he had made additional attempts to contact Graciela that day (September 7) and the previous day: calling her and her boyfriend's numbers again, speaking to her boyfriend's father, going again to Graciela's last-known address and speaking to neighbors, who confirmed she no longer lived there. Despite these efforts, Hernandez remained unable to locate Graciela. The court found Graciela to be unavailable as a witness under Evidence Code section 240, subdivision (a)(5) and found that the prosecution had exercised due diligence in attempting to locate her and to induce her to come to court.

Appellant contends the introduction of the preliminary hearing testimony violated his rights to due process and a fair trial and his right to confront his accusers, and that the prosecution failed to establish due diligence in its efforts to procure Graciela's presence in court.[6] As explained below, we discern no error.

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sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime."

[6] Appellant contends that notwithstanding Code of Civil Procedure section 1219, Graciela had no right to refuse to testify and that the court had the power to subpoena her and compel her appearance at trial. (See *People v. Cogswell* (2010) 48 Cal.4th 467, 478-479 [although section 1219 prohibits trial court from jailing for contempt sexual assault victim who refuses to testify against attacker, prosecution has the power under other provisions to take victim into custody and compel his or her appearance in court].) Section 1219 is beside the point here, where the prosecutor was never faced with the issue whether to

2. *Analysis*

"A criminal defendant has the right under both the federal and state Constitutions to confront the witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This right, however, is not absolute." (*People v. Wilson* (2005) 36 Cal.4th 309, 340; accord, *People v. Friend* (2009) 47 Cal.4th 1, 67.) In *Crawford v. Washington* (2004) 541 U.S. 36, 59, the United States Supreme Court "reaffirmed the long-standing exception that '[t]estimonial statements of witnesses absent from trial [are admissible] where the declarant is unavailable, and . . . where the defendant has had a prior opportunity to cross-examine.'" (*People v. Wilson*, *supra*, at p. 340, quoting *Crawford v. Washington*, *supra*, at p. 59.) "Evidence Code section 1291 codifies this traditional exception." (*People v. Wilson*, *supra*, at p. 340.) "When the requirements of Evidence Code section 1291 are met, 'admitting former testimony in evidence does not violate a defendant's right of confrontation under the federal Constitution. [Citations.]'" (*Ibid.*; accord, *People v. Friend*, *supra*, at p. 67; see *People v. Smith* (2003) 30 Cal.4th 581, 609 ["The constitutional and statutory requirements are 'in harmony.'"].)

Evidence Code section 1291, subdivision (a) provides that former testimony is not rendered inadmissible by the hearsay rule if: (1) "the declarant is unavailable as a witness," and (2) "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the

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compel Graciela to appear by serving her with a subpoena or taking her into custody. Despite his efforts, Hernandez was never able to ascertain Graciela's current residence, and thus could not have served her with a subpoena.

declarant with an interest and motive similar to that which he has at the hearing." Under Evidence Code section 240, subdivision (a)(5), a witness is unavailable when he or she is "[a]bsent from the hearing and the proponent of his or her statement has exercised reasonable diligence but has been unable to procure his or her attendance by the court's process."

"The term '[r]easonable diligence, often called "due diligence" in case law, "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'"'" (*People v. Herrera* (2010) 49 Cal.4th 613, 622, quoting *People v. Cogswell*, *supra*, 48 Cal.4th at p. 477.) To establish due diligence and unavailability, "the prosecution must show that its efforts to locate and produce a witness for trial were reasonable under the circumstances presented." (*People v. Herrera*, *supra*, at p. 623.) "Considerations relevant to the due diligence inquiry 'include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.'" (*Id.* at p. 622, quoting *People v. Wilson, supra,* 36 Cal.4th at p. 341; accord, *People v. Thomas* (2011) 51 Cal.4th 449, 500.) "The prosecution is not required 'to keep "periodic tabs" on every material witness in a criminal case'" or take preventative measures to stop a witness from disappearing "absent knowledge of a 'substantial risk that [an] important witness would flee.'" (*People v. Wilson*, *supra*, at p. 342, quoting *People v. Hovey* (1988) 44 Cal.3d 543, 564.) The Supreme Court has held that efforts made over a two-day period -- including visiting the witness's last known address, attempting to locate his known associates, and checking police, county and state records -- constituted due diligence, rejecting appellant's contention the investigator also should have checked

the post office, located the witness's family and contacted people who visited him when he was in jail. (*People v. Wilson*, *supra*, at pp. 341-342.) "'[W]hen a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence [citation], but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising.'" (*People v. Fuiava* (2012) 53 Cal.4th 622, 677.)

Appellate courts "'defer to the trial court's determination of the historical facts of what the prosecution did to locate an absent witness,'" and "'independently review whether those efforts amount to reasonable diligence sufficient to sustain a finding of unavailability.'" (*People v. Thomas*, *supra*, 51 Cal.4th at p. 503.) We have reviewed the record and are satisfied that the prosecution exercised due diligence to locate Graciela and procure her testimony. Hernandez's efforts to find her went on for more than a week. He visited her last-known address and her boyfriend's address multiple times. He spoke with family members and neighbors. He called and left repeated messages with Graciela and her boyfriend. Graciela spoke with him once, and made clear she did not wish to testify at trial or cooperate with his efforts to locate her. After that conversation, neither she nor her boyfriend responded to Hernandez's messages, and he was unable to locate her through Internet searches. Given her determination to avoid cooperating with the prosecution and the lack of assistance from those who knew her, there was little more that could be done.

Appellant points out that Hernandez did not initiate his efforts to find Graciela until the first day of trial, August 23. The first witness did not testify until August 31 however, and the

trial took more than three weeks to complete. Hernandez gave himself sufficient time to locate the witness, and indeed, made contact with her almost immediately. However, she did not wish to cooperate, she was not locatable through Internet searches, and her family and boyfriend were of no assistance in his efforts to find her. This was not a situation where starting earlier would have resulted in a different outcome. We agree with the trial court that the prosecution demonstrated due diligence in its unsuccessful attempt to secure Graciela's presence. Accordingly, the court did not err in permitting the prosecution to read her preliminary hearing testimony.

B. *Admission of Uncharged Offense*

1. *Background*

Prior to trial, appellant moved under Evidence Code section 352 to exclude evidence of two uncharged offenses.[7] The first occurred when appellant was 14. The second was the 2006 incident involving Adrianna, discussed above. The court excluded the older incident, but found the Adrianna incident to be "relevant as to intent," and further found that its "probative value outweigh[ed] any prejudice," as it was "similar in its facts, and . . . not particularly inflammatory when compared to the charged crimes." The court specifically found the evidence admissible under Evidence Code section 1108.

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[7] Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

During the trial, the prosecution informed the court that Adrianna was unavailable to testify, as she had gone to Mexico and was not responding to calls. The defense objected to having Gloria Tatum relate Adrianna's statements to her that she had been raped by "Junior." The court ruled that the statements were admissible under Evidence Code section 1240 as spontaneous statements and as a "fresh complaint." Appellant now contends permitting the prosecution to introduce evidence of the uncharged offense violated his right to confrontation, due process and a fair trial, and that the trial court abused its discretion in permitting introduction of the evidence in the face of his Evidence Code section 352 objection and erred in permitting the testimony of Officers Churchill and Jongsomjit and the examining nurse, Courtemanche.[8]

2. *Analysis*

a. *Evidence that the Assault on Adrianna Occurred*

Evidence Code section 1108, subdivision (a) provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352."[9] The Legislature enacted Evidence Code section 1108 "to expand the admissibility of disposition or propensity evidence in

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[8] On appeal, appellant does not re-assert any specific issues with respect to Tatum's testimony.

[9] Evidence Code section 1101 generally proscribes the admission of evidence of character to prove conduct.

sex offense cases"; "to relax the evidentiary restraints section 1101, subdivision (a), imposed"; and "to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*People v. Falsetta* (1999) 21 Cal.4th 903, 911 (*Falsetta*).) "In this regard, section 1108 implicitly abrogates prior [judicial] decisions . . . indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Ibid.*)

In *Falsetta*, the Supreme Court concluded that admission of evidence of uncharged sexual offenses under section 1108 did not violate a defendant's due process rights. The court found that even if "the rule against 'propensity' evidence in sex offense cases should be deemed a fundamental historical principle of justice," section 1108 "did not unduly 'offend' those fundamental due process principles," and there was "no undue unfairness in its limited exception to the historical rule against propensity evidence." (*Falsetta*, *supra*, 21 Cal.4th at pp. 914-915, italics omitted.) "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations. Section 1108 provides the trier of fact in a sex offense case the opportunity to learn of the defendant's possible disposition to commit sex crimes," which evidence is "at least circumstantially relevant to the issue of his disposition or propensity to commit these offenses." (*Id.* at p. 915, italics omitted.) The court further explained that the limitation on the scope of evidence admissible under the statute (evidence of prior sex offenses only and only when the defendant is charged with committing another sex

offense) meant no undue burden would be imposed on the defense; the requirement of pretrial notice of the intention to introduce such evidence precluded any possibility of surprise or lack of preparedness; and the discretion afforded the trial judge to exclude the proffered evidence eliminated the potential for "protracted 'mini-trials'" to determine the truth or falsity of the prior charge and undue prejudice to the defendant. (*Id*. at pp. 915-916.) The court held that with these checks and balances in place, admission of propensity evidence under section 1108 did not violate state or federal due process. (*Id*. at pp. 918, 922.)

As *Falsetta* resolves appellant's contention that admission of the evidence of the uncharged crime under Evidence Code section 1108 violated his constitutional rights, we turn to his contention that it was inadmissible under Evidence Code section 352. In determining whether to admit evidence of uncharged sexual offenses at the trial of an alleged sexual offender, the trial court is required to "engage in a careful weighing process under section 352" and consider such factors as "its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (*Falsetta*, *supra*, 21 Cal.4th at p. 917; accord, *People v. Loy* (2011) 52 Cal.4th 46, 61.) "[T]he probative value of 'other crimes' evidence is increased by the relative similarity between the charged and uncharged offenses,

the close proximity in time of the offenses, and the independent sources of evidence (the victims) in each offense." (*Falsetta*, *supra*, at p. 917, quoting *People v. Balcom* (1994) 7 Cal.4th 414, 427.) Appellate review of a trial court's decision to admit evidence of uncharged sexual offenses over an Evidence Code section 352 objection is under the deferential abuse of discretion standard and ""'will not be disturbed . . . unless 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. Lewis* (2009) 46 Cal.4th 1255, 1286.)

The sexual assault on Adrianna bore similarities to the assaults in the charged offenses. Like all the other victims, she was acquainted with appellant and like the majority, the attack took place in his place of residence. Unlike the juvenile incident excluded by the court for its remoteness, the attack on Adrianna occurred within three years of the charged offenses, the 2009 assault of Kassie. The details were not inflammatory, as the jury was informed of few details beyond the fact of the assault itself. We see no likelihood that the evidence confused, misled or distracted the jurors from their main inquiry of determining appellant's guilt of the charged offenses.

Even had we found the court erred or abused its discretion in admitting the evidence, any error would be harmless, because it is not reasonably probable that the jury would have reached a result more favorable to appellant had the court excluded the evidence. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 659 ["Error in the admission or exclusion of evidence [under Evidence Code section 1108] following an exercise of discretion under [Evidence Code] section 352 is tested for prejudice under

the . . . harmless error test [of *People v. Watson* (1956) 46 Cal.2d 828, 836]."].) The four victims testified in detail to appellant's actions. Their testimony was supported by the physical evidence -- the presence of appellant's DNA in or on their bodies and the injuries suffered by some of the victims -- appellant's statement to the nurse examiner, appellant's apology to Kassie, and the similarity in the modus operandi each independently described. According to all four victims, appellant approached them in the guise of a friend or suitor, and appeared kind and caring until he got them alone and in a vulnerable position. Then he became physically and verbally aggressive, causing them to fear for their safety or the safety of others they cared about. Ignoring their struggles and pleas to be let alone, he sexually assaulted all four women multiple times. Having heard their testimony, the jurors were unlikely to be unduly swayed by the evidence of the uncharged assault.

b. *Testimony of Police Officers and Nurse*

As discussed above, the United States Supreme Court has held that "the introduction of 'testimonial' hearsay statements against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witness, unless the witness is unavailable at trial and the defendant has had a prior opportunity for cross-examination." (*People v. Vargas* (2009) 178 Cal.App.4th 647, 653, citing *Crawford v. Washington*, *supra*, 541 U.S. at p. 59.) Testimonial hearsay is generally described as "a formal out-of-court statement to a government officer" including """affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorily."" (*People v. Martinez* (2018) 19 Cal.App.5th 853,

860, quoting *Crawford, v. Washington*, *supra*, at p. 51.) In *People v. Vargas*, *supra*, at pages 660-662, this court held that statements made by the victim to a nurse conducting a sexual assault examination were testimonial.

Appellant incorrectly asserts that the testimony of Officers Churchill and Jongsomjit and Nurse Courtemanche involved testimonial hearsay. Their testimony involved no hearsay at all. It was confined to matters they personally observed: Adrianna's appearance and actions and, in the case of Courtmanche, her injuries. Accordingly, neither *Crawford* nor the confrontation clause was implicated by their testimony.

C. *Assessed Fines*

The parties agree that the trial court erred in failing to impose and stay a parole revocation fine of $300 under section 1202.45 to match the fine imposed pursuant to section 1202.4, subdivision (b).[10]

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[10] Section 1202.45 provides: "(a) In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. [¶] (b) In every case where a person is convicted of a crime and is subject to either postrelease community supervision under Section 3451 or mandatory supervision under subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional postrelease community supervision revocation restitution fine or mandatory supervision revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4, that

Respondent contends the court also erred by imposing a single $40 court operations assessment under section 1465.8, subdivision (a) and a single $30 criminal conviction assessment for court facilities under Government Code section 70373, subdivision (a). Respondent asserts that the court should have imposed a separate assessment for each count, that such assessments are mandatory, and that the failure to impose such assessments may be corrected on appeal. Appellant contends separate section 1465.8, subdivision (a) and Government Code section 70373 assessments are not required for each count, and that in any event, the issue was forfeited by the failure to object at trial. We agree with respondent.

Section 1465.8, subdivision (a) provides: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." In *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865, the court held that the phrase "'on every conviction for a criminal offense'" must be interpreted as "unambiguously requir[ing] a fee to be imposed for each of defendant's convictions." (*Ibid.*, italics omitted.) Contrasting that language with other fee and assessment provisions, such as section 1202.4, which "limits it application to 'every case,'" the court concluded

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may be collected by the agency designated pursuant to subdivision (b) of Section 2085.5 by the board of supervisors of the county in which the prisoner is incarcerated. [¶] (c) The fines imposed pursuant to subdivision (a) and (b) . . . shall be suspended unless the person's parole, postrelease community supervision, or mandatory supervision is revoked."

that because the defendant was convicted of nine criminal offenses, he was "subject to nine $20 court security fees under section 1465.8." (*Id.* at pp. 865-866.)

The court in *People v. Cortez* (2010) 189 Cal.App.4th 1436 reached the same result with respect to the assessment imposed by Government Code section 70373, which similarly provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." The court held that "[d]espite its awkward construction, the scope of section 70373 can be logically construed in only one way -- as applying to all criminal convictions." (*Cortez*, *supra*, at p. 1442.) Other courts have reached the same conclusion, albeit with less discussion. (See, e.g., *People v. Calles* (2012) 209 Cal.App.4th 1200, 1226 ["The trial court was required to impose a $30 criminal conviction assessment [under Government Code section 70373] as to each count on which defendant was convicted"]; *People v. Lopez* (2010) 188 Cal.App.4th 474, 480 ["We affirm the judgment but order the trial court's . . . sentencing order and the abstract of judgment be corrected to impose a $30 assessment [under Government Code section 70373] for each of defendant's three felony convictions"]; *People v. Woods* (2010) 191 Cal.App.4th 269, 274 [where defendant was convicted of two counts of drug possession, appellate court concluded "a total of two . . . Penal Code section 1465.8, former subdivision (a)(1) court security fees and two . . . Government Code section 70373, subdivision (a)(1) assessments" should have been imposed];

People v. Roa (2009) 171 Cal.App.4th 1175, 1181 ["The court imposed, and the abstract reflects, a . . . court security fee, under section 1465.8, subdivision(a)(1). But because appellant was convicted on two counts, two such fees should have been imposed"]; see also *People v. Valenzuela* (2018) 23 Cal.App.5th 82, 88 [court ordered remand to correct abstract of judgment, which reflected "a single imposition of a court operations assessment (§ 1465.8, subd. (a)(1)) and criminal conviction assessment (Gov. Code, § 70373), whereas the trial court ordered one of each assessment for each [of two] murder count[s]."].)

With respect to appellant's contention that the issue was forfeited, courts are in agreement that failure to impose mandatory fees and assessments may be corrected on appeal. (See, e.g., *People v. Rodriguez* (2012) 207 Cal.App.4th 1540, 1543, fn. 2; *People v. Guiffre* (2008) 167 Cal.App.4th 430, 434-435; *People v. Woods*, *supra*, 191 Cal.App.4th at pp. 272-273.) Accordingly, we will modify the judgment and direct correction of the abstract.

DISPOSITION

The judgment is modified to impose and stay a parole revocation fine of $300 under section 1202.45, and to impose twelve $40 court operations assessments under section 1465.8 and twelve $30 criminal conviction assessments for court facilities under Government Code section 70373. The trial court is directed to prepare an amended abstract of judgment reflecting the modifications and to forward a certified copy to the

Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

MICON, J.*

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