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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>WILLIAM G. CORTEZ,<br><br>Defendant and Appellant. | B264932<br><br>(Los Angeles County<br>Super. Ct. No. VA134949) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Mildred Escobedo, Judge. Affirmed in part, reversed in part.

Richard A. Levy, 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, Victoria B. Wilson, and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant William Cortez of forcible rape, forcible oral copulation of a minor, and two counts of furnishing a minor with a controlled substance. Cortez encountered his two minor victims, both 14 years old, at a bus stop. He took them back to a friend's house, where the girls ingested the methamphetamine that he gave them. After one of the minors left, Cortez injected the other minor with more methamphetamine, then orally copulated and had vaginal intercourse with her. The minor testified that she did not consent to the last methamphetamine injection, nor to the sex acts. Cortez raises several challenges to his convictions. We agree that the trial court incorrectly instructed the jury regarding the use of an inconsistent prior statement made by the victim regarding the forcible methamphetamine injection. As we will explain, that ruling prejudiced Cortez with respect to the charges of forcible rape and forcible oral copulation, and his convictions on those counts must therefore be reversed. We also amend the judgment to correct certain errors in the calculation of Cortez's sentence. In all other respects, we affirm the judgment.

## FACTS AND PROCEEDINGS BELOW

On October 28, 2013, Cortez, age 49, was sitting at a bus stop in Bell Gardens when he encountered Destiny, a 14-year-old girl. She accepted his offer to pay for her bus fare and accompany her to a local McDonald's, where she met her friend Aurelia, who was also 14 years old. At the McDonald's, at Cortez's suggestion, the girls smoked marijuana with him.

The girls then accompanied Cortez to a house in Huntington Park, where Cortez's acquaintance, Eric Samayoa, lived. Cortez took out a packet of methamphetamine, which he, Samayoa, Aurelia, and Destiny smoked and snorted. Destiny and Cortez then left to get beer, which both Destiny and Aurelia drank at Samayoa's house.

Later that evening, the girls decided they wanted to go home. Cortez went with them on the bus, but when Destiny got off, Aurelia decided to stay with Cortez, and they returned to Samayoa's house at around 11:00 p.m. At Samayoa's house, they used more methamphetamine, including at least one instance in which Aurelia allowed him to inject it into her arm. Cortez then went to sleep, but Aurelia could not fall asleep.

The next day, Cortez injected Aurelia with more methamphetamine. Aurelia testified that this time, it was against her will. Then, according to Aurelia, "he asked if he could kiss my vagina." She testified that she said no, but he performed cunnilingus on her for approximately 20 seconds. Cortez then pulled down his pants and took out a condom. Aurelia told him to stop, but Cortez told her to shut up. She asked him to put on the condom, which he did, and engaged in vaginal intercourse with her. Aurelia testified that she was afraid to resist or tell him to stop.

Cortez took Aurelia's pants, telling her he was going to put them in the washing machine, and gave her a pair of shorts to wear. Aurelia went to Samayoa's room and stayed there for about 10 minutes. At that point, Aurelia's parents and Destiny arrived at Samayoa's house. Destiny went into the house and retrieved Aurelia. When Aurelia came out of the house, she still appeared to be under the influence of methamphetamine. For the next two days, she suffered powerful hallucinations during which she believed that Cortez was trying to enter her room, after which she told her parents about the sexual assault.

For his part, Cortez denied that he had ever met Destiny or Aurelia that night, and stated that he had seen them only briefly that night when he looked through the window of Samayoa's house. Samayoa corroborated Aurelia and Destiny's testimony regarding the evening before the rape, including the drug use. But he also stated that Cortez knocked on his window from outside the house very early the next morning, and that he did not see Cortez in the house at the time the rape and oral sex allegedly occurred.

A sexual-assault exam conducted three days later found that Aurelia had a laceration on the posterior fourchette at the rear of her vagina, an injury consistent with the position Aurelia and Cortez were in when Aurelia said Cortez raped her. The exam also disclosed puncture marks on Aurelia's arm, and showed that she had methamphetamine in her blood. A few weeks later, both Aurelia and Destiny identified Cortez from a police photo array as the man they had been with.

An information charged Cortez with: (count 1) forcible rape, in violation of Penal Code section 261, subdivision (a)(2),[1] with an allegation of a special circumstance, in that Cortez had administered a controlled substance during the commission of the offense against the will of the victim, pursuant to section 667.61, subdivision (e)(6), and an allegation that the victim was a minor age 14 or older, pursuant to section 667.61, subdivision (m); (count 2) forcible oral copulation of a minor 14 or 15 years old by a person at least 10 years older, in violation of section 288a, subdivision (c)(2)(C), with an allegation of a special circumstance, in that Cortez had administered a controlled substance during the commission of the offense against the victim's will, pursuant to section 667.61, subdivision (e)(6); and (counts 4 and 5)[2] two counts of furnishing a minor with a controlled substance, in violation of Health and Safety Code section 11380, with an allegation that the minors were at least four years younger than the defendant, pursuant to Health and Safety Code section 11380.1, subdivision (a)(3). The information also alleged that Cortez had previously been convicted of one strike offense, pursuant to section 1170.12, one serious felony prior, pursuant to section 667, subdivision (a)(1), and six prison priors, pursuant to section 667.5.

A jury convicted Cortez on all counts, and found true the allegations that Cortez had administered a controlled substance against the will of the victim during the commission of counts 1 and 2, that the victim in count 1 had been a minor age 14 or older, and that the victims had been at least four years younger than the defendant with respect to counts 4 and 5. In the second phase of the bifurcated trial, the jury found the prior strike and five-year prior to be true.

The trial court sentenced Cortez as follows: On count 1, a term of 50 years to life plus five years, consisting of 25 years to life, doubled due to the prior strike, plus five additional years for the serious felony prior; on count 2, a consecutive term of 50 years to life plus five years, calculated in the same manner as count 1; on count 4, a consecutive

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[2] Count 3 was dismissed at the preliminary hearing for insufficient evidence.

sentence of 26 years, consisting of the upper term of nine years, doubled due to the prior strike, plus the upper term of three years for the enhancement for a four-year age difference, plus five additional years for the serious felony prior; and on count 5, a consecutive sentence of 12 years, consisting of one-third the midterm, or two years, doubled to four years due to the prior strike, plus an additional five years for the serious felony prior, and three more years for the age difference enhancement. This amounted to a total sentence of 148 years to life in prison.

## DISCUSSION

Cortez raises several contentions on appeal. First, he contends that the trial court erred by instructing the jury that the victim's prior statements to a nurse during the sexual assault exam could not be considered for their truth or to evaluate the victim's credibility. Next, he contends that the trial court erred by allowing the prosecution to impeach Cortez on the basis of a previous kidnapping charge. Third, he contends that the trial court erred by revoking, on the basis that he was disruptive, his self-representation status. Fourth, he contends that the trial court erred by proceeding with the trial in his absence without a showing that he had deliberately refused to come to court. Fifth, he contends that the court erred by denying his motions for continuances. Finally, he contends that the trial court erred in its imposition of certain elements of his sentence. We affirm in part and reverse in part.[3]

### I. *Victim's Prior Statements*

Cortez contends that the trial court erred by instructing the jury that it could consider Aurelia's prior statements testified to by the nurse who performed the sexual-assault exam only for the limited purpose of evaluating an expert witness's testimony. Cortez argues that the statements were admissible for their truth and to

[3] Because we reverse Cortez's conviction for forcible oral copulation of a minor as a result of the trial court's instructional error (see Discussion part I, *post*), we need not address Cortez's argument that the trial court erred with respect to that count by refusing to instruct the jury regarding a lesser included offense.

evaluate Aurelia's credibility, under the hearsay exception for prior inconsistent statements. (Evid. Code, § 1235.) We agree with respect to one of these statements.

At trial, Aurelia testified that just prior to raping her, Cortez forcibly injected her with methamphetamine. She said, "I was like, no, I don't want to be injected. Then he just forced." She also stated that he performed oral sex on her against her will: "He asked if he could kiss my vagina." "I told him I didn't want him to."

The forensic medical expert who testified for the prosecution was a sexual-assault nurse who had examined Aurelia three days after her encounter with Cortez. On three occasions, she testified that Aurelia had made statements to her or to a police officer that, according to Cortez, were inconsistent with her trial testimony. The first of these statements was revealed during cross-examination of the nurse, while the other two were revealed during the prosecutor's redirect examination. In all three instances, the court received the testimony without objection from the opposing side, and neither the trial court nor the parties discussed limiting the admissibility of the testimony.

At the end of the trial before closing arguments, the trial court gave the jury an instruction based on CALCRIM No. 360 limiting the use of Aurelia's statements to the nurse. Neither party in the case requested nor objected to this instruction. The instruction stated as follows: "[The sexual-assault nurse] testified that in reaching her conclusions as an expert witness, she considered statements made by Aurelia. You may consider those statements only to evaluate the expert's opinion. Do not consider those statements as proof that the information contained in the statements is true."

The limiting instruction would have been appropriate if Aurelia's statements were admissible only pursuant to Evidence Code section 802, which provides that "[a] witness testifying in the form of an opinion may state on direct examination the reasons for [her] opinion and the matter . . . upon which it is based, unless [she] is precluded by law from using such reasons or matter as a basis for [her] opinion." Under this section, an expert witness may refer to hearsay statements that would otherwise be inadmissible, but the jury may consider such statements only for the purpose of evaluating the expert's

opinion, not to prove the truth of the matter asserted. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1524-1525.)

Cortez contends that, regardless of whether Aurelia's hearsay statements were admissible under Evidence Code section 802, they were also admissible pursuant to a different statute. Under Evidence Code section 1235, "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with [her] testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." He argues that Aurelia's hearsay statements were powerful exculpatory evidence, and that the trial court prejudiced him by instructing the jury not to consider those statements for the truth of the matter asserted. We address his claims with respect to each of the alleged inconsistent statements in turn.

A. *The First Statement During Redirect*

During redirect examination, the prosecutor referred to the nurse's report, saying "I do notice on page—you asked her right here on page 2, . . . 'involuntary ingestion of alcohol/drugs,' did you ask [Aurelia] this, exactly, did you involuntar[il]y ingest alcohol or drugs?" The nurse answered, "Yes." The prosecutor continued, "And she said no?" The nurse answered, "Correct."

This statement directly contradicted Aurelia's trial testimony, in which she stated that Cortez forcibly injected her. This rendered the statement inconsistent for the purposes of Evidence Code section 1235. In addition, Aurelia's statements complied with Evidence Code section 770, which requires that the witness whose inconsistent statement is admitted either have an opportunity to explain the inconsistency or not be excused from giving testimony.[4] Because Aurelia's statements were admissible under

[4] Evidence Code section 770 provides that, in order for an inconsistent statement to be admissible, "(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action." (*Ibid.*) Here, the trial court informed Aurelia, "[y]ou may step down," when she finished testifying, but the court did not excuse her from giving further testimony. (See Cal. Law Revision Com. com., Deering's Ann. Evid. Code (2004 ed.) foll. § 770, p. 444.) "Section 770 permits the judge to

Evidence Code section 1235 for the truth of the matter asserted, the trial court erred by instructing the jury to consider the statements only for the purpose of evaluating the expert's opinion.

B. *The Statement During Cross-Examination*

During cross-examination of the sexual-assault nurse, Cortez's attorney quoted from the nurse's report, in which the nurse wrote down what Aurelia told the nurse during the examination: "She told you, 'I got raped,[] he said he wanted to suck my pussy. He put it in. It hurted [*sic*]. I told him I didn't want it. I think [the condom] ripped like it was halfway off and gone when he took off. []Do you want to make this the hard way? That is what he said.['] " Cortez's attorney asked the nurse, "[Aurelia] said those exact words?" The nurse answered, "The exact words."

Cortez argues that Aurelia's statements implicitly contradicted her trial testimony and were admissible pursuant to Evidence Code section 1235. He points out that " ' " '[i]nconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement' " ' " under Evidence Code section 1235. (*People v. Homick* (2012) 55 Cal.4th 816, 859.) The McCormick treatise explains, "if the prior statement omits a material fact presently testified to and it would have been natural to mention that fact in the prior statement, the statement is sufficiently inconsistent." (1 McCormick on Evidence (7th ed. 2013) § 34, pp. 210-211, fn. omitted.) Cortez contends that, if Aurelia had actually told Cortez that she did not want him to perform oral sex on her, it would have been natural for her to mention this when telling the nurse about what happened that night. According to Cortez, when she failed to do so, she implicitly contradicted her trial testimony.

We disagree. Nothing about Aurelia's statement implies that she had consensual oral sex with Cortez. She did not give a full chronological account of what Cortez did

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exclude evidence of an inconsistent statement only if the witness during his examination was not given an opportunity to explain or deny the statement *and* he has been unconditionally excused and is not subject to being recalled as a witness." (Italics added.)

to her, but rather a brief description in only a few sentences. Aurelia told the nurse that Cortez said he "wanted to suck my pussy," but she did not state her response one way or the other. Nor did she describe the oral sex at all. After describing the rape, Aurelia said that Cortez asked her, " 'Do you want to make this the hard way?' " This was out of order from the remainder of her statement—it must have occurred before the rape, and possibly before the oral sex. A jury might reasonably infer from these statements that Aurelia was, for the first time, describing a recent traumatic event to a stranger, and that in the moment she emphasized certain aspects while leaving others out. A jury could not reasonably infer that, because she did not at that moment explicitly deny consenting to oral sex, she must have consented.

C. *The Second Statement During Redirect*

During redirect examination, the prosecutor again asked the nurse about her report. The prosecutor said, "I also want to point out on page 3, 'Suspect asked if he could taste her vagina. She agreed.' Are those in response to a direct question[?] How did that come about?" The nurse answered, "That was brought by Deputy Rubio [the sheriff's deputy who had interviewed Aurelia]. That is his scenario on what he told me. That came from the deputy."

This statement differs from the two described previously in that it presents an additional level of hearsay. Instead of the nurse reporting what Aurelia told her directly, in this instance, Aurelia spoke to the deputy, who told the nurse, who testified in court. A statement that contains multiple levels of hearsay may be admissible, so long as "each [level of hearsay] meets the requirements of an exception to the hearsay rule." (Evid. Code, § 1201.) Here, Auriela's statement falls within the hearsay exception for inconsistent statements because it directly contradicts her trial testimony, where she stated that she did not consent to the oral sex.

There is no applicable exception, however, for the deputy's statement reporting Aurelia's statement to the nurse. Cortez contends that the statement falls within the hearsay exception for records created by public employees. (Evid. Code, § 1280.) But the requirements of that exception were not met. According to the nurse's testimony,

Deputy Rubio "told" her about Aurelia's statement. In other words, the nurse found out about Aurelia's statement orally, not from a written police report. Furthermore, although a police report was marked as an exhibit, no party introduced it into evidence. In consequence, we cannot be sure that this police report contained the deputy's statement about Aurelia's statement, nor, if it did, that it would fall within the hearsay exception for records from public employees. Because Aurelia's statement was not admissible under the exception for multiple levels of hearsay, the court did not err by instructing the jury not to consider the statement for the truth of the matter asserted in it.[5]

D. *Prejudice*

Having concluded that the trial court erred with respect to Aurelia's first hearsay statement during redirect examination of the sexual-assault nurse (see Discussion part I.A, *ante*), we must now consider whether the error prejudiced Cortez. Cortez contends that the error violated his Sixth and Fourteenth Amendment rights by depriving him of his rights to due process and to confront the witnesses testifying against him. He argues that we should therefore review the error under the standard established by *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*), under which a violation of a defendant's federal constitutional rights requires reversal unless the error was harmless beyond a reasonable doubt. We need not decide this issue, however, because we hold

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[5] Cortez argues in the alternative that if this statement was not admissible for the truth of the matter asserted, then his trial counsel provided ineffective assistance by failing to ensure its admission into evidence. The record is silent as to why Cortez's trial counsel failed to seek admission of Aurelia's statement to the deputy. In a case involving a claim of ineffective assistance of counsel, 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.' " (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) Here, although Aurelia's statement to the deputy included potentially exculpatory evidence consistent with trial counsel's strategy of attempting to cast doubt on Aurelia's credibility, and although we are not aware of any tactical reason not to seek the admission of the evidence, we cannot be certain that no reason existed. Consequently, we reject Cortez's claim of ineffective assistance of counsel.

that it was "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) Thus, even if the more forgiving standard established in *Watson* applied, the error prejudiced Cortez and reversal would still be required.

We must presume, in the absence of evidence to the contrary, that the jury followed the trial court's instructions. (*People v. Williams* (2009) 170 Cal.App.4th 587, 635.)[6] Here, those instructions told the jury not to consider important evidence that, if believed, would have negated the special circumstances allegations, as well as cast doubt on the credibility of the prosecution's most important witness.

Aurelia's hearsay statement was directly relevant to the jury's finding of a special circumstance pursuant to section 667.61 with respect to counts 1 and 2. Cortez was convicted in count 1 of forcible rape, in violation of section 261, subdivision (a)(2), and in count 2 of forcible oral copulation, in violation of section 288a, subdivision (c)(2)(C). Under section 667.61, any defendant who administers a controlled substance to a minor victim against the victim's will in the commission of either of these offenses is subject to an indeterminate sentence of 25 years to life for each offense. (See *id.*, subds. (a), (c)(1), (c)(7), (e)(6) & (m).) The only evidence that Cortez administered drugs against Aurelia's will came from Aurelia's own testimony. If the jury had considered Aurelia's statement to the nurse that Cortez had not drugged her against her will for the truth of the matter asserted, it is reasonably probable that the jury would have believed her initial statement

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[6] The trial court also instructed the jury pursuant to CALCRIM No. 318, as follows: "You have heard evidence of statement[s] that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: 1. To evaluate whether the witness's testimony in court is believable; AND 2. As evidence that the information in those earlier statements is true." This instruction was insufficient to correct the trial court's error in instructing the jury to limit the use of Aurelia's statements to the sexual-assault nurse. When two instructions are inconsistent with one another, we may not "assume[] that the jury ignored the improper instruction and based its verdict solely on the correct one." (*LeMons v. Regents of University of California* (1978) 21 Cal.3d 869, 878.) This is particularly true where, as here, the more specific instruction was erroneous, because "where two instructions are inconsistent, the more specific charge controls the general charge." (*Ibid.*, fn. omitted.)

rather than her subsequent testimony, and found the special circumstances not true. Accordingly, those findings must be reversed.

Moreover, although Aurelia's inconsistent statement regarding drug use was not directly relevant to Cortez's convictions for forcible rape and forcible oral copulation, her statements were indirectly relevant to those charges as a result of a spillover effect. The trial court instructed the jury, in accordance with CALCRIM No. 105, that "[i]f you decide that a witness deliberately lied about something significant in this case, you should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest." If the jurors chose to believe that Aurelia was not credible regarding some of her accusations, they might have also disbelieved her with respect to the rape and forcible oral sex allegations. (See, e.g., *In re Ponce De Leon* (2004) 117 Cal.App.4th 1116, 1122 [impeachment of police officers' testimony regarding their use of force required reversal of otherwise unrelated cocaine possession charge].)[7]

Aurelia's inconsistent statement was uniquely powerful exculpatory evidence in this case. The prosecution relied almost exclusively on Aurelia's testimony to prove that Cortez committed forcible rape and oral copulation. There was no physical evidence that Cortez performed oral sex on Aurelia, and although the sexual-assault nurse found a small tear at the rear fourchette of Aurelia's vagina, that evidence was not definitive. The sexual-assault nurse had no incentive to lie about what Aurelia told her in order to make Cortez seem less culpable. A jury might reasonably conclude that Aurelia was not telling the truth in her trial testimony. Under any standard of review, then, the instruction telling the jury not to consider the earlier statement for its truth prejudiced Cortez.

The Attorney General contends that there could be no prejudice on the ground that Aurelia's consent was irrelevant, in that she was only 14 years old and was too

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[7] Cortez does not contend that the error requires reversal of Cortez's convictions for furnishing a minor with a controlled substance (counts 4 and 5). With respect to those convictions, Aurelia's testimony was corroborated by Destiny and Cortez's friend Samayoa, who both testified that Cortez furnished methamphetamine to Aurelia and Destiny. Thus, the potential for spillover does not exist with respect to counts 4 and 5.

intoxicated at the time to consent to Cortez's actions in any case. We are not persuaded. Although it is true that a person who is less than 18 years of age may not legally consent to sexual acts with an adult, the law distinguishes between legal and actual consent and punishes more harshly offenders who commit sex acts against a minor without the minor's actual consent. For example, section 288a, the section under which Cortez was convicted in count 2, distinguishes between oral copulation where the perpetrator is over 21 years old, and the victim is under 16, which is a violation of subdivision (b)(2), and "oral copulation upon a minor who is 14 years of age or older, when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person," which is a violation of subdivision (c)(2)(C). The information charged Cortez with the latter offense. In instructing the jury on counts 1 and 2, the court correctly stated that the jury must find that Aurelia "did not consent to the intercourse" and "did not consent to the act." Her age alone was not sufficient proof on these counts.

The difference in potential punishment for these crimes is significant. If Cortez had been convicted under subdivision (b)(2), the trial court could have sentenced him to a felony with a maximum base term of three years. Because he was convicted under subdivision (c)(2)(C), Cortez was sentenced under the One Strike law, and he received a base sentence of 25-years-to-life for the offense. (See § 667.61, subd. (c)(6) [applying One Strike sentencing for violations of section 288a, subd. (c)(2), but not for subd. (b).])

The Attorney General contends that Aurelia's intoxication throughout her encounter with Cortez rendered the instructional error harmless, arguing that Aurelia was incapable of consenting to be injected. We disagree. Although she appeared highly intoxicated at the time she left Samayoa's house, that was shortly after Cortez injected her with methamphetamine. According to Aurelia, at the time Cortez injected her and performed oral sex on her, she had not consumed methamphetamine or any other intoxicating substance for several hours. Thus, a jury could reasonably conclude that she was sufficiently sober to consent to the methamphetamine injection.

E. *Invited Error*

The Attorney General contends that reversal is not required because any error in the jury instructions was invited. "The doctrine of invited error generally precludes reversal on appeal for an error the trial court made at the behest of the accused. [Citation.] It applies only to tactical choices by the defense." (*People v. Viramontes* (2001) 93 Cal.App.4th 1256, 1264.) Here, the court simply informed the parties about the instructions it planned to read to the jurors. There is no sign in the record that Cortez's attorney requested the erroneous instruction regarding the limitation of Aurelia's hearsay. Nor did Cortez's attorney intentionally reject the theory that Aurelia consented to the drug use. Indeed, his closing argument was based almost entirely on casting doubt on Aurelia's credibility. The Attorney General's argument of invited error fails.

Furthermore, except in cases of invited error, "[t]he appellate court may . . . review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (§ 1259; accord, § 1469; *People v. Felix* (2008) 160 Cal.App.4th 849, 857.) "In this regard, '[t]he cases equate "substantial rights" with reversible error' under the test stated in . . . *Watson*[, *supra*,] 46 Cal.2d 818." (*People v. Felix*, *supra*, at p. 857.) As we have already noted, this case requires reversal under the *Watson* standard because it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) Consequently, Cortez's argument regarding the instructional error is not forfeited.

F. *Conclusion*

In consequence of the instructional error, Cortez's convictions for forcible rape (count 1) and forcible oral copulation (count 2) are reversed.

II. *Impeachment With The Prior Kidnapping Charge*

Cortez contends that the trial court erred by allowing the prosecution to impeach him with his 1992 conviction for kidnapping. According to Cortez, the trial court could have reduced the prejudicial effect of the questioning by sanitizing the kidnapping conviction and by allowing the prosecution to question Cortez regarding two more recent

theft convictions. We disagree and hold that the trial court acted within its discretion by allowing the prosecution to impeach Cortez with the kidnapping conviction.

Before trial testimony began, Cortez moved to bar the prosecution from impeaching him with evidence of his prior convictions, including, among others, a 1992 conviction for kidnapping, and two subsequent convictions for petty theft with a prior. The trial court tentatively indicated that it would allow the prosecution to ask Cortez about the kidnapping conviction and all subsequent felony convictions, but would forbid questioning about convictions that predated 1992. After both the prosecution and defense had rested, Cortez informed his attorney that he wanted to testify on his own behalf. Cortez's counsel renewed his motions to exclude the prior convictions pursuant to Evidence Code section 352, or at least to sanitize them by requiring the prosecution to refer to them only as crimes involving moral turpitude, without specifying the exact nature of the conviction. The trial court denied this motion and allowed the prosecution to impeach Cortez by asking him about the kidnapping conviction and the two theft convictions. During cross-examination, the prosecutor asked Cortez about all three convictions.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).) Under Evidence Code section 352, a trial court has the discretion to "exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "When determining whether to admit a prior conviction for impeachment purposes, the court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the charged offense, and what effect its admission would have on the defendant's decision to testify." (*Clark*, *supra*, 52 Cal.4th at p. 931.) "Because the court's discretion to admit or exclude impeachment evidence 'is as broad as necessary to deal with the

great variety of factual situations in which the issue arises' [citation], a reviewing court ordinarily will uphold the trial court's exercise of discretion." (*Id.* at p. 932.)

Cortez contends that the trial court erred by allowing the prosecution to impeach him with the unsanitized kidnapping conviction. He points out that the conviction was remote in time, having occurred more than 20 years before this case. In addition, although he acknowledges that the kidnapping conviction involved moral turpitude, he contends that it was less indicative of a tendency to lie than his more recent convictions for theft. (See *People v. Rivera* (2003) 107 Cal.App.4th 1374, 1379-1380 [noting that crimes where dishonesty is an element are more strongly probative of a willingness to lie than are crimes that indicate only a general readiness to do evil].) Consequently, he argues that the additional probative value of impeachment for the kidnapping charge was minimal, while its potential prejudicial effect was much greater, as it might have led the jury to convict him of his current charges because he had previously committed a crime that also involved forcible behavior against a victim.[8]

But the trial court had justification for allowing questioning regarding the kidnapping conviction. First, "a series of relevant crimes is more probative of credibility than a single lapse." (*People v. Hinton* (2006) 37 Cal.4th 839, 888.) Next, even if the kidnapping conviction involved elements similar to the rape and forced oral copulation charges in this case, a court may not forbid impeachment with a prior offense simply because it is too similar to the current offenses. (*Ibid.*) Furthermore, where, as here, a

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[8] Prior to 1982, prior convictions could be used as impeachment only if they reflected adversely on a defendant's tendency toward honesty and integrity. Consequently, crimes of violence generally could not be used for impeachment. In addition, a defendant could not be impeached with a conviction for a crime involving substantially similar conduct to that for which he was on trial. (See *People v. Beagle* (1972) 6 Cal.3d 441, 453 (*Beagle*).) In 1982, however, the voters passed Proposition 8, which radically altered these rules. (See *People v. Castro* (1985) 38 Cal.3d 301, 313-315.) In his briefs, Cortez has cited several cases decided on the basis of pre-Proposition 8 law. (E.g., *Beagle, supra,* 6 Cal.3d at p. 453; *People v. Gurule* (2002) 28 Cal.4th 557, 607; *People v. Williamson* (1977) 71 Cal.App.3d 206, 211; *People v. Kyllingstad* (1978) 85 Cal.App.3d 562, 568-569.) To the extent that Cortez's reasoning relies on outdated interpretations of the law, these cases are unpersuasive.

defendant has spent much of the intervening time in prison, the remoteness of the earlier offense is diminished. (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1056.) Indeed, the prosecution did not ask Cortez about the details of the earlier offense, and there was no suggestion that the defendant's kidnapping conviction involved a sexual assault.

It is not our position to re-weigh the trial court's decision to allow the unsanitized kidnapping conviction. Indeed, as long as the court did not "exceed[] the bounds of reason in admitting" the prior convictions, we must affirm the trial court. (*Clark*, *supra*, 52 Cal.4th at p. 933.) Under that deferential standard, we hold that the trial court acted within its discretion by allowing the prosecution to impeach Cortez with the kidnapping conviction.

III. *Revocation Of Self-Representation*

After jury selection had begun and one day before opening statements, Cortez requested to waive his right to counsel and represent himself at trial. The trial court initially granted this request, but when Cortez refused to answer questions to the court's satisfaction and claimed not to be ready to proceed with the trial, the court reconsidered its decision and revoked Cortez's self-represented status. Cortez contends that this was an error, but we disagree.

Cortez had requested to represent himself once before, on October 16, 2014, several months before trial. On that earlier occasion, the trial court granted Cortez pro. per. status pursuant to *Faretta v. California* (1975) 422 U.S. 806, 807 (*Faretta*). Less than one month later, Cortez acknowledged that "[i]t was way too difficult" to represent himself, and the court granted his request to reappoint counsel.

When trial proceedings began on April 14, 2015, there were several occasions during which the trial court found Cortez to be uncooperative or disruptive. The first occurred when Cortez remained in his jail uniform just before jury selection was to begin. The trial court asked him if he planned to change into street clothes before potential jurors entered the courtroom, but he refused to answer and complained that he was not ready for trial. Shortly thereafter, the court asked if he was willing to waive his right to a jury trial on his prior convictions, and he replied that he was not ready for trial, did not

know what was going on, had not spoken with his attorney adequately in preparation for his case, and that no one had told him his trial was about to begin. Cortez then spoke up several times during proceedings to state that he was not ready for trial, sometimes after the court had asked him an unrelated question, and other times when no one had called for him to speak. Later, Cortez again interrupted the proceedings to complain that his lawyer had not consulted with him during a break.

The next morning, April 15, 2015, Cortez did not appear in court as proceedings began. The court explained that jail officials initially did not have a wheelchair needed to transport Cortez to the courtroom.[9] According to the court, a wheelchair was eventually made available, but Cortez complained that he did not like it. When another wheelchair was located, Cortez refused to travel on the bus that transported prisoners to court, demanding to go in a smaller van. Shortly after 10:30 a.m., the court filed an extraction order to transport Cortez to court. Cortez again had problems with the wheelchair. Cortez ultimately arrived in court at 2:38 p.m. The court asked Cortez if he understood that if he refused again to come to court, the trial would proceed without him. Cortez initially gave no answer at all, then complained that he was not being allowed to call witnesses, and that his attorney had not spoken with him about the case. Cortez continued to interrupt, demanding to speak with his lawyer. Cortez acknowledged that he had refused to travel in the first wheelchair provided for him, claiming that he could not fit in it, and likewise that he could not travel on a prisoner transport bus.

After consulting with his attorney, Cortez again requested to represent himself. The court explained that the trial was about to begin, and that if Cortez represented himself, the court would not grant any further continuances to allow him to prepare, and that Cortez would need to follow the rules and not disrupt the proceedings further. Cortez stated that he understood these requirements. The court granted the motion, but Cortez then complained, "I need a little time to read this. I don't know what all my charges are. I don't know the witnesses." The court replied that the trial was going to

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[9] While in jail, Cortez had been assaulted and seriously injured by other inmates, requiring his use of a wheelchair.

resume immediately, and asked if Cortez wished to proceed with the self-representation. Cortez answered that he did wish to proceed, but then asked for more time to research issues of jury instructions and how to pick jurors. Cortez noted that the *Faretta* waiver form stated that he had the right to research his case. The court replied, "I indicated to you that you are in trial, and I do not have good cause to continue this because now you are going pro[.] per. We are right in the middle of trial. That is not going to happen, Mr. Cortez." The court twice asked if Cortez understood, and he replied, "We haven't even started trial, ma'am," and "[w]e haven't even picked the jury yet."[10] When Cortez continued to argue this point, the court reconsidered its decision, denied Cortez's *Faretta* motion, and reinstated his counsel. Shortly thereafter, the court explained its reasoning. The court cited Cortez's frequent interruptions, which the court believed were intended "only to halt proceedings and cause havoc in this trial." The court also noted that Cortez had attempted to delay the trial further by refusing to come to court that day. In spite of these disruptions, "[t]he court was very close [to] granting" the *Faretta* motion, but after "Mr. Cortez continued with his interruptions and efforts to try to delay the proceedings once again, . . . the court in finality decided not to grant *F[a]retta* rights to Mr. Cortez [and] reinstated" Cortez's attorney.

A criminal defendant is entitled under the Sixth and Fourteenth Amendments to the Constitution to the right to represent himself at trial "when he voluntarily and intelligently elects to do so." (*Faretta*, *supra*, 422 U.S. at p. 807.) "A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial." (*People v. Welch* (1999) 20 Cal.4th 701, 729 (*Welch*), abrogated on other grounds by *People v. Blakely* (2000) 23 Cal.4th 82, 90.) When, as here, the defendant's motion is untimely because it was made on the

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[10] Jury selection had begun the preceding afternoon but was not yet complete.

eve of trial, it is within the discretion of the court to grant or deny the motion. (*People v. Burton* (1989) 48 Cal.3d 843, 852-853; see *People v. Lynch* (2010) 50 Cal.4th 693, 722 (*Lynch*), abrogated on another ground by *People v. McKinnon* (2011) 52 Cal.4th 610, 637-638.) If a court has already granted the defendant's motion, the court "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct." (*Faretta*, *supra*, 422 U.S. at p. 834, fn. 46.) We review a trial court's decision to revoke a defendant's pro. per. status or to deny a defendant's motion to represent himself for abuse of discretion. (*Welch*, *supra*, 20 Cal.4th at p. 735.)

In this case, the record is ambiguous as to whether the trial court's decision was a denial of Cortez's request, or a grant of his motion for self-representation followed by an immediate revocation. In rejecting Cortez's motion, the court stated that it had "reconsidered. The court is not going to grant *F[a]retta*." This suggests that the court denied the request outright. On the other hand, the court later stated that it had "reinstated" Cortez's counsel, suggesting that the court granted Cortez's pro. per. status, then revoked it. We need not resolve this ambiguity because the same standard applies when a trial court decides to deny a motion for self-representation as when it revokes a self-representation status that it had previously granted. (*Welch*, *supra*, 20 Cal.4th at p. 734.) Nevertheless, because the court's reconsideration or revocation of Cortez's self-representation came immediately after the court stated that it would grant his *Faretta* motion, and for the sake of convenience, we will refer to the court's decision as a denial of Cortez's motion.

Cortez contends that the trial court abused its discretion in denying his *Faretta* motion because his conduct was not sufficiently disruptive to warrant denying or revoking his pro. per. status. He points out that in the moments immediately before the court denied his self-representation, he was not abusive, but rather "politely and respectfully made his point." Cortez is too narrow in his focus. A trial court may consider the defendant's conduct throughout the course of the proceedings. Thus, in *Welch*, *supra*, 20 Cal.4th at p. 735, our Supreme Court reviewed the full record of proceedings prior to the defendant's *Faretta* motion in order to determine whether the

trial court had acted within its discretion when it denied the motion. After detailing numerous instances in which the defendant had disrupted the proceedings and failed to follow proper protocol, the Court affirmed that the trial court had acted within its discretion because, "while no single one of the above incidents may have been sufficient by itself to warrant a denial of the right of self-representation, taken together they amount to a reasonable basis for the trial court's conclusion that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive." (*Ibid.*)

Here, the trial court cited numerous instances in which Cortez had been disruptive over the preceding two days. In addition to interrupting on numerous occasions, Cortez had failed to give a responsive answer to virtually every question the court had asked of him, including whether he understood his rights and whether he wished to waive jury trial on his priors. Because the facts of every case are different, it is impossible to define what specific actions are sufficiently disruptive to warrant the revocation of self-representation. In previous cases, courts have upheld revocations for actions ranging from frequent and belligerent interruptions (*Welch*, *supra*, 20 Cal.4th at p. 735) to a defendant's stated intention to stand mute during trial. (*People v. Clark* (1992) 3 Cal.4th 41, 114, abrogated on other grounds as recognized by *People v. Edwards* (2013) 57 Cal.4th 658, 704-705.) "We are also aware that the extent of a defendant's disruptive behavior may not be fully evident from the cold record, and that one reason for according deference to the trial court is that it is in the best position to judge defendant's demeanor." (*Welch, supra,* 20 Cal.4th at p. 735.) There is enough evidence of Cortez's failure " 'to abide by rules of procedure and courtroom protocol' " (*People v. Watts* (2009) 173 Cal.App.4th 621, 629) to support the trial court's denial of Cortez's motion for self-representation.

The trial court denied Cortez's motion not only because he had been disruptive, but also because he was "try[ing] to delay the proceedings." Our Supreme Court has held that a trial court may deny a *Faretta* motion if it "is made for purpose of delay." (*Lynch*, *supra*, 50 Cal.4th at p. 722.) In evaluating this question, "the defendant's

pretrial delays, in conjunction with a motion for continuance for the purpose of self representation, would be strong evidence of a purpose to delay." (*People v. Burton*, *supra*, 48 Cal.3d at p. 854.) Here, there is ample support in the record to justify the court's conclusion that Cortez made his motion for the purpose of delay. Cortez stated multiple times that he was "not ready for trial." On the day he made the *Faretta* motion, he refused to travel to court because he claimed he did not like the kind of wheelchair and bus transportation to the courthouse. In addition, the trial court noted that Cortez had previously made a *Faretta* motion. On that previous occasion, Cortez reconsidered when he found that serving as his own lawyer was too difficult. This was further evidence that Cortez's motivation in filing the motion was to delay his trial, not to serve as his own attorney. (See *id.* at p. 853 [indicating that trial courts should consider " 'the defendant's prior proclivity to substitute counsel' " in deciding whether to grant untimely *Faretta* motions].)[11]

In a supplemental brief, Cortez argues that our Supreme Court's recent decision in *People v. Becerra* (2016) 63 Cal.4th 511 (*Becerra*) supports his position. We disagree. In *Becerra*, the defendant, who was representing himself, made extensive discovery requests over the course of several months. (*Id.* at pp. 515-516.) The prosecution

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**11** Cortez argues that our conclusion is incorrect on the basis of *Burton v. Davis* (9th Cir. 2016) 816 F.3d 1132, in which the Ninth Circuit held that the California trial court violated the defendant's Sixth and Fourteenth Amendment rights by denying his *Faretta* motion because his request was untimely and would have required a continuance, without holding an adequate hearing to determine whether his request was motivated by delay. (*Id.* at pp. 1143-1144.) The court in *Burton v. Davis* recognized that in reviewing a court's decision, the Ninth Circuit's standard for deciding a defendant's *Faretta* request made shortly before trial differs from that of our Supreme Court, in that under the Ninth Circuit's rule, the prosecution bears the burden of demonstrating that the defendant's request was made for the purpose of delay, whereas under our Supreme Court's rule, the defendant must prove that his request was not made for the purpose of delay. (*Id*. at p. 1145, citing *Burton*, *supra*, 48 Cal.3d at p. 854.) As Cortez acknowledges, because our Supreme Court is a court of superior jurisdiction, we are bound to follow its rule rather than that of the Ninth Circuit. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) As we have explained, under our Supreme Court's rule, the trial court acted within its jurisdiction in denying Cortez's untimely request to represent himself.

did not object to these requests, and in some instances acknowledged that some documents remained outstanding. (*Id.* at p. 515.) At the next hearing, the trial court terminated the defendant's self-representation without prior warning, telling the defendant that "everything you've done is dilatory" and that "all you're doing is stalling." (*Id.* at p. 516.) The Supreme Court reversed the defendant's conviction on the ground that the trial court had erred by revoking his self-representation. (*Id.* at pp. 520-521.) The Court reasoned that "although the [trial] court said defendant had been dilatory, the record does not contain factual support for this finding." (*Id.* at p. 519.) The Court stated further that "[t]erminating a defendant's self-representation status should be considered a last resort, not a first impulse." (*Id.* at p. 520.)

The circumstances of this case were very different from those in *Becerra*. In *Becerra*, unlike in this case, the defendant had no history of disrupting the court prior to the revocation of his self-representation. Next, the record showed that the defendant in *Becerra* had been preparing in good faith to represent himself for months at the time of the revocation. Finally, in *Becerra*, both the request for self-representation and its subsequent revocation came months before trial. Here, the defendant had requested to represent himself once before, then abandoned the representation within one month because it was "way too difficult." He made his second request the day before jury selection started, after protesting repeatedly that he did not want the trial to begin. Although the court's decision to terminate his self-representation was abrupt, it was well supported, and was not an unconsidered "first impulse." (*Becerra, supra*, 63 Cal.4th at p. 520.)

Cortez also contends that the trial court abused its discretion in denying his *Faretta* motion because his pro. per. status did not contribute to his ability to disrupt the court. He cites *People v. Butler* (2009) 47 Cal.4th 814, in which the trial court revoked the defendant's self-representation after he was found with weapons in his jail cell on numerous occasions, including once when he concealed a weapon in his rectum shortly before being transported to court. (*Id.* at p. 826.) Our Supreme Court overturned the conviction on the ground that although "defendant was an obvious security risk, and

safety precautions were justified both in the jail and the courtroom," "there was no showing that his pro. per. status increased the risk in any way." (*Ibid.*; accord, *People v. Carson* (2005) 35 Cal.4th 1, 11–12.) Cortez cites no case applying this standard to a defendant's in-court disruptive conduct, for good reason: A defendant who serves as his own lawyer necessarily has greater opportunity to disrupt the proceedings than a defendant who is represented by counsel. When a defendant speaks for himself, he has far more opportunities to refuse to respond to the court's questions, to give nonresponsive answers, and to raise irrelevant arguments, all of which Cortez did in this case. Thus, almost by definition, pro. per. status increases the risk of disruption by a defendant who has already engaged in disruptive behavior in court. (See *People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1515-1516 [requiring a nexus between the defendant's misconduct and his pro. per. status for revocation of self-representation for out-of-court conduct, but not for in-court conduct].)

Finally, Cortez argues that the trial court erred by failing to consider lesser sanctions than denial of his self-representation. He cites *People v. Doss* (2014) 230 Cal.App.4th 46, 57, another case in which the trial court revoked the defendant's self-representation because of his out-of-court conduct. The Court of Appeal overturned the conviction, noting that "[a]lmost all the out-of-court misconduct related to [the defendant's] in propria persona status involved his in propria persona telephone privileges, but the court never considered the possibility of revoking or limiting only those privileges." (*Ibid.*) It is difficult to imagine crafting lesser sanctions that would adequately handle a defendant's in-court disruptions. Cortez suggests that the trial court could have simply ignored his continued requests for a continuance, but that would not have prevented Cortez from continuing to interrupt the proceedings and refuse to cooperate with the administration of the trial. The trial court did not err by failing to consider alternative sanctions.

The trial court has discretion to deny or revoke a defendant's self-representation, and its decision " 'will not be disturbed in the absence of a strong showing of clear abuse.' " (*Welch*, *supra*, 20 Cal.4th at p. 735.) We see no such abuse in this case.

IV. *Proceeding Without Presence Of Defendant*

For approximately 30 minutes on the second day of trial testimony, the court allowed the case to proceed in Cortez's absence. Cortez contends that this was error because there was no adequate showing that his absence was due to his deliberate refusal to come to court. We agree, but we hold that the error was harmless.

As is explained in more detail above (see Discussion part III, *ante*), on the day before testimony in the case began, Cortez did not appear in court on time. The delay was initially the fault of jail officials, who did not have the wheelchair needed to bring Cortez to court. Cortez compounded this delay, however, by refusing to be transported in the first wheelchair that was provided, or to travel in the bus that transported inmates from jail to court. He claimed that he could not fit in the wheelchair or on the bus. When he finally arrived in court, the trial court explained to him that if he again refused to come to court, the trial would proceed without him.

Two days later, Cortez again was not present in court on time for proceedings to begin at 10:20 a.m. At 11:10 a.m., the court stated as follows: "The defendant has refused to come out this morning. Our deputy has been on the phone all morning. Whether he is coming out or not this far, it is a refusal. The court would proceed with trial. If he chooses to attend his proceedings again—he clearly refused to do so this morning." The trial then proceeded with testimony from Aurelia's mother. At 11:45 a.m., the witness stepped down, and Cortez entered the courtroom. The court then informed the jury that there had been a problem with the transportation system, admonished the jury not to consider Cortez's absence from court, and proceeded with testimony from the next witness.

In a noncapital case, the court has discretion to allow the trial to continue when "the defendant is voluntarily absent." (§ 1043, subd. (b)(2).) The court's factual finding that the defendant was voluntarily absent is reviewed for substantial evidence. (*People v. Concepcion* (2008) 45 Cal.4th 77, 84.) "Before it can make a finding that a defendant's absence is knowing and voluntary, a trial court must make reasonable inquiry and have 'sufficient facts before it.' [Citation.] The defendant must be given a 'full opportunity

to explain his absence.' [Citation.] The court cannot 'look solely at the facts initially before the court' but must base its determination 'upon the totality of the facts; not just a portion of them.' " (*People v. Disandro* (2010) 186 Cal.App.4th 593, 602.)

We are aware of no justification for the trial court's use of mere hearsay to conclude that Cortez was absent voluntarily. In *United States v. Watkins* (7th Cir. 1993) 983 F.2d 1413, the Seventh Circuit held that the trial court erred when it relied on " 'third-degree hearsay' " to conclude that the defendant in that case had voluntarily waived his right to be present at trial. (*Id.* at p. 1420.) Our Supreme Court reached a similar conclusion in *People v. Hines* (1997) 15 Cal.4th 997, 1040, when the trial court there relied on hearsay to find that the defendant was malingering when he failed to appear at a court proceeding. (*Ibid.*) Thus, we agree with Cortez that there was no substantial evidence to support the trial court's conclusion that Cortez was absent from the trial voluntarily.

Because "[a] defendant has the right, under the Sixth Amendment of the federal Constitution, to be present at trial during the taking of evidence," the continuation of the trial in Cortez's absence implicates his constitutional rights. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1209 (*Jackson*).) In such circumstances, we review for prejudice under the *Chapman* standard, under which reversal is required unless the error was harmless beyond a reasonable doubt. (*People v. Davis* (2005) 36 Cal.4th 510, 532 (*Davis*).) Even under this strict standard, however, we hold that the court's error was harmless. First, the trial court was careful not to blame Cortez for his absence during testimony, telling the jury that he was missing due to an issue with the court transportation system. (See *People v. Mendoza* (2016) 62 Cal.4th 856, 903 [proper admonition of jury supported finding of harmless error].)

Next, Cortez was not in a position to help with cross-examination of Aurelia's mother. Often, a defendant may suffer prejudice in his absence from the courtroom during testimony because he cannot assist his attorneys with cross-examining a witness. (See, e.g., *Jackson*, *supra*, 13 Cal.4th at pp. 1211-1212; *People v. Cunningham* (2015) 61 Cal.4th 609, 635, abrogated on other grounds as stated in *McGee v. Kirkland* (2009)

726 F.Supp2d 1073, 1080.) Cortez missed only 30 minutes of testimony from Aurelia's mother. Although this testimony provided relevant information about Aurelia's condition immediately after she left Samayoa's house and in the days that followed, Aurelia's mother did not testify about Cortez's conduct, nor about anything that Cortez had himself witnessed.

Furthermore, Cortez's attorney had ample opportunity to tell Cortez about what he had missed. (See *Davis*, *supra*, 36 Cal.4th at p. 533 [no prejudice in part because attorneys had opportunity to consult with defendant regarding what he missed]). Cortez argues that he suffered prejudice because if he had been present for Aurelia's mother's testimony, he might have decided not to testify on his own behalf, or might have changed his testimony. This is implausible in light of the testimony Cortez witnessed, and his subsequent conduct. Cortez heard three witnesses—Destiny, Aurelia, and his friend Samayoa—testify that he had been present with Destiny and Aurelia at Samayoa's house. Yet Cortez elected to testify that he had never met Destiny or Aurelia. There is no reason to believe that witnessing Aurelia's mother testify in person, as opposed to hearing the substance of her testimony from his attorney, would have caused Cortez to change his decision regarding his own testimony. Nor did Cortez have a right to change the substance of his testimony—essentially, to have an opportunity to commit perjury more effectively—in order to take into account the testimony of Aurelia's mother.

V. *Denial Of Motions For Continuances*

Cortez contends that the trial court abused its discretion by denying two motions for continuances just before trial was to begin. We find no merit in Cortez's argument.

Cortez was initially represented by the public defender's office. After Cortez elected to represent himself in October 2014, then changed his mind and requested the reappointment of counsel one month later, the public defender's office declared a conflict and withdrew from representation. New counsel, who represented Cortez at trial, was appointed in January 2015. This case was transferred to the trial court in February 2015, more than 15 months after the incidents at issue. At the first pretrial hearing, the court informed both parties that the case needed to come to trial quickly. At the next hearing,

on March 19, both sides agreed to a trial date of April 14. On April 14, Cortez claimed that he was not aware that his trial was about to begin, had not consulted with his attorney, and was not ready for trial. His attorney then informed the court that "because of my client's feelings about what is going on, it is difficult for me to continue saying I am ready," and requested a continuance. The court denied the continuance, finding that Cortez's personal preference not to begin trial was insufficient to justify delaying the trial. The next day, as is explained in more detail above (see Discussion part III, *ante*), Cortez made a motion to represent himself at trial. The court granted the motion but informed Cortez that it would not grant him a continuance to prepare. Cortez requested a continuance, stating that he needed time to prepare, but the court denied the motion and revoked Cortez's self-represented status.

The trial court may order a continuance in a criminal case only for good cause, and the court has " 'broad discretion to determine whether good cause exists.' " (*People v. Riggs* (2008) 44 Cal.4th 248, 296.) Cortez notes correctly that there are limits to that discretion, however. In particular, the court's " 'discretion "may not be exercised so as to deprive the defendant or his attorney of a reasonable opportunity to prepare." ' " (*Ibid.*) In addition, " 'a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.' " (*People v. Courts* (1985) 37 Cal.3d 784, 791.)

By this standard, the trial court acted within its discretion in denying Cortez's motion for continuances. By the time trial started, nearly 18 months had passed since Cortez was arrested. The court had explained to both sides that it would grant no more continuances, and both sides agreed in March that trial would begin on April 14. On that date, Cortez's attorney was prepared for trial. It was only when Cortez began proclaiming that he was not ready for trial that his attorney requested the continuance. The court concluded reasonably that Cortez did not need additional time to consult with his attorney, but rather was attempting to disrupt and delay the trial. Similarly, as is explained in more detail above (see Discussion part III, *ante*) when the trial court initially granted Cortez's motion to represent himself, the court had good reason to be suspicious

that Cortez was engaging in a delaying tactic and was not sincerely interested in representing himself.

VI. *Sentencing*

Cortez contends that the trial court made three errors in imposing his sentence, and we agree.

First, Cortez contends that the trial court erred by imposing a five-year enhancement pursuant to section 667, subdivision (a) with respect to count 5. Cortez's prior conviction for a serious felony required the court to impose enhancements pursuant to section 667, subdivision (a) in this case. When a defendant is convicted of multiple offenses to which indeterminate sentencing applies, the section 667, subdivision (a) enhancement must be applied for each conviction. (*People v. Williams* (2004) 34 Cal.4th 397, 403-404.) But when a defendant is convicted of multiple offenses subject to determinate sentencing, section 1170.1 limits the court to imposing only one five-year enhancement. (*People v. Sasser* (2015) 61 Cal.4th 1, 15-16.) Here, the trial court correctly applied a five-year enhancement to each of count 1 and count 2, the offenses subject to indeterminate sentencing. But the court also imposed a separate five-year enhancement for each of counts 4 and 5, to which determinate sentencing applied. Under *Sasser*, the five-year enhancement for count 5 was unauthorized.

Next, Cortez contends that the trial court erred by imposing a three-year age difference enhancement to his sentence for count 5. In count 5, the trial court imposed a base sentence of two years, one-third the midterm, for furnishing methamphetamine to a minor, in violation of Health and Safety Code section 11380, subdivision (a). Because there was at least a four-year age difference between Cortez and Destiny, the court had discretion to impose an enhancement of one, two, or three years, pursuant to Health and Safety Code section 11380.1, subdivision (a)(3). The court selected the high term and imposed a three-year enhancement. Cortez contends that this was improper, and we agree. Because the court imposed a subordinate sentence for count 5, the age-difference enhancement was a subordinate enhancement, and accordingly, the court was required to impose a sentence of only one-third the statutory length specified for the enhancement.

(See *People v. Hill* (2004) 119 Cal.App.4th 85, 91; § 1170.1, subd. (a).) Thus, the correct sentence for this enhancement was one-third the upper term of three years, or one year.

Finally, Cortez contends that the trial court lacked jurisdiction to impose and stay punishment for one prison prior (§ 667.5, subd. (b)) when the prosecutor withdrew the allegation of his prison priors. We agree. After the jury found true the allegation that Cortez had suffered one previous serious felony conviction (§ 667, subd. (a)(1)), the trial court treated that same offense as if it had been proved as a prison prior as well. The court then stated that sentence for the prison prior enhancement was stayed pursuant to section 654, and that the court would "strike it for sentencing purposes only." This was error. The court may not impose a sentence enhancement unless the enhancement is "admitted by the defendant in open court or found to be true by the trier of fact." (§ 1170.1, subd. (e).) In order for a prison-prior enhancement to be appropriate, the prosecution needed to establish not only that Cortez had been convicted, but that he had not remained free from custody for at least five years. (See § 667.5, subd. (b).) Here, Cortez did not admit the prison priors, and the prosecutor withdrew them before the jury could find them true. Nor can the trial court's imposition of a sentence for the prison prior be taken as an implied finding by the court that the prior had been proved. (*People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1440.) Because the court made no finding regarding the prison prior, it could not impose sentence for it. (*Ibid.*)

On remand, the trial court shall amend the abstract of judgment to remove the five-year enhancement for count 5, to reduce the age-difference enhancement for count 5 to one year, and to remove the enhancement for the prison prior.

## DISPOSITION

Cortez's convictions for forcible rape (count 1) and forcible oral copulation of a minor (count 2) are reversed. Furthermore, Cortez's sentence is amended as described in Discussion part VI, *ante*. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.