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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRIS HARRIS,

Defendant and Appellant.

B286433

(Los Angeles County
Super. Ct. No. BA452258)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Wilcox Clarke, Jr., Judge. Affirmed, as modified.

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

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General for Plaintiff and Respondent.

Defendant convinced his victim, a recovering methamphetamine addict, to come stay with him, by offering her drugs. Once he had her in his apartment, defendant embarked on a course of conduct that included repeated rapes and forced oral copulation, and once invited three other men to rape her, which they did. He kept her compliant by brutally beating her, and giving her methamphetamine, even when she wanted to stop taking it. After she had been captive for two months, Defendant used his victim's mobile phone to call her mother, telling the woman she would never see her daughter again. The victim's mother hired an investigator, who tracked defendant from his phone calls. The police discovered the victim, weak and badly injured, in defendant's apartment. Defendant was convicted of torture, rape, rape in concert, and forcible oral copulation, with multiple circumstances justifying increased sentencing found to be true. Defendant appeals. We modify his sentence to stay a term which the trial court had instead imposed concurrently, modify the abstract to correct some minor errors, and otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

1. *Defendant Convinces Amelia to Come to His Apartment*

In September 2016, Amelia H. was 31 years old.¹ She had just completed a drug treatment program, and had been released to the Union Rescue Mission on Skid Row. The mission accepted her and agreed to provide her shelter for 15 days. She was, at this time, healthy. She had been diagnosed with depression and

¹ We use pseudonyms for the victim and her mother in order to protect their privacy.

bipolar disorder with schizoaffect, for which she was taking prescription medication.

She stayed at the mission for only two nights. On the third day, defendant approached Amelia outside the shelter when she was headed out to buy some snacks. Defendant asked her where she was going and where she was coming from; Amelia told him that she was staying at the mission for rehab. Defendant told Amelia that she could stay with him and they would get high. Amelia found the idea of drugs appealing, and went with defendant. He walked her to an apartment building a couple blocks away from the mission.

When defendant and Amelia had entered the elevator to go up to defendant's apartment, defendant stopped the elevator and took off his pants. He pushed Amelia's head down and she orally copulated him out of fear. She felt intimidated.

When they arrived in defendant's small studio apartment, defendant wanted Amelia to orally copulate him again. Amelia tried to leave, but defendant became aggressive and Amelia chose to avoid a physical confrontation. After she orally copulated defendant, he told her to lie down on the bed and play dead. Amelia did so, and defendant groped her. Defendant then gave Amelia some methamphetamine, which she snorted. Defendant also partook.

The next day, Amelia tried to grab her belongings and leave. Defendant punched her and would not let her go. A few days later, she again tried to leave. He punched her again and forced her to stay. From that time forward, defendant did not let her leave the apartment. She could not call anyone for help; Amelia had given defendant her telephone.

2. *Defendant's Cruel Treatment of Amelia*

For more than two months, until her rescue on December 1, defendant's mistreatment of Amelia would take three forms: physical brutality; forcible rape; and administration of drugs.

A. *Physical Brutality*

Defendant physically abused Amelia. He punched and slapped her. He hit her over the head with a belt buckle and beat her with a broomstick. He hit her with a chair. He beat her so severely that she twice lost consciousness. This was virtually continuous; he beat her three or four days each week.

When she was finally rescued, Amelia's entire body was covered with bruises. She had two black eyes. She had bruises all over her neck, chest, arms, hips, legs, buttocks, and pelvic area. The bruises were of different colors, indicating that they had been inflicted at different points in time. There were fresh bruises on top of older, fading bruises. Her hands and each of her fingers were swollen.

Amelia had suffered multiple rib fractures, a nasal bone fracture, fractured vertebrae, and a dislocated thorax. She left the apartment by ambulance as she was unable to walk.

The interior of her mouth had been split open and she had a dry crust of blood around her mouth. Her mouth was so swollen that she could barely speak. She was weak and malnourished.

Four months later at the preliminary hearing, Amelia still had a fractured back and her hands were still swollen and sore.

B. *Forcible Rape and Other Sexual Assaults*

During the time that defendant kept Amelia in the apartment, he raped her approximately six times. Amelia did not testify to any particular details of any of the rapes; she simply

stated that he raped her six times, and that she did not consent. Defendant raped her after he had used physical force against her, and she was in no shape to resist.

Defendant forced Amelia to orally copulate him approximately 13 times. She did not consent.

There was one sex act which stood out from the others: at one point during her captivity, defendant brought three men to the apartment, and the three men all raped her. One of the men threatened her and used force. She had been physically abused prior to the rape in concert, and was not physically able to fight back. She had also used methamphetamine with defendant an hour or two before the three men arrived, and did not have the mental ability to resist. Although Amelia did not hear the men discuss payment with defendant, or see anything exchange hands, defendant possessed more methamphetamine after the men had raped her than he had before. After the three men left, defendant raped Amelia again. He professed anger toward her, purportedly for being a “slut” and having sex with the three men he had brought to the apartment. He chased her with a knife because of it.

C. *Methamphetamine Use*

Amelia freely admitted that she had initially gone to defendant’s apartment because he had offered her drugs. She took drugs at defendant’s apartment continually while she was there. However, at some point, she wanted to stop taking the drugs and escape. She believed defendant continued to give her methamphetamine even after this point, in order to keep her “out of [her] mind.”

3. *Defendant's Phone Calls to Amelia's Mother*

Amelia's mother, Lori, was worried about her daughter. Lori was aware that Amelia had been released to the Union Rescue Mission. Amelia had telephoned her from the mission to tell her mother that she was OK.

But after that first call, Amelia did not call again, and her parents became worried. They came to the mission to look for her, but found only her possessions. Lori filed a police report.

On Thanksgiving, Amelia telephoned Lori. Lori was relieved to hear from Amelia, but thought she did not sound like herself. Lori asked if Amelia was OK, and told her to say "OK" if she was OK, but to say "I'm fine" if she was not. Amelia said, "I'm fine." After just a few minutes, defendant took the phone from Amelia. He told Lori, "I have your daughter and she's with me. I'm taking care of her and she's my girlfriend and I'm gonna be – I'm gonna be using her. She's gonna be with me all the time."

Lori testified she did not want to lose contact with Amelia, so she attempted to placate defendant, pretending to be on his side. She told him to call her back, which he did. Sometimes, Lori would call back and defendant would take the call. Whenever Lori asked to speak with Amelia, defendant told her that Amelia was sleeping and couldn't talk. Lori spoke only a few times with Amelia, who always sounded sleepy.

Defendant told Lori that he was giving Amelia her medications and some drugs that were "better than her own drugs, that gonna make her feel better."

The day after Thanksgiving, defendant called Lori again. While he was on the phone with Lori, she heard people yelling and screaming in the background. Lori asked defendant what

was happening. He replied, “Well, gang rape is happening right now.” He told her, “There’s three men here at my house right now and they’re all line[d] up to rap[e] her.” He hung up the phone. Lori repeatedly tried to call back, but defendant did not pick up. He returned her call a couple hours later. He told Lori that Amelia was “enjoying being gang raped” and he was going to continue to do that.

Defendant never specifically spoke about prostituting Amelia, but he asked Lori if Lori was sexually active and whether she wanted to be included in his plans. He stated that he was going to move in with Lori and take care of her, and they would do “this business” together.

At one point, defendant agreed to Lori’s plan to meet him and Amelia for lunch. Thereafter, defendant became angry, cancelled the lunch, and told Lori she was never going to see her daughter again.

4. *Amelia’s Rescue*

During the course of their conversations, defendant told Lori his real name and birthday. Armed with this knowledge, and Amelia’s mobile phone number, Lori hired a private investigator. The investigator came back with an address. Lori took this information to the police and requested a welfare check on Amelia.

On December 1, 2016, two Los Angeles Police Department officers, acting on the information from Lori, went to defendant’s apartment. There was no answer when they knocked, so the manager let them in.

Defendant was standing in the room, wearing gym shorts. Amelia was lying on the bed, badly injured, and staring vacantly at the ceiling; police initially thought she was dead. Amelia’s

hair was in a side ponytail matted so badly that it appeared to be a dreadlock. On the other side of her head was a large bald spot. She initially did not respond when the officer called her name; the officer then called her by her nickname, and she turned her head slightly and began to weep.

Conditions in the apartment were unsanitary, unsuitable for human residence. Police were met with piles of dirty dishes, grease on the wall, and the overwhelming stench of body odor. Although there were piles of clothes on the floor, there were no female clothes beyond the thin clothes Amelia was wearing and a single pair of pants. There were also no female shoes. In the bathroom, there was an unopened box of sanitary napkins, but no other women's products. There was nothing to suggest Amelia had been living there consensually.

Amelia was taken to the emergency room. Defendant was arrested.

5. *Defendant's Statements to Police*

At defendant's initial interview with police, he admitted that he had met Amelia at the mission and that she stayed with him in his apartment. When asked how she received all of her injuries, defendant said that Amelia hit herself. At a later interview, defendant stated that he and Amelia had had sex "various times" while she had lived with him, and that it had all been consensual.

6. *Charges*

Defendant was charged by information with five counts: (1) torture (Pen. Code, § 206); (2) human trafficking (Pen. Code, § 236.1, subd. (b)); (3) forcible rape (Pen. Code, § 261, subd. (a)(2)); (4) forcible rape in concert (Pen. Code, § 264.1, subd. (a)); and (5) forcible oral copulation (Pen. Code, § 288a,

subd. (c)(2)(A)). Defendant would subsequently be found not guilty of human trafficking, and we do not address that count further.

As to the torture count, it was alleged that defendant inflicted great bodily injury (Pen. Code, § 12022.7). The three sexual assault counts (forcible rape, forcible rape in concert, and forcible oral copulation) each alleged three different bases for alternative sentencing under California’s “one-strike” law: that in the commission of the offenses, he inflicted torture on the victim (Pen. Code, § 667.61, subd. (d)(3)); that, in the commission of the offenses, he personally inflicted great bodily injury on the victim (Pen. Code, § 667.61, subd. (d)(6)); and that in the commission of the offenses, defendant administered a controlled substance to the victim within the meaning of Penal Code section 12022.75 (Pen. Code, § 667.61, subd. (e)(6)).²

Defendant entered a not guilty plea and proceeded to trial.

7. Trial

A. The Prosecution’s Evidence

At the time of the preliminary hearing, Amelia had been living at her parents’ home, recovering. Subsequently, the police

² Independent of the one-strike statute, Penal Code section 12022.75 provides for a sentence enhancement when the defendant administered a controlled substance to the victim “for the purpose of committing a felony.” The information alleged both the individual enhancement (Pen. Code, § 12022.75) and the administration of drugs as a basis for the one-strike sentencing scheme (Pen. Code, § 667.61, subd. (e)(6)). However, the jury was instructed only on the one-strike allegation, not the individual enhancement. The parties raise no contentions of error with respect to the handling of the individual enhancement under Penal Code section 12022.75, and we do not address it further.

and prosecutor learned that Amelia had left their home to live with friends. Although she had telephone contact with her parents, she refused to give her parents her new address. Amelia's parents did not want Amelia to testify, and told police they did not have Amelia's telephone number. The police conducted independent searches, but could not locate Amelia. The only thing revealed by their investigation was that, shortly before the trial was to begin, Amelia's mental condition had deteriorated to the point where her father had brought her to the emergency room at her request. A mental health hold was sought because Amelia felt suicidal.

On the prosecution's motion, the court concluded that the prosecution acted with due diligence in attempting to secure Amelia's presence at trial, that Amelia was legally unavailable, and the prosecution would be permitted to read Amelia's preliminary hearing testimony at trial.

At trial, Amelia's preliminary hearing testimony was corroborated by Lori's testimony regarding the telephone calls, police testimony about the circumstances of her rescue, and medical testimony regarding her injuries.

B. *Defense Witnesses*

Defendant offered the testimony of two witnesses. The first was Rickey Wilson, a friend of defendant's, who testified that he saw defendant and Amelia together all the time, both at the apartment and walking together outside.³ Incredibly, he testified

³ Wilson admitted to a defense investigator that he had gotten high with defendant and Amelia a few times. Defense counsel conceded in argument that Wilson "was probably coming [to defendant's apartment] to get drugs" and/or "to give [defendant] and Amelia drugs."

that although he saw Amelia 10 to 20 times, he never saw any injuries on her. In cross-examination, he admitted to multiple felony convictions. Defendant's second witness was an expert pharmacist, who testified as to the possible side effects of methamphetamine, including paranoia and negative effects on a person's ability to recall. The expert also testified to what might hypothetically happen to a person who went off the medications Amelia had been prescribed for her bipolar disorder, specifically, the return of bipolar symptoms. The expert testified that methamphetamine could counteract Amelia's bipolar medications, resulting in a regression of her symptoms, but could not say for certain if that had occurred.

C. *Argument to the Jury*

In argument to the jury, the prosecution argued that no single act was the basis for the torture count and that, instead, the torture consisted of defendant's entire course of physical abuse.⁴ As to the count of rape in concert, the prosecution proceeded on a theory that defendant aided and abetted the three men who gang raped Amelia. The rape and forcible oral copulation counts were not based on any specific acts of rape or

⁴ At the beginning of the prosecutor's argument, the prosecutor stated that the entire nightmare Amelia endured constituted an unrelenting course of torture, stating, "And when we talk about the torture, let's take into account everything. It's not just the punches and the hits and the kicks and the attack with the chair or the broomstick, or whatever it was that she was hit with, it's everything. It's the rapes. It's that forced sodomy – or forced oral copulation. It's everything." However, when the prosecutor turned to the substantive offense of torture, the prosecutor relied on the physical beatings alone to establish the crime.

forcible oral copulation. The prosecutor simply noted that defendant had conceded that he had sex with Amelia, and the only issue was whether defendant possibly could have thought Amelia had consented when he had beaten her so brutally that she was completely at his mercy.

In response, defendant's counsel argued that the relationship between defendant and Amelia had been a consensual one, although it was concededly an abusive relationship fueled by methamphetamine. Defendant's theory on the rape in concert count was that he had not intended the three men to rape Amelia, and, when he realized what was happening, he telephoned Lori out of concern for his girlfriend. Conceding that Amelia suffered horrific injuries, counsel argued that some of her bruises were consistent with having been forcibly sexually assaulted on the day after Thanksgiving (when defendant called Lori about the gang rape) and suggested that Amelia's injuries were caused by the gang rapists and not by him. At the same time, counsel conceded that there had been "domestic violence" in the relationship, but argued that defendant was bad at conflict resolution, and had simply lashed out in anger.

The jury acquitted defendant of human trafficking, and otherwise convicted defendant as charged, and found true all of the enhancement allegations.

8. *Sentencing*

The one-strike statute provides that when a defendant is convicted of certain sex offenses and either torture or great bodily injury allegations are found true under the alternative one-strike sentencing scheme, the defendant shall be sentenced to 25 years to life in prison for the underlying offense (Pen. Code, § 667.61, subd. (a)); the administration of controlled substance allegation

mandates a sentence of 15 years to life (Pen. Code, § 667.61, subd. (b)). The statute also provides for mandatory consecutive sentences when the crimes are committed on separate occasions. (Pen. Code, § 667.61, subd. (i).)

As to the rape and forcible oral copulation counts, the trial court concluded that the prosecution's failure (and/or inability) to identify the specific rapes or acts of forcible oral copulation took those offenses out of the realm of mandatory consecutive sentences.⁵ The court chose to group together all of the sexual assaults defendant committed personally as a single course of conduct. However, the trial court found that when defendant brought in the other three men to rape Amelia in concert, this constituted a distinct act justifying consecutive sentencing. Consistent with these findings, the court imposed a sentence of 25 years to life for count 3 (forcible rape) and a consecutive sentence of 25 years to life for count 4 (aiding and abetting forcible rape in concert).⁶ Concurrent terms were imposed for count 5 (forcible oral copulation) and count 1 (torture and great bodily injury enhancement).

⁵ Respondent does not argue to the contrary.

⁶ The court did not specify which particular one-strike finding (torture or great bodily injury) supported the 25-to-life sentence on each count, but it appears that, in order to avoid any possible double-counting issues, the court used one finding for count 3 and the other for count 4. As defendant was sentenced to 25 years to life on each of counts 3 and 4 on the basis of the torture and/or great bodily injury circumstances under the one-strike law, the alternative circumstance of administration of controlled substances, which would have supported a one-strike sentence of 15 years to life, was simply unused in sentencing.

9. *Appeal*

Defendant filed a timely notice of appeal.

DISCUSSION

On appeal, defendant raises numerous issues, which we group in the following manner: (1) challenges to the trial court's admission of Amelia's preliminary hearing testimony; (2) challenges to the conviction of aiding and abetting rape in concert; (3) challenges to the one-strike finding based on torture; and (4) challenges to the one-strike finding based on controlled substance administration (which was not used in sentencing).

1. *Amelia's Preliminary Hearing Testimony was Properly Admitted*

Defendant challenges the trial court's admission of Amelia's preliminary hearing testimony on two bases. First, he argues that the prosecution did not establish due diligence in attempting to locate her; and second, he argues her preliminary hearing testimony did not satisfy the Confrontation Clause of the U.S. Constitution.

A. *The Prosecution Exercised Due Diligence and Amelia was Legally Unavailable*

"The confrontation clauses of both the federal and state Constitutions guarantee a criminal defendant the right to confront the prosecution's witnesses. (U.S. Const., 6th Amend.; Cal. Const. art. I, § 15.) That right is not absolute, however. An exception exists when a witness is unavailable and, at a previous court proceeding against the same defendant, has given testimony that was subject to cross-examination. Under federal constitutional law, such testimony is admissible if the prosecution shows it made 'a good-faith effort' to obtain the presence of the witness at trial. [Citations.] California allows

introduction of the witness's prior recorded testimony if the prosecution has used 'reasonable diligence' (often referred to as due diligence) in its unsuccessful efforts to locate the missing witness. [Citation.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 892.) In practical effect the good-faith effort and due diligence tests are the same. (*People v. Smith* (2003) 30 Cal.4th 581, 610.)

Our review of a trial court's finding of due diligence is a two-step inquiry. First, we look the historical facts, asking what actions the prosecution took to locate the absent witness. "Those facts will rarely be in dispute. When they are, a reviewing court, must, of course, apply a deferential standard of review to the trial court's findings." (*People v. Cromer, supra*, 24 Cal.4th at p. 900.) Next, we ask whether those facts amount to due diligence. This is a legal question we review de novo. (*Id.* at pp. 900-901.)

"Factors that a court should consider in determining whether reasonable diligence has been shown include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored. [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 500.) We are also mindful of the rule that the prosecutor need only demonstrate due diligence: that other theoretical inquiries were not made does not itself preclude the admission of prior testimony. (*People v. Valencia* (2008) 43 Cal.4th 268, 293.)

When the prosecution first moved to admit Amelia's preliminary hearing testimony, the trial court conducted a hearing outside the presence of the jury. The investigating officer, Los Angeles Police Department Detective Sammy Cruz, testified to the efforts he, and the prosecutor, had made to attempt to obtain Amelia's presence. Initially, there had been

good communication between the family, the prosecutor, and Detective Cruz. There had been no problem obtaining Amelia's presence at the preliminary hearing. In preparation for trial, Detective Cruz had planned to serve both Amelia and Lori at the parents' home, but before he could do so, the prosecutor informed him that Amelia was no longer living with her parents. The detective went to the house on September 21, and nobody answered his knock, so he left a subpoena under the door. He telephoned Lori, who told him that Amelia had moved out approximately two months earlier, and had been living with a friend. Lori said she did not know with whom Amelia was living, or where she was living. Detective Cruz asked Lori if she had any contact information for Amelia; she said she did not. Detective Cruz then did a computer search, checking DMV records and arrest records. He also checked with local hospitals and the coroner's office. All searches were negative. Detective Cruz did, however, obtain records indicating Amelia had a recent mental health hospitalization for suicidal thoughts. The records did not show any address other than her parents' home.

Although the court based its ruling on this evidence, Lori subsequently testified at trial prior to the prosecution's use of Amelia's preliminary hearing testimony. In cross-examination, defense counsel inquired if she knew where Amelia was living. Lori said that she did not. She explained that Amelia still called her. She said that Amelia left her home and "went to live somewhere else out of the fear." Lori said that Amelia did not give Lori her address, and Lori represented that there was a reason for this. Lori again explained that Amelia was still in contact with her, and admitted that she had seen Amelia the previous weekend and told her that she, Lori, was coming to

court. The court excused the jury for the day and spoke with Lori, encouraging her to persuade Amelia to appear at trial. Lori reaffirmed that Amelia did not want to come.

The trial court admitted Amelia's preliminary hearing testimony on the basis that Amelia was unavailable and the prosecution had exercised due diligence in trying to locate her. The trial court concluded that, while it was possible that Lori was hiding Amelia in her house, the evidence suggested that Amelia was not, in fact, there. The court observed that it is very difficult to find a witness who was both intentionally hiding and being intentionally hidden by her family.

There is no real dispute as to the efforts made by the prosecution once they had learned that Amelia was no longer living at her parents' house: an attempt at service, a phone call to Lori where they were told Amelia was not there and the parents had no information as to how to find her, and independent searches which came up empty. The issue, then, is whether those efforts amounted to due diligence. We agree with the trial court that they did. As was subsequently illuminated when Lori testified at trial, Amelia did not want to testify, and she was so motivated by fear that she moved out of her parents' house and declined to give them her contact information. When the only apparent method of finding Amelia's location was to get it from her parents, who supported her desire to remain hidden, there was nothing more the prosecution could do.

On appeal, defendant suggests that, to the extent Lori did not divulge Amelia's telephone number, she committed a fraud on the court. He argues that Lori must have had a telephone number for Amelia, and the police could have used that number to find Amelia's location. We disagree.

We first observe that this was not the argument defendant made at trial. When the court specifically asked why defense counsel believed due diligence had not been satisfied, the defendant responded that the detective had made only a single attempt to subpoena Amelia at the house, and should have returned to try again. The court found that Amelia was not, in fact, being hidden at the house, meaning that any further service attempts would have been futile.

As Lori's subsequent testimony and conversation with the court explained, Amelia had a reason for not giving her parents her address, and it had to do with fear. Lori told the detective that she did not have a telephone number for Amelia, and this statement was not inherently unbelievable. It is certainly plausible that Amelia did not give her parents her number for the same reason she did not give them her address.⁷ For some reason – perhaps the fear of being subpoenaed by the prosecution in connection with this case – Amelia did not want her parents to have the means of contacting her. In any event, even if Lori did, in fact, have a telephone number for Amelia, defendant has not shown any way in which the police could have legally obtained that number from a parent who was clearly unwilling to share it.

⁷ We observe that at one time, Lori knew her daughter's cell phone number and used it to locate her while she was captive. There was testimony that defendant took the victim's phone from her, but there was no evidence whether police found a phone when they arrested defendant or arranged for Amelia to be taken to the hospital. The trial court made no express findings on the subject but we may infer the trial court found Amelia had a new cell phone and that Lori, as she testified, did not know the phone number.

B. *The Confrontation Clause was Satisfied*

Under the Confrontation Clause, testimonial statements of a witness absent from trial may be admitted when the declarant is unavailable only if the defendant has had a prior opportunity for cross-examination. (*Crawford v. Washington* (2004) 541 U.S. 36, 68.) Not only must the defendant have had an opportunity to cross-examine the witness at the prior hearing, but the defendant must have also had an interest and motive similar to that which he has at trial. (*People v. Seijas* (2005) 36 Cal.4th 291, 303.)

Conceding that he had an opportunity to cross-examine Amelia at the preliminary hearing, defendant argues that it was not sufficient, in that he did not have an interest and motive to cross-examine her similar to his interest and motive to do so at trial.

Defendant's argument is mistaken on the facts and the law. Factually, he suggests that his motive to cross-examine was different because the prosecution changed its theory on the rape in concert count between the preliminary hearing and trial. He argued that the prosecutor pursued the count as the natural and probable consequence of human trafficking at the preliminary hearing, but at trial argued defendant aided and abetted the actual offense by letting the men into the apartment. This is incorrect; at the preliminary hearing, the prosecution argued an aiding and abetting theory.⁸

⁸ Defendant also argues that he had been unable to impeach Amelia at the preliminary hearing with certain evidence which was admitted at trial, but was unavailable at the preliminary hearing. This, too, appears at least partially incorrect. Defendant argues that he could not have impeached Amelia with the trial testimony of the nurse who had conducted her sexual

Legally, contrary to defendant's position on appeal, our Supreme Court has already concluded that preliminary hearing testimony satisfies the requirements of *Crawford*. (*People v. Seijas, supra*, 36 Cal.4th at p. 303; *People v. Byron* (2009) 170 Cal.App.4th 657, 674.) A defendant's interest and motive at a second proceeding are not generally dissimilar to his interest and motive at the first hearing simply because intervening events might have led counsel to alter the nature of the cross-examination in certain respects. (*People v. Valencia, supra*, 43 Cal.4th at p. 293.) The motives need not be the same, only similar. (*Id.* at p. 294.) Our Supreme Court explained, “ ‘ “Both the United States Supreme Court and this 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.’ ” [Citations.]’ [Citation.]” (*Ibid.*)

2. *There Was No Error in Connection with the Rape in Concert Count*

As to the rape in concert count, defendant makes two arguments: first, that it is unsupported by sufficient evidence; and second, that it was the product of the prosecution improperly pursuing inconsistent theories.

assault exam. But the testimony which defendant finds helpful to his case was documented in her medical records, and it appears that those records were available at the preliminary hearing.

A. *The Evidence is Sufficient*

“ ‘In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]’ ” (*People v. James* (2007) 148 Cal.App.4th 446, 452.)

“In order to be found guilty of the crime of rape in concert, a defendant must ‘voluntarily acting in concert with another person,’ commit the crime of rape ‘by force or violence and against the will of the victim.’ [Citation.] He may do so ‘either personally or by aiding and abetting the other person.’ (*Ibid.*)” (*People v. Keovilayphone* (2005) 132 Cal.App.4th 491, 496.) When the prosecution proceeds on an aiding and abetting theory, it must establish that the defendant had the specific intent to aid the perpetrator; that is, that he had knowledge of the perpetrator’s criminal purpose as well as an intent to encourage, facilitate or instigate its commission. (*Id.* at p. 497.)

Defendant challenges the evidence of virtually all elements of this offense. He argues that the evidence is insufficient to establish: (1) that the three men raped Amelia (specifically, that the sex was nonconsensual); (2) that defendant intended that they rape Amelia; and (3) that defendant let them in the apartment intending that they commit rape.

The evidence is more than sufficient. The fact that defendant told Lori on the telephone that there were “three men here at my house right now and they’re all line[d] up to rap[e] her” provides evidence of the first two elements. Defendant’s use of the word “rap[e]” establishes that the sex was nonconsensual

and defendant knew it. The fact that defendant made the statement while the men were “line[d] up” indicates he knew that the sex would be rape before it occurred. The entirety of the circumstances – including that defendant had beaten Amelia so badly that she could not resist, prior to defendant bringing the men into the apartment where they lined up to rape her – confirms defendant’s criminal intent.

Defendant’s main argument on appeal is that he believed Amelia consented to the sex and therefore he could not have intended that the men rape Amelia. He relies on the evidence that he told Lori that Amelia was “enjoying being gang raped” and that, after the men had left, he beat Amelia for having been a “slut.” The jury did not take defendant’s statements at face value, and neither do we. After defendant told Lori that her daughter was being gang raped, he hung up the telephone. Lori frantically called back, but defendant did not pick up. That he eventually returned the call and told the frightened mother that her daughter enjoyed being gang raped, and he was going to continue with the practice, is simply another act of sadism, not a statement of fact. The same is true for defendant cruelly beating Amelia and calling her a “slut” for having been raped by the very men defendant brought in to rape her. This is torture, not a defense.

B. *The Prosecution Did Not Pursue Inconsistent Theories*

Defendant next argues that his conviction on the rape in concert count must be reversed because the prosecution pursued a theory on that count which was inconsistent with the theory it pursued on the torture count. Specifically, the prosecution took the position that defendant intended the men to rape Amelia (in

the rape in concert count) but that defendant punished Amelia for having sex with them (in the torture count).

Defendant's argument is factually unsupported. As discussed above, the so-called inconsistency exists only if we assume that a sadistic, controlling defendant, who enjoys making people suffer, would not possibly beat someone for engaging in an act he forced her to perform. We do not expect such rationality from irrational cruelty.⁹

3. *One-Strike Sentence Based on Torture; Stay of Substantive Torture Conviction*

Defendant argues the imposition of a one-strike sentence based on the torture finding must be reversed for two reasons: first, that a one-strike sentence based on a *course of conduct* of torture cannot legally be imposed in connection with "generic" sex offenses; and second, that the evidence is insufficient that the torture was committed "in the commission of" the sex offenses. We reject these arguments, but accept defendant's alternative argument, that the sentence on the substantive crime of torture (count one) must be stayed under Penal Code section 654.

A. *Overview of Torture as a Substantive Offense and Under the One-Strike Law*

Torture is defined in Penal Code section 206 as follows: "Every person who, with the intent to cause cruel or extreme pain

⁹ In any event, defendant relies on case authority holding that the prosecution cannot argue, in two different prosecutions, the irreconcilable theories that two different defendants were the primary killer in the same murder. (E.g., *People v. Richardson* (2008) 43 Cal.4th 959, 1015.) Defendant cites to no authority prohibiting inconsistent theories in a single case, and, in fact, a jury may return inconsistent verdicts in a single criminal case. (*People v. York* (1992) 11 Cal.App.4th 1506, 1510.)

and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury . . . on the person of another, is guilty of torture. [¶] The crime of torture does not require any proof that the victim suffered pain.”

Under the separate one-strike law, a defendant is eligible for a sentence of 25 years to life if the defendant inflicted torture, “in violation of” Penal Code section 206, “in the commission” of an identified sex offense, including rape and rape in concert. (Pen. Code, § 667.61, subds. (c)(1), (c)(3), & (d)(3).)

Given that the one-strike law specifically refers to torture “in violation of” Penal Code section 206, it follows that an infliction of “torture” within the meaning of the offense is also “torture” within the meaning of the one-strike law. The only additional element needed to trigger application of the one-strike law is that the torture was inflicted “in the commission” of the sex offense.

B. *Course of Conduct Torture Under the One-Strike Law Can Apply to Generic Sex Offenses*

Defendant’s argument addresses the intersection of two different criminal acts – course of conduct torture and generic sex offenses.

The crime of torture can be committed by a course of conduct over time. (*People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1427.) The theory is related to the requirement of instructional rules on unanimity. Generally, when the evidence suggests more than one discrete crime, the prosecution must elect among the crimes or the jury must be instructed that it must unanimously agree on the same criminal act. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 569.) There is an exception to this requirement when the crime is committed by a

course of conduct. No unanimity instruction is required when the acts are so closely connected that they form part of one and the same transaction, and thus one offense, or when the statute itself contemplates a continuous course of conduct over time. (*Id.* at p. 572.) “Where (as here) torture is charged and tried as a course of conduct crime, no single act in the perpetrator’s course of conduct may result in great bodily injury. But where the cumulative result of the course of conduct is great bodily injury, and the requisite intent can be found, then the crime of torture has been committed under the course of conduct exception to the election/unanimity requirement.” (*Hamlin, supra*, at p. 1429.)

The concept of “generic” sex offenses also relates to the unanimity requirement. When a defendant commits multiple similar sex offenses over a period of time against the same victim, the victim is sometimes unable to recall the specific details regarding the time and circumstances of each count. (*People v. Matute* (2002) 103 Cal.App.4th 1437, 1439.) Because there is no testimony distinguishing the different acts, there is no reasonable likelihood of juror disagreement as to particular acts. (*Id.* at p. 1448.) In such a case, the trial court should give a modified unanimity instruction that the jury could convict if it unanimously agrees the defendant committed all of the acts described by the victim. (*Ibid.*) Such an instruction was given in this case. (CALCRIM No. 3501.)

We now turn to the finding of torture under the one-strike law, which provides for a sentence of 25 years to life when the defendant inflicted torture on the victim “in the commission of” the underlying sex offense. (Pen. Code, § 677.61, subd. (d)(3).) The “in the commission of” language does not require that the infliction of torture occur simultaneously with the execution of

the sex crimes. Instead, it is satisfied when the relationship between the sex offense and the torture “was sufficiently close to justify an enhanced punishment.” (*People v. McCoy* (2013) 215 Cal.App.4th 1510, 1529-1530.) As long as the offense posed a greater threat of harm because of the torture, the torture circumstance applies. (*Id.* at p. 1530.) This is true whether the torture occurred before the sex offense (rendering the victim unable to resist the sexual assault) or after the sex offense (using the assault to maintain control over the victim). (*Id.* at pp. 1530, 1534).

We agree with our colleagues in the Third District that course of conduct torture can be used to establish the one-strike torture circumstance. (*People v. McCoy, supra*, 215 Cal.App.4th at pp. 1529, 1534.) Defendant’s argument is that course of conduct torture cannot be used to establish the one-strike torture circumstance when it is alleged in connection with a sex offense proven with generic testimony that does not address the exact time, place or circumstances of each assault. Defendant suggests that without this rule a defendant is deprived of due process because “there is no [facilitative] nexus provided between the torturous course of conduct and the generic sexual offenses attested to.” But there is such a facilitative nexus. This case proves it. The jury found that defendant tortured Amelia “in the commission” of rape and forcible oral copulation. To find defendant guilty of the crimes of rape and forcible oral copulation based on generic testimony required the jury to agree that defendant committed *each of* the multiple acts of virtually identical rape and forcible oral copulation to which Amelia testified. The jury’s true finding on the torture enhancement means that the jury found defendant facilitated each of those acts

by his lengthy course of torture. When a defendant, over a course of months, repeatedly physically abuses his victim to the point where she is always in pain, and incapable of resisting, and during that time uses that inability to resist to commit multiple sexual assaults against her, the repetitive nature of his brutality is properly addressed by a course of conduct torture finding in connection with each of the sexual assaults. That the assaults were proven by generic testimony does not change this result.

C. *The Evidence of Course of Conduct Torture*

Facilitating the Sexual Assaults Here is Sufficient

Defendant's argument in Part B is inextricably intertwined with his argument that the evidence is insufficient that his course of conduct of torture facilitated his sex offenses. We are not persuaded.

Amelia testified that defendant raped her six times. She testified that this was after he had used physical force against her, and that she was in no position to resist when he forced himself on her. In other words, the torture facilitated the rapes, by leaving Amelia unable to resist.¹⁰ The same is true with respect to the rape in concert. Defendant argues that "there was no evidence that [he] had tortured Amelia before or relative" to the rape in concert. This is simply incorrect; Amelia testified that she had been physically abused before the rape in concert, to

¹⁰ Amelia was never specifically asked whether the physical abuse left her unable to resist the multiple times defendant forced her to orally copulate him. She did, however, testify that she never consented to those acts. It is a reasonable inference from her testimony of near-continuous physical abuse that the acts of forcible oral copulation, like the rapes, were also facilitated by the beatings.

the point where she was in “not good physical condition,” such that she “definitely” would not have been able to fight back.

In defendant’s brief on appeal, he speculates that the facilitative nexus is missing because, “it could have been that appellant beat Amelia three times a week and had sex with her only on the weekends. It could have been that appellant had sex with Amelia and beat her twelve hours later. It could have been that appellant had sex with Amelia in the morning and beat her at night or beat her one morning and had sex the following morning.” Defendant’s suggestion that the passage of a few hours or days necessarily breaks the connection between his torture of Amelia and his forcible rapes is belied by the brutality of his attacks and the extent of her injuries. Defendant broke several of Amelia’s ribs, fractured two of her vertebrae, caused two facial fractures, inflicted bruises on top of bruises, twice beat her into unconsciousness, and rendered her unable to walk at the time of her rescue. The notion that the broken bones would rapidly heal and the amount of pain defendant had inflicted would likely dissipate in a few hours and not impact Amelia’s ability to resist borders on the grotesque.

D. *The Sentence on the Crime of Torture (Count One)*
Must be Stayed

As we have explained, the prosecution proceeded on the basis that defendant committed a single lengthy course of torture, not that defendant committed multiple acts each constituting a discrete violation of the torture statute. Because of this, defendant argues that, if we reject his challenges to the application of the one-strike law based on torture, the concurrent sentence imposed for the crime of torture (count one) must be stayed under Penal Code section 654.

This argument, to which the prosecution does not respond, is persuasive. We are guided by *People v. Mejia* (2017) 9 Cal.App.5th 1036, which considered the application of Penal Code section 654 to a case in which the defendant was convicted of torture on a course of conduct theory, as well as several sex offenses which themselves were part of the conduct on which the prosecution had relied to establish torture. (*Id.* at pp. 1039, 1043-1044.) The court concluded that “although a defendant may be convicted of both torture and of any or all of the underlying acts [citation], section 654 precludes imposition of unstayed sentences for both torture and any of the underlying assaultive offenses upon which the prosecution relies to prove that element. [Citation.]” (*Id.* at pp. 1044-1045.) This analysis would not apply if the record supported the conclusion that any of the acts were committed “outside of the torture course of conduct. Whether a particular offense is part of a course of conduct for purposes of section 654 is a question of fact. [Citation.] In the absence of an explicit ruling by the trial court at sentencing, we infer that the court made the finding appropriate to the sentence it imposed.” (*Id.* at p. 1045.) We affirm unless the implied finding is not supported by substantial evidence. (*Ibid.*) In *Mejia*, the appellate court found an implied finding was not supported. “There is no evidence that any of the acts of rape was not a part of that course of conduct, nor did the prosecutor seek to distinguish any of those acts on that basis.” (*Ibid.*; see also *People v. Kelly* (2016) 245 Cal.App.4th 1119, 1130 [stay under Penal Code section 654 of the sentence for kidnapping when the same kidnapping was used to impose a one-strike sentence].)

Here, the trial court made no express finding that the substantive crime of torture was established by conduct outside

the course of conduct of torture which established torture within the one-strike law. Although under traditional rules of appellate review, we would usually imply a court finding of separate acts, here the prosecutor relied on the entire course of conduct of torture to establish the one-strike circumstance. There was no evidence that any acts sufficient to constitute the substantive crime of torture were not part of the same course of conduct that constituted the torture finding under section 667.61, subdivision (d)(3). The same analysis applies to the great bodily injury enhancement on the torture offense, which arose from the same facts. Accordingly, the concurrent terms imposed for the torture count and the related great bodily injury enhancement must be stayed.¹¹

4. *The One-Strike Controlled Substance Circumstance*

Defendant's final two contentions pertain to the one-strike circumstance for administering a controlled substance "in the commission of the" offense in violation of Penal Code section 12022.75. (Pen. Code, § 667.61, subd. (e)(6).) As we have noted, defendant was sentenced under other provisions of the one-strike law, and this circumstance did not impact his sentence in any way. It therefore could be argued that his appellate arguments are moot. We nonetheless address them, in case the controlled substance sentencing alternative becomes relevant in further proceedings.

¹¹ This will have no practical effect on the sentence defendant will receive, and because it appears that the trial court would have imposed the same term if it was aware of the applicability of section 654, we simply modify the sentence on appeal.

Penal Code section 12022.75 applies to any person who “administers by injection, inhalation, ingestion, or any other means” a controlled substance “against the victim’s will by means of force, violence, or fear of immediate and unlawful bodily injury.” Defendant argues the evidence was insufficient to support the jury’s finding that he violated this section in the commission of the sex offenses, and that the court erred in failing to instruct on unanimity with respect to the allegation.

A. *The Evidence Was Sufficient*

Defendant first contends the evidence was insufficient in that (1) there is insufficient evidence he “administered” the methamphetamine to Amelia against her will; (2) there is insufficient evidence that he administered the drugs to her “in the commission of” the sex offenses; and (3) he was simply a co-participant sharing drugs with another addict.

As to the first point, defendant is simply rearguing the evidence. To be sure, there was evidence from which the jury could have concluded that Amelia willingly snorted methamphetamine defendant provided her, at least when she first came to his apartment. But there was also testimony from which the jury could have concluded that Amelia wanted to stop taking drugs, but defendant continued forcing her to do so in order to keep her compliant. The fact that defendant tortured Amelia and kept her confined to his apartment provides further support for the jury’s conclusion that the drugs were administered against Amelia’s will.¹²

¹² Defendant represents that whether giving drugs to a known addict constitutes “administering” them is an issue of first impression. We need not address the issue here, as there is

Defendant's argument that there was insufficient evidence the drugs were administered in the commission of the sex offenses is answered by Amelia's testimony that she could not mentally resist the gang rape because she had used drugs an hour or two before, combined with her general testimony that defendant gave her drugs to keep her "out of [her] mind." On appeal, defendant makes a convoluted argument that Amelia could not have been so drugged as to be incapable of consenting to sex because there is some evidence that she may have attended to her personal hygiene during her confinement. We disagree with this characterization of the evidence, given that Amelia's hair was pulled in a single dreadlocked ponytail and balding on the other side. But even if defendant is correct, a victim need not be catatonic from drug ingestion for those drugs to facilitate the commission of forcible sex offenses against her.

Defendant's third sufficiency of the evidence argument, that he was a mere co-participant in the drug use, arises from cases such as *People v. Edwards* (1985) 39 Cal.3d 107. That case considered the accidental death of the defendant's girlfriend by heroin overdose. The defendant and the victim had purchased and used the heroin together; the question was whether the defendant could be guilty of his girlfriend's murder on the theory of felony-murder arising from his act of "furnishing" her with heroin. (*Id.* at pp. 110, 112-113.) The California Supreme Court concluded that a defendant who only participates in a group purchase of heroin is simply an equal partner in the purchase who cannot be seen to have supplied the heroin for the others. (*Id.* at pp. 113-114.) However, the court stated, "Where one of the

substantial evidence that defendant forced drugs on Amelia after she stopped willingly taking them.

copurchasers takes a more active role in instigating, financing, arranging or carrying-out the drug transaction, the ‘partnership’ is not an equal one and the more active ‘partner’ may be guilty of furnishing to the less active one.” (*Id.* at p. 114.) This answers defendant’s argument. Defendant’s use of methamphetamine does not absolve him of administering it to Amelia as they were not equal co-participants. When defendant kept Amelia captive in his apartment – weakened by beatings and out of her mind on drugs – it is clear that he was the more active individual in the acquisition and ingestion of methamphetamine.

B. *Any Error in Not Giving a Unanimity Instruction is Harmless*

The jury was instructed on unanimity with respect to the rape and forcible oral copulation counts. The jury was not instructed on unanimity with respect to the one-strike controlled substance allegation. Apart from whether the failure to instruct was error, we conclude that any error would have been harmless.

There is a split in authority as to which standard of review applies to the failure to give an unanimity instruction. But the majority of courts apply the stricter *Chapman* standard. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 576.) “Under *Chapman*, [the failure to give a unanimity instruction is harmless] ‘[w]here the record provides no rational basis, by way of argument or evidence, for the jury to distinguish between the various acts, and the jury must have believed beyond a reasonable doubt that [the] defendant committed all acts if he committed any, the failure to give a unanimity instruction is harmless.’ [Citation.] For example, where the defendant offered the same defense to all criminal acts, and ‘the jury’s verdict implies that it did not believe the only defense offered,’ failure to

give a unanimity instruction is harmless error. [Citation.] But if the defendant offered separate defenses to each criminal act, reversal is required. [Citations.] The error is also harmless ‘[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence’ [Citation.]” (*Id.* at p. 577.)

Here, Amelia testified to multiple acts of rape and forcible oral copulation facilitated by defendant having administered methamphetamine to her. Defendant offered a unified defense to all charges: that the sex acts were consensual and the use of methamphetamine was consensual as well. The jury was instructed on unanimity as to the underlying offenses, thus all of the jurors either agreed that the same individual act of forcible rape was established by the evidence, or they agreed that all of the acts of rape to which Amelia testified were established (the same being true with respect to forcible oral copulation). If the former occurred – and the jurors agreed on the same act – no unanimity instruction was required with respect to the controlled substance allegation, because the jury would have considered whether defendant administered controlled substances to Amelia in the commission of that offense under the plain language of the instruction on the allegation. (CALCRIM No. 3183.) If, instead, the jurors agreed that the prosecution established defendant committed all of the acts of rape to which Amelia had testified, the failure to instruct on unanimity on the controlled substance allegation would have made no difference. The testimony presented the jury with only two choices: Either it believed Amelia’s generic testimony that defendant administered methamphetamine against her will to render her compliant for

the sex offenses, or it accepted defendant's argument that he never gave her methamphetamine against her will. The possibility that some jurors would have found the allegation true based on one discrete administration of methamphetamine while other jurors would have relied on a different administration of methamphetamine is simply not one which could have occurred on this record.

5. *We Must Correct Two Errors in the Abstract of Judgment*

As we have discussed above, we will modify the sentence to stay under Penal Code section 654 the concurrent term imposed for torture and the related great bodily injury enhancement (count one). Our review of the record shows two errors in the abstract of judgment which must also be corrected.

The front page of the abstract properly reflects consecutive sentences of 25 years to life imposed for the crimes of rape (count three) and rape in concert (count four). However, the second page of the abstract indicates, under "Other orders," that "Parole is not to be considered until 25 years minimum." But the two consecutive terms of 25 years to life result in the conclusion that defendant may not be paroled until he has served 50 years. (Pen. Code, § 3046, subds. (a) & (b).) Defendant concedes that he was sentenced to 50 years to life. The abstract must be corrected.

In addition, the checkbox on the abstract indicating that sentence was imposed under Penal Code section 667.61 is not checked, although it is undisputed that defendant was, in fact, sentenced pursuant to that statute.

DISPOSITION

The concurrent sentences on torture (count one) and the great bodily injury enhancement on the same count are modified

to stayed terms under Penal Code section 654. In addition, the abstract of judgment is to be corrected as follows: (1) under line 8, the box for 667.61 should be checked; and (2) on line 10, the statement indicating that defendant is not to be considered for parole for 25 years must be modified to 50 years. The trial court is directed to prepare an amended abstract of judgment reflecting the modified sentence and the corrections to the abstract, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

STRATTON, J.

DUNNING, J.*

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