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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. EDWARD G. ROBINSON, Defendant and Appellant.	B286810 (Los Angeles County Super. Ct. No. BA452022)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed in part and remanded in part with directions.

Jeralyn B. Keller, 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, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Edward Robinson guilty of forcible oral copulation and false imprisonment of his former girlfriend, Ursula R., and further found that he used a knife in the commission of those acts. Defendant raises multiple issues on appeal. First, he contends the court erred in admitting Ursula's preliminary hearing testimony based on a finding that Ursula was unavailable as a witness pursuant to Evidence Code section 1291 after she refused to testify at trial. Second, he argues that the court improperly admitted testimonial hearsay statements made by Ursula during a 911 call and a sexual assault examination. Third, defendant contends that the court should have stayed his sentence for false imprisonment pursuant to Penal Code section 654.[1] Fourth, he seeks a limited remand to allow the trial court to make two determinations: whether to exercise its discretion to strike the five-year prior serious felony conviction enhancement, and his ability to pay the fines and fees imposed at his sentencing.

We affirm defendant's conviction. However, we conclude that remand is appropriate to allow the trial court to exercise its independent discretion whether to strike the prior serious felony conviction enhancement. Conversely, defendant has forfeited any challenge to the imposition of fines and fees at his sentencing, and therefore we decline to remand on that additional basis.

PROCEDURAL HISTORY

The Los Angeles County District Attorney filed a six-count information against defendant, alleging three counts of forcible oral copulation (§ 288a, subd. (c)(2)(A), counts one through three), one count of sexual penetration by a foreign object (§ 289, subd.

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

(a)(1)(A), count four), one count of false imprisonment by violence (§ 236, count five), and one count of dissuading a witness (§ 136.1, subd. (b)(2), count six).[2] The information also alleged as to counts one through four that defendant engaged in tying or binding the victim in the commission of the offenses (§ 667.61, subds. (a), (e)(5)) and as to counts one through five that he personally used a knife (§ 12022, subd. (b)(1)). The information further alleged that defendant suffered a prior serious felony conviction (§ 667, subd. (a) (667(a)), a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)), and served a prior prison term (§ 667.5, subd. (b)).

The jury found defendant guilty of one count of forcible oral copulation (count three) and false imprisonment (count five). On count three, the jury found not true the tying or binding allegation; on both counts, the jury found true the special allegation that defendant personally used a knife. The jury found defendant not guilty of the remaining counts (counts one, two, and four).

Defendant waived his right to a jury for the bifurcated trial of the strike prior allegations; following a bench trial, the court found those allegations true.

The court sentenced defendant to 15 years to life on count three, doubled to 30 years to life due to defendant's prior strike, plus an additional five years for the serious prior felony conviction pursuant to section 667(a), for a total of 35 years to life. On count five, the court imposed the upper term of three years, doubled to six years due to defendant's prior strike, plus an additional one year for the personal use of a knife pursuant to

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[2]The court granted defendant's motion for judgment of acquittal on count six at the close of the prosecution's case.

section 12022, subdivision (b)(1), for a total of seven years on that count. The court ordered the sentence on count five to run concurrently to the sentence on count three. Defendant timely appealed.

FACTUAL BACKGROUND

I. *Prosecution Evidence*

A. *Ursula*

As discussed further below, Ursula did not testify at trial. Instead, the transcript of her testimony at defendant's preliminary hearing was read to the jury. Ursula testified at the preliminary hearing that she had known defendant for about three years. They had a dating relationship that she described as "rocky." They stopped dating in approximately November 2015; afterward, they would occasionally exchange texts or see each other.

On the afternoon of November 15, 2016, she drove to meet defendant at his mother's house. Ursula and defendant had been texting each other, and defendant occasionally "offered to help me out financially." That day, defendant offered her $200 and she went to meet him to get the money. She believed he was trying to win her back by offering to give her money.

Defendant's mother lived in a duplex with a detached garage. When Ursula arrived, she parked in his mother's driveway. Defendant met her outside and led her toward the garage. The garage had a roll-up door that appeared to be broken and was not fully closed. Ursula told defendant she could only stay for a minute, because she had to pick up her daughter from school. They went into the garage, and defendant put a table and large dumbbell weights in front of the garage door; these items held the door closed and blocked the exit.

Once they were inside the garage, Ursula asked defendant if he was going to give her the money. He responded, "man, you tripping," and then pushed her to the floor. They started "arguing and tussling" and Ursula tried to tell defendant that she had to leave. He said, "you are not leaving. You are not going anywhere." They continued to struggle and Ursula noted there were "a couple of little knives around," so she grabbed one, but it folded closed as she tried to use it. She testified that defendant was stronger than she was, and "from episodes in the past, he already knows my weaknesses. Once he gets me down, there is nothing really I can do."

Ursula continued to try to get up, but defendant put his knee on the back of her neck, saying "Bitch, be still. Be still." Ursula's phone started to ring, and she told him it was her daughter's school calling. He responded, "You better call somebody to come get them because you are not going to get your kids today from school." Defendant then flipped her from her side onto her stomach and began to tie her hands behind her back with string. As Ursula continued to try to move, defendant used duct tape to further restrain her wrists and then her ankles.

Ursula also testified that there were "two or three knives" around and defendant had a big knife, which he used to cut her shirt off after she was tied up. She was still moving around and kicking, but stopped when she saw the knife. Defendant held the knife point toward her neck and said, "Bitch, I am not playing with you. You better stop moving."

After taping her wrists and ankles, defendant flipped Ursula onto her back and lifted her shirt. He touched her breasts under her clothing. He also pulled down her pants and underwear to her ankles. He unzipped his pants and told her,

"Suck my dick, bitch." He was having a difficult time achieving an erection, so he continued to touch her breasts, vagina, and butt. He also put his mouth on her vagina. Defendant then began roughly forcing his penis into her mouth. At this point she could not see the knife and thought he had put it down. Ursula continued to plead with defendant to let her go to pick up her children, but defendant refused.

At some point, defendant's mother approached the garage and asked, "Eddie, is that Ursula's car in the driveway?" Defendant told Ursula, "you better not say nothing," so she remained quiet. He responded affirmatively to his mother and his mother said, "She got to move her car. She cannot park in my driveway like that." Ursula thought this interaction would make defendant stop. When she told defendant that now his mother knew she was in the garage, he said, "I don't give a fuck. I will tie her up too." He then began forcing his penis in and out of her mouth faster and faster until he ejaculated into her mouth.

Defendant then told Ursula that he wanted to have vaginal sex and she asked him to untie her "so we can do it right." She testified that she was trying to "do whatever it would take to get out," and was very frightened for her life once she realized defendant did not care that someone else knew she was in the garage. Defendant untied her arms and she continued to ask him to let her go to get her children, promising she would return. Ursula got dressed and started to leave. Defendant "tried to block [her] a little bit" but she rolled the weight away from the door and managed to exit the garage. She ran up to his mother, who was sitting in a chair outside, and said, "Your son just assaulted me and had me tied up and taped in your garage." Defendant's mother seemed "scared herself," and said, "I'm sorry

that happened to you." Ursula saw defendant coming out of the garage, so she ran to her car and drove away. She estimated that she was in the garage for about two hours. Defendant texted her the next day that she "better not tell" what happened or "there will be a hit on [her] head."

After Ursula left the garage, she called 911. Because she was driving when she made the call, the operator told her to call back.[3] She called 911 again when she reached her mother's house.

B. *911 call*

Ursula's mother, Evelyn Foster, testified that Ursula called her from her car after the incident, hysterical and crying. She told her mother what had happened and said she was going to call the police. Foster was present when Ursula called 911 after arriving at Foster's home. According to Foster, Ursula was still hysterical and crying during the 911 call. The prosecution played a recording of the 911 call for the jury.

In the call, Ursula reported that she went to her ex-boyfriend's house "to talk to him," but he "threw me in the garage. He tied me up. He duct taped me. He sexually assaulted me. He busted my lip." She told the operator that she was able to get free and drove away from the scene because "I didn't know if he was going to come out and do anything else." The operator asked if she needed a paramedic, and Ursula replied, "I don't know, I think so – my neck – I got a busted lip. He did sexually assault me, so I do want them to take swabs out of my mouth or whatever." She also said that defendant "put a knife to me making me perform oral sex on him," and that

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[3]There is no recording or transcript of this first 911 call in the record.

defendant "had knives everywhere." Ursula also told the operator that she "already filed a report against [defendant] a long time ago at 77th Street police station. So, I'm gonna go through with it this time," and that she had "been through so much with [defendant] before."

C. *Investigation*

Officer Juan Chavez of the Los Angeles Police Department (LAPD) testified that he responded to the 911 call around 3:00 p.m. on November 15, 2016. He and his partner met with Ursula, who was standing in the driveway of the residence; she appeared to have been crying and seemed nervous. She told them that she went to defendant's residence and he "taped her up and forced oral copulation."

In her statement to the officers, Ursula said she was dragged into the garage by defendant and that defendant punched her in the face. She also reported that defendant pressed a knife against her neck and that there were several knives on the ground, but when she tried to grab one, defendant kicked it away and punched her. Ursula also told the officers that defendant played a pornographic movie during the assault. When his mother came to the door, defendant held a knife to Ursula's throat and said that she better not scream. He stated he did not care that his mother was there, and that he would kill her too.

After the officers took Ursula's statement, they drove her to a rape treatment center. Ursula arrived at the center around 6:30 p.m. Sexual assault response team (SART) nurse practitioner Amarra McHale testified that she conducted a forensic examination of Ursula. McHale recalled that when she came in, Ursula was "terrified. . . . She truly thought she was

going to die that day." Ursula had visible injuries, including redness, swelling, and tenderness to the right side of her face and mouth. Ursula reported that she was having pain in her mouth and her left shoulder, where defendant had put his knee on her. Ursula also told McHale that defendant had forced his penis into her mouth and in between her breasts, cut off her shirt, attempted to penetrate her anus with his fingers, and forced his mouth on her genitals. She also said defendant had slapped her face, bound her wrists and ankles with tape and string, showed her two knives, and held one knife to her throat. McHale testified that her physical examination found injuries consistent with Ursula's statements, including the injuries to the side of Ursula's face and lip and an abrasion inside her mouth, all of which appeared to be recent. There were no marks on Ursula's wrists or ankles.

McHale also collected Ursula's shirt that had been cut, as well as her underwear and pants, as part of the evidence she sent to the LAPD crime lab.

The LAPD conducted forensic analysis of DNA swabs taken from Ursula during her sexual assault examination. DNA found on Ursula's left breast was consistent with defendant's DNA profile. The swabs were all negative for semen and sperm.

LAPD detective Dara Brown testified to her search of defendant's mother's garage pursuant to a search warrant on November 23, 2016. She recovered two knife blades and an empty roll of tape from inside the garage. She also spoke with defendant's mother, Priscilla Craig, who said that when she saw Ursula on November 15, Ursula looked like she was about to cry.

D. *Defendant's mother*

Defendant's mother testified that defendant was not living

with her at the time of the incident, but he would come over and sometimes "hang out" in the garage. Craig went out to the garage that day because she recognized Ursula's car parked in the driveway. She saw Ursula leave the garage by crawling underneath the partially open garage door. Craig testified that Ursula looked "normal," but admitted that Ursula told her that she had been assaulted and held hostage by defendant.

II. *Defense Evidence*

Defendant did not present any evidence.

DISCUSSION

I. *Admission of Ursula's Preliminary Hearing Testimony*

Defendant contends that the trial court improperly found Ursula unavailable for trial and thereafter admitted her preliminary hearing testimony. He argues that the prosecution failed to prove that it exercised due diligence to secure Ursula's presence at trial. He also argues that her preliminary hearing testimony was not reliable, because he did not have the opportunity to cross-examine her at that proceeding with the same interest and motive that he had at trial, and that its introduction violated his right to confrontation and prejudiced him. We conclude the court properly admitted the testimony.

A. *Background*

Ursula testified at the preliminary hearing on March 28, 2017. On the date set for trial, October 24, 2017, the prosecutor informed the court that he had tried to contact Ursula with "no progress." The following day, as jury selection was about to begin, defense counsel informed the court that he had been told that Ursula had been subpoenaed but was refusing to come to court. The court set a due diligence hearing for the following morning. The prosecutor confirmed that if he lost the due

diligence hearing, "we would be unable to proceed" with the prosecution of the case. The defense argued that "in order to . . . meet the due diligence standard and unavailability, they have to actually arrest the witness and bring them to court and have the witness declare that they're unwilling to testify." The prosecutor disagreed, indicating that he believed "the code does not permit us to issue a body attachment, given the fact that she's a sexual assault victim." He continued that if the witness was "not willing to come, there is nothing we can do to force [her] into court."

The court held the due diligence hearing the following morning, October 26, 2017. The prosecution presented two witnesses. Detective Brown testified that "earlier in the year, I believe it was March" she sent Ursula a text message telling her about the trial set to start in October. She received no response. On October 5, 2017, she left Ursula a voicemail about the trial. She called Ursula again on another day and left a message. She received no response to either message. Next, Brown went to Ursula's home on October 18, 2017 to serve a subpoena. No one was home so she left the subpoena and a business card on the gate.

Finally, Brown waited outside Ursula's home on Monday, October 23, at 7:00 a.m. Ursula came out around 7:30 a.m. to take her children to school. Brown walked up to Ursula's car and handed her a copy of the subpoena. Brown testified that Ursula was "very upset, she was shaking." Ursula said she had already spoken with the prosecutor and she was not coming to court. She said "she was really stressed out over this case. Had a breakdown." Ursula also told Brown that she had gone to the police department in November 2016 to follow up on the case and

provide additional text messages and photos. The officers with whom she spoke told Ursula that Brown was on vacation. Ursula said that "at that point she felt like the police department was not helping her so she didn't want to go forward with the case." Ursula also said that after the defendant was in custody, she received some phone calls from the jail. She kept hanging up and "it made her very nervous, because of [defendant's] involvement in a gang." She also said people "from the neighborhood" were coming up to her and asking why she was proceeding with the case, which made her fear for her and her children's safety. Ursula also told Brown that she thought Robinson needed counseling and not prison, and noted that she told the prosecutor the same thing on Friday, October 18.

LAPD detective Danette Menifee testified that she and her partner went to Ursula's home in the morning on October 24, 2017 (the day after the attempt by Brown) to attempt to serve a subpoena. Ursula came outside and "started shaking her head 'no,' that she didn't want to talk." However, Ursula agreed to sit in the police car to talk to the detectives. Once in the car, Ursula "immediately started crying and said, 'I told the attorney that I didn't want to have any more to do with the case. That I'm done with the case. You don't understand how deeply depressed I've been because of this incident'" with defendant. Menifee told Ursula that they needed to serve her the subpoena for jury trial. She replied that she was not going to court and that she would not sign the subpoena. Ursula also said that she did not want to testify because she "feared for her safety and her family's safety and her kids," further contending that defendant and his family were gang members. Detective Menifee explained that this would be the last time she would have to testify, but "before I

could tell her anything else she immediately said, "No. I'm not going to do it. I'm done." Ursula refused to take the subpoena when they tried to serve her. Menifee testified that she did not feel there were any further efforts that would change Ursula's mind.

The court then heard argument on the due diligence issue. The prosecutor, citing *People v. Cogswell* (2010) 48 Cal.4th 467 and Code of Civil Procedure section 1219,[4] argued that "all efforts have been done that could be done to try to compel this witness/victim to come to court to testify." The defense argued that section 1219 applied to contempt proceedings, rather than "somebody who basically is refusing to come to court who's been subpoenaed." He argued that Ursula was not unavailable simply because she refused to come to court.

Relying on *Cogswell*, the court found that the people had exercised due diligence in attempting to secure Ursula for trial, "in that they have served her with a subpoena, they have gone and talked to her several times, they have attempted to get her to cooperate and come in and testify, and she has made it absolutely clear through her statements to the police that she does not want to come in and testify in this case. She's largely indicated she doesn't want to come in and testify because she's fearful. . . . She has made it clear that she has no intentions of testifying in this case or cooperating." The court also found that "the Code of Civil Procedure does not allow the police to arrest a sexual assault

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[4]Code of Civil Procedure section 1219, subdivision (b) (section 1219(b)) provides: "Notwithstanding any other law, a court shall not imprison or otherwise confine or place in custody the victim of a sexual assault or domestic violence crime for contempt if the contempt consists of refusing to testify concerning that sexual assault or domestic violence crime."

victim for purposes of bringing her in to testify." As such, the court concluded that "there is nothing else [the prosecution] could do" to procure Ursula's attendance or testimony. The court found that the witness was unavailable and allowed the prosecution to read the transcript of her testimony from the preliminary hearing.

B. *Analysis*

The state and federal constitutions afford a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const., art. 1, § 15.) That right is not absolute, however; under certain circumstances, the prosecution may introduce a witness's out-of-court statements at trial. (*People v. Herrera* (2010) 49 Cal.4th 613, 621 (*Herrera*).) Evidence Code section 1291 sets forth the requisite circumstances. (See *People v. Friend* (2009) 47 Cal.4th 1, 67; Evid. Code, § 1291.) Under that statute, a witness's prior testimony is not rendered inadmissible by the hearsay rule if (1) "the declarant is unavailable as a witness," and (2) the "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 declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).)

1. *Unavailability and due diligence*

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." (Evid. Code, § 240, subd. (a)(5); see also *People v. Valencia* (2008) 43 Cal.4th 268, 291-292 [in determining due diligence "California law and federal

constitutional requirements are the same."].) To establish the exercise of reasonable or 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." (*Herrera*, *supra*, 49 Cal.4th at p. 623.) There is no "'mechanical definition'" of the term due diligence; it "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character.'" (*People v. Cromer* (2001) 24 Cal.4th 889, 904 (*Cromer*).) "A witness who is absent from a trial is not 'unavailable' in the constitutional sense unless the prosecution has made a 'good faith effort' to obtain the witness's presence at the trial. [Citation.] The United States Supreme Court has described the good faith requirement this way: 'The law does not require the doing of a futile act. Thus, if no possibility of procuring the witness exists (as, for example, the witness'[s] intervening death), "good faith" demands nothing of the prosecution. But if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith may demand their effectuation. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." [Citation.] The ultimate question is whether the witness is unavailable despite good-faith efforts undertaken prior to trial to locate and present that witness.' [Citations.]" (*Herrera*, supra, 49 Cal.4th at p. 622.)

We "'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* (2011) 51 Cal.4th 449, 503.)

Applying this mixed standard of review, we conclude that the trial court did not err in finding that the prosecution exercised reasonable diligence to produce Ursula. We find *Cogswell, supra,* 48 Cal.4th 467 on point. In *Cogswell*, the victim, Lorene, was visiting California from Colorado when she was sexually attacked by Cogswell. She testified against Cogswell at the preliminary hearing, but refused to return to California for trial. (*Id.* at p. 471.) The prosecution sought to compel her attendance through a process set forth in the Uniform Act to Secure the Attendance of Witnesses from without the State in Criminal Cases (Uniform Act, § 1334 *et seq*.), under which a Colorado court issued a subpoena to the victim. (*Id.* at p. 472.) The victim refused to appear at trial and the prosecutor explained to the court that the victim had said "that she has had as much of this matter as she can possibly handle. . . . And she has emotional issues with coming back here to court." (*Id.* at p. 473.) The trial court declared her unavailable and permitted the prosecution to introduce her preliminary hearing testimony. (*Ibid.*)

The Court of Appeal reversed, finding that to establish reasonable diligence, the prosecution was required to use the provision of the Uniform Act allowing the court to detain and transport the victim to California. (*Cogswell, supra*, 48 Cal.4th at p. 474.) The Supreme Court disagreed, holding that the prosecution had used reasonable diligence in attempting to obtain the witness's presence at trial. (*Id.* at p. 473.) The court held that section 1219(b) did not *prohibit* the prosecution from invoking the Uniform Act's "custody-and-delivery provision," but conversely, the prosecution was not *required* to do so before it could establish due diligence. (*Id.* at pp. 476-477.) The court

reasoned, "To have a material witness who has committed no crime taken into custody, for the sole purpose of ensuring the witness's appearance at a trial, is a measure so drastic that it should be used sparingly. (See, e.g., *State v. Reid* (1976) 114 Ariz. 16, 559 P.2d 136, 145 ['Confinement of a witness, even for a few days, not charged with a crime, is a harsh and oppressive measure which we believe is justified only in the most extreme circumstances.'].) Confinement would be particularly problematic when, as in this case, the witness is a sexual assault victim." (*Cogswell, supra*, 48 Cal.4th at p. 477–478.) The court then identified potential concerns, including that "sexual assault victims are particularly likely to be traumatized because of the nature of the offense," and that "[e]ven fewer such crimes would be reported if sexual assault victims could be jailed for refusing to testify against the assailant." (*Id*. at p. 478.) Turning to section 1219(b), the court found that the enactment of the statute "reflects the Legislature's view that sexual assault victims generally should not be jailed for refusing to testify against the assailant." (*Ibid*.)

The *Cogswell* court thus concluded that "the prosecution acted reasonably when it chose not to request—even though permitted under the Uniform Act's custody-and-delivery provision—to have sexual assault victim Lorene taken into custody and transported from Colorado to California to testify at defendant's trial." (*Cogswell, supra*, 48 Cal.4th at p. 478.) Given the victim's repeated refusals to testify despite issuance of a valid subpoena, the court found it was "highly unlikely that had Lorene been taken into custody, she would have become a cooperative witness. . . . Having spoken directly to Lorene, the prosecutor was in the best position to assess the strength of her

determination not to testify at defendant's trial. Based on that assessment, the prosecutor could reasonably conclude that invoking the Uniform Act's custody-and-delivery provision would not have altered Lorene's decision not to testify again about the sexual assault, and thus it would have been a waste of time and resources." (*Id*. at p. 479.)

We reach the same conclusion here, finding that "confinement of a sexual assault victim to ensure her presence at the assailant's trial would . . . not be a reasonable means of securing the witness's presence." (*Cogswell, supra*, 48 Cal.4th at p. 479.) The prosecution and police detectives visited Ursula several times, attempting to convince her to testify one final time against defendant at trial, but she stated that she was "done," had received what she believed to be threats, and was fearful for her family's safety. Ursula also told the detectives that she no longer believed defendant should be prosecuted, but rather that he should seek treatment for his mental health issues. Detective Menifee told the court that she believed there was nothing more she could do to change Ursula's mind. Under these circumstances, we agree with the trial court's conclusion that the prosecution exercised due diligence in its efforts to secure Ursula as a trial witness. Moreover, it was not error for the trial court to find under *Cogswell* that the drastic step of taking Ursula into custody and transporting her to court was not necessary to demonstrate due diligence.[5]

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[5] Because the prosecutor was not required to request that Ursula be taken into custody and transported to court for the purpose of either testifying at trial or being subject to contempt proceedings, we need not reach defendant's argument that interpreting section 1219(b) as barring taking a witness into

Defendant also contends the prosecution's efforts to secure Ursula for trial were insufficiently diligent because they did not begin until shortly before trial. We disagree. The prosecution began its efforts to secure Ursula as a trial witness in early October 2017, several weeks before trial was scheduled to begin. After several attempts to reach her went unanswered, police detectives visited Ursula at her home on three different dates (October 18, 23, and 24) to serve her with a trial subpoena. Each time, detectives talked with Ursula at some length in an attempt to convince her to appear. The detectives testified that Ursula was visibly upset and frightened during these meetings; Ursula told them she was afraid for her family's safety and expressed other concerns regarding the trial. Ursula repeatedly refused to testify, and the detectives concluded they could do nothing more to convince her. These efforts were reasonable.

Defendant identifies a number of additional steps he believes the prosecution should have taken to "explore alternative methods to secure Ursula's cooperation," such as making sure Ursula was aware of and provided with available victim support services and ensuring that the detectives were more responsive to her. Even assuming that the prosecution could have taken those steps but failed to do so, it was not required to do so. "An appellate court 'will not reverse a trial court's determination [of unavailability] simply because the defendant can conceive of some further step or avenue left unexplored by the prosecution. Where the record reveals, . . . that sustained and substantial good faith efforts were undertaken, the defendant's ability to suggest additional steps (usually, as here, with the benefit of hindsight) does not automatically render the prosecution's efforts

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custody would be unconstitutional.

"unreasonable." [Citations.] The law requires only reasonable efforts, not prescient perfection.' [Citation.]" (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.) We find no abuse of discretion in the trial court's conclusion that the prosecution took reasonable steps in this case to attempt to secure Ursula as a witness.

2. *Motive to cross-examine*

In addition to demonstrating that Ursula was unavailable, the prosecution was also required to establish that defendant had a previous opportunity to cross-examine her, with an interest and motive similar to his interests and motives at trial, before it could introduce her preliminary hearing testimony. (Evid. Code, § 1291, subd. (a)(2); *Herrera*, *supra*, 49 Cal.4th at p. 621.) The trial court concluded the prosecution met its burden. Defendant argued to the trial court that he had no motive to confront Ursula with her inconsistent statements at the preliminary hearing and further noted that he had not received the transcript of the 911 call at the time. We agree with the trial court.

"Both the United States Supreme Court and [the California Supreme Court] have concluded that 'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.'" (*Wilson* (2005) 36 Cal.4th 309, 343.) Here, defendant's trial counsel cross-examined Ursula at length at the preliminary hearing. His motives and interests, both then and at trial, were to impugn Ursula's credibility and to demonstrate that the prosecution could not prove its case. Even if the motives may have shifted somewhat, they need not be identical, only similar. (*People v.*

Harris (2005) 37 Cal.4th 310, 333.)

We are unconvinced by defendant's contention that he was not afforded an adequate opportunity to cross-examine Ursula at the preliminary hearing because he was not yet aware of inconsistencies in her statements to the 911 operator and the SART nurse. A "defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars." (*People v. Harris, supra,* 37 Cal.4th at p. 333, citing *People v. Alcala* (1992) 4 Cal.4th 742, 784.) We are not persuaded that the differences between Ursula's statements were so significant as to fundamentally restrict defendant's opportunity for cross-examination. We also note that defendant was nevertheless able to elicit evidence of certain inconsistencies in Ursula's statements through the testifying police officers at trial, and focused on these inconsistencies in his closing argument.

Accordingly, defendant's opportunity to cross-examine Ursula satisfied the confrontation clause, and the trial court did not err in admitting her preliminary hearing testimony.

II. *Admission of 911 Call*

Over defendant's objection, the trial court found Ursula's 911 call was nontestimonial hearsay and that the majority of Ursula's statements on the call were admissible as spontaneous statements under Evidence Code section 1240. Defendant contends these findings were error. He argues that the admission of the entire call violated his confrontation rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). In

addition, he contends that portions of the call were not admissible as spontaneous statements. We find no error.

A. *Challenge to the Call under* Crawford

As he did below, defendant argues that under *Crawford*, he was denied his Sixth Amendment right to confront and cross-examine Ursula as a result of the admission of her out-of-court, testimonial statements made during the 911 call. The trial court found that Ursula's statements in the 911 call were not testimonial, citing *Davis v. Washington* (2006) 547 U.S. 813, 817 (*Davis*) and *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), and denied defendant's motion to exclude the call.[6] We agree with the trial court that the evidence was not testimonial and therefore its admission did not violate defendant's confrontation rights under *Crawford*.

1. *Legal principles*

In *Crawford*, the United States Supreme court held that the admission of testimonial hearsay violates the confrontation clause unless the declarant is unavailable for trial and the defendant had a prior opportunity to cross-examine the declarant. (*Crawford*, *supra*, 541 U.S. at pp. 53-54.) In *Davis v. Washington*, *supra*, 547 U.S. at p. 817, the court clarified what it meant by testimonial statements: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

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[6]We note that the Attorney General's response to this issue on appeal was wholly inadequate, consisting of a single, conclusory sentence stating that Ursula's statements "were not 'testimonial hearsay' within the meaning of *Crawford*."

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Id*. at p. 822, fn. omitted.)

Our own Supreme Court, analyzing *Davis, supra,* 547 U.S. 813, said: "We derive several basic principles from *Davis*. First, ... the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage, supra*, 40 Cal.4th at p. 984, fns. omitted.)

Numerous courts analyzing this issue in the context of 911 calls have found some or all of those calls to be nontestimonial.

In *Davis*, the victim told a 911 operator her boyfriend was "here jumpin' on me again" and assaulting her with his fists. (*Davis, supra*, 547 U.S. at p. 817.) The 911 operator told the victim that help was on the way, and then asked the victim a series of questions, including her boyfriend's name. (*Id*. at p. 818.) Then the victim reported that her boyfriend had left the house and fled in a car. (*Ibid*.) The trial court admitted this portion of the 911 call over Davis's confrontation clause objection. (*Ibid*.)

The Supreme Court found the victim's statements during the 911 call, including her identification of the defendant in response to questions, were nontestimonial, concluding that "the circumstances of [the victim's] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. She simply was not acting as a witness; she was not testifying." (*Davis, supra*, 547 U.S. at p. 828.) In reaching this conclusion, the court identified four factors that indicated the victim's statements were nontestimonial: First, a 911 call, "and at least the initial interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." Second, "any reasonable listener would recognize that [the victim] . . . was facing an ongoing emergency. Although one *might* call 911 to provide a narrative report of a crime absent any imminent danger, [the victim's] call was plainly a call for help against bona fide physical threat." Third, the nature of the conversation, "viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency, rather than simply to learn . . . what had happened in the past," including "the operator's effort to establish the identity of the

assailant." Finally, the court noted the lack of formality of the 911 interview, as the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." (*Id.* at p. 827; see also *Cage*, *supra*, 40 Cal.4th at pp. 982–983.)

As relevant here, courts have applied the same analysis to 911 calls made shortly after the incident at issue. For example, in *People v. Banos* (2009) 178 Cal.App.4th 483, 492, the court upheld the admission of a 911 call in which the victim stated she was calling from a phone booth and the defendant was "in my apartment, and I don't want him there because I fear that he's, you know, going to attack me. . . . " In response to questions from the 911 dispatcher, the victim also stated that the defendant "got arrested about two or three months ago and . . . he's not supposed to be near me. I have a—the restraining order says a hundred—within a hundred yards." (*Ibid.*) Similarly, in *People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1597 (*Saracoglu*), the court admitted statements made by the victim to a police officer about 30 minutes after a domestic violence incident. Where the victim drove herself to the police station and reported the incident to an officer there, the court reasoned that her "trip to the station was, in effect, the functional equivalent of making a 911 call." (*Ibid.*; see also *People v. Corella* (2004) 122 Cal.App.4th 461, 468 [victim's statements to 911 operator that her husband hit her, made shortly after the incident, were not testimonial]; *People v. Johnson* (2010) 189 Cal.App.4th 1216, 1225 ["We reject a reading of *Davis* that would require that challenged statements be made while the actual assault is ongoing in order to be nontestimonial."].)

2. *Analysis*

Applying these principles to this case, we conclude that Ursula's statements during the 911 call were made in the context of an ongoing emergency, and were thus nontestimonial. Ursula testified that after being held by defendant in the garage, bound, threatened with a knife, and sexually assaulted for approximately two hours, she escaped the garage despite defendant's attempt to stop her. She then fled the scene when she saw defendant emerge from the garage; she first attempted to call 911 while driving away from defendant's mother's house. Once she reached her mother's house, she parked in the driveway and called 911 again. The prosecutor estimated that Ursula made the second 911 call within 15 minutes of leaving the garage.

Ursula's mother testified that she was present during the 911 call and that Ursula was crying and hysterical. She told the 911 operator that defendant "threw me in the garage. He tied me up. He duct taped me. He sexually assaulted me. He busted my lip." She also reported that she fled the scene because she "didn't know if he was going to come out and do anything else." Ursula also had fresh wounds on her face and mouth. When the operator asked if she needed a paramedic, Ursula replied, "I don't know, I think so – my neck – I got a busted lip. He did sexually assault me, so I do want them to take swabs out of my mouth or whatever." She also answered questions from the operator regarding what weapons defendant had in the garage, and provided defendant's name, age, and a description. At the conclusion of the call, the operator told Ursula she was "sending police to you right now. If [defendant] shows up there before we

get there, you call 911 again." Ursula responded that defendant "knows where my mom and I live."

Under these circumstances, Ursula's statements to the 911 operator were made in the context of seeking assistance in an ongoing emergency, rather than for the purpose of establishing some past fact. Ursula's description of the incident, the location, and defendant's appearance served to assist officers in determining the appropriate response, and statements by both Ursula and the 911 operator indicate that neither party believed Ursula was necessarily safe from a continuing threat by defendant. The few statements she made during the call referring to a prior incident with defendant and requesting oral swabs do not, in the context of the entire call, suggest that her purpose was to build a case for prosecution.

B. *Challenge to Certain Statements as Spontaneous Statements*

Defendant also argues that the trial court erred in denying his motion to redact two statements Ursula made during the 911 call, which he contends do not qualify as spontaneous statements under Evidence Code section 1240. We disagree. Further, any such error was harmless.

1. *Background*

Prior to trial, defendant moved to redact several portions of the 911 call as outside the scope of Evidence Code section 1240 and irrelevant and unduly prejudicial under Evidence Code section 352: (1) references to his prior convictions and his gang affiliation; (2) Ursula's statement that she "already filed a report against [defendant] a long time ago at 77th Street police station. So, I'm gonna go through with it this time."; and (3) Ursula's statement, "I've been through so much with him before." The

court granted defendant's motion as to the first category. The court also indicated it was inclined to redact Ursula's statement regarding filing a prior report. The prosecutor argued that the statement went to Ursula's state of mind and also noted that there was "considerable discussion" of the prior report during Ursula's preliminary hearing testimony. The court found the statement about Ursula's prior report was not prejudicial; the court later indicated that this statement was admissible under Evidence Code section 1240 as long as it was "part of the flow of the conversation . . . unless, quote, 352, or there are other reasons to exclude it." The court similarly denied defendant's request to redact Ursula's statement that "I've been through so much with him before."

2. *Legal principles*

Evidence Code section 1240 provides an exception to the hearsay rule, permitting admission of a statement if it: "(a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception."

"The admissibility requirements for such out-of-court statements are well established. "'(1) [T]here must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.'" (*People v. Merriman* (2014) 60 Cal.4th 1, 64 (*Merriman*).) "A statement meeting these

requirements is 'considered trustworthy, and admissible at trial despite its hearsay character, because "in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief."'" (*Ibid*.)

Whether an out-of-court statement meets the statutory requirements for admission as a spontaneous statement is generally a question of fact for the trial court, the determination of which involves an exercise of the court's discretion. (*Merriman, supra,* 60 Cal.4th at p. 64.) "We will uphold the trial court's determination of facts when they are supported by substantial evidence and review for abuse of discretion its decision to admit evidence under the spontaneous statement exception." (*Id*. at pp. 64-65, citing *People v. Lynch* (2010) 50 Cal.4th 693, 752.)

3. *Analysis*

Defendant challenges the two statements Ursula made referring to a report she filed "a long time ago" and having been "through so much with [defendant] before." He contends those statements did not relate to the immediately preceding events and therefore were not admissible as part of the spontaneous statements Ursula made to the 911 operator.

The "crucial element" in determining the admissibility of a purportedly spontaneous statement is "the mental state of the speaker at the time the statement was uttered." (*Merriman, supra*, 60 Cal.4th at p. 66, citing *People v. Gutierrez* (2009) 45 Cal.4th 789, 811.) As we have discussed, substantial evidence, including Ursula's demeanor and the timing of the call, supports the conclusion that Ursula made the 911 call while under the stress of defendant's acts. (See, e.g., *Saracoglu, supra*, 152

Cal.App.4th at pp. 1589-1590 [noting that victim was "quite distraught" when making statements about 30 minutes after incident]; *People v. Brown* (2003) 31 Cal.4th 518, 541 [two-and-one-half hours].) Moreover, Ursula's statements regarding prior incidents with defendant were sufficiently related to the current offense to come within the scope of the hearsay exception—the statements explained her relationship with defendant and her state of mind at the time. (See *People v. Poggi*, 45 Cal.3d at p. 318.) As such, the court did not abuse its discretion in admitting the statements under Evidence Code section 1240.

Further, even if admission of the statements was error, it was harmless. Defendant has not established a federal constitutional violation; accordingly, we analyze the asserted error under the test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 to "evaluate whether 'it is reasonably probable that a result more favorable to [defendant] would have been reached in the absence of the error.'" (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 813, quoting *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Defendant contends that the admission "of testimony Robinson 'had done it before' seriously compromised [his] defense," as it was "effectively testimony Robinson had committed sexual assaults on Ursula in the past." This mischaracterizes the statements that Ursula made. She did not tell the 911 operator that defendant "had done it before," which could strongly suggest, as defendant argues, that he had previously committed the same acts against her. Rather, she stated that she had "filed a report against him a long time ago," and, later, that she had "been through so much with him before." In context, it was not as damaging as defendant suggests, but

rather a minor part of her statements to the 911 operator. Further, in Ursula's preliminary hearing testimony, the jury heard several references to her filing of a previous report against defendant. In addition, Ursula's testimony about the crimes was bolstered by her consistent statements to law enforcement, the testimony from her mother and defendant's mother, her injuries, evidence found in the garage, DNA evidence, and her ripped clothing. As such, it was not reasonably probable that the jury would have reached a more favorable result for defendant in the absence of the challenged statements in the 911 call.[7]

III. *Admission of Statements to SART nurse*

Defendant also contends that Ursula's statements to McHale, the SART nurse, were testimonial hearsay and should have been excluded by the trial court. The Attorney General argues that defendant has forfeited this challenge by failing to object at trial. We agree that the issue was forfeited and therefore do not reach the substance of defendant's claim of error.

Defendant acknowledges that he did not object to the introduction of this evidence at trial. Such evidentiary challenges are forfeited without a timely objection. (Evid. Code 353; see also *People v. Partida*, supra, 37 Cal.4th at p. 431 ["a trial objection must fairly state the specific reason or reasons the defendant believes the evidence should be excluded. . . . A

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[7]Defendant also asserts that the admission of this evidence infringed his federal constitutional right to due process. "We have recognized that the admission of evidence in violation of state law may also violate due process, but only if the error rendered the defendant's trial fundamentally unfair." (*Merriman, supra*, 60 Cal.4th 1, 70, citing *People v. Partida* (2005) 37 Cal.4th 428, 439.) Defendant fails to make such a showing here.

defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial."]; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777.) The requirement of an objection on specific grounds "gives both parties the opportunity to address the admissibility of the evidence so the trial court can make an informed ruling, and creates a record for appellate review." (*People v. Davis* (2008) 168 Cal.App.4th 617, 627.) "'[I]t is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.'" (*Ibid.*, quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 394, pp. 444-445.)

However, defendant relies on an exception to forfeiture that excuses "a failure to object when requiring the objection 'would place an unreasonable burden on defendants to *anticipate unforeseen changes* in the law and encourage fruitless objections in other situations where defendants might hope that an established rule of evidence would be changed on appeal.'" (*People v. Blessett* (2018) 22 Cal.App.5th 903, 928.) He argues this exception applies here because at the time of his trial, "there were no reported California cases considering the application of *Crawford* to statements made to a SART nurse by a sexual assault victim."

Defendant is incorrect. In *People v. Vargas* (2009) 178 Cal.App.4th 647, 662, we found that a sexual assault victim's statements to the nurse during a SART examination were testimonial under *Crawford*. Moreover, even if *Crawford* had not yet been applied to the specific factual circumstance present in this case, nothing about the application of *Crawford* to Ursula's statements to the SART nurse would be inconsistent with prior jurisprudence or unforeseeable.

Alternatively, defendant argues that his attorney's failure to preserve this claim constituted ineffective assistance of counsel. This contention also fails.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* [1984] 466 U.S. 668, 688 [ ].) Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' (*People v. Carter* (2003) 30 Cal.4th 1166, 1211 [ ].) If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

"Finally, prejudice must be affirmatively proved; the record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" (*People v. Bolin* (1998) 18 Cal.4th 297, 333; see also *Strickland v. Washington, supra*, 466 U.S. 668, 689 ["[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."]; *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [on appeal, a conviction will be reversed on the ground of ineffective assistance of counsel "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act

or omission"].)

Apart from requesting that this court find defense counsel "failed to provide effective assistance of counsel," citing *Strickland v. Washington, supra*, 466 U.S. 668, defendant makes no showing how his trial counsel's failure to object fell below an objective standard of reasonableness, nor of any resulting prejudice. Accordingly, he has failed to meet his burden to demonstrate ineffective assistance of counsel. (See *People v. Williams* (1997) 16 Cal.4th 153, 206 ["Points 'perfunctorily asserted without argument in support' are not properly raised."].)

IV. *Cumulative Error*

Defendant argues that the cumulative effect of the errors he alleged rendered his trial unfair. We disagree. We have found no error with respect to any of defendant's claims. His claim of cumulative error accordingly fails.

V. *Section 654*

Defendant argues that the counts for forcible oral copulation (count three) and false imprisonment (count five) alleged a single course of conduct with a single objective, and therefore that the court should have stayed the sentence on count five under section 654. We disagree.

Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." This provision "precludes multiple punishments for a single act or indivisible course of conduct." (*People v. Hester* (2000) 22 Cal.4th 290, 294.) The defendant's intent and objective, not the temporal proximity of his or her offenses, determine whether

multiple offenses constitute an indivisible course of conduct. (*People v. Hicks* (1993) 6 Cal.4th 784, 789.) A defendant who acts pursuant to a single objective may be found to have harbored a single intent and therefore may be punished only once. (*Ibid.*) "On the other hand, if the evidence discloses that a defendant entertained multiple criminal objectives which were independent of and not merely incidental to each other, the trial court may impose punishment for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1134, citing *In re Adams* (1975) 14 Cal.3d 629, 634.)

"The question whether section 654 is factually applicable to a given series of offenses is for the trial court, and the law gives the trial court broad latitude in making this determination." (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; see also *People v. Saffle* (1992) 4 Cal.App.4th 434, 438.) "If the court makes no express findings on the issue, as happened here, a finding that the crimes were divisible is implicit in the judgment and must be upheld if supported by substantial evidence. [Citation.] Thus, '[w]e review the trial court's findings "in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence."'" (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717; see also *People v. Blake* (1998) 68 Cal.App.4th 509, 512 ["A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence."].)

Defendant contends that he harbored a single objective—"to subject [Ursula] to sexual abuse in an environment he could

easily control." As such, he argues that the false imprisonment was committed merely as a means to facilitate the sexual assault and was not therefore subject to separate punishment. We conclude that substantial evidence supports the trial court's implied finding that defendant harbored separate criminal objectives in committing the false imprisonment and forcible oral copulation offenses. Defendant was charged with three counts of forcible oral copulation and was convicted on the third count; the prosecution argued at trial that count three was based on defendant's act of forcing his penis into Ursula's mouth a second time and then ejaculating into her mouth. On the other hand, there was evidence at trial that defendant pushed Ursula to the ground after she asked him for money, then held Ursula in the garage for several hours, bound her wrists and ankles, pinned her to the ground with his knee, threatened her, and attempted to engage in multiple sexual acts, including demanding vaginal intercourse after the oral copulation was complete. As such, the record supports a finding that the false imprisonment was not done solely to facilitate the forcible oral copulation in count three. (See, e.g., *People v. Saffle*, *supra*, 4 Cal.App.4th at p. 438 [finding separate objectives for false imprisonment and sex offenses]; *People v. Ratcliffe* (1981) 124 Cal.App.3d 808, 818-819.)

VI. *Remand for resentencing*

Defendant requests that we remand the matter for resentencing pursuant to section 667(a).[8] He was sentenced to a consecutive five-year term on count three under section 667(a) for his prior serious felony conviction. At the time of his sentencing,

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[8]Defendant did not raise this issue in his opening brief on appeal. However, we granted his request for supplemental briefing.

the trial court was required to impose this term under section 667(a). On September 30, 2018, while this appeal was pending, the Governor signed Senate Bill No. 1393 (2017-2018 Reg. Sess.) (S.B. 1393), amending sections 667(a) and 1385 to provide the trial court with discretion to strike enhancements for serious felony convictions. The legislative changes became effective January 1, 2019. S.B. 1393 applies to all cases not yet final as of the statute's effective date. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 972.) The amendment therefore applies to this case.

Defendant contends remand is required to allow the trial court to exercise its discretion whether to strike the section 667(a) enhancement. The Attorney General agrees that remand is appropriate, as do we. Absent a clear indication by the trial court as to how it would have exercised its discretion, an appellate court generally must remand for the trial court to hold a hearing to exercise its newly granted discretion. (*People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428; *People v. Rocha* (2019) 32 Cal.App.5th 352, 360-361.) We accordingly remand the matter for the trial court to exercise its discretion whether to strike the enhancement. We express no opinion as to how the trial court should exercise its discretion on remand.

VII. *Remand to Determine Ability to Pay*

In his reply brief, defendant made a passing reference to a "Second Amended Complaint," in which he purportedly "asks for a limited remand to allow the court to determine his ability to pay the fines and fees imposed at sentencing." We have found no other reference in the record to such a request by defendant. Defendant did not raise any objection during sentencing to the

imposition of fines and fees.

At sentencing, the trial court imposed a $ 1,400 restitution fine (§ 1202.4, subd. (b)), a $1,400 parole restitution fine (§ 1202.45), an $80 court security fee (§ 1465.8, subd. (a)(1)), a $60 criminal conviction assessment (Gov. Code, § 70373), and a $ 300 sex offender registration fee (§ 290.3). Defendant's reference to this issue in his reply appears to challenge the imposition of the fines and fees pursuant to (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 242.)

Because defendant failed to object to any fines or fees at sentencing, he has forfeited this challenge. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153; *People v. Avila* (2009) 46 Cal.4th 680, 729.) Defendant has not addressed the forfeiture issue on appeal. Moreover, we agree with our sister court in *Frandsen* that the holding in *Dueñas* was foreseeable and therefore defendant was required to raise an objection to the imposition of fines and fees, and demonstrate an inability to pay, at the time of his sentencing. (*Frandsen, supra,* 33 Cal.App.5th at pp. 1154-1155.)

DISPOSITION

The matter is remanded for the limited purpose of allowing the trial court to consider, at a hearing at which the defendant has a right to be present with counsel, whether to exercise its discretion to strike the prior prison term pursuant to section 667(a). If the court elects to exercise this discretion, defendant

shall be resentenced. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J