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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

TYRRELL BURRIS,

Defendant and Appellant.

B281621

(Los Angeles County
Super. Ct. No. BA448133)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed as modified.

Doris M. LeRoy, 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, Senior Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Tyrrell Burris of multiple crimes related to his assault of two women in their homes. On appeal he contends the prosecutor engaged in prejudicial misconduct during closing argument, his lawyer's failure to object to many of the prosecutor's misstatements deprived him of the effective assistance of counsel, the evidence is insufficient to support his conviction for aggravated kidnapping, he improperly suffered convictions for different statements of the same offense and it was error to order he pay restitution to one of his two victims. We agree two of Burris's burglary convictions must be dismissed as duplicative and the restitution order was imposed in error. In all other respects we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Information

Burris was charged in an information filed September 6, 2016 with assaulting Mariana R. on June 28, 2016 with intent to commit a felony—rape, sodomy or oral copulation—during the commission of a first degree burglary (Pen. Code, § 220, subd. (b);¹ count 1) and with first degree burglary of an inhabited dwelling house with a person present (§ 459; count 4).

He was also charged with assaulting Mitsuko L. on July 1, 2016 with intent to commit a felony—rape, sodomy, or oral copulation—during the commission of a first degree burglary (count 2), kidnapping to commit rape (§ 209, subd. (b)(1); count 3) and first degree burglary of an inhabited dwelling house with a person present (count 5). It was specially alleged as to counts 2, 3 and 5 that the victim was elderly (§ 667.9, subd. (a)).

¹ Statutory references are to this code.

2. The People's Evidence

a. The attack on Mariana R.

Mariana R. lived in a house near the intersection of North Las Palmas Avenue and Lexington Avenue in Hollywood. On June 28, 2016 she came home around 11:30 p.m. She entered her backyard through the gate and went into the house through the back door. She threw her purse onto her bed in the master bedroom, which was at the back of the house, undressed in the bathroom and returned to the bedroom to put on her pajamas.

Mariana saw Burris lying on his back diagonally across the bed, naked except for a cloth head covering and socks. He appeared to have an erection. Mariana started screaming and attempted to leave the bedroom. Burris jumped up, grabbed her and threw her onto the bed, pinning her down by pushing her head into the bed and digging his knee into her back. Mariana yelled at him and struggled to get free. As Burris started to get off her, Mariana pushed him away; Burris fell against the dresser and hit his head. Mariana reached for her phone and yelled that she was calling the police. Burris left the house through the back door and jumped from a bench over the fence. Mariana grabbed her purse, locked herself in the front part of the house and called the police.

Responding police officers determined the lock on one of the rear doors was not properly aligned, and the door could be pushed open. In a vacant lot next to Mariana's property, the police found a glass pipe near the fence between the two properties. They also observed what appeared to be human feces in a plastic container. DNA testing of the glass pipe provided a match to Burris's DNA. When the police officers asked to see Mariana's identification, she

discovered \$500 in cash and her debit and credit cards were missing from her wallet, which had been in her purse.

Mariana sustained bruises on her arms, legs, breasts and tailbone and had pain in her neck and arms.

On June 30, 2016 officers showed Mariana a photographic lineup, but she became too emotional to attempt an identification. She was shown a second photographic lineup on July 5, 2016 and was able to identify Burris as her assailant.

b. *The attack on Mitsuko L.*

Eighty-year-old Mitsuko L. lived alone in a downstairs apartment on North Las Palmas Avenue in Hollywood. Michael Dong was her next door neighbor. Their apartments shared a front entryway and had back patios separated by a six- or seven-foot fence. Zachary Corbaley lived in an apartment across the walkway from Mitsuko's apartment.

At about 1:00 p.m. on July 1, 2016 Corbaley saw Burris near the front of Mitsuko's apartment. He went outside and asked what Burris was doing there. Burris gave an "answer that wasn't very coherent," mumbling something to the effect that he was just looking around. It appeared to Corbaley that Burris was "spaced out"; he seemed to be mentally imbalanced or inebriated. Corbaley asked Burris to leave.

About 4:30 that afternoon Dong was bringing cases of bottled water to Mitsuko when he saw Burris stretched out on their front steps. He had seen Burris in the driveway the previous night. Burris did not look out of place, and Dong assumed he was someone's guest. Burris helped Dong put the cases of water in Mitsuko's apartment and sat back down on the steps while Mitsuko paid Dong for the water.

Burris took out a glass pipe and began smoking what appeared to Dong to be methamphetamine or crack cocaine. Burris offered the pipe to Dong, but Dong waved it away and returned to his apartment.

Mitsuko noticed Burris smoking on the front steps and asked if he was Dong's friend. Burris indicated he was and said he wanted to take a shower. Mitsuko closed and locked her front door.

A short time later, as Mitsuko sat on her sofa near the front door watching television, she saw Burris in her kitchen looking at her. She got up and moved toward the front door, but Burris seized her from behind and pulled her away from the door. Burris grasped Mitsuko's shorts. They ripped, and he threw them down. Mitsuko fell to the floor. Burris grabbed her legs and began dragging her down the hallway toward the bedroom, a distance of about 10 steps. Mitsuko screamed for Dong and Corbaley to come help her.

Mitsuko saw that the zipper on Burris's pants was open, and his hand moved in that area as though he were trying to take out his penis. Spotting one of Burris's boots on the floor, she picked it up and hit him with it.

In his apartment Corbaley heard muffled screaming coming from the direction of Mitsuko's apartment. When he went outside to go to the laundry room, he realized Mitsuko was screaming his and Dong's names and calling for help. He ran to her front door but could not open it because it was locked. He pounded on the door, calling her name. When she did not come to the door, he ran to the back of her apartment and was able to enter through the open back gate and back door.

When he heard pounding on the front door, Burris let go of Mitsuko's legs, ran out of the apartment to the back patio and jumped over the fence to Dong's patio. Corbaley entered the apartment and saw Mitsuko on the floor of the hallway, not wearing any pants. She exclaimed, "He tried to rape me." Corbaley searched the apartment but did not find anyone inside. He returned to Mitsuko, who again said that someone had broken in and tried to rape her.

Dong was in his bedroom watching television when he heard noise coming from his patio. He looked outside and saw Burris crouched by his back door. He told Burris he could not be back there. Burris said, "Oh, okay," and moved out of view. Dong then heard a knock on the front door and went to answer it. Mitsuko was there in a shirt and underwear, and she told Dong someone had tried to rape her. Dong went to his bedroom to get his phone and saw Burris was still on his patio. Dong again told him to leave, went outside and saw him jump over the fence. Dong then called the police.

As Dong and Corbaley waited in front of their apartments for the police to arrive, Burris returned and asked for his boot back. They told him that they had called the police, and Burris left without the boot.

When the officers arrived, they spotted Burris crouched on a third floor balcony across the street and ordered him to come downstairs with his hands up. He complied, holding a cowboy boot in one hand and a belt in the other. The officers took him into custody. He did not appear to the officers to be under the influence of drugs. (A subsequent urine test was positive for amphetamines and marijuana.)

Los Angeles Police Officer Jaz Menier testified he was with Burris for approximately six hours after Burris's arrest. Burris had no problems understanding or complying with directions. Burris exhibited none of the common signs and symptoms of someone who is under the influence of methamphetamine, such as hyperactivity, paranoia or profuse sweating. Rather, Burris remained calm throughout that time.

Los Angeles Police Officer Nicholas Clanton, one of the arresting officers, testified Burris obeyed police commands, had no trouble walking down the stairs and did not look confused or "out of it." Burris exhibited no signs of being under the influence of methamphetamine, such as moving around, twitching, grinding his teeth or otherwise being unable to stand still. Another arresting officer, Howard Hwang, agreed Burris exhibited no signs of being under the influence of drugs or alcohol. Nurse Sarah Grayson, who collected samples from Burris at the hospital following his arrest, did not observe any signs that he was under the influence of drugs or alcohol.

Both Mitsuko and Corbaley identified Burris at a field showup. Mitsuko suffered bruises on her legs, abrasions on her knee and shoulders, pain in her neck and shoulder and redness in one eye.

c. Henry Cherry's testimony

Henry Cherry lived in an apartment building across the street from the building in which Mitsuko lived. On the night of June 30, 2016 he observed Burris sleeping in the carport of the building next door. Because there were so many homeless people in the area, Cherry did nothing.

The following day one of Cherry's neighbors told him that Burris was pushing on one of his windows. Cherry confronted

Burris, who then left. Burris looked disheveled, but it did not appear to Cherry that he was inebriated.

Cherry armed himself with a baseball bat and monitored Burris's movements. He saw the police briefly detain Burris but then let him go. A few minutes later Cherry saw Burris again. Holding the baseball bat, he told Burris "to get out of this neighborhood or I'll destroy you." He asked if Burris understood what he was saying. Burris replied, "Yes," and left.

Cherry took his dog for a walk in the direction Burris had gone and saw Burris on the second floor of an apartment building, pushing on a window. Cherry yelled at him, and Burris ran away.

That afternoon at about 5:30 Cherry saw Burris in the street with the police. Burris was wearing one of the boots Cherry had seen him wearing that morning.

3. *The Defense Case*

a. *Burris's testimony*

Testifying in his own defense, Burris, who was 24 years old at the time of trial, explained he had come to California from Missouri for winter break in January 2016. He had been in college, where he maintained good grades and was on the football team. He had also worked as a personal wellness coach.

Burris said he was an artist. After coming to California, he sold some of his drawings "here and there for a few dollars." Eventually he ran out of money and became homeless, living on the streets in Hollywood. During this time he was introduced to crystal methamphetamine, which he had never used before.

i. The incident involving Mariana R.

In the days prior to the Mariana R. incident, Burris had purchased methamphetamine; he also had marijuana and a pipe.

He walked around looking for a place to sleep. He found an abandoned house next door to Mariana's house. He thought he could rest there. At the time he was spaced out from crystal methamphetamine.

Burris was wearing pants he had obtained from a center that offered services to the homeless. The pants were too tight, and he took them off so he could squat and defecate. He defecated into a plastic container he found, took off his shirt and wiped himself with it, then threw the shirt into the container. He went to look for something else to use to clean himself and went over a gate and into Mariana's yard.

Burris noticed the doors to Mariana's house were cracked open, so he pushed on them and went into the house. He was looking for a bathroom and was standing in the doorway between the dining room and the bedroom when he saw Mariana coming toward him, holding her clothes in her hand. She began to scream at him. He wanted to leave; but she was in the doorway, blocking his exit. He grabbed her by the arms, moved her out of his way, and then ran out of the house. He went back over the gate, put his pants on and ran away. Burris denied taking anything from Mariana's purse, which he claimed he had not seen while he was in her home.

ii. The incident involving Mitsuko L.

Burris continued using methamphetamine. He decided to try to find an apartment to rent, even though he acknowledged he had no money. He saw the apartment complex in which Mitsuko's apartment was located and thought it might be inexpensive. He knocked on doors looking for the manager. When he was unable to find the manager, he sat down on a porch to smoke the remainder of his crystal methamphetamine.

Mitsuko asked Burris if he was there to see someone. He initially said he was, but then told her, “No, I’m homeless.” He asked her if he could take a shower, and she said, “No, no. My husband. My husband.” Deciding she did not speak English, Burris stopped trying to talk to her and started to smoke again. Mitsuko watched him through her screen door. Burris became paranoid about her watching him, so he got up and walked away.

Burris walked to the back of the apartments, opened a gate and entered Mitsuko’s back patio. He took off his boots and washed his feet because they were swollen from doing so much walking. He saw that the back door to the apartment was open, and he went inside. Because he was high at the time, he was not sure why he entered the apartment. He insisted he did not intend to sexually assault Mitsuko.

Burris went into the bathroom to take a shower but changed his mind, peeked around a corner and saw Mitsuko. She saw him, as well. As Mitsuko got up, she fell. Burris wanted to help her up but did not want to grab her by her arms and hurt her. He grabbed her by her waist to lift her up, but her clothing ripped. He put her down again. Mitsuko hit him with a pot, and he ran out of the apartment and jumped over the back gate. After he realized he had left one of his boots behind, he went back to try to retrieve it. On cross-examination Burris explained he stayed at the scene “and asked for my boot because I was—that’s the only thing I felt I needed at the time. I was extremely delusional.”

Burris denied Mitsuko was trying to get out the front door or that he had dragged her away from it. He did not attempt to pull his penis out of his pants. He had unzipped his pants to

shower, and he was checking to make sure he had zipped them back up.

b. *Character evidence*

Conrad Terry had known Burris since they were children. Burris was a good student, involved in athletics and volunteer activities; Burris displayed good sportsmanship and was not a violent person. Terry had never witnessed or heard about Burris being violent, abusive or disrespectful toward women. Terry did not believe that Burris was a sexual predator.

Burris's mother, Princess Cole, had never seen or heard of Burris being abusive or disrespectful toward women. She explained at one time Burris had a bad reaction when experimenting with synthetic marijuana, and she had to put him in a facility. The staff there thought he might have suffered drug-induced schizophrenia. However, Burris got clean and healthy before going to school in Missouri.

4. *The Verdict and Sentence*

With respect to the attack on Mariana R., the jury found Burris not guilty of assault with intent to commit rape during the commission of a first degree burglary, the offense charged in count 1, and the lesser included offense of assault with intent to commit rape. It found him guilty of the lesser included offenses of first degree burglary and simple assault. It also found Burris guilty of first degree burglary as charged in count 4.

With respect to the attack on Mitsuko L., the jury found Burris guilty of assault with intent to commit rape during the commission of a first degree burglary as charged in count 2, kidnapping to commit rape as charged in count 3 and first degree burglary as charged in count 5. As to all three charges the jury found true the special allegation the victim was elderly.

The trial court sentenced Burris to an aggregate state prison term of life plus five years six months: a term of life for assault with intent to commit rape during the commission of a first degree burglary plus one year for the elderly victim enhancement on count 2, plus consecutive terms of four years (the middle term) for first degree burglary and six months for misdemeanor assault on count 1. The court stayed the sentence on the remaining charges (counts 3, 4 and 5) pursuant to section 654 and ordered Burris to pay various fines and fees, as well as direct restitution of \$500 to Mariana.

DISCUSSION

1. *Burris Was Not Prejudiced by Prosecutorial Misconduct or Denied the Effective Assistance of Counsel*

a. *Governing law*

i. Prosecutorial misconduct

““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.”” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1331-1332; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 349; *People v. Cortez* (2016) 63 Cal.4th 101, 130.)

“A defendant’s conviction will not be reversed for prosecutorial misconduct’ that violates state law, however, ‘unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.’” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071; accord,

People v. Daveggio and Michaud (2018) 4 Cal.5th 790, 854; *People v. Lloyd* (2015) 236 Cal.App.4th 49, 60-61.) Bad faith on the prosecutor's part is not a prerequisite to finding prosecutorial misconduct under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 821; accord, *Lloyd*, at p. 61.) As the Supreme Court has explained, "[T]he term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error." (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667; see *People v. Sandoval* (2015) 62 Cal.4th 394, 438.)

It is misconduct to misstate the facts or refer to facts not in evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1207; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353.) Nevertheless, the prosecutor "enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom." (*Ellison*, at p. 1353; accord, *People v. Hill*, *supra*, 17 Cal.4th at p. 823.) "A prosecutor's 'argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom.'" (*People v. Edwards* (2013) 57 Cal.4th 658, 736.)

It is also prosecutorial misconduct to misstate the applicable law. (*People v. Gray* (2005) 37 Cal.4th 168, 217.) As with any other claim of prosecutorial misconduct, however, "[a] prosecutor's misstatements of law are generally curable by an admonition from the court." (*People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) The failure to object and request an admonition forfeits the issue unless "the prosecutor's argument [was] so extreme or pervasive that a prompt objection and admonition would not have cured the harm." (*Ibid.*)

ii. Ineffective assistance of counsel

“A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel.” (*People v. Centeno, supra*, 60 Cal.4th at p. 674.) To prevail on that claim, Burris “bears the burden of showing by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice.” (*Ibid.*) Prejudice is established by showing that, but for counsel’s unprofessional errors, it is reasonably probable that the result of the proceeding would have been more favorable to the defendant. (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; *Strickland v. Washington* (1984) 466 U.S. 668, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

On appeal we “defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” [Citation.] Defendant’s burden is difficult to carry on direct appeal, as we have observed: “Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]’ [Citation.] If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,’ the claim on appeal must be rejected,”

and the ‘claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.’” (*People v. Vines* (2011) 51 Cal.4th 830, 876, overruled on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 104; see *People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

“[T]he decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one . . .’ [citation], and ‘a mere failure to object to evidence or argument seldom establishes counsel’s incompetence’ [citation].” (*People v. Centeno, supra*, 60 Cal.4th at p. 675.) Defense counsel’s failure to object to the prosecutor’s reference to facts not in evidence may well have been “a conscious tactical decision and a sensible one at that, taken so as not to draw the jury’s attention to remarks that were, in context, fleeting.” (*People v. Padilla* (1995) 11 Cal.4th 891, 958, disapproved on another ground in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1; cf. *People v. Vines, supra*, 51 Cal.4th at p. 878 [failure to ask certain questions of a witness “was a tactical decision to prevent the introduction of or further emphasis on testimony unhelpful or damaging to defendant”]; *People v. Stanley* (2006) 39 Cal.4th 913, 965-966 [failure to request instruction at penalty phase not to draw adverse inferences from the defendant’s failure to testify may have reflected a tactical decision not to draw the jury’s attention to the fact that he did not testify]; *People v. Medina* (1995) 11 Cal.4th 694, 740 [“counsel may have deemed it tactically unwise to call further attention to defendant’s prior offenses by requesting special instructions”].)

b. *Any mischaracterization of the evidence was harmless*

Responding to the suggestion Burris had been so impaired by his use of crystal methamphetamine that he was unable to form the specific intent required for the charged offenses, the prosecutor told the jurors that none of the civilian witnesses who had encountered Burris the day of the incident involving Mitsuko L. had “observed any symptoms of him being under the influence.” Contending this statement mischaracterized the evidence, Burris points to Corbaley’s testimony that, when he first interacted with Burris, Burris’s answers to Corbaley’s questions were “incoherent” and “spaced out,” and Burris seemed to be “not quite there,” mentally imbalanced or inebriated. Burris’s argument ignores the context in which the challenged statement was made.

In her initial closing argument the prosecutor stated: “All the witnesses, the civilians, the cops, the nurse that examined him that night, all of them have told you that they didn’t have trouble with him understanding what they said or them seeing any symptoms of anything that would be related to him being under the influence of anything.

“You have the nurse who describes him as cooperative and in[]tact. You have the officers who see him, and they tell him. Why do we go through the exercise of having everyone who had contact with him that day come here and testify? Because it’s important for you to understand. There are many people who saw him who came in contact with him, and they all said the same thing.

“Professional—professionals told you that there were no subjective symptoms of him being under the influence. The officers who work in Hollywood who are—at least have some

basic understanding or training of what subjective symptoms are, the grinding of the teeth, the sweating, all of the subjective symptoms that they talked about, none of those symptoms that they talked about, none of those symptoms were described by any of those witnesses.

“So if you don’t trust cops or you hate cops or whatever that case might be, then look at the testimony of all the civilians that came into contact with him that day: Zachary Corbaley, Michael Dong, Mr. Cherry from across the street. All of these people told you he was able to communicate. He had deliberate, goal-oriented actions that matched what he was doing. None of them observed any symptoms of him being under the influence. And the nurse told you the same thing.” Defense counsel did not object to this argument.

Defense counsel in his closing argument stressed Burris’s background, which indicated he was not the type of person who was a sexual predator. Counsel asked, “How could someone with Tyrrell Burris’s background and character already formed turn into a sexual predator like [the prosecutor] is trying to describe him on his own and have this—be able to have that type of specific intent formed on his own to rape someone or to go into a house and steal something? How did that happen? Real simple. Methamphetamines.” Defense counsel argued methamphetamine use interfered with Burris’s ability to form the specific intent to commit the crimes, pointing to Burris’s testimony that at the time of the two incidents he was “delusional and paranoid.”

Following this argument the prosecutor objected that defense counsel had referred to facts not in evidence. In response the court reminded the jury, “[W]hat the attorneys say is not

evidence. I'm sure that both sides are trying as best they can to remember specifically the evidence that was stated, that came out in the trial. But inevitably there can be mistakes. If you have any questions as to what is evidence as opposed to what is argument, just ask me, and we'll get the court reporter to check it out."

In her final argument the prosecutor commented that defense counsel "just stood here and told you that on the days in question the defendant was delusional, hallucinating, had a reality completely different than ours, that he was acting bizarre, et cetera. But what the defendant got—when he got up and took the stand and he talked about what happened on those days, he didn't tell you he was hallucinating. He didn't testify here during the trial that he was hallucinating or delusional. He didn't say he had a reality difference."

At this point defense counsel objected that the prosecutor was misstating the evidence. The trial court again admonished the jury, "Like I said, ladies and gentlemen, each side has a difference of opinion as to what was stated in this regard. If you have a question, just ask to have it clarified."

The prosecutor's statement that none of the witnesses had seen Burris exhibit symptoms indicating he was under the influence of methamphetamine was, in context, directed to the period immediately before the attack on Mitsuko through Burris's arrest and shortly thereafter. Corbaley's testimony that Burris appeared to be mentally imbalanced or delusional, in contrast, referred to the time several hours earlier when Corbaley first saw Burris. The prosecutor did not misstate the evidence, but rather focused on that portion of the evidence most relevant to the issue of Burris's mental state during the attack, urging the

jury to draw reasonable inferences from that evidence. Her argument in this regard was unobjectionable. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 823; *People v. Ellison*, *supra*, 196 Cal.App.4th at p. 1353.)

As to the prosecutor's statement that Burris did not testify he was hallucinating or delusional, she was mistaken: Burris did testify that, when he asked for his boot back, he was delusional. However, Burris did not testify his actions in the homes of Mariana and Mitsuko, the issue in the case, were the result of hallucinations or delusions. Instead, he denied he had attacked either woman and offered alternate versions of what had actually taken place. Again, when viewed in context, any possible harm from the prosecutor's overstatement of the testimony was cured by the trial court's repeated instructions that what the attorneys said was not evidence. (See *People v. Centeno*, *supra*, 60 Cal.4th at p. 674.) Indeed, acting on the court's additional instruction that it could ask for clarification of what the testimony actually was if it had a question, the jury made a number of requests for readbacks of the testimony of different witnesses. None of those requests concerned testimony as to whether Burris was under the influence of methamphetamine, hallucinating or delusional at the times in question. Under these circumstances it is not reasonably probable the prosecutor's error affected the outcome of the trial. (See *People v. Shazier* (2014) 60 Cal.4th 109, 127.)

Because the claimed mischaracterization of the evidence by the prosecutor either was proper argument or did not rise to the level of prejudicial misconduct, Burris was not deprived of the effective assistance of counsel as a result of defense counsel's failure to object or to request an appropriate admonition in response to the challenged comments. (See *People v. Osband*

(1996) 13 Cal.4th 622, 700 [no ineffective assistance of counsel where court “found either no misconduct at all or misconduct so trivial that no prejudice could have arisen from it”]; see also *People v. Jackson, supra*, 1 Cal.5th at p. 350 [no ineffective assistance of counsel when prosecutor’s “improper statements spanned a relatively small amount of time in an otherwise proper closing statement”].)

c. Any misstatement of the law was harmless

i. The elusive distinction between general and specific intent

“Specific and general intent have been notoriously difficult terms to define and apply, and a number of text writers recommend that they be abandoned altogether. . . . When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent. There is no real difference, however, only a linguistic one, between an intent to do an act already performed and an intent to do that same act in the future.” (*People v. Hood* (1969) 1 Cal.3d 444, 456-457.)

“‘General intent’ and ‘specific intent’ have ‘evolved as labels to identify’ particular crimes, with ‘specific intent’ crimes allowing the admission of evidence of voluntary intoxication to disprove the required mental element and ‘general intent’ crimes not doing so. [Citations.] [¶] Pursuant to the accepted rule of thumb, “[g]eneral intent” has usually been affixed if the mental

element of a crime ‘entails only an intent to engage in certain proscribed conduct.’ [Citations.] ‘In contrast, “specific intent” has usually been affixed if the mental element of a crime ‘entails an intent to engage in certain proscribed conduct for the purpose of bringing about, or allowing, a certain proscribed result.’” (*People v. Atkins* (2001) 25 Cal.4th 76, 94 (conc. opn. of Mosk, J.); see also *People v. Berg* (2018) 23 Cal.App.5th 959, 965.)

ii. The prosecutor’s attempts to explain general and specific intent

Burris contends the prosecutor misstated the law regarding the difference between specific intent and general intent in her closing argument, as well as the law regarding the effect of voluntary intoxication as it relates to proof of a defendant’s specific intent to commit a crime. As with his claims the prosecutor mischaracterized the evidence, any misstatement of the law by the prosecutor during closing argument was harmless.

In her initial closing argument, which followed the court’s instructions to the jury, the prosecutor stated, “This case is about whether or not at the time that this occurred [Burris] had the specific intent to do—to assault or to kidnap or to commit a theft or rape. . . . Now, specific intent. Let me go back here because I really want you guys to pay attention. Specific intent is just fancy language that means what was . . . in his mind. What was he thinking at the time he acted.” After telling the jury it could determine what was in Burris’s mind based on his actions, the prosecutor stated, “So this is what it all boils down to. When you hear over and over and over again specific intent, specific intent, all it means is did he mean to do what he did. Right? If I think to myself right now I want to leave you guys right now and I walk out, that means I acted according to what my thought was. Right? I walked out. I acted according to what my intent is.”

This argument did, as Burris contends, muddle the distinction between general and specific intent, suggesting that specific intent was the intent to do an act, not the intent to bring about a particular result. At that point, however, the court took a break, conferred with counsel and then again read to the jury CALCRIM Nos. 252 on general and specific intent crimes, and 3426 on voluntary intoxication.²

² The trial court instructed the jury pursuant to CALCRIM No. 252, “The crimes charged in counts 1 through 5 require proof of the union or joint operation of act and wrongful intent. The following crimes require a specific intent or mental state. And that is counts 1 through 5. For you to find a person guilty of these crimes, the person must not only intentionally commit the prohibited act but must do so with a specific intent and/or mental state. The act and specific intent or mental state required are explained in the instructions for those crimes.

“The following crimes require a general criminal intent. And they are all lesser included offenses. One is the lesser included offense of assault. One is the lesser offense of simple kidnapping and the lesser offense of false imprisonment, as well as the special allegation of a victim being over 65. For you to find a person guilty of these crimes or find that allegation true, the person must not only commit the prohibited act but must do so with wrongful intent. A person acts with wrongful intent when he intentionally does a prohibited act. However, it is not required that he intend to break the law. The act required is explained in the instruction for that crime or allegation.”

Pursuant to CALCRIM No. 3426, the court again instructed the jury, “You may consider evidence, if any, of the defendant’s voluntary intoxication only in a limited way. You must consider that evidence only in deciding whether the defendant acted with specific intent.

After the break the prosecutor continued, addressing the charged crimes and arguing that, “when [Burris] acted, he intended to commit rape.” Emphasizing Mariana’s testimony that Burris was lying naked on her bed and then jumped up and grabbed her, the prosecutor argued, “if you look at the facts and the totality of the circumstances, of course that’s his intent.”

As to Mitsuko, the prosecutor argued, when Burris entered her apartment, “you have absolutely no doubt that he does so in order to rape her.” The prosecutor highlighted the evidence Burris dragged Mitsuko down the hallway while grabbing at his crotch and argued these were “the acts of someone who is there to assault that woman . . . in a sexual way and, obviously, to rape her.”

Turning to Burris’s claim of voluntary intoxication, the prosecutor argued, as discussed, that none of the witnesses who saw Burris around the time of his arrest observed any signs he was under the influence of methamphetamine or any other substance. The prosecutor stated, “Now, you’re going to say, oh, yes, . . . but he had drugs in his system. Yes, he did. I stipulated to that, obviously. But the question is not just whether there’s drugs present. The question is despite the fact that there’s drugs,

“A person is voluntarily intoxicated if he becomes intoxicated by willingly using any intoxicating drug or other substance knowing that it could produce an intoxicating effect or willingly assuming the risk of that effect.

“In connection with the charges in counts 1 through 5, the People have the burden of proving beyond a reasonable doubt that the defendant acted with specific intent. If the People have not met this burden, you must find the defendant not guilty of counts 1 through 5.”

can he have goal-oriented actions. Does he know what he's doing? Is he acting in a way that's purposeful?"

The prosecutor pointed out that "there's an instruction that talks about voluntary intoxication." The jury had to "consider it in determining whether or not [Burris] acted with specific intent." The jury would hear about "specific intent . . . throughout all the instructions. . . . All that means is did he act with intent. Did he have goal-oriented actions? Did he know what he was doing? Did he enter that home knowing that he was entering that home?" That Burris was a drug addict, the prosecutor added, was relevant only "to a certain extent and that is did that keep him from knowing what he was doing."

Again, the prosecutor misstated the distinction between general and specific intent and the effect of voluntary intoxication with respect to the requisite intent. The question for the jury was not whether voluntary intoxication kept Burris "from knowing what he was doing," but whether it kept him from acting with specific intent "to engage in certain proscribed conduct for the purpose of bringing about, or allowing, a certain proscribed result." (*People v. Atkins, supra*, 25 Cal.4th at p. 94.)

In subsequently discussing the offenses charged, however, the prosecutor clarified that kidnapping for rape required that the People prove Burris acted with the intent to commit rape when he used force or fear to detain and move Mitsuko. As to the burglary charges, the prosecutor explained, "All we have to show is that he entered a . . . building or a room within a building . . . with the intent to commit theft or rape. . . . Once you step into that home with that intent in mind, you have your first degree burglary."

In response defense counsel argued Burris “really didn’t know he was doing anything wrong because . . . this meth and marijuana had affected his ability to form the specific intent to rape somebody.”

In her final argument the prosecutor again discussed the claim of intoxication, telling the jury, “The question is if at the time, despite the taking of marijuana and methamphetamine, despite that, whether or not he intended to enter somebody else’s home, whether or not he intended to rape Mariana . . . , whether or not he intended to enter [Mitsuko’s] home and also grab her and drag her across the living room and down the hallway by her feet, whether or not he intended to kidnap her at the time It’s in the context of what he was doing, despite the fact that he is maybe taking drugs.”

In these concluding comments the prosecutor again erroneously suggested voluntary intoxication was only a defense if Burris did not know what he was doing, if his actions were not purposeful. That is, voluntary intoxication was a defense only if Burris lacked general intent to do a proscribed act.

As the People point out, Burris’s counsel failed to object to these misstatements or request an admonition, forfeiting any claim of prosecutorial misconduct. (*People v. Centeno, supra*, 60 Cal.4th at p. 674.) Nonetheless, the trial court instructed the jury a second time on general and specific intent and on the effect of voluntary intoxication. It also instructed the jury pursuant to CALCRIM No. 200: “You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” “Absent any contrary indication,

we presume the jury followed this instruction.” (*People v. Gray, supra*, 37 Cal.4th at p. 217.)

Moreover, the record establishes the jury did follow the court’s admonitions and requested clarification if it had questions as to the law or the evidence. In addition to requesting readback of certain testimony, it asked questions concerning when it could consider a lesser charge and what evidence it could consider in determining the issue of intent.

Additionally, contrary to Burris’s claim, the record shows the jury was not misled by the prosecutor’s argument into failing to properly analyze his intent in entering Mitsuko’s apartment. The jury asked for a readback of Burris’s “testimony relating to his touching of his crotch area” and Mitsuko’s “testimony regarding any reference of a shower,” as well as Burris’s and Dong’s testimony regarding a shower and “the testimony of the nurse who examined [Mitsuko] as it relates to any bruises, abrasions, or pain in the back or back of the neck.” It is clear the jury carefully analyzed the circumstantial evidence of Burris’s intent in entering Mitsuko’s apartment.

Based on the record as a whole, any misstatements of the law did not constitute prejudicial misconduct. Because no prejudice resulted from the misstatements of law, Burris was not deprived of the effective assistance of counsel by his trial counsel’s failure to object. (See *Strickland v. Washington, supra*, 466 U.S. at p. 694; *People v. Centeno, supra*, 60 Cal.4th at p. 674.)

2. *The Evidence of Asportation Was Sufficient To Support Burris’s Conviction for Aggravated Kidnapping*

a. *Governing law*

The enhanced penalty for aggravated kidnapping—kidnapping to commit robbery, rape or other enumerated

crimes—applies only if “the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (§ 209, subd. (b)(2); see *People v. Dominguez* (2006) 39 Cal.4th 1141, 1152 (*Dominguez*) “[t]he essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement”].)

The Supreme Court has established a two-prong test to evaluate whether the asportation necessary for aggravated kidnapping has been proved: “As for the first prong, or whether the movement is merely incidental to the crime of robbery, the jury considers the ‘scope and nature’ of the movement.” (*People v. Rayford* (1994) 9 Cal.4th 1, 12.) For the second prong, the jury determines “whether the movement subjects the victim to a substantial increase in risk of harm above and beyond that inherent in robbery.” (*Id.* at p. 13.) These two prongs “are not mutually exclusive, but interrelated.” (*Dominguez, supra*, 39 Cal.4th at p. 1152.) “[E]ach case must be considered in the context of the totality of its circumstances.” (*Ibid.*)

Although the actual distance a victim has been moved is significant, the Supreme Court has made clear that “no minimum distance is required to satisfy the asportation requirement [citation], so long as the movement is substantial.” (*Dominguez, supra*, 39 Cal.4th at p. 1152.) Further, the actual measured distance “must be considered in context, including the nature of the crime and its environment.” (*Ibid.*) As to the second prong the Supreme Court has “articulated various circumstances the jury should consider, such as whether the movement decreases the likelihood of detection, increases the danger inherent in a

victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." (*Ibid.*)

In *Dominguez* the defendant had forced the victim from the side of the road to a location in an orchard 25 feet away and 10 to 12 feet below the level of the road, "where it was unlikely any passing driver would see her." (*Dominguez, supra*, 39 Cal.4th at p. 1153.) The Supreme Court upheld the finding that moving the victim from a relatively open area next to the road to a more secluded location "substantially decreas[ed] the possibility of detection, escape or rescue" and "substantially increased her risk of harm." (*Id.* at pp. 1153, 1154.) Similarly, in *Rayford* the Court upheld the finding that movement of a victim 105 feet to an area behind a wall to rape her was not merely "incidental" to the attempted rape and substantially increased her risk of harm. (*People v. Rayford, supra*, 9 Cal.4th at pp. 6, 14, 22; see *People v. Shadden* (2001) 93 Cal.App.4th 164, 167 [moving the victim only nine feet from the front counter of a store to the small back room for the purpose of raping her was sufficient to support the finding of asportation]; *People v. Jones* (1999) 75 Cal.App.4th 616, 629 [finding of asportation upheld where the defendant moved the robbery victim 40 feet within a parking lot into a car].)

In *People v. Robertson* (2012) 208 Cal.App.4th 965, 984, the court explained, "[w]here a defendant drags a victim to another place, and then attempts a rape, the jury may reasonably infer that the movement was neither part of nor necessary to the rape." Reviewing the evidence before it, the court concluded the defendant's "movement of the victim served several purposes and increased the risk of harm. '[A] rape victim is certainly more at risk when concealed from public view and therefore more vulnerable to attack.' [Citation.] By moving the victim away

from the back door, [the defendant] reduced the possibility that the victim could escape. Even if she had been able to gain access to [the defendant's] key, [he] increased the odds that he could foil an escape attempt by expanding the distance between the victim and the back door. The movement also decreased the likelihood of detection since it was less likely that [the victim's son] could have heard his mother if she had screamed for help.” (*Id.* at p. 985.)

- b. *Substantial evidence supports the jury's finding Burris's movement of Mitsuko was not merely incidental to the attempted rape and increased her risk of harm*

To determine whether the evidence is sufficient to support a conviction, “we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that

upon no hypothesis whatever is there sufficient substantial evidence to support” the jury’s verdict.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142; accord, *People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Burris argues the evidence of asportation was insufficient because Mitsuko “was moved a short distance within her apartment”—as little as 10 feet—“and the circumstances evidence no appreciable change in either the physical risk to her or the likelihood of detection” because Dong was in his apartment watching television and could not hear what was happening in Mitsuko’s apartment, and Corbaley could barely hear Mitsuko’s screams from inside his apartment across the walkway. However, as in *Robertson*, Mitsuko was by the door and attempting to make an escape when Burris grabbed her and dragged her away from the door, down the hallway toward the bedroom, rather than simply blocking her access to the door and attacking her on the sofa. From this evidence the jury could reasonably infer that the movement was neither part of, nor necessary to, the rape. (See *People v. Robertson, supra*, 208 Cal.App.4th at p. 984; *People v. Shadden, supra*, 93 Cal.App.4th at p. 169.) Further, by moving Mitsuko away from the front door, Burris decreased the likelihood of detection since it was less likely that someone passing by could have heard Mitsuko’s screams for help. (See *Robertson*, at p. 985.)

These circumstances distinguish this case from *People v. Perkins* (2016) 5 Cal.App.5th 454, on which Burris relies. There, the defendant sexually assaulted the victim in the small apartment’s only bathroom and then ordered her into its only bedroom, a distance of 10 to 30 feet, where he again assaulted her. The court of appeal held there was insufficient evidence that

the movement between the two assaults increased the risk to the victim or had any effect on the likelihood the crimes would be discovered. The evidence here, in contrast, reasonably supports the jury's finding that Burris's movement of Mitsuko was not merely incidental to the commission of the intended rape and substantially increased the risk of harm to her.

3. *The Duplicate Burglary Convictions Must Be Dismissed*

Burris contends, the People concede, and we agree that the first degree burglary convictions on counts 4 and 5, which duplicate the burglary convictions included within the jury's verdicts on counts 1 and 2, must be dismissed.

"In general, a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged.'" [Citations.]' Section 954 generally permits multiple conviction."³ (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227; accord, *People v. Delgado* (2017) 2 Cal.5th 544, 570.) However, although section 954 "authorizes multiple convictions for different or distinct offenses, [it] does not permit multiple convictions for a different statement of the same offense when it

³ Section 954 provides in part, "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged"

is based on the same act or course of conduct.” (*People v. Vidana* (2016) 1 Cal.5th 632, 650, 651.)

As to Mariana R., the jury found Burris guilty of the lesser included offense of first degree burglary on count 1. It also found him guilty of first degree burglary on count 4. Because there was only one entry into her house on which both convictions were based, Burris may be convicted of only one count of burglary. (*People v. Vidana, supra*, 1 Cal.5th at pp. 650-651.)

As to Mitsuko L., the jury found Burris guilty of assault with intent to commit rape during the commission of a first degree burglary on count 2 and first degree burglary with a person present on count 5. Burglary of an inhabited dwelling (first degree burglary) is a lesser included offense of assault with intent to commit rape during the commission of a first degree burglary. (See *People v. Dyser* (2012) 202 Cal.App.4th 1015, 1020-1021.) Burris therefore may not be convicted of both offenses. (See *People v. Reed, supra*, 38 Cal.4th at p. 1227 “[a] judicially created exception to the general rule permitting multiple conviction ‘prohibits multiple convictions based on necessarily included offenses’”].)

4. *The Trial Court Acted in Excess of Its Statutory Authority in Ordering Payment of Victim Restitution to Mariana R.*

Section 1202.4, subdivision (a)(1), provides, “It is the intent of the Legislature that a victim of crime who incurs an economic loss as a result of the commission of a crime shall receive restitution directly from a defendant convicted of that crime.” Section 1202.4, subdivision (f), in turn, specifies how the amount of restitution is to be determined, “[I]n every case in which a victim has suffered economic loss as a result of the defendant’s conduct, the court shall require that the defendant make

restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court.” (See also Cal. Const., art. I, § 28, subd. (b)(13)(B) [“[r]estitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss”]; *People v. Giordano* (2007) 42 Cal.4th 644, 652.)

At a post-sentencing restitution hearing the prosecutor presented Mariana R.’s request for a restitution award of \$500, the amount missing from her purse after Burris’s attack. Defense counsel stipulated to the amount, and the trial court ordered that Burris pay Mariana \$500 in restitution. Notwithstanding his counsel’s stipulation, Burris contends the restitution order should be struck because he was neither charged with, nor convicted of, theft and, he argues, there was no substantial evidence of a causal connection between the loss and his adjudicated criminal conduct.

In *People v. Williams* (2017) 7 Cal.App.5th 644 our colleagues in Division One of this court rejected the People’s argument, repeated here, that defense counsel’s stipulation to the amount of restitution forfeited a challenge on appeal that the restitution order was in excess of the court’s statutory authority because no evidence connected the order to the defendant’s criminal conduct. “Factual issues may be subject to the waiver rule, but an objection may be raised for the first time on appeal where it concerns an “unauthorized” sentence, i.e., one that “could not lawfully be imposed under any circumstance in the particular case.” [Citation.] [Defendants] have not forfeited the purely legal issue whether the court imposed the restitution order in excess of its statutory authority.” (*Id.* at p. 696; see

People v. Percelle (2005) 126 Cal.App.4th 164, 179 [contention that court imposed restitution order in excess of its statutory authority not forfeited by failure to object on that ground in the trial court].)

The *Williams* court then held a valid restitution order must concern losses that resulted from the crimes of which the defendant had been convicted. “[S]ection 1202.4 . . . limit[s] restitution awards to those losses arising out of the criminal activity *that formed the basis of the conviction*.” [Citation.] Section 1202.4, subdivision (f) provides for restitution when a victim suffered economic loss “‘as a result of the defendant’s criminal conduct. . . .’ [T]he term ‘criminal conduct’ as used in subdivision (f) means the criminal conduct for which the defendant has been convicted.” [Citation.] A restitution order is not authorized if the defendant’s relationship to the victim’s loss is through a crime of which the jury acquitted the defendant, which is equally true when the defendant is not charged with the crime.”” (*People v. Williams, supra*, 7 Cal.App.5th at pp. 696-697; accord, *People v. Walker* (2014) 231 Cal.App.4th 1270, 1274-1275 [“the court may order restitution only for losses arising out of the ‘criminal conduct for which the defendant has been convicted,’” which “turns on what conduct is encompassed by the crime:”]; see *People v. Percelle, supra*, 126 Cal.App.4th at p. 181 [“there is no evidence that the unauthorized charges to Spade’s credit card were the result of any crime of which defendant was convicted. It follows that the trial court’s order directing defendant to pay restitution to Spade was unauthorized and must be stricken”]; cf. *People v. Martinez* (2017) 2 Cal.5th 1093, 1104-1105 [defendant convicted of leaving the scene of an accident cannot be required to make restitution for the victim’s injuries

caused by the accident itself; “even if defendant had been at fault in the accident—and the evidence in the record does not establish that he was—his negligence might well give rise to civil tort liability, but it would not give rise to an obligation to make direct victim restitution for injuries caused by a collision that involved no criminal wrongdoing”].)

Here, Burris was not charged with, let alone convicted of, the theft of \$500 from Mariana’s purse. Indeed, no evidence was presented that Burris, who was wearing only a head covering and socks when he was in Mariana’s bedroom, took anything with him when he fled from her home. The restitution order was not authorized and must be stricken. (See *People v. Williams, supra*, 7 Cal.App.5th at pp. 696-697.)

DISPOSITION

Burris’s convictions on counts 4 and 5 are dismissed. The order directing Burris to pay \$500 in victim restitution to Mariana R. is stricken. In all other respects the judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J.

WILEY, J.*

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