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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DITRICK WELLS et al., Defendants and Appellants.	B236446 (Los Angeles County Super. Ct. No. NA086325)

APPEALS from judgments of the Superior Court of Los Angeles County, Joan Comparet-Cassini, Judge. Modified with directions.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant Ditrick Wells.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant Edward Tyler.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant Keshia Gordon.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Theresa A. Patterson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants, Ditrick Wells, Edward Tyler and Keisha Gordon, of multiple crimes against one or more victims: second degree robbery (Pen. Code,[1] § 211); kidnapping to commit another crime (§ 209, subd. (b)(1)); forcible oral copulation (§ 288a, subd. (c)(2)); forcible rape (§ 261, subd. (a)(2)); sodomy by use of force (§ 286, subd. (c)(2)); assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)); and attempted extortion (§ 524).[2] The trial court sentenced Mr. Wells to 548 years to life

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[1] All further statutory references are to the Penal Code except where otherwise noted.

[2] The jury convicted defendant, Ditrick Wells, of: second degree robbery of C. G. (§ 211) (count 1); kidnapping G. A. and R. P. to commit another crime (§ 209, subd. (b)(1)) (counts 2, 20); five counts of forcible oral copulation of C. G. (§ 288a, subd. (c)(2)) (counts 3, 4, 5, 7, 11); four counts of forcible rape of C. G. (§ 261, subd. (a)(2)) (counts 6, 8, 14, 15); two counts of sodomy by use of force on C. G. (§ 286, subd. (c)(2)) (counts 12, 13); attempted extortion from C. G. (§ 524) (count 10); forcible oral copulation on R. P. (§ 288a, subd. (c)(2)) (count 23); and forcible rape of R.P. (§ 261, subd. (a)(2)) (count 24). The jury further found, in connection with counts 3 through 8, 11 through 15, and 23 through 24, that Mr. Wells: kidnapped the victims in violation of section 207 within the meaning of sections 667.61, subdivisions (a) and (e); and the movement substantially increased the risk of harm to the victims within the meaning of section 667.61, subdivisions (a) and (d). The trial court found Mr. Wells had: a prior conviction within the meaning of sections 667, subdivision (a)(1), 667, subdivisions (b) through (i) and 1170.12; and two prior section 667.5, subdivision (a) convictions.

The jury convicted defendant, Edward Tyler, of: second degree robbery of C. G., R. P., S. U. and K. W. (§ 211) (counts 1, 18, 19, 27); kidnapping C. G., R. P. and K. W. to commit another crime (§ 209, subd. (b)(1)) (counts 2, 20, 25); five counts of forcible oral copulation on C. G. (§ 288a, subd. (c)(2)) (counts 3, 4, 5, 7, 11) and one count of forcible oral copulation on R. P. (count 23); four counts of forcible rape of C. G. (§ 261, subd. (a)(2) (counts 6, 8, 14, 15); two counts of forcible rape of R. P. (§ 261 (a)(2)) (counts 21, 24); two counts of sodomy by use of force on C. G. (§ 286, subd. (c)(2)) (counts 12, 13); and attempted extortion of R. P. (§ 524) (count 22). The jury further found, in connection with counts 3 through 8, 11 through 15, 21, 23, and 24, that Mr. Tyler: kidnapped the victims in violation of section 207 within the meaning of sections 667.61, subdivisions (a) and (e); and the movement substantially increased the risk of

in state prison. Mr. Tyler was sentenced to 472 years to life. Ms. Gordon was sentenced to 205 years to life. We modify the judgments to: reverse the 8-year terms (as to Mr. Tyler and Ms. Gordon) and the 16-year terms (as to Mr. Wells) imposed on each of the sex offense convictions; impose $880 in court operations assessments and $660 in court facilities assessments as to Mr. Tyler; impose $300 in court facilities assessments as to Ms. Gordon; impose $510 in court operations assessments as to Mr. Wells; impose a $10,000 parole revocation restitution fine (§ 1202.45) as to each defendant; award Mr. Wells 443 days of presentence custody credit plus 66 days of conduct credit for a total of 509 days; and award Mr. Tyler and Ms. Gordon 441 days of custody credit plus 66 days of conduct credit for a total presentence custody credit of 507 days. We also modify the judgment to impose a *concurrent* 25-years-to-life term on count 12 as to Mr. Wells. Upon remittitur issuance, the trial court may correct its failure to set forth in the minutes its reasons for exercising its section 1385, subdivision (a) discretion in sentencing Mr. Wells on count 10. Alternatively, the trial court may revisit its decision. In all other respects, the judgments are affirmed.

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harm to the victims within the meaning of section 667.61, subdivisions (a) and (d). The jury found true the allegations that Mr. Tyler personally inflicted great bodily injury upon K. W. (§ 12022.7, subd. (a)) in connection with the kidnapping to commit another crime (count 25) and the robbery (count 27).

The jury convicted defendant, Keshia Gordon, of: two counts of second degree robbery of C. G. (§ 211) (counts 1, 9); kidnapping C. G. to commit another crime (§ 209, subd. (b)(1)) (count 2); four counts of forcible oral copulation on C. G. (§ 288a, subd. (c)(2)) (counts 3, 4, 5, 7); two counts of forcible rape of C. G. (§ 261, subd. (a)(2)) (counts 6, 8); and assault by means likely to produce great bodily injury on C. G. (§ 245, subd. (a)(1)) (count 16). The jury further found in connection with counts 3 through 8 that Ms. Gordon kidnapped the victim, C. G., and the movement substantially increased the risk of harm to her within the meaning of section 667.61, subdivisions (a) and (d).

II. THE EVIDENCE

A. Victim K. W.

On June 17, 2010, Mr. Tyler assaulted K. W., a prostitute. He dragged her to a corner and punched her in the face. He dragged her from the street to behind a truck stop. He took her cellular telephone from her hand and put it in his pocket. When K. W. told Mr. Tyler she was pregnant, he hit her with a gun, breaking her nose. On July 15, 2010, Mr. Tyler confessed to Detective Jennifer Kearns that he had assaulted K. W. He said he wanted to be K. W.'s pimp. Mr. Tyler denied he had used a gun. The confession was not recorded.

B. Victim C. G.

In the early morning hours of July 2, 2010, defendants assaulted C. G., a prostitute. Mr. Wells and Mr. Tyler punched her in the head. Ms. Gordon pushed C. G. into some bushes and kicked her in the face. Mr. Wells pulled C. G. from the bushes. He tore her clothing off and pushed her into the back seat of a sport utility vehicle. C. G. wore only shoes and a coat. Mr. Wells sat on one side of C. G. Mr. Tyler sat on the other side. Ms. Gordon sat in the front passenger seat. An unidentified fourth man drove the sport utility vehicle. Mr. Wells took C. G.'s cellular telephone, car keys and driver's license out of her bra.

During a drive from Compton to Long Beach, Mr. Wells forced C. G. to orally copulate him. Mr. Wells also ordered her to orally copulate Mr. Tyler. During the sexual assault, Ms. Gordon said C. G. was a "bona fide ho." Ms. Gordon also said C. G. would make them money. Defendants told C. G. they would be her pimp. Mr. Wells then ordered C. G. to stop orally copulating Mr. Tyler. She stopped "for a minute." Mr. Tyler asked Ms. Gordon for a condom. After donning the condom, Mr. Tyler raped C. G. as Mr. Wells forced her to orally copulate him. (This use of a condom was the only time

any defendant used one during the assaults on C. G.) The parties then changed position; Mr. Wells raped C. G. (The Attorney General asserts, "[C. G.] did not testify that Wells raped her in the SUV." However, the record is otherwise.) As this was occurring, Mr. Tyler forced C.G. to orally copulate him. While these acts were occurring in the back seat, Ms. Gordon punched C. G. in the face at least eight times. Ms. Gordon took earrings, a necklace and rings from C. G.'s person.

The unidentified driver stopped at a Long Beach apartment complex. The occupants exited the sport utility vehicle. Mr. Wells pulled C. G. out of the back seat. He grabbed her cellular telephone as it began to ring. Mr. Wells spoke to the caller. Mr. Wells demanded $1,000 to secure C.G.'s release. A series of telephone calls followed, during which the caller was directed to a Travelodge Motel. The caller reported the events to an emergency operator.

Defendants, the unidentified driver and C. G. reentered the sport utility vehicle. Ms. Gordon pushed C. G. into the backseat between Mr. Wells and Mr. Tyler. As this was occurring, C. G. saw her driver's license and picked it up. Ms. Gordon took the driver's license from C. G. The unidentified driver drove to a parked gray or silver Pontiac. Mr. Tyler pushed C. G. into the backseat of the Pontiac where he joined her. Mr. Wells drove. Ms. Gordon and the unidentified driver left in the sport utility vehicle. While in the Pontiac's back seat, Mr. Tyler forced C. G. to orally copulate him. Mr. Wells parked the Pontiac on a dead-end street. Mr. Tyler, Mr. Wells and C. G. entered a garage. It contained a pool table and two couches.

In the garage, Mr. Wells bent C. G. over the pool table and grabbed her neck. He then sodomized and raped her. Mr. Wells left the garage. Mr. Tyler forced C. G. to bend over on a couch. He then proceeded to rape her and attempted to sodomize her. Mr. Wells got up and moved C. G. to a larger couch at the back of the garage. There he forced her to lie on her back and raped her again.

Mr. Wells, Mr. Tyler and C. G. left the garage and walked out to the street. Ms. Gordon and the unidentified driver returned in the sport utility vehicle. Ms. Gordon

repeatedly punched C. G. in the face until the men stopped her. Mr. Wells told Mr. Tyler to get "rid of" C. G.

Mr. Tyler pushed C. G. towards the backyard of a house. There he sodomized her again. As they returned to the street, C. G. attempted to walk away. Mr. Tyler caught her. He proceeded to walk the streets with C. G. who was nude. Mr. Tyler asked a man they encountered, "Do you want some?" Mr. Tyler hit C. G. in the forehead after she turned in response to a car horn. When she fell down, Mr. Tyler kicked her. Mr. Tyler left in the sport utility vehicle with Mr. Wells and Ms. Gordon.

During a subsequent sexual assault examination at a hospital, deoxyribonucleic samples were lifted from C. G.'s hands and vaginal and anal areas. Sperm found in C. G.'s vagina matched Mr. Tyler as a major contributor. Mr. Wells was identified as a possible minor contributor. Detective Nader Chahine recovered a silver car at a location in Long Beach. Mr. Wells and Mr. Tyler were at the location when the car was retrieved.

C. G. identified a photograph of Mr. Wells as the man who sexually assaulted and beat her. Detective Chahine and a partner arrested Mr. Wells on July 13, 2010. Mr. Tyler was with Mr. Wells at that time. Because Mr. Tyler matched the description of a suspect in the case, Detective Chahine prepared a photographic lineup. The lineup included Mr. Tyler's photograph. Shown the photographic lineup, C. G. identified Mr. Tyler. She said of Mr. Tyler: "This guy raped me. Beat me. Had sex with me." Mr. Tyler was arrested on July 15, 2010. C. G. also identified Ms. Gordon in a separate photographic lineup. During a post-arrest audiotaped interview, on July 15, 2010, Mr. Tyler confessed to Detectives Chahine and Arthur Thomas. Mr. Tyler admitted that he had engaged in sexual acts with C. G. Mr. Tyler said he was a pimp and he wanted C. G. to work for him but she refused.

C. Victims R. P. and S. U.

In the early morning of July 4, 2010, Mr. Tyler accosted R. P. and S. U. He threatened to shoot the women. He took R. P.'s cellular telephone from her hand. He

asked the two women whether they were prostitutes. Mr. Tyler told R. P., "I'm taking you to work for me[.]" He told S. U. that she could leave. But Mr. Tyler threatened to shoot R. P. if S. U. yelled or signaled to anyone. S. U. walked away. Mr. Tyler escorted R. P. down the street to where Mr. Wells waited. Mr. Tyler dragged R. P. into a small alley and between two parked cars where he raped her. R. P. asked Mr. Tyler whether there was any way she could get herself out of "this" and he agreed that she could buy him off. They walked back to the street where Mr. Wells waited. After a police car drove past, they returned to the alley. Mr. Wells forced R. P. to orally copulate him. He also raped her. R. P. subsequently escaped and sought help. Mr. Tyler later confessed that he had sexual contact with R. P. He claimed that it was consensual. Mr. Tyler said he thought R. P. was a prostitute who could make money for him. He denied that he had a gun but admitted he had grabbed his waistband as if he did. The two victims identified Mr. Tyler from a photographic lineup. Deoxyribonucleic acid samples from R. P.'s vaginal and exterior anal areas matched Mr. Wells as a possible contributor.

III. DISCUSSION

A. The Trial

1. Mr. Tyler's confessions

a. the redacted statements

Mr. Tyler did not testify at trial. However, Mr. Tyler's recorded redacted statements to Detectives Chahine and Thomas concerning the assault on C. G. were introduced in evidence. All references to Mr. Wells and Ms. Gordon were redacted. Mr. Wells and Ms. Gordon argue admission of Mr. Tyler's statements violated their constitutional confrontation and fair trial rights. We conclude Mr. Tyler's extrajudicial

confession was sufficiently redacted. Mr. Wells and Ms. Gordon did not suffer any violation of their constitutional rights.

The United States Supreme Court has explained, "[A] defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial, even if the jury is instructed to consider the confession only against the codefendant." (*Richardson v. Marsh* (1987) 481 U.S. 200, 207; see *People v. Lewis* (2008) 43 Cal.4th 415, 454; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044-1045.) Here, the jury was instructed: "Evidence has been received of a statement made by defendant Tyler after his arrest. [¶] At the time the evidence of this statement was received you were instructed that it could not be considered by you against the other defendants. [¶] Do not consider the evidence of this statement against the other defendants."

However, both the United States and the California Supreme Courts allow admission of a nontestifying codefendant's confession under the following circumstances: "(1) [A trial court] can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant. By effective deletions, we mean not only direct and indirect identifications of codefendants but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established. (2) [A trial court] can grant a severance of trials if the prosecution insists that it must use the extrajudicial statement and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a codefendant, the trial court must exclude it if effective deletions are not possible." (*People v. Aranda* (1965) 63 Cal.2d 518, 530-531, fn. omitted; accord, *People v. Burney* (2009) 47 Cal.4th 203, 230-231; see also *Richardson v. Marsh, supra,* 481 U.S. at pp. 208, 211 ["confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence"]; *People v. Fletcher* (1996) 13 Cal.4th 451, 464; *People v. Hampton* (1999) 73 Cal.App.4th 710, 718, 721.) There is no Confrontation Clause violation when a nontestifying defendant's confession is redacted

to eliminate any reference to codefendants and a proper limiting instruction is given. (*Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Burney, supra,* 47 Cal.4th at p. 231.)

Here, Mr. Tyler's confession was effectively redacted. There were no references to Mr. Wells or Ms. Gordon. No symbols, blank spaces or substitute words were used to indicate a name was omitted. (See *Gray v. Maryland* (1998) 523 U.S. 185, 192-195; *People v. Fletcher, supra,* 13 Cal.4th at pp. 465-466; *People v. Hampton, supra,* 73 Cal.App.4th at pp. 718, 720.) Mr. Tyler's redacted statements did not refer to either codefendant by inference. (See *People v. Fletcher, supra,* 13 Cal.4th at pp. 465-466; *People v. Mitcham, supra,* 1 Cal.4th at p. 1047.) Limited references to "we" largely seemed to refer to the unidentified driver of the sport utility vehicle. C. G. had testified to the presence of the unknown driver.

No doubt, there was some suggestion Mr. Tyler may not have been alone at all times. But, there were only a few statements suggesting Mr. Tyler did not act alone. First: "[Detective Chahine]: When you're in the back seat [of the sport utility vehicle]--[¶] [Mr. Tyler]: Yeah. [¶] [Detective Chahine]: --which side were you sitting on? Behind its passenger or behind the driver? [¶] [Mr. Tyler]: Passenger. [¶] [Detective Chahine]: So you're sitting behind the passenger, and she was sitting where? [¶] [Mr. Tyler]: Who her? [Detective Chahine]: Yeah. [¶] [Mr. Tyler]: In the middle." Second: "[Detective Chahine]: And just – when you took her out of the car, where'd you take her? [¶] [Mr. Tyler]: In the back. [¶] [Detective Chahine]: Where in the back? [¶] [Mr. Tyler]: Garage. [¶] [Detective Chahine]: Who walked her back there? [¶] [Mr. Tyler]: Me." Third: "[Mr. Tyler]: So like I just got it like -- [¶] [Detective Chahine]: -- SUV? [¶] [Mr. Tyler]: Whatever it is yeah. [¶] [Detective Chahine]: Okay. And who got out of the car to uh, talk to her? [¶] [Mr. Tyler]: Me – no it was like she walked up to the car." Fourth: "[Mr. Tyler]: We was up in that car, that was in front of the house. [¶] . . . [¶] [Detective Chahine]: And who jumps in that car? The Pontiac Grand Prix? [¶] [Mr. Tyler]: Shit, me. [¶] [Detective Chahine]: And where are you sitting? [¶] [Mr. Tyler]: In the backseat. [¶] [Detective Chahine]: With who?

[¶] [Mr. Tyler]: Uh her. [¶] [Detective Chahine]: Okay, and while you were in the backseat with her-- [¶] [Mr. Tyler]: She was just-- [¶] [Detective Chahine]: Where were you on the way to? [¶] [Mr. Tyler]: She was sucking my dick." There was *no* reference to any other person's involvement in the substantive acts constituting the crimes against C. G. of which the codefendants were convicted. In short, Mr. Tyler's confession did not incriminate his codefendants. In any event, any error in admitting Mr. Tyler's redacted statements was harmless beyond a reasonable doubt—the evidence of guilt was overwhelming. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Burney*, *supra*, 47 Cal.4th at p. 234.)

b. the prosecutor's closing argument

Ms. Gordon and Mr. Wells assert they were prejudiced by the admission of Mr. Tyler's statements because the prosecutor relied on them as corroborating evidence. During closing argument to the jury, Deputy District Attorney Carol Rose argued, with respect to the assault count against Ms. Gordon: ". . . [T]hey go outside [the garage] and low and behold what do we have? Gordon is not done. Gordon is not done kicking [C. G.] Gordon is not done beating her. [¶] Now, this assault could clearly, could easily be an assault [separate] from in the car. You can decide where you want to put her assaults. [¶] I mean she was kicking her. Remember, even I think in the bushes Tyler was kicking her. Tyler said in a statement that she fell into the bushes. But Gordon is certainly an aider and abettor to someone else assaulting her." After Ms. Gordon's counsel, Jack A. Fuller, objected, the trial court admonished the jury: "[A]s I said before, I'll repeat it, defendant Tyler's statement is only to be used with respect to counts against defendant Tyler. His statements are not to be used with respect to either defendant Wells or defendant Gordon." Later, discussing the sexual assaults on C. G. by Mr. Tyler and Mr. Wells in the garage, Ms. Rose argued: "These are the defendant Tyler's statements, exact quotes: [¶] 'Just don't hurt me.' This is [C. G.] She is scared to death. She was scared. 'Oh, please, don't hit me no more.' This is what he said she said. Tyler said she was

scared. She started running. '"Don't hurt me. Don't hurt me." That is all she kept saying like "Don't hurt me." I know she was going to be terrified of me.'" [¶] He said that at the end. Then, he admits to the facts, I'm showing you the corroboration here. That the defense attorneys are saying does not exist." On Mr. Fuller's objection, the trial court advised the jury, "The statement is only as to defendant Tyler."

We assume for purposes of argument, Ms. Rose improperly urged the jury to use Mr. Tyler's statement in evaluating the cases against Ms. Gordon and Mr. Wells. (See *Richardson v. Marsh, supra,* 481 U.S. at p. 211; *People v. Bryden* (1998) 63 Cal.App.4th 159, 177.) The Court of Appeal has held: "When [a codefendant's] statements after redaction do not directly implicate the defendant, but the prosecution improperly uses these statements against the codefendant, we look to see whether the trial court abused its discretion in refusing to sever the trial and in refusing to grant a mistrial. ([*U.S. v.*] *Sherlock* [(9th Cir. 1989) 962 F.2d [1349,] 1359-1360; *People v. Cruz* (1988) 121 Ill.2d 321, 334.)" (*People v. Bryden, supra,* 63 Cal.App.4th at p. 177.)

However, the prosecutor's purported improper reference to Mr. Tyler's statements was harmless. (*People v. Thomas* (2012) 54 Cal.4th 908, 937; *People v. Coffman* (2004) 34 Cal.4th 1, 91-95; *People v. Bryden, supra,* 63 Cal.App.4th at p. 179.) C. G. testified that during the initial abduction, she was pushed into some bushes and kicked in the face. According, to C.G., this was done by Ms. Gordon. It was unnecessary to rely on Mr. Tyler's extrajudicial statement to so find. Further, there was substantial evidence Ms. Gordon had assaulted C. G. on more than one occasion: during the initial abduction; in the sport utility vehicle; and on the street outside the garage. Because Ms. Gordon was charged with only one count of assault, the jury needed only to find one of those occasions evidenced the crime. Further, the jury was repeatedly admonished to consider Mr. Tyler's extrajudicial statements only as to him. And defense counsel conceded in argument to the jury that Ms. Gordon was guilty of assault by means of force likely to produce great bodily injury. Under these circumstances, there is no likelihood the jury would have acquitted Ms. Gordon of assault absent the prosecutor's reference to the confession.

The second alleged erroneous comment involved the assaults on C. G. in the garage. Ms. Gordon was not present in the garage and was not charged as an aider and abettor to any assault perpetrated there. Hence, there was no resulting prejudice to Ms. Gordon. Nor did Mr. Tyler's comments about the victim's pleas prejudice Mr. Wells. Those comments did not implicate Mr. Wells in any of the charged crimes. The alleged error was harmless.

c. Mr. Well's severance motion

Mr. Wells asserts the trial court abused its discretion when it denied his severance motion. At the outset of jury selection, Mr. Well's counsel, Deputy Public Defender Edwin S. Najera, asked the trial court whether it would consider severing the cases for trial. Mr. Najera argued Mr. Tyler's statement implicated Mr. Wells. The trial court noted that a hearing would be required to determine whether the statement could be redacted. The trial court denied the severance motion on grounds it was untimely. Our review is for an abuse of discretion. (*People v. Coffman, supra,* 34 Cal.4th at p. 41; *People v. Box* (2000) 23 Cal.4th 1153, 1195, disapproved on another point in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10.) There is a legislative preference for joint trials. (§ 1098; *People v. Coffman, supra,* 34 Cal.4th at p. 40; *People v. Box, supra,* 23 Cal.4th at p. 1195.) Moreover, as discussed above, there was no prejudice to Mr. Wells. Mr. Tyler's confession did not implicate Mr. Wells. Under these circumstances, even if the severance motion was timely, introduction of Mr. Tyler's extrajudicial statements did not compel the trial court to grant severance. (*People v. Coffman, supra,* 34 Cal.4th at p. 43.) There was no abuse of discretion. Mr. Tyler and Ms. Gordon cannot join in Mr. Well's argument on appeal. They have not shown they sought severance in the trial court. This forfeits the issue. (*People v. Champion* (1995) 9 Cal.4th 879, 906, disapproved on another part in *People v. Combs* (2004) 34 Cal.4th 821, 860; *People v. Saunders* (1993) 5 Cal.4th 580, 589-591.)

B. Robbery Counts Against Ms. Gordon

Ms. Gordon was convicted of two counts of robbery. Ms. Gordon argues that where multiple items of property are taken from a single victim in one incident, there is a single robbery. Ms. Gordon relies upon *People v. Marquez* (2000) 78 Cal.App.4th 1302, 1307-1308. *Marquez* is of no help to Ms. Gordon. In *Marquez,* two separately owned amounts of money, tips and money from the cash register, were taken from one victim, a server. The taking occurred at the same place and time. Here, there were three robberies. Two Ms. Gordon perpetrated directly. The third, she aided and abetted.

First, Mr. Wells took C. G.'s property during the initial abduction. This was after C. G. was thrown into the backseat of the sport utility vehicle. Mr. Wells took her cellular telephone, car keys and driver's license. Second, after defendants drove away, Mr. Wells and Mr. Tyler were sexually assaulting C. G. in the sport utility vehicle. As this was occurring Ms. Gordon took C.G.'s jewelry. Third, C. G. saw her driver's license and picked it up. Ms. Gordon took the license from C.G. On these facts, Ms. Gordon could properly be convicted of two counts of robbery. (§ 211; see *People v. Anderson* (2011) 51 Cal.4th 989, 994; *Miller v. Superior Court* (2004) 115 Cal.App.4th 216, 221-223.)

C. Sentencing

1. Section 667.61

On each of the sex offense counts, the trial court sentenced all three defendants to consecutive terms of both eight years, and 25 years to life. (667.61, subds. (a), (d)). (In Mr. Wells's case, the eight-year terms were doubled under sections 667, subdivisions (b) through (i) and 1170.12.) Section 667.61 sets forth an alternative and harsher sentencing scheme for certain sex offenses, not an enhancement. (*People v. Anderson* (2009) 47 Cal.4th 92, 107-108; *People v. Acosta* (2002) 29 Cal.4th 105, 118-119; *People v. Mancebo* (2002) 27 Cal.4th 735, 741.) An offense punished under section 667.61 is not

subject to other sentencing schemes. (*People v. Rodriguez* (2012) 207 Cal.App.4th 204, 214; see *People v. Fuller* (2006) 135 Cal.App.4th 1336, 1342-1343.) Therefore, the trial court imposed an unauthorized sentence when it sentenced the defendants to 8 years (or 16 years in Mr. Wells's case) plus 25 years to life on the sex offense counts. (*People v. Rodriguez, supra*, 207 Cal.App.4th at p. 214; see *People v. Snow* (2003) 105 Cal.App.4th 271, 282.) The 8-year terms (16-year terms in Mr. Wells's case) imposed on each of the defendant's sex offense convictions must be reversed.

Mr. Wells seeks a remand for resentencing. He argues: "[I]t is unknown how the trial court would exercise its discretion under Penal Code section 667.6 and Penal Code section 1385 with respect to the 'strike' prior (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497) in light of the mandatory sentencing under the 'One Strike' law and a potential doubled 'One Strike' sentence under the 'Three Strike[s]' law based on the 'strike' prior (see *People v. Garcia* (1999) 20 Cal.4th 490, 503-504 [the trial court has discretion to strike the 'strike' priors on a count-by-count basis]). (See *People v. Hammer* [(2003)] 30 Cal.4th 756, 771 [a *Romero* motion can remove two or three 'strike' consequences for the 'One Strike' law].) The California Supreme Court has repeatedly confirmed that a person subject to the 'Three Strikes' law is entitled to a genuine exercise of sentencing discretion by the trial court (*People v. Rodriguez* (1998) 17 Cal.4th 253, 257; *People v. Fuhrman* (1997) 16 Cal.4th 930, 942), and that the trial court's decision either way is subject to review for abuse of discretion (*People v. Carmony* (2004) 33 Cal.4th 367, 375; *People v. Williams* (1998) 17 Cal.4th 148, 162)." The Attorney General has not addressed this argument. We find no cause for resentencing. The trial court has already exercised its discretion. As to each of the sex offenses, it imposed a high eight-year term enhanced by a 25-years-to-life term. There is no reason to believe the trial court would exercise its discretion differently in connection with a sentence now reduced by 104 determinate years.

2. Section 667.6

Defendants were sentenced to full consecutive terms under section 667.6, subdivision (d). Section 667.6, subdivision (d), states in part: "A full, separate, and consecutive term shall be imposed for each violation of an offense specific in subdivision (e) [including rape, sodomy and oral copulation] if the crimes involve separate victims or involve the same victim on separate occasions." Defendants argue the trial court erred as to certain sex crimes where the offenses did not occur on separate occasions. Our review is for substantial evidence to support the trial court's separate occasion findings. (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230; see *People v. Chan* (2005) 128 Cal.App.4th 408, 424.)

A sex offense occurs on a "separate occasion" within the meaning of sections 667.6, subdivision (d), and 667.61, subdivision (i),[3] if the defendant had a reasonable opportunity between crimes to reflect on his or her actions. (§ 667.6, subd. (d); *People v. Jones* (2001) 25 Cal.4th 98, 105; *People v. Garza* (2003) 107 Cal.App.4th 1081, 1092; *People v. McPherson* (2001) 86 Cal.App.4th 527, 530; *People v. Irvin* (1995) 43 Cal.App.4th 1063, 1070-1071; *People v. Plaza* (1995) 41 Cal.App.4th 377, 384-385; *People v. Corona* (1988) 206 Cal.App.3d 13, 15-18.) Section 667.6, subdivision (d) states in part: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or

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[3] Section 667.61, subdivision (i) provides: "For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c) . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involved separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6."

abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

Whether sex crimes against a single victim occurred on separate occasions is an objective test. (*People v. Deloza* (1998) 18 Cal.4th 585, 597; *People v. Jones, supra,* 25 Cal.4th at p. 104, fn. 2.) As our Supreme Court explained in *Jones*: "Under the broad standard established by Penal Code section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location. Thus, the Court of Appeal herein cited *People v. Irvin*[, *supra*,] 43 Cal.App.4th [at p.] 1071, for the principle that a finding of 'separate occasions' under Penal Code section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: '[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' Similarly, the Court of Appeal in *People v. Plaza*[, *supra*,] 41 Cal.App.4th [at p.] 385, affirmed the trial court's finding that sexual assaults occurred on 'separate occasions' although all of the acts took place in the victim's apartment, with no break in the defendant's control over the victim. (But see *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316 [defendant's change of positions between different sexual acts was insufficient by itself to provide him with a reasonable opportunity to reflect upon his actions, 'especially where the change is accomplished within a matter of seconds']; *People v. Corona*[,s*upra*,] 206 Cal.App.3d [at p.] 18 [holding, after the respondent implicitly conceded the point, that the trial court erred in imposing consecutive sentences for different sexual acts when there was no cessation of sexually assaultive behavior 'between' acts].)" (*People v. Jones, supra,* 25 Cal.4th at p 104.)

Mr. Wells and Mr. Tyler argue their sexual assaults on C. G. in the sport utility vehicle did not occur on separate occasions. There was substantial evidence to the contrary. First, Mr. Wells forced C. G. to orally copulate him. Mr. Tyler had a reasonable opportunity to reflect on his actions at that time. Mr. Wells then ordered C. G. to orally copulate Mr. Tyler. Both defendants had an opportunity to reflect on their actions as they told C. G. they would be her pimps and Mr. Wells commanded her to

orally copulate them. Mr. Wells could further reflect on his actions while C. G. was being forced to orally copulate Mr. Tyler. Mr. Wells ordered C. G. to stop orally copulating Mr. Tyler. C. G. stopped for a minute. Mr. Wells and Mr. Tyler both had a reasonable opportunity to reflect during this pause. Mr. Wells then forced C. G. to orally copulate him a second time. Meanwhile, Mr. Tyler asked Ms. Gordon for a condom. She gave it to him and he put it on. Mr. Tyler could reflect on his conduct while he was so engaged. He then raped C. G. while she continued to orally copulate Mr. Wells.

Mr. Tyler and Mr. Wells also assert the sexual assaults on C. G. in the garage did not occur on separate occasions. Again, there is substantial evidence to the contrary. Both men had an opportunity to reflect on their actions after they ceased the sexual assaults in the sport utility vehicle and before they entered the garage. In the garage, Mr. Wells grabbed C. G. by the neck and bent her over a pool table. He then sodomized and raped her. He removed his penis and ejaculated on her back. Mr. Tyler sat on a small couch waiting during these assaults. Mr. Tyler had a reasonable opportunity to reflect while Mr. Wells sodomized and raped C. G. Mr. Wells left the garage. C. G. stood up and Mr. Tyler grabbed her by the arm. He pulled her over to a small couch. Mr. Tyler forced C. G. to bend over on the couch. He then proceeded to rape her and attempted to sodomize her. Mr. Tyler got up and pushed C. G. to a larger couch in the back of the garage. This gave him an opportunity to consider his actions. He then forced her to lie on her back and raped her again. With respect to the rape and sodomy Mr. Wells perpetrated on the pool table there is no substantial evidence he had a reasonable opportunity to reflect between acts. (*People v. Pena, supra,* 7 Cal.App.4th at p. 1316; *People v. Corona, supra,* 206 Cal.App.3d at p. 18.) The judgment must be modified to impose a concurrent 25-years-to-life term on count 12 as to Mr. Wells.

3. Section 654, subdivision (a)

Mr. Tyler argues the trial court violated section 654, subdivision (a), when it imposed sentence for both robbery of K.W.'s cellular telephone and kidnapping to

commit another crime. We disagree. Substantial evidence supports the trial court's implied determination the two crimes involved separate objectives. (*People v. Osband* (1996) 13 Cal.4th 622, 730-731; *People v. Islas* (2012) 210 Cal.App.4th 116, 129.) Mr. Tyler told Detective Kearns he kidnapped K.W. because he wanted to be her pimp. The trial court could reasonably conclude Mr. Tyler had a separate intent when he took her telephone. (*People v. Osband, supra,* 13 Cal.4th at pp. 730-731; compare, *People v. Milan* (1973) 9 Cal.3d 185, 197.)

4. Sections 667, subdivision (e)(1) and 1170.12, subdivision (c)(1)

We asked the parties to brief the question whether the trial court erred when it sentenced Mr. Wells to the midterm of two years on count 10, attempted extortion. The trial court found Mr. Wells had a prior conviction within the meaning of sections 667, subdivisions (a) through (b), and 1170.12. We asked the parties to brief the question whether the trial court was jurisdictionally obligated to double the two-year concurrent term. Defendant argues the trial court exercised its section 1385, subdivision (a) discretion when it said: "I'm not doubling it." (See *People v. Garcia* (1999) 20 Cal.4th 490, 492-493, 496-504.) However, there is no statement of the trial court's reasons for exercising its discretion in the reporter's transcript or in the minutes. The Attorney General contends resentencing is necessary because the trial court failed to give a specific reason for refusing to double the sentence as required by section 1385, subdivision (a). Section 1385, subdivision (a) states in part, "The reasons for the dismissal must be set forth in an order entered upon the minutes." (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531; *People v. Orin* (1975) 13 Cal.3d 937, 944.) We agree with the Attorney General. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153.) In *Bonnetta,* our Supreme Court held: "[A]s the trial court's order of dismissal [under section 1385, subdivision (a)] is ineffective [for failure to articulate its reasons for doing so in a written order], the matter must be remanded at least for the purpose of allowing the trial court to correct the defect by setting forth its reasons in a written order entered upon the minutes.

Alternatively, on remand the trial court may, but need not, revisit its earlier decision, as on reflection it might determine its reasoning was flawed or incomplete." (*Ibid.*)

5. Court operations and facilities assessments

The trial court imposed court operations (§ 1465.8, subd. (a)(1)) and facilities assessments (Gov. Code, § 70373, subd. (a)(1)) as to each defendant and as to each count. However, the trial court erred in its calculations. Each defendant was subject to a $40 court operations assessment on each count. (§ 1465.8, subd. (a)(1), as amended by Stats. 2011, ch. 40, § 6.) Each defendant was also subject to a $30 court facilities assessment per count. (Gov. Code, § 70373, subd. (a)(1), as amended by Stats. 2008, ch. 311, § 6.5).

As to Mr. Tyler, the trial court imposed $920 in court operations assessments and $920 in court facilities assessments. Mr. Tyler was convicted on 22 counts. Therefore, the trial court should have imposed $880 in court operations assessments and $660 in court facilities assessments. Ms. Gordon was convicted on 10 counts. The trial court correctly assessed $400 in court operations assessments. However, Ms. Gordon was subject to $300 in court facilities assessments, not the $400 imposed. Mr. Wells was convicted on 17 counts. The trial court correctly imposed $680 in court operations assessments. However, it erred when it imposed $680 in court operations assessments. That amount should have been $510. The judgments must be modified and the abstracts of judgment must be amended to reflect the foregoing.

6. Parole revocation restitution fines

The trial court failed to orally impose parole revocation restitution fines under section 1202.45. Defendants were sentenced to determinate terms of imprisonment in addition to indeterminate terms. Under these circumstances, imposition of the parole revocation restitution fine was mandatory, even if defendants are unlikely to ever serve any part of a parole period. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) The trial

court imposed on each defendant a $10,000 restitution fine under section 1202.4. As a result, the oral pronouncement of judgment must be modified to include a $10,000 parole revocation restitution fine under section 1202.45 as to each defendant. (§ 1202.45; *People v. Villalobos* (2012) 54 Cal.4th 177, 181; *People v. Soria* (2010) 48 Cal.4th 58, 62.) The abstracts of judgment are correct in this regard and need not be amended.

7. Presentence custody credit

The trial court miscalculated defendants' presentence custody credits. We may correct the awards on appeal. (*People v. Florez* (2005) 132 Cal.App.4th 314, 318, fn. 12; *People v. Jones* (2000) 82 Cal.App.4th 485, 493; *People v. Acosta* (1996) 48 Cal.App.4th 411, 427-428.) Mr. Wells was arrested on July 13, 2010, and sentenced on September 28, 2011. He was awarded credit for 436 days in presentence custody plus 65 days of conduct credit for a total of 501 days. He should have received credit for 443 days in presentence custody plus 66 days of conduct credit for a total of 509 days. Mr. Tyler was arrested on July 15, 2010, and sentenced on September 28, 2011. He received credit for 435 days in custody plus 65 days of conduct credit for a total of 500 days. He should have received credit for 441 days in presentence custody plus 66 days of conduct credit for a total of 507 days. Ms. Gordon was also arrested on July 15, 2010, and sentenced on September 28, 2011. She received 436 days of actual custody credit plus 65 days of conduct credit for a total of 501 days. Ms. Gordon should have received credit for 441 days in presentence custody plus 66 days of conduct credit for a total of 507 days. The judgments must be modified and the abstracts of judgment amended to so reflect. (*In re Marquez* (2003) 30 Cal.4th 14, 25-26; *People v. Morgain* (2009) 177 Cal.App.4th 454, 469; *People v. Heard* (1993) 18 Cal.App.4th 1025, 1027.)

IV. DISPOSITION

The judgments are modified to: reverse the 8-year terms (as to Mr. Tyler and Ms. Gordon) and the 16-year terms (as to Mr. Wells) imposed on each of the sex offense convictions; impose $880 in court operations assessments and $660 in court facilities assessments as to Mr. Tyler; impose $300 in court facilities assessments as to Ms. Gordon; and impose $510 in court operations assessments as to Mr. Wells; impose a $10,000 parole revocation restitution fine (§ 1202.45) as to each defendant; award Mr. Wells 443 days of presentence custody credit plus 66 days of conduct credit for a total of 509 days; and award Mr. Tyler and Ms. Gordon 441 days of custody credit plus 66 days of conduct credit for a total presentence custody credit of 507 days. The judgment as to Mr. Wells is further modified to impose a *concurrent* 25-years-to-life term on count 12. Upon remittitur issuance, the trial court may correct its failure to set forth in the minutes its reasons for exercising its section 1385, subdivision (a) discretion in sentencing Mr. Wells on count 10. Alternatively, the trial court may revisit its decision. The judgments are affirmed in all other respects. Upon remittitur issuance, the superior court clerk is to prepare amended abstracts of judgment and deliver copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, 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.