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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR EUGENE LINDSEY, Defendant and Appellant.	B263506 (Los Angeles County Super. Ct. No. MA059832)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Judgment of conviction affirmed; sentence vacated and remanded for resentencing.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Arthur Eugene Lindsey was convicted by a jury of multiple sexual offenses, including rape and oral copulation of an unconscious person.[1] The trial court sentenced Lindsey to 50 years to life plus an additional determinate term of 52 years and four months.

Lindsey contends the trial court erred by denying his post-verdict *Marsden*[2] motion and argues the court's instructional errors require reversal. In addition, Lindsey claims the trial court erred by finding that both of his prior Indiana convictions qualified as serious or violent felonies for purposes of the three strikes law. He also argues the court erred by imposing multiple serious felony enhancements on his determinate and indeterminate sentences. We find no *Marsden* or instructional error but agree the sentence was erroneous. Consequently, while we affirm the judgment of conviction, we vacate the sentence and remand for resentencing.

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1 Lindsey was charged by information with the following crimes: two counts of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4); counts 1 & 2), oral copulation of an unconscious person (*id.*, § 288a, subd. (f); count 3), penetration with a foreign object (*id.*, § 289, subd. (d); count 4), resisting a peace officer (*id.*, § 148, subd. (a)(1); count 5), possession of a firearm by a felon (*id.*, § 29800, subd. (a)(1); count 6), two counts of rape by use of drugs (*id.*, § 261, subd. (a)(3); counts 7 & 8), oral copulation by use of a controlled substance (*id.*, § 288a, subd. (i); count 9), and sexual penetration with a foreign object by use of an intoxicating substance (*id.*, § 289, subd. (e); count 10).

2 *People v. Marsden* (1970) 2 Cal.3d 118.

FACTS

A. *The Case Begins With a Parole Visit to Lindsey's Home*

In June of 2013, Lindsey lived in a trailer park near Acton in the Santa Clarita Valley. He was 73 years old at the time and was a lifetime parolee due to his prior convictions for rape and murder. He was considered a high risk sex offender, wore a GPS ankle monitor, and was subject to unannounced visits from parole officers.

Thomas Foster, a state parole agent recently assigned to Lindsey's case, made an unannounced visit to Lindsey's trailer on the morning of June 5, 2013.[3] When he entered, Foster observed a partially dressed young woman whom Lindsey identified as Tiffany. Lindsey said he brought Tiffany home the night before because she needed help. Foster attempted to question Tiffany, but Lindsey kept interrupting and answering his questions. Foster asked if they had sex, and Lindsey said they had not.

Foster took Tiffany outside to question her. He asked her if she had sex with Lindsey; she said she did not remember. Tiffany appeared to be under the influence of an unknown intoxicant. She had difficulty walking and speaking and seemed to nod off during the interview.

Foster told Lindsey he did not want Tiffany spending another night at the trailer. Foster left and called his supervisor, Larry Dorsey, for advice on how to proceed. Dorsey and another parole agent, Kyle Smith, met Foster in Acton, and the three of them went to the trailer park.

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[3] All of the witnesses at trial were called on behalf of the People.

Dorsey opened the door and entered Lindsey's trailer. Tiffany was naked, and Lindsey was orally copulating her. Tiffany looked dazed and disheveled, her speech was slurred, and she appeared to be drifting in and out of consciousness. Smith handcuffed Lindsey.

Dorsey handed Tiffany her clothing and told her to get dressed. She had difficulty following his directions and getting dressed. Dorsey took her outside the trailer, and he and Smith attempted to talk to her while Foster stayed with Lindsey. Tiffany had trouble walking and talking; her speech was slurred, she could not complete a sentence, and she kept drifting in and out of consciousness. She was unable to tell Dorsey her name, so he looked in her purse for identification. He found a pill, which Tiffany identified as Xanax.

Tiffany spontaneously blurted out that she had been raped, then she started crying and became hysterical. Dorsey called the sheriff's department, and deputies came and took Lindsey into custody. Paramedics took Tiffany to the hospital.

A search of Lindsey's trailer revealed a vodka bottle, a bag of marijuana, a marijuana pipe, and a penis pump. At one point Lindsey told Dorsey, "I pumped my dick up and fucked her all night." A shovel and a rope were found in the trunk of Lindsey's car. Lindsey's cell phone contained a photograph of Tiffany lying down with her eyes closed, as well as photographs of a vagina and breasts.

Two tablets found on a table outside Lindsey's trailer contained alprazolam, a benzodiazepine contained in Xanax. Two containers with clear liquids and one with a red liquid were found inside Lindsey's trailer, but they did not contain any controlled substances.

B. *Forensic Evidence*

Lindsey was given a sexual assault examination at the hospital. The examination revealed bruising on Lindsey's penis. Lindsey told a nurse practitioner he used the penis pump the previous day in order to have sexual intercourse. Blood and urine specimens revealed a blood alcohol level of .01 percent and the presence of cannabinoids. Tiffany's DNA was present on Lindsey's hand, mouth and penis.

Tiffany had a blood alcohol level of .20 percent. Her urine tested positive for amphetamines, benzodiazepines, cannabinoids and opiates. Benzodiazepines increase the effects of alcohol and combining the two can impair thinking or reactions and cause drowsiness or dizziness.

C. *Lindsey's Statements to Law Enforcement*

Lindsey initially told Los Angeles County Sheriff's Deputy Scott Short that he was driving through Acton on his way home when he saw Tiffany standing in front of the post office, looking lost. She asked for a ride to an address in Canyon Country, and Lindsey said he would take her there but needed to stop at his home first.

Lindsey said that once they arrived at his trailer, Tiffany drank vodka and took a pill from her purse. Tiffany began rubbing Lindsey's back, "one thing led to another," and they had sexual intercourse. Lindsey used a penis pump to obtain an erection. Lindsey took some pictures of Tiffany using his cell phone. The following morning Tiffany drank three pints of vodka and took another pill from her purse. She again rubbed his back, and then he orally copulated her.

The day after Lindsey's arrest, detectives interviewed him at the sheriff's station. Lindsey said he was at a bar with Sandra Venables when he saw Tiffany standing on the curb. Tiffany gestured toward him, and he asked if she needed a ride. She said she did. He asked her where she wanted to go, and she said she had no place to go. He believed she was a "party girl" because she was wearing a tank top and hot pants. He gave her a ride to his trailer, stopping on the way to buy two beers.

Tiffany had alcohol with her: three full, pint bottles of vodka; one that was half full. Tiffany was already "high." After arriving at Lindsey's trailer, she finished the half full bottle. She took some pills from her pocket, crushed and snorted them. She spilled Kool Aid on herself and was acting silly, but she was not incoherent or falling down drunk. She asked if Lindsey could get heroin, morphine or cocaine. He said he could not.

Lindsey had sexual intercourse with Tiffany two times. At first he was able to get only half an erection due to treatment for prostate cancer. He then used a penis pump to get a full erection. He also inserted his finger in Tiffany's anus.

The following morning Tiffany suggested going for a walk. Before leaving, she drank two pints of vodka and a beer, and she snorted another pill. On the way back to Lindsey's trailer, Tiffany was staggering and had to lean on Lindsey. Back at the trailer, she took her shorts off, sat down and told Lindsey, "There it is." He began orally copulating her.

Lindsey agreed that Tiffany was "wasted," but he said that she never passed out, and she knew what she was doing. He denied raping her or taking advantage of her. While in hindsight he recognized he should not have had sexual relations with someone who was so intoxicated, Lindsey, nonetheless, stated

that when she initiated sexual relations, he was not going to make her stop.

Lindsey told the detectives he served 33 years in prison for first degree murder. He did not recall the events of the murder. He remembered he drank a case of beer, then went to a bar and drank more beer and hard liquor, and was convicted of rape and murder. As a result, he no longer drank more than two or three beers.

D. *Tiffany F.'s Testimony*

In 2013, Tiffany F. was 28 years old, married, with a six-year-old child. In April, she entered a rehabilitation facility in Acton to be treated for drug and alcohol abuse. At the beginning of June, she was given a 30-hour pass so she could visit her family. During that visit she relapsed and began drinking alcohol. Her husband dropped her off in front of the facility on June 4. Knowing she would not be allowed back into the facility because she had alcohol in her system, Tiffany left her luggage and walked away.

Tiffany walked to a market and stole three half-pint bottles of vodka. She drank half of one of the bottles and began walking down the street. Lindsey drove up and asked if she needed a ride. She said she did and got into Lindsey's car. Lindsey asked where she was going, and Tiffany said she had no idea. She said she needed to sober up so that she could return to the rehabilitation facility. Lindsey offered to take her to his trailer, and she agreed. He stopped on the way and bought two beers. The drive to the trailer took longer than Tiffany expected, and she got nervous.

Once they arrived at Lindsey's trailer, Tiffany drank some more alcohol and took four Xanax. Lindsey provided her with the Xanax. She took a drink of a pink liquid and "some kind of wine." The next thing she remembered was waking up in the hospital days later. She did not remember engaging in any sexual activity with Lindsey, and she did not consent to any sexual activity with him. She did not remember smoking marijuana with Lindsey.

E. *Jailhouse Recordings of Conversations with Sandra Venables*

The People presented evidence of two recorded telephone conversations between Lindsey and Sandra Venables. The calls were recorded while Lindsey was in jail. The recordings were played for the jury.

In the first call, Lindsey and Venables discussed packing up Lindsey's possessions and contacting an attorney. They also discussed Tiffany. Lindsey told Venables that when they were at the bar and a "girl walked up to the fence" "and she propositioned me, she said she needed some money and if we do that, they're screwed, they ain't got no case." Venables responded that "[s]he did that in front of me at the [bar] when we were drinking tea." Venables told Lindsey, "I got your back."

Lindsey then asked Venables if she had "been there to look . . . for the bang-bang." She said she "got it." Lindsey asked, "Stun, stun, stun—the cell phone?" Lindsey said it was behind the battery on the GMC, adding, "I think the cord is there with it and everything. It's . . . both of them are a million volts."

The conversation returned to the subject of Tiffany:

"[Venables:] And she was like, lit out of her mind and she propositioned you and I was like, oh my god . . . .

"[Lindsey:] But she wasn't, she wasn't—she was not comatose, so that's what they're saying.

"[Venables:] Yes, she was.

"[Lindsey:] No, you can't say that, though.

"[Venables:] Oh, okay.

"[Lindsey:] That automatically makes me guilty.

"[Venables:] Oh, okay. Okay.

"[Lindsey:] She was of sound mind, and uh, you knew she'd be drinking. She drank, she drank two full pints of vodka before we'd walked over to the railroad tracks and by the time we got back I had to hold her up. Two full pints—that's not counting she was . . . .

"[Venables] Well, when she came to the fence she was coherent. She knew what she was saying.

"[Lindsey] Yeah she—but you know, she was, she was crunching up Xanax, the four bar Xanax . . . [a]nd oxycodone or oxycontin—it wasn't mine—and snorting them.

"[Venables] Oh, well, you know . . . .

Lindsey later told Venables that Tiffany kept telling him, "you're so funny, and uh, they're talking about, uh, being comatose? I don't think so." Lindsey said he "knew she was a hooker when I seen her," "[b]ut I got no problem with that, you know?" He said he "didn't want to say nothing to the detectives about her 'cause I wasn't wanting to put no heat on her as a prostitute." Venables told him he was looking at a life sentence and he had to protect himself, not Tiffany.

In the second call, Lindsey asked Venables if she "got the stuff up on top of the wheel on both . . . of the motor homes." Venables said she got the cell phone but did not find the stun gun. Lindsey said "[i]t was right up on top of the tire," and the

"bigger stun gun—one million volts," was under the hood, on the back side of the battery.

F. *Property Searches*

Deputy Short spoke to Venables, who indicated that Lindsey had a second motor home in a remote area by Soledad Canyon Road. Deputy Short drove to the area and found the motor home and an envelope in it with Lindsey's name and address on it. The GPS record of Lindsey's movements showed he was there a number of times in the month prior to his arrest.

During a search of Venables's property on July 23, 2013, sheriff's deputies recovered four handguns—including one found under her pillow—and a disassembled rifle. She denied knowing anything about the guns or seeing Lindsey with a gun. She also said if there were guns, they might be Lindsey's, and the gun under her pillow might have come from the wheel well of Lindsey's motor home. That gun was registered to Michael Mcquillen, who was deceased, and the gun had been reported stolen.

G. *Venables's Trial Testimony*

Venables testified she obtained two stun guns from Lindsey's motor home. She did not recall talking to Lindsey about getting a gun from his motor home. She denied telling deputies the gun found under her pillow might have come from the wheel well of the motor home. The gun belonged to her friend Mike.

Venables also denied she and Lindsey fabricated a story about meeting Tiffany. She testified she and Lindsey were

sitting outside at the bar when Tiffany offered to have a "threesome" with them. Venables told Tiffany to "go kick rocks."

H. *Prior Crimes Evidence*

In 1965 Lindsey was convicted in Indiana of murder and murder in the perpetration of rape.

On September 26, 2002, Lindsey was arrested for forcible rape and assault with intent to commit rape of Mallory, a 17-year-old. He was acquitted following a jury trial. In an interview following his arrest in 2002, Lindsey told officers he was friends with Mallory's mother. He thought of Mallory like a granddaughter. Sometimes Mallory discussed sexual issues with him, and once when he kissed her on the forehead, she went "berserk." He did not attempt to rape her and could not have done so, because he was unable to maintain an erection. When officers searched Lindsey's trailer, they found three boxes of condoms and a pornographic magazine.

I. *Verdict and Sentencing*

The jury convicted Lindsey of two counts of rape of an unconscious person (Pen. Code, § 261, subd. (a)(4); counts 1 & 2), oral copulation of an unconscious person (*id.*, § 288a, subd. (f); count 3), penetration with a foreign object (*id.*, § 289, subd. (d); count 4), possession of a firearm by a felon (*id.*, § 29800, subd. (a)(1); count 6), two counts of rape by use of drugs (*id.*, § 261, subd. (a)(3); counts 7 & 8), oral copulation by use of a controlled substance (*id.*, § 288a, subd. (i); count 9), and sexual penetration with a foreign object by use of an intoxicating substance (*id.*, § 289, subd. (e); count 10). The jury acquitted

Lindsey on count 5, resisting a peace officer (*id*., § 148, subd. (a)(1)).

The trial court found true the allegations Lindsey had two prior serious felony convictions from Indiana dating back to 1965 (Pen. Code, §§ 667, subds. (a)(1), (b)-(j), 1170.12), and he had a prior conviction in California from 2005 for which he served a state prison term for violating former Penal Code section 290, subdivision (f), which required a sex registrant to notify law enforcement of any change of residence (*id*., § 667.5).

The court consolidated count 1 with count 7, count 2 with count 8, and count 3 with count 9.[4] The court sentenced Lindsey under the three strikes law to consecutive terms of 25 years to life on counts 7 and 8, plus an additional 10 years as to each count for his prior serious felony convictions. On count 9, the court sentenced Lindsey to the upper term of eight years, doubled to 16 years, plus one year for the prior prison term.

The trial court imposed one-third the mid-term sentence of two years on count 4, doubled as a second strike, but stayed the

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[4] The court consolidated these counts pursuant to *People v. Soria* (2015) 239 Cal.App.4th 123. On October 21, 2015, the California Supreme Court granted review in *Soria* and on March 15, 2017, transferred the case back to the Court of Appeal with directions to vacate its decision and reconsider the matter in light of *People v. White* (2017) 2 Cal.5th 349. *White* held that a defendant may be properly convicted of both rape of an unconscious person and rape of an intoxicated person based on the same act, although the defendant may not be punished for both crimes. (*Id*. at p. 352.) Consequently, as this matter is being remanded for resentencing, these counts may no longer be consolidated, but the execution of sentence must be stayed on one count of each of the pairings pursuant to Penal Code section 654.

sentence pursuant to Penal Code section 654. On count 6, the trial court imposed one-third the mid-term of eight months, doubled to 16 months, to run consecutively. On count 10, the court imposed one-third the mid-term of six years, which it doubled as a second strike to four years, to run consecutively, plus 10 years for the prior serious felony convictions. Lindsey's sentence totaled 50 years to life plus an additional determinate term of 52 years and four months.

DISCUSSION

A. *Marsden Motion*

1. *Proceedings Below*

After the jury's verdict, but prior to the bench trial on the prior conviction allegations, Lindsey requested the opportunity to address the court. Lindsay stated that "from the start, me and [my attorney,] Mr. Harris have been at odds." Interpreting this to be a request for a *Marsden* hearing, the court held a confidential hearing.

During the hearing, the court provided Lindsey an opportunity to explain the basis for his request for new counsel. Lindsey asserted Harris had not properly represented him. Lindsey's complaints can be grouped as follows:

(1) *Failure to investigate, present witnesses and experts*: Lindsey stated he asked Harris "to put his investigator with my witnesses," who "would have testified to the fact that Tiffany [F.] was all over that park the first night she stayed with me." There

was "no investigation, period."[5] Lindsey complained Harris told him "he was gonna have expert witnesses to counter whatever—we knew, from jump street, that . . . the drink that they were talking about was . . . water enhancer, . . . and Tiffany drank it all . . . ."[6]

(2) *Irreconcilable differences and trial tactics*: Lindsey said he "bumped heads" with Harris whenever they met. He complained he only had two telephone conferences with Harris and nothing was accomplished. Lindsey criticized Harris's cross-examination of Tiffany and faulted Harris for not bringing up the "immunity on Tiffany stealing four pints of liquor" or "she was locked up twice and charged with prostitution while I'm in jail." Lindsey said Harris failed to get two sets of transcripts. The first set involved his last two telephone calls with Venables, in which he claimed he told Venables that "'[I] got a gal here that needs help,'" and Venables said that he should "'take her up on a highway and dump her out.' And I said, 'I don't do that, Sandy. I don't do that to nobody. That's not me.'" And the second set involved transcripts from the parole board hearing which would have "put a different light on . . . Foster and . . . Dorsey."

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[5] Lindsey suggested Harris failed to investigate the true reason for his prosecution which had "nothing to do with Tiffany." Rather, he was there because, "I got set up. . . . [T]o start with, I'm here because of some cold cases, murder cases, that I know nothing about, except who did 'em . . . ."

[6] Lindsey also complained that Venables, "knowing that I was being set up, tried to embellish—or tried to make the evidence for me better and she—and she fell on her face and tripped me up, too."

(3) *Advisement not to testify*: Lindsey told the court he wanted to testify on his own behalf, but Harris "kept telling me, 'don't,' and 'they gonna tear you up on the stand,' and I don't think . . . there's a prosecutor or a [district attorney] in this state that can tear me up on the stand, regardless what you say." Lindsey acknowledged he had the option of testifying but elected not to do so on Harris's advice.

(4) *Failure to file a* Pitchess *motion*: Lindsey said he wanted to file a *Pitchess*[7] motion with respect to the parole officer but acknowledged he was acquitted on the charge of resisting arrest. Nonetheless, Lindsey believed the *Pitchess* motion should have been filed because "[i]t woulda went towards my—to my not guilty, I think, overall."

(5) *Harris's Closing Argument*: Lindsey believed Harris painted him in a bad light before the jury when he said, "'Mr. Lindsey don't have no social skills.' I feel I got just as many social skills as he has."

After hearing from Lindsey the court asked counsel to respond. Harris explained that "[o]ne of the difficulties with this case, in terms of how it affected my relationship with . . . Lindsey since the get-go, was having him understand that his entire relationship with the parole officers would probably not be admissible, that everything that the parole officers have done in their lives is not admissible, that everything that the alleged victim in this case did in her whole life was not admissible. When I explain to him that only some convictions are admissible for impeachment, he doesn't think that's right." Lindsey did not understand that Tiffany being "out on the street being sexually

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7 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

promiscuous" was not admissible. Harris explained he had his investigator checking weekly to see if there were any arrests or convictions, but there were none.

Harris explained he did not call witnesses from the trailer park because they were not present during the alleged crimes, and evidence as to Tiffany's behavior could be obtained through Venables's testimony. Lindsey's purported witnesses were "people at the trailer park with whom . . . Lindsey and Tiffany sat around all night, outside and talking, drinking, whatever. What that would have shown to the jury was that she was free to come and go . . . . That's not the issue on the sex charges." Harris also disagreed with Lindsey's desire to put on character evidence, believing the jury was likely to disregard it in light of Lindsey's prior convictions.

As to calling experts concerning the red or pink liquid found in Lindsey's trailer, Harris explained the jury was told the liquids tested negative so an expert on this issue was not required.

With respect to Lindsey's decision not to testify, Harris recounted that he provided Lindsey with his opinion that the prosecutor "would have shredded . . . Lindsey, not that he doesn't come across as a gentle, nice man, but if, after two years . . . in our conversations, he wasn't following my lead and was still pursuing that which was not relevant to the charges [themselves] . . .—I told him I thought that he'd probably get in an argument with [the prosecutor] and that he'd lose, and that would be worse, because if the jury saw him get angry, it would be all over. That was my opinion but I stressed that the choice was his."

Harris acknowledged he did not visit Lindsey at the county jail, explaining the case was relatively simple and a visit was not necessary.

After hearing from Lindsey and Harris, the court denied Lindsey's motion. The trial court found very few conflicts in what Lindsey and Harris said, noting they were "agreeing on what you're arguing about, you just may not agree on the resolution." The court found Harris "properly represented [Lindsey], [and] will continue to do so." The court noted "there was sufficient and adequate and professional investigation completed. With respect to the issue of trial tactics, that lies solely within the discretion of defense counsel, not the defendant." The issues Lindsey raised were irrelevant or would not have assisted the defense. There was no reason to call an expert because there was nothing in the drink Tiffany obtained from Lindsey. The statements contained in the transcripts would have been hearsay and inadmissible. The comments about Lindsey's social skills were designed to help the jury recognize that not all of Lindsey's actions were "ideal, but that doesn't make him guilty."

The court did not "find there's been a breakdown in the attorney-client relationship, to the degree that it would make it unlikely that defense counsel could properly represent this defendant. [The court did] find that any deterioration in the relationship has been caused only by the defendant's attitude. There's no reason to believe the defendant cannot be represented effectively by this counsel" or "that the defendant would get along better with any other attorney I might appoint."

2. *Applicable Law and Standard of Review*

A defendant's Sixth Amendment right to the assistance of counsel entitles him to substitute appointed counsel ""[if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.]"" [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 728; accord, *People v. Vines* (2011) 51 Cal.4th 830, 878; *People v. Fierro* (1991) 1 Cal.4th 173, 204; see also *People v. Hart* (1999) 20 Cal.4th 546, 603.) When the defendant requests the first appointed counsel be discharged and another attorney substituted, and asserts inadequate representation, the trial court must permit the defendant to explain the basis for the request and relate specific instances of the attorney's inadequate performance. (*Welch*, *supra*, at p. 728; *People v. Marsden*, *supra*, 2 Cal.3d at p. 124.) A *Marsden* hearing is not a full-blown adversarial proceeding, but rather an informal hearing in which the court determines the nature of the defendant's concerns about his or her counsel's representation and decides whether the allegations have sufficient substance to warrant counsel's replacement. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 803.)

"A defendant does not have the right to present a defense of his own choosing, but merely the right to an adequate and competent defense. [Citation.] Tactical disagreements between the defendant and his attorney do not by themselves constitute an 'irreconcilable conflict.' 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' [Citation.]" (*People v. Welch*, *supra*, 20 Cal.4th

at pp. 728-729; accord, *People v. Rodriguez* (2014) 58 Cal.4th 587, 624.) The number of times a defendant sees his attorney and the way in which the defendant relates to his attorney do not by themselves establish incompetence. (*People v. Hart*, *supra*, 20 Cal.4th at p. 604.) A *Marsden* motion should only be granted where the defendant has made "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." (*People v. Crandell* (1988) 46 Cal.3d 833, 859.)

Once the hearing is held, the decision whether or not to allow the defendant to substitute counsel rests within the sound discretion of the trial court ""'unless there is a sufficient showing that the defendant's right to the assistance of counsel would be substantially impaired if his present request was denied.'" [Citations.]" (*People v. Burton* (1989) 48 Cal.3d 843, 855; accord, *People v. Streeter* (2012) 54 Cal.4th 205, 230.)

3. *Analysis*

Lindsey argues the trial court erred by denying his *Marsden* motion because there was an irreconcilable conflict between him and trial counsel. In addition, Lindsey argues the trial court's denial of his motion, in effect, deprived him of his right to file a new trial motion. Neither argument has merit.

First, as the trial court observed, Lindsey did not describe an irreconcilable conflict between himself and Harris. Lindsey described disagreements regarding trial tactics, caused in large part by Lindsey's lack of understanding concerning the relevance and admissibility of evidence. Disagreements over trial tactics do not constitute an irreconcilable conflict for purposes of a *Marsden* motion. (*People v. Rodriguez*, *supra*, 58

Cal.4th at p. 624; *People v. Welch*, *supra*, 20 Cal.4th at pp. 728-729.)

The trial court also found Harris provided Lindsey with adequate representation. No evidence was presented that Harris's investigation was inadequate or that his communications with Lindsey were insufficient. Lindsey failed to present evidence demonstrating that any of the witnesses he sought to call, including experts, would have provided relevant, exculpatory testimony.[8] The court found no merit to Lindsey's contention a *Pitchess* motion should have been filed or that Harris's comments during his closing argument were inappropriate. With respect to Lindsey's decision not to testify, Lindsey admitted the decision was his to make. In sum, Lindsey failed to demonstrate inadequate representation or an irreconcilable conflict. The trial court did not abuse its discretion in denying his *Marsden* motion. (*People v. Streeter*, *supra*, 54 Cal.4th at p. 230; *People v. Vines*, *supra*, 51 Cal.4th at p. 878; *People v. Welch*, *supra*, 20 Cal.4th at p. 728.)

As an alternative argument, Lindsey contends the court's denial of his *Marsden* motion simultaneously deprived him of the right to file a motion for a new trial.[9] While Lindsey

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[8] Lindsey argues the witnesses from the trailer park would have testified Tiffany was intoxicated but still capable of giving consent, and that she initiated the sexual activity. But Lindsey failed to present anything other than speculation. He neither identified any witnesses nor presented evidence of what any particular witness would have said. Lindsey's argument is unsupported by any evidence in the record.

[9] The People disagree with Lindsey's assertion that "[t]he record is very clear that [he] wanted to file a motion for a new

discusses extensively the general principles regarding a defendant's right to make a new trial motion and to be represented by counsel when making such a motion, Lindsey's argument is fundamentally flawed. Counsel for Lindsey was entitled to file such a motion. The fact he did not is unrelated to the court's denial of Lindsey's *Marsden* motion.

Lindsey's real claim, however, is that because the court did not grant his *Marsden* motion, his hypothetical motion for a new trial based upon ineffective assistance of counsel was foreclosed. First, Lindsey does not identify the basis for this hypothetical new trial motion, and, in conjunction with this failure, does not explain why Harris could not have brought the motion. Second, assuming the basis for the motion for the hypothetical new trial motion would have been ineffective assistance of counsel, Lindsey never made this argument as part of his *Marsden* motion. Accordingly, this argument is forfeited. (*People v. Clark* (2016) 63 Cal.4th 522, 602 ["To the extent that [the] defendant did not raise the kind of . . . challenge below that he now does on appeal, he has forfeited it"]; *People v. Cornejo* (2016) 3 Cal.App.5th 36,74 ["argument is forfeited for failure to raise it in the trial court"].) Third, to the extent the new trial motion would have been based on ineffective assistance of counsel (see *People v. Reed* (2010) 183 Cal.App.4th 1137, 1143), he could have raised that claim on appeal. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1261 [order denying a new trial motion is not independently appealable but "the grounds for the unsuccessful motion are assessed on appeal from the

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trial." Inasmuch as we conclude the trial court did not abuse its discretion or violate Lindsay's constitutional rights by denying his *Marsden* motion, we need not resolve this disagreement.

underlying final judgment"].) Fourth, Lindsey has not raised a claim for ineffective assistance in his appeal, although he could have. (See *People v. Ledesma* (1987) 43 Cal.3d 171, 215; *In re Hill* (2011) 198 Cal.App.4th 1008, 1023-1025.) Consequently, Lindsey's alternative argument fails to demonstrate the trial court abused its discretion or violated his constitutional rights by denying his *Marsden* motion.

B. *Instructional Error*

1. *CALCRIM No. 371—Consciousness of Guilt*

The trial court instructed the jury pursuant to CALCRIM No. 371 on consciousness of guilt as follows: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.

"If the defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.

"If someone other than the defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show the defendant was aware of his guilt, but only if the defendant was present and knew about that conduct, or, if not present, authorized the other person's actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself."

This instruction was requested by the People, and the defense objected to it, albeit the day after it was given. The trial court subsequently allowed Harris to make a record as to the basis of his objection.

The instruction related to Lindsey's jailhouse conversations with Venables. Harris argued the first paragraph of the instruction was not applicable because the evidence did not support the conclusion Lindsey discouraged anyone from testifying. In their telephone calls, "There is no indication that somebody is being discouraged from testifying against him." Harris also argued the language of the third paragraph was misleading because, even if the prosecutor's theory was that Lindsay was trying to get Venables to dispose of the gun, this did not constitute "false evidence" or "false testimony." "[T]he People's theory, that he was—through some kind of code—attempting to tell her to take and dispose of some kind of weapon that was, I believe, in the wheel well of the trailer, but . . . that is not the creation of false evidence. That doesn't provide false testimony. [The People] might be entitled to [the instruction] under a theory that the code is about concealing and destroying, but I believe all the other verbiage in here is very misleading."

The prosecutor responded that the first paragraph of CALCRIM No. 371 "relates to the firearm and the fact that [Lindsey] hid the firearm." The second and third paragraphs related to Lindsey's jailhouse phone calls with Venables and her subsequent false testimony regarding the calls. It was the People's position that Lindsey "did hide evidence, he did create false evidence or try to obtain false testimony" from Venables.

The trial court found there was "more than sufficient evidence to give that particular instruction. Regarding discouraging someone from testifying, I don't think there's any evidence of that, however, . . . if the instruction does not apply, [the jury is] just to disregard it, so I think it is appropriate to give that instruction."

2. *General Principles and Standard of Review*

The trial court has the duty to instruct the jury "'on the general principles of law relevant to the issues raised by the evidence.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The court "'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues." [Citation.] "It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference [citation]." [Citation.]' [Citation.]" (*People v. Alexander* (2010) 49 Cal.4th 846, 920-921; accord, *People v. Jimenez* (2016) 246 Cal.App.4th 726, 732-733.)

On appeal, "[w]e conduct independent review of issues pertaining to instructions." (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1411; see *People v. Waidla* (2000) 22 Cal.4th 690, 733.) We note that "'not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. The question is "'whether the ailing instruction . . . so infected the entire trial that the resulting conviction violates due process.'" [Citation.]'" (*People v. Mills* (2012) 55 Cal.4th 663, 677.) "'In reviewing [a] purportedly erroneous instruction[],

"we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." [Citation.] In conducting this inquiry, we are mindful that "'a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" [Citations.]' [Citation.] 'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.) Reversal for instructional error is not required unless the error results in a miscarriage of justice, i.e., there is a reasonable probability of a more favorable result absent the error. (*People Olivas* (2016) 248 Cal.App.4th 758, 773; see *People v. Whisenhunt* (2008) 44 Cal.4th 174, 214 ["[i]nstructional error is subject to harmless error review," "subject to the reasonable probability standard of harmless error"].)

3. *Any Error Instructing the Jury Was Harmless*

While there was sufficient evidence to support the conclusion Lindsey tried to hide evidence and create false evidence or testimony, there was no evidence Lindsey tried to discourage anyone from testifying. Therefore, as the People concede, the trial court erred by instructing the jury with respect to a portion of the first paragraph of CALCRIM No. 371.[10]

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[10] To the extent Lindsey argues the instruction should have been modified to delete the reference to discouraging someone from testifying, Lindsey was obligated to make that request for modification. (*People v. McKinnon* (2011) 52 Cal.4th 610, 670 ["a defendant who believes an instruction requires clarification or

Any error in this regard, however, was harmless. The jury was instructed pursuant to CALCRIM No. 200 that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them." We may presume the jury followed this instruction and ignored the inapplicable portion of CALCRIM No. 371. (*People v. Chism* (2014) 58 Cal.4th 1266, 1299; *People v. Holloway* (2004) 33 Cal.4th 96, 152-153.)

Moreover, even apart from the evidence to which CALCRIM No. 371 applied, from which the jury could draw an inference of consciousness of guilt, the evidence as to Lindsey's guilt was overwhelming. Foster testified Tiffany said she could not remember if she had sex with Lindsey, she appeared to be under the influence, she had difficulty walking and speaking, and she seemed to nod off during the interview. Dorsey testified Tiffany looked dazed and disheveled, her speech was slurred, she was unable to tell Dorsey her name, and she appeared to be drifting in and out of consciousness. Tiffany spontaneously blurted out that she had been raped, then started crying and became hysterical. She was taken to the hospital, where tests revealed Tiffany had a blood alcohol level of .20 percent, and she tested positive for amphetamines, benzodiazepines, cannabinoids and opiates. Given this evidence, there is no reasonable

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modification must request it"].) We need not address the question whether Lindsey's failure to request this modification forfeited any claim of error, however, because any error was harmless.

probability the jury convicted Lindsey because of the erroneous portion of the jury instruction.

Lindsey also claims CALCRIM No. 371 violates the Due Process clause because it allows the jury to make an improper permissive inference. As the People point out, Lindsey failed to object to the instruction on this basis in the trial court. Assuming this claim was not forfeited (see *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 434), it is nonetheless without merit.

In *People v. Jackson* (1996) 13 Cal.4th 1164, the Supreme Court held the predecessor to CALCRIM No. 371, CALJIC No. 2.06, and other consciousness of guilt instructions did not allow the jury to draw impermissible inferences. (*Jackson*, at pp. 1223-1226; accord, *People v. Yeoman* (2003) 31 Cal.4th 93, 131 [permissive inference created by CALJIC No. 2.06 does not violate due process].) Lindsey attempts to distinguish CALJIC No. 2.06 from CALCRIM No. 371 on the basis that the former used the phrase, "consciousness of guilt," while the latter uses the phrase, "aware of his guilt." There is no practical distinction between the two phrases. Inasmuch as "consciousness of guilt" passes constitutional muster, "aware of his guilt" does as well. (*People v. Hernández Ríos* (2007) 151 Cal.App.4th 1154, 1158-1159; see also *People v. Price* (2017) 8 Cal.App.5th 409, 455-456 [agreeing with *Hernández Ríos* with respect to similar language in CALCRIM No. 372].)

4. *CALCRIM No. 521—First Degree Murder*

Evidence of Lindsey's prior crimes was admitted to prove propensity under Evidence Code section 1108. The trial court initially instructed the jury pursuant to CALCRIM No. 1191

that "[t]he People presented evidence that the defendant committed the crimes of [m]urder in the [p]erpetration of a [r]ape, [a]ttempted [f]orcible [r]ape, and [a]ssault with [i]ntent to [c]ommit [r]ape that were not charged in this case. These crimes are defined for you in these instructions." The instruction goes on to explain that if the jury found that Lindsey committed these crimes, it could find he "was disposed or inclined to commit sexual offenses."

After the prosecutor's initial closing argument, the court stated that "[i]t was brought to the court's attention by both counsel that the court neglected and we all missed the fact that when we were doing the [Evidence Code section] 1108 evidence, that we had to outline the underlying charges, the propensity charges. So the court has prepared and amended the jury packet to include the following instructions, with the concurrence of both sides," following CALCRIM No. 1191. "We will add [CALCRIM Nos.] 521, 540A, 1000, 460, 890 to the packet, because those give the elements of the [Evidence Code section] 1108 evidence." The court asked counsel if they were satisfied with these instructions, and Harris said that he was.

The court then told the jury it had "to read [to] you a couple instructions that I neglected to read to you yesterday." It gave the jury the packet containing the added instructions, and read the instructions to the jury. The case then continued with defense counsel's closing argument and the prosecutor's closing argument.

Lindsey contends the trial court erred instructing the jury pursuant to CALCRIM No. 521[11] on the elements of first degree murder, in that first degree murder is not a crime which is admissible under Evidence Code section 1108 as propensity evidence. Because trial counsel did not object to giving this instruction and, in fact, specifically agreed that it should be given, Lindsey's claim is forfeited. (*People v. Blacksher* (2011) 52 Cal.4th 769, 834 ["Given that defense counsel specifically agreed to substitute the instruction ultimately given to the jury for the ones they had previously requested, [the] defendant has forfeited this claim"]; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1235 ["Counsel's assent to the instruction forfeits [the defendant's] claim of instructional error"].)

Even if we were to reach the merits of the claim, Lindsey's argument would fare no better because any error in giving this instruction was harmless. As Lindsey admits, the instruction had no bearing on the case: "[b]y instructing the jury to consider [his] mental state of premeditation and deliberation, and acting

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[11] CALCRIM No. 521 as read to the jury provided: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] . . . [¶] The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder."

with willful intent to kill, the jury was told to make a determination of something that one, was not necessary or relevant, and two, was impossible because it had no evidence or information from which to make any such determination." As stated above, the jury was instructed to ignore inapplicable instructions. (*People v. Chism*, *supra*, 58 Cal.4th at p. 1299; *People v. Holloway*, *supra*, 33 Cal.4th at pp. 152-153.) Moreover, as previously stated given the evidence presented, any error was harmless by any standard.

Lindsey also asserts instructing the jury with CALCRIM No. 521 on first degree murder was inflammatory, but this instruction was no more inflammatory than the instruction given to the jury pursuant to CALCRIM No. 540A on first degree murder under the felony murder theory based on causing the death of another person during the commission of rape.[12] "'[A]t worst, there was no evidence to support the instruction and . . . it was superfluous. . . . Under the circumstances, reversal on such a minor, tangential point is not warranted.'" (*People v. Jackson*, *supra*, 13 Cal.4th at p. 1225.)

C. *Prior Strike Convictions*

Lindsey admitted two prior strike convictions occurring in Indiana in 1965. He argues that, for purposes of the three strikes law, the court erred by sentencing him as a third strike offender because the two convictions constitute only a single strike. Lindsey further contends the trial court erred in

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[12] As with CALCRIM No. 521, this instruction was given with respect to uncharged offenses from which the jury could find Lindsey "was disposed or inclined to commit sexual offenses" (CALCRIM No. 1191).

imposing six five-year prior serious felony enhancements under Penal Code section 667, subdivision (a)(1), based on the two prior convictions. Lindsey is correct.

1. *Factual and Procedural Background*

Lindsey was convicted in Indiana of murder in the first degree and murder in the first degree in the perpetration of rape. Both counts were based on the murder of Julia K. Zink on November 14, 1964. The first count was based on Lindsey's having committed the murder with premeditated malice, and the second count was based on the fact the murder occurred in the perpetration of rape.[13]

Based on the two convictions, the trial court sentenced Lindsey on counts 7 and 8—rape by use of drugs (Pen. Code, § 261, subd. (a)(3))—to indeterminate terms as a third strike offender. The trial court imposed two prior serious felony conviction enhancements on each indeterminate term in counts 7 and 8, as well as two prior serious felony conviction enhancements on the determinate term in count 10— sexual

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[13] The presentence investigation report and the parole investigation report from Lindsey's Indiana case reflect that, after consuming approximately nine beers, Lindsey went to Zink's trailer, grabbed her by the arm, and dragged her to an embankment near where he had parked his car. He tore off her clothes and raped her. She asked for her clothes, but he put her into his car while she was still naked. He drove to a river bank where he hit her over the head with a 12-inch crescent wrench. He threw the wrench in the river and choked Zink. He did not know whether or not she was dead, so he threw her into the river and held her under the water with his foot until she drowned.

penetration with a foreign object by use of an intoxicating substance (*id.*, § 289, subd. (e)).

2. *Governing Law and Standard of Review*

For purposes of the three strikes law, a prior conviction from another jurisdiction constitutes a strike under the three strikes law if the offense includes all of the elements of a serious or violent felony under California law. (Pen. Code, §§ 667, subd. (d)(2), 1170.12, subd. (b)(2).) Similarly, a five-year enhancement for a prior serious felony conviction may be imposed under Penal Code section 667, subdivision (a)(1), for "any offense committed in another jurisdiction which includes all of the elements of any serious felony" under California law when the current offense is also a serious felony.

"The standards of review for questions of pure fact and pure law are well developed and settled. Trial courts and juries are better situated to resolve questions of fact, while appellate courts are more competent to resolve questions of law. Traditionally, therefore, an appellate court reviews findings of fact under a deferential standard (substantial evidence under California law, clearly erroneous under federal law), but it reviews determinations of law under a nondeferential standard, which is independent or de novo review. [Citation.]" (*People v. Cromer* (2001) 24 Cal.4th 889, 893-894, fn. omitted.) Thus, to the extent the trial court makes a factual determination as to whether a prior conviction from another jurisdiction constitutes a strike, we apply the substantial evidence standard. (*People v. Miles* (2008) 43 Cal.4th 1074, 1083 [determination of "the serious felony nature of the prior conviction" reviewed for substantial evidence]; *People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1067

[same].) To the extent we must determine whether the law permits imposition of a third strike sentence or the prior conviction enhancements based on the trial court's finding with respects to the two Indiana convictions, we apply independent review. (*In re N.C.* (2016) 4 Cal.App.5th 1235, 1247 ["Where the issue involves the proper interpretation of a statute and its application to undisputed facts our review is independent"]; *People v. Scott* (2016) 3 Cal.App.5th 1265, 1271 [questions regarding the interpretation of a law are reviewed de novo].)

3. *The Two Indiana Convictions Do Not Constitute Two Strikes, So Lindsey Must Be Sentenced as a Second Strike Offender*

In *People v. Vargas* (2014) 59 Cal.4th 635 (*Vargas*), the Supreme Court addressed the question "whether two prior convictions arising out of a single act against a single victim can constitute two strikes under the Three Strikes law." (*Id*. at p. 637.) The court concluded they could not. (*Ibid*.)

The court acknowledged the three strikes law "does not require that prior convictions, to qualify as strikes, be brought and tried separately." (*Vargas*, *supra*, 59 Cal.4th at p. 638.) However, in *Vargas*, the "[d]efendant's two prior felony convictions—one for robbery and one for carjacking—were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim." (*Ibid*.) The court concluded that "because neither the electorate ([Pen. Code,] § 1170.12) nor the Legislature ([*id*.,] § 667, subds. (b)-(i)) could have intended that both such prior convictions would qualify as separate strikes under the Three Strikes law, treating

them as separate strikes is inconsistent with the spirit of the Three Strikes law, and the trial court should have dismissed one of them and sentenced [the] defendant as if she had only one, not two, qualifying strike convictions." (*Id*. at pp. 638-639.)

Lindsey's two prior convictions "were not only tried in the same proceeding and committed during the same course of criminal conduct, they were based on the same act, committed at the same time, against the same victim." (*Vargas*, *supra*, 59 Cal.4th at p. 638.) Both convictions were based on the murder of Julia K. Zink on November 14, 1964.

The People nonetheless argue that although Lindsey's "two strike convictions arose from the same course of conduct, they did not derive from a 'single act.' The act of raping the victim was distinct from the act of murdering her." The dispositive and distinguishing factor here, however, is that Lindsey was not convicted of rape and murder; he was convicted only for murder, involving a single victim. He could only murder the victim once. Therefore, the two convictions must be treated as a single strike. (*Vargas*, *supra*, 59 Cal.4th at pp. 638-639.)

4. *Only One Prior Serious Felony Enhancement May Be Imposed*

As stated above, the trial court imposed two prior serious felony conviction enhancements under Penal Code section 667, subdivision (a)(1), on counts 7 and 8—rape by use of drugs—and count 10— sexual penetration with a foreign object by use of an intoxicating substance. Lindsey contends, and the People concede, count 10 is not subject to this enhancement because violation of Penal Code section 289, subdivision (e), is not a

serious felony to which the enhancement attaches. (*Id*., § 667, subd. (a)(1).)

Lindsey further contends only one enhancement should have been imposed as to counts 7 and 8. Penal Code section 667, subdivision (a)(1), provides: "any person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately." The two Indiana convictions did not result from charges brought and tried separately. Therefore, the People acknowledge, the trial court erred in imposing two serious felony enhancements on counts 7 and 8, one for each of the two prior convictions.

The question remains whether the trial court erred by imposing serious felony enhancements as to both counts 7 and 8. This question was answered by *People v. Sasser* (2015) 61 Cal.4th 1, decided just after Lindsey's sentencing hearing, in which the court held "that the prior serious felony enhancement may be added only once to multiple determinate terms imposed as part of a second strike sentence." (*Id*. at p. 7.) Because, as discussed above, Lindsey must be sentenced as a second strike offender, only one prior serious felony enhancement may be imposed as to counts 7 and 8.[14]

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[14] The People's argument that the two enhancements were proper is predicated on the assumption the trial court properly sentenced Lindsey to indeterminate terms as a third strike offender. As discussed above, that assumption is incorrect.

In conclusion, the two Indiana convictions constitute only one strike for purposes of the three strikes law, so Lindsey must be resentenced as a second strike offender. Only one five-year enhancement under Penal Code section 667, subdivision (a)(1), may be imposed for his prior conviction on Lindsey's determinate term.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the case is remanded for resentencing consistent with the views expressed herein.

BENSINGER, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

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