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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JEROME BURNS,

Defendant and Appellant.

A132942

**(Alameda County
Super. Ct. No. H-49561)**

Jerome Burns (appellant) appeals from a jury conviction of unlawful sexual intercourse by a person age 21 or older with a minor under age 16 (Pen. Code, § 261.5, subd. (d))¹ (count 1); forcible rape (§ 261, subd. (a)(2)) (count 2); oral copulation of a person under age 16 (§ 288a, subd. (b)(2)) (counts 4 & 5); using a minor for sex acts (§ 311.4, subd. (a)) (count 6); procuring a child to engage in a lewd act (§ 266j) (counts 7 & 8); pandering by procuring (§ 266i, subd. (a)(1)) (count 10); and pimping (§ 266h, subd. (a)) (count 11).² The court found true a prior strike conviction (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). It also found appellant was in violation of his probation in an unrelated case and revoked probation. Appellant was sentenced to 32 years four months in state prison.

¹ All undesignated section references are to the Penal Code.

² At the close of evidence, on the prosecution's motion, the court dismissed count 3, which charged forcible rape. The jury found appellant not guilty on count 9, which charged human trafficking of a minor (§ 236.1, subd. (c)).

On appeal, appellant contends his defense attorneys were ineffective, the court failed to advise him of his right to discharge his retained counsel, the court erred in instructing the jury with CALCRIM No. 318, the court's prior serious felony conviction finding is unsupported by substantial evidence, the court failed to exercise informed discretion in setting the amount of his restitution fund fines, and the court erred in imposing a full, consecutive sentence for his violation of probation. We conclude the imposition of a full, consecutive sentence on the probation violation was erroneous and remand the matter for resentencing.

BACKGROUND

The Victim's Testimony

At the end of 2009, the 14-year-old victim ran away from her Modesto home and became a prostitute. One evening in December, while she was working as a prostitute on Tennyson Street in Hayward, appellant pulled up in his car and called her over. The victim approached and got into appellant's car. When he asked her age, she first said she was 19 and then admitted she was 14. He responded he "c[ould] work with that." Appellant drove to a three-story parking structure where he and the victim had consensual sex inside the car. Appellant did not give her any money.

Thereafter, appellant took the victim to a Hayward hotel room where they stayed for "more than a couple of days." Before staying at the hotel with appellant, the victim had been living "everywhere"; she had no place else to go. She also was worried about the police because she "had a warrant."

While at the hotel, appellant told the victim to wear lingerie he kept in a suitcase and to assume sexually provocative poses; he then took pictures of her with his cell phone camera. Numerous such photos were shown to the jury and admitted into evidence. One photo depicted the victim's tongue on appellant's penis. After taking the photos, appellant posted them on the "Myredbook" Web site, advertising her services under the name "Coco," at a rate of \$180. The ad included appellant's cell phone number. After the ad was placed appellant's, cell phone rang more frequently.

The first man who came to the hotel room was Indian. By prearrangement, when the man entered the room, appellant left and waited in the hallway. The victim performed oral sex on the man; he gave her \$70 before leaving the hotel room. When appellant returned to the room, the victim gave him the money. Thereafter, appellant's friend, a short man with glasses, came to the hotel room. The victim performed oral sex on him in the bathroom. There was no discussion about payment.

Twice inside the hotel room, the victim had sex with appellant against her will. On one occasion, she awoke to find appellant on top of her with his penis in her vagina. When she told him to stop, he ignored her. On another occasion, appellant grabbed her hair and forced her to perform oral sex on him. When she told him to stop, he ignored her.

During the victim's stay with appellant, he threatened her, causing her to be afraid. She stayed with him because she was afraid of him, was afraid to leave, was afraid of the police, and had nowhere else to go.

Eventually, while appellant was asleep, the victim used his cell phone to call her older sister, T.M. The victim told T.M. she was afraid; T.M. agreed to come and get her. After appellant and the victim argued, appellant drove her to a 7-Eleven where she was picked up by T.M.'s boyfriend. On the way to the 7-Eleven, appellant told the victim he was going to call the police and take her to the police. After T.M.'s boyfriend drove the victim to T.M.'s home, T.M. called the police. The victim went to the police station, where she gave a videotaped interview with two police officers. She then went to the hospital for an examination.

On cross-examination, the victim testified she ran away from home after her mother punched her in the face during an argument about her having been "kicked out" of school for fighting. She then went to San Jose with her friend Michael, a pimp. Michael told her that, in order to go to San Jose, she had to perform oral sex on the driver; she complied. While staying with Michael in San Jose, he told her she had to prostitute; thereafter, she performed sexual acts on approximately 20 men. Michael also called a chat line and told the victim she had to talk on it. She went to Salinas with

Michael and a man she met on the chat line, who was also a pimp. In Salinas, the victim and the other pimp's "girl" prostituted together. Michael had a gun that he would show the victim and use to strike her and sexually assault her. He also spit on her. The victim was afraid of Michael. After having known Michael for "weeks," he took her to Tennyson Street, where she met appellant. The first night the victim was with appellant, she called Michael several times but he did not answer.

T.M.'s Testimony

T.M. testified that when the victim called in December 2009 she was crying, "kind of hysterical," and seemed afraid. They agreed to meet at the 7-Eleven; T.M. overheard a male in the background tell the victim he would take her there.

Velasquez's Testimony

Hayward Police Inspector Greg Velasquez was assigned to investigate appellant's alleged sexual assault against the victim. From the motel room, he obtained a suitcase containing "very provocative" women's clothing. A search of appellant's cell phone depicted photographs of the victim. On December 10, 2009, Velasquez conducted a videotaped interview of the victim. During the interview, her physical appearance and demeanor were consistent with her stated age of 14. The victim said she met appellant on Tennyson Road and told him her real age; he said he could work with that or that would be no problem. Appellant knew she had a warrant and threatened to call the police; she had no place else to go. Appellant placed sex ads on "SF Redbook" and "Craigslist." Appellant had photographs of other women on his cell phone and laptop and told the victim they had worked for him as prostitutes before she arrived. The victim told Velasquez the lingerie in the suitcase belonged to those other girls. She described to Velasquez the incidents that occurred with the Indian man and appellant's friend. She also said appellant had grabbed her hair, forced her to orally copulate him, and told her to "make Daddy happy." She also woke up to find appellant pinning her down, and his penis was inside her vagina. The victim said appellant did not use a condom during any of these acts. She also described an occasion where she got drunk with appellant and

later woke up to find him and his friend in bed with her. Thereafter, she experienced vaginal soreness.

Sexual Assault Examination

On December 10, 2009, a sexual assault examination was performed on the victim. The vaginal examination findings included tenderness and abrasions in the posterior fourchette. In addition, the victim had mild tenderness, abrasions, and faded bruising on her lower back.

The Defense

The defense played the entire 90-minute videotaped police interview of the victim.³ The defense put on no other evidence. The victim's videotaped statements are summarized as follows:

On the first night, when appellant took the victim to the hotel, he "seemed like a pretty cool guy. So [the victim] was like yeah I will stay with him." They did not have sex that night. The next day, a Thursday, he bought her food, then took sexually provocative pictures of her. When she objected, he said she had to pose for the pictures or she "would be back on the streets." When she tried to leave, he would tell her, "No." Appellant was "in and out all day." He went to his sister's house to post the pictures of the victim on the internet. The internet ad for the victim gave her name as Coco, a name Michael had given her.

On Friday, appellant went to work. He returned that night with his friend, the Indian man, who gave the victim \$70 in exchange for orally copulating him, while appellant waited outside. The victim said the Indian man was "the only guy that I had ever done anything with besides [appellant]."

On Saturday morning, appellant told the victim to get up and grease his head. When she said, "No," he told her to leave. She replied, "No. I won't leave." She then greased his head and agreed to take off his shoes and socks. Appellant then left for work.

³ The jury was provided an 82-page transcript of the interview, to be used as an aid while watching the videotape. Both the videotape and the transcript were admitted into evidence.

When he returned later that night, he grabbed her hair, told her to “make daddy happy,” and forced her head onto his penis for about five minutes. When she refused to cooperate, he became angry and told her to lay on the bed; she fell asleep. When she awoke he was lying on top of her with her arms pinned down and his penis in her vagina. This occurred for five or 10 minutes. When she told him to get off her, he refused. She believed that if she screamed he would hit her. He did not use a condom and ejaculated inside her. When she told him she would call the police, appellant responded he did not care and said, “If I go to jail, you go to jail with me.” Appellant left in a car; the victim was so upset she “got drunk” with alcohol that was in the room. The victim said appellant and Michael knew each other before appellant took her to the hotel; Michael had bought a car for him with the money she had made from prostituting.

The next morning, Sunday, when the victim woke up, she was naked on the bed in between appellant and a Black friend of his. She “freaked out,” did not know what to do, and went back to sleep. When she woke up, appellant and his friend were gone. She did not know whether they had had sex with her, but she “kind of hurt down there.” The victim did not leave the hotel that day because she had nowhere to go. She believed appellant would have called the police if he returned and she was not there. When appellant returned with his friend, appellant told her to go into the bathroom. Inside the bathroom, the friend, whose pants were down, told the victim to orally copulate him; she complied. After two minutes, he told her to stop. That night, appellant tried to take more pictures of her, but she refused. The victim was “in a good mood because he accepted that.”

The victim could not remember what happened next. She said appellant sometimes put pills in her drinks and tried to make her drink them. He also tried to make her sniff cocaine or methamphetamine from a key; when she tried to do so, her nose bled. After such incidents, her vagina hurt; she thought there may have been times when he had sex with her that she did not remember.

On Monday morning, appellant went to work at 8:30 a.m. When he returned at 7:00 p.m., he pinned the victim down on the bed and forced his penis into her mouth.

This lasted about five to 10 minutes. She believed he would have hit her if she had refused.

On Tuesday morning, appellant went to work and left the victim alone in the hotel room all day. He returned around 10:00 p.m. and “nothing happened” that night.

On Wednesday, appellant went to work. When he returned around 8:30 p.m., he let the victim use his computer and went to sleep. They did not have sex. While appellant slept, the victim stayed up all night “trying to get out of there” by talking “on the computer” to the sister of “[T.M.]’s brother’s girlfriend.” In an effort to get away from appellant, the victim also used his phone to text message a man in Oakland she had met online. When appellant woke up, he read the text messages on his phone. Although he initially said she could leave, when he learned the man was not the victim’s brother, he said he would not take her anywhere. He told her, she could either stay at the hotel or call the police. When the victim started screaming and crying, appellant told her to shut up or get out. She then asked for his phone, which he gave her, and she called T.M. Appellant dropped her off at the 7-Eleven at 6:00 a.m.

The victim said none of the sex she had with appellant was consensual. She said she did not eat a lot while she was at the hotel with appellant. She believed he was a pimp because he had a bunch of women’s clothes and he said one of his “girls” was in jail. She also said that all the girls whose pictures were on his computer were “his,” and one was 17 years old. She identified photos of marijuana inside the hotel room and photos of herself and appellant. She believed appellant was selling drugs while they were together.

The parties stipulated that appellant was at least 21 years old at the time of the charged offenses and that he and the victim were never married.

Closing Arguments

In closing argument, the prosecutor argued that, in the video, the victim looked and sounded like an unsophisticated 14-year-old girl. He also argued the victim’s trial testimony was essentially consistent with her statements on the video, except, in the

video, she said she and appellant never had consensual sex; and, at trial, she testified they had consensual sex when appellant first picked her up.

Defense counsel's closing argument asserted numerous discrepancies between the victim's trial testimony and her statements during the videotaped police interview. Defense counsel also attempted to paint a positive picture of appellant, arguing that, in the video, the victim said appellant gave her a place to stay, bought her food, had consensual sex with her after she told him she was 19 years old, and drove her to the 7-Eleven after she made it clear she wanted to leave. Defense counsel also argued based on the video, the victim, not appellant, placed the online ads, and at most, only two people came to the hotel where they drank, partied, and had consensual sex with appellant and the victim.

DISCUSSION

I. There Was No Ineffective Assistance of Counsel

Appellant contends his defense counsel⁴ provided ineffective assistance by playing the entire 90-minute videotaped police interview of the victim, which elicited "tremendously damaging" evidence against him. He argues, even if defense counsel had a tactical reason for showing the video to the jury, they were ineffective in failing to redact it to exclude "at least" the victim's statements about his additional sex crimes against her and her allegations he was a drug dealer and a pimp. Appellant also contends defense counsel provided ineffective assistance during cross-examination of the victim by eliciting unfavorable information from her about him and failing to impeach her credibility.

To establish ineffective assistance of counsel, a defendant must prove that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's failings, the defendant would have received a more favorable result. (*Strickland v.*

⁴ Appellant was simultaneously represented by two retained attorneys at trial.

Washington (1984) 466 U.S. 668, 687-688, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Appellant has the burden of establishing that his counsel was ineffective. (*Strickland*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) “When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) We may reject a defendant’s ineffective assistance of counsel claim for failure to establish prejudice, without the need to determine whether counsel’s representation fell below an objective standard of reasonableness. (*People v. Boyette* (2002) 29 Cal.4th 381, 430-431.)

A. *The Videotape*

Defense counsel could reasonably have sought to have portions of the videotape played for the jury to highlight the discrepancies between the victim’s statements to the police and her testimony at trial, to paint a positive picture of appellant, and to create the inference that the victim, not appellant, placed the online ads. In addition, defense counsel could reasonably have believed that even extremely negative statements regarding appellant made by the victim in the videotape, but not repeated in her testimony, undermined the veracity of that testimony.⁵

In any event, we conclude appellant has failed to demonstrate that defense counsel’s conduct was prejudicial and, therefore, reject his incompetence of counsel claim. The evidence of appellant’s guilt was overwhelming. Velasquez testified that, during his interview with the victim, her physical appearance and demeanor were consistent with her stated age of 14. Based on this testimony alone, the jury could reasonably reject the defense’s suggestion that appellant and his two friends had sex with her believing she was 19 years old. The victim’s trial testimony and videotaped

⁵ Examples of such testimony include statements that appellant sometimes put drugs in her drinks and tried to make her ingest cocaine or methamphetamine; she believed he sold drugs while they were together; and, after being drugged her vagina hurt, therefore he may have had sex with her at times she could not remember.

statements were consistent and supported the charges of forcible rape and oral copulation. In addition, the prosecution presented numerous photographs taken from appellant's cell phone showing the victim in sexually provocative poses, including one depicting her tongue on appellant penis, and similar images of the victim in the online ad, which advertised her services and gave appellant's cell phone number. A suitcase containing very provocative women's clothing also was recovered from the hotel room. This evidence amply supports the remaining procuring, pandering and pimping charges against appellant.

B. Cross-examination of the Victim

Appellant contends defense counsel was incompetent in eliciting, during cross-examination of the victim, the following damaging information about which the victim had already testified: When appellant was photographing her she told him she did not want her photographs on the internet; she performed a sex act on his friend in the hotel room bathroom; she laughed while telling the police about the Indian man; and one of the two times she had vaginal sex with appellant was not consensual. Appellant also argues defense counsel should have more vigorously questioned the victim about her unwillingness to leave the hotel, but instead elicited insignificant details such as the street on which she was walking when she first met him, whether he forced her to perform oral sex on him on the first night, and whether she could identify photos of the hotel room and lobby.

Appellant also contends defense counsel was incompetent in not impeaching the victim's credibility by asking her about her statements to police that she greased appellant's hair and took off his shoes and socks because she did not want to leave or "get kicked out" of the hotel, and asking whether she told police that appellant was off work one day and went to work four days. He also asserts defense counsel could have asked the victim about the contradiction between her trial testimony that she and appellant had consensual sex before they first went to the hotel and her statement to police that they went straight to the hotel. Appellant also argues defense counsel could have impeached her with her preliminary hearing testimony that, after the first day,

appellant never threatened to “kick her out” of the hotel, and that, at some point during her stay with appellant, he drove her to meet Michael, but she returned to appellant’s car when Michael did not show up. Appellant asserts such impeachment “might have actually affected the outcome of the case in a positive way.”

A trial counsel’s manner of cross-examination is a matter within his or her discretion and rarely implicates ineffective assistance of counsel. (*People v. McDermott* (2002) 28 Cal.4th 946, 993.) Here, defense counsel made the tactical choice to impeach the victim’s credibility primarily by playing the videotape of her statement to the police. In addition, defense counsel attacked the victim’s credibility in closing argument by focusing on the inconsistencies between her trial testimony and her statements to the police. Defense counsel’s tactical choices regarding cross-examination of the victim were not deficient. Even assuming such deficiency were shown, given the strength of the prosecution’s case, we cannot conclude there is a reasonable probability that, but for counsel’s failings, appellant would have received a more favorable result.

II. *Appellant Did Not Clearly Indicate a Request to Discharge Counsel*

Appellant next contends the court violated his Sixth Amendment right to counsel by failing to advise him of his right to discharge his retained counsel. We reject this claim of error because appellant made no clear indication of his desire to discharge his current counsel.

Appellant was represented by retained counsel J. Robert Mortland and George M. Derieg. On June 7, 2011, after the verdicts were returned and the court found true his prior conviction allegation, appellant asked if he would be permitted to speak at sentencing about how he felt the trial went, because he wanted “all that to be on the record.” The court responded it was “more than willing to let [appellant] say whatever you need to say, Sir.” Sentencing was set for July 18.

On July 18, 2011, the date set for sentencing, appellant appeared with Mortland. Appellant said he “wanted to have things brought to [the court’s] attention” and then stated the following: “Everything that’s going on now is violating my rights, man, with my lawyer and this courtroom.” Appellant said he did not know what was going on and

his lawyers had told him “nothing.” He said there was a “smoke screen on me with me and my lawyer that’s disrespectful.” Appellant also said he was afraid evidence not presented at trial was going to be thrown away and he wanted to know how to preserve it. He said he did not trust his counsel to advise him when to file his appeal and counsel had not come to see him to talk about his appeal and had not explained the appeal process to him. When the court asked appellant, “What are you asking me to do, Sir?,” appellant said he wanted his counsel to come to see him in jail and explain the appeal process to him. When the court asked appellant if he wanted a continuance of the sentencing hearing, appellant responded, “Yes.” The court also said, “a lot of what you told me is you’re not happy with your lawyers” and stated it was inclined to continue the sentencing if that’s what appellant wanted; appellant responded affirmatively. When the court asked appellant if a one-month continuance would be enough time, appellant asked if he could question his attorney; a discussion was then held off the record. Thereafter, Mortland told the court appellant adamantly wanted the sentencing in two weeks. Mortland also stated, “I will make sure we do visit him and get an appeal started in his case.”

Sentencing was continued to August 2.

At the August 2, 2011 sentencing hearing, the court noted it had received a letter from appellant requesting an additional continuance for sentencing; the request was denied.⁶ The court noted that appellant had been frustrated throughout the trial process and stated it was giving him “an opportunity to tell me whatever you need to tell me if you need to tell me anything at all.” Appellant began by saying, “I said everything I want to say in my letter to you.” He then said this was his first trial experience and it was unfair to him. He said “a lot could have been done on this case on [his] lawyer’s part,” but appellant did not hold anyone responsible. Although he had been angry at his lawyers, he was no longer angry. He said he did not trust that his lawyers would timely

⁶ In his July 20, 2011 letter, appellant maintained he was convicted because his lawyers refused to diligently represent him; he had not heard from his lawyers since July 18 and his appeal had not yet been filed; he was repeatedly told by his lawyers that he could not win at trial despite evidence to the contrary; and he did not trust his lawyers or what they said would be done.

file his appeal paperwork, but reiterated he was not angry at anyone and was going to get his “justice” in “round two.” When the court asked if appellant wanted to put anything else on the record, appellant said, “No.” The court commented that the problem with appellant’s case was that the prosecution had strong evidence and said, “It’s always easy after a case is done to Monday morning quarterback and say this could have happened.” The court proceeded to sentence appellant. Thereafter, it noted defense counsel had that day filed a notice of appeal in the case.

“While a defendant may discharge appointed counsel only if that lawyer is rendering inadequate representation or there exists an irreconcilable conflict between counsel and client [citation], he or she may discharge retained counsel for any reason. [Citation.] The right to discharge retained counsel is not, however, absolute. The trial court may deny a request to discharge retained counsel ‘if discharge will result in “significant prejudice” to the defendant [citation], or if it is not timely, i.e., if it will result in “disruption of the orderly processes of justice” [citations].’ [Citation.]” (*People v. Keshishian* (2008) 162 Cal.App.4th 425, 428.) “[A] trial court’s duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises ‘when the defendant in some manner moves to discharge his current counsel. . . .’ [Citation.]” (*People v. Lara* (2001) 86 Cal.App.4th 139, 157.) The defendant is “not required to make a proper and formal legal motion, ‘but at least some clear indication . . . that he wants a substitute attorney. . . .’ [Citation.]” (*Ibid.*) “Mere grumbling” about counsel’s failures does not constitute a request to discharge counsel. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.)

Appellant appears to argue his two oral statements and his letter to the court asserting he did not trust his attorneys and they were dishonest, did not respect him, did not keep him informed, played games with him, were unqualified, and did no more than get him convicted, sufficiently indicated he wanted to discharge his current counsel.⁷

⁷ Appellant’s assertion he “apparently did not know he had the right to discharge his attorneys” is belied by the record before us. On May 17, 2011, prior to trial, the court noted appellant had previously been represented by the public defender’s office, had filed

At the July 18, 2011 hearing, appellant expressed dissatisfaction with his counsel, but when the court asked him what he wanted the court to do, he indicated only that he wanted the sentencing hearing continued and asked to speak to counsel. Following an unreported discussion, Moreland stated appellant wanted a two-week continuance and counsel would make sure to visit him and begin the appeal process. The court then continued the sentencing hearing pursuant to appellant's request. At no time during the July 18 hearing did appellant clearly indicate a desire to discharge his current counsel.

Similarly, appellant expressed dissatisfaction with his counsel in his July 20, 2011 letter to the court and again at the August 2 sentencing hearing, but he made very clear that although he had been angry at his lawyers, he was no longer angry. Appellant said he did not trust that his lawyers would timely file his appeal paperwork, but the court confirmed that defense counsel had filed appellant's notice of appeal. Moreover, when the court asked if appellant wanted to put anything else on the record, appellant said, "No." Viewed in context, appellant's articulations of his apparent unhappiness with his counsel were more akin to "mere grumbling" than a clear indication of his desire to discharge counsel. No error is demonstrated.

III. *CALCRIM No. 318*

Next, appellant contends the court erroneously instructed the jury with *CALCRIM No. 318* because the instruction "endorsed the veracity of [the victim's] pretrial statement, and implicitly her testimony," reducing the prosecution's burden of proof. He contends the instruction violated his rights to due process and a fair trial.

We reject the People's assertion that appellant forfeited this contention by failing to object to the instruction in the trial court. We may review any instruction given even though no objection was made in the trial court "if the substantial rights of the defendant were affected thereby." (§ 1259; *People v. Hudson* (2009) 175 Cal.App.4th 1025, 1028

an in propria persona motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, and was currently represented by retained counsel. When asked by the court if the previously filed *Marsden* motion was withdrawn, appellant and Derieg answered affirmatively. The record contains the January 2011 form *Marsden* motion filed by appellant seeking to dismiss and/or relieve counsel.

(*Hudson*.) Appellant’s failure to object to the instruction below does not preclude our review for constitutional error. We, thus, turn to the merits of his claim.

Pursuant to CALCRIM No. 318, the court instructed the jury: “You have heard evidence of statements 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.”⁸

Appellant argues CALCRIM No. 318 unambiguously informs the jury a witness’s pretrial statements are to be viewed as truthful because they were made. Claims similar to appellant’s have been rejected by other appellate courts. (See *People v. Tuggles* (2009) 179 Cal.App.4th 339, 363-366; *Hudson, supra*, 175 Cal.App.4th at pp. 1027-1029; *People v. Golde* (2008) 163 Cal.App.4th 101, 119-120; *People v. Felix* (2008) 160 Cal.App.4th 849, 859 (*Felix*.) *Hudson* reasoned, “By stating that the jury ‘may’ use the out-of-court statements, the [CALCRIM No. 318] instruction does not require the jury to credit the earlier statements even while allowing it to do so. [Citation.] Thus, we reject defendant’s argument that CALCRIM No. 318 lessens the prosecution’s standard of proof by compelling the jury to accept the out-of-court statements as true.” (*Hudson, supra*, 175 Cal.App.4th at p. 1028.)

The jury was also instructed with CALCRIM No. 220, which told the jury it could find appellant guilty only if it concluded beyond a reasonable doubt that he committed the offense in light of “all the evidence” and CALJIC No. 226, which told the jury it could accept or reject any testimony and could consider whether the witness’s prior statement was consistent or inconsistent with his or her testimony. Taken together, the instructions provide proper guidance as to how the jury may use witness testimony, and do not encourage the jury to believe it is bound to find a witness’s out-of-court statement

⁸ In its oral instructions, the court stated in relevant part, “You must decide that the witness made those statements” instead of “If you decide that the witness made those statements.” Where a discrepancy exists between the written and oral versions of jury instructions, the written instructions provided to the jury control. (*People v. Wilson* (2008) 44 Cal.4th 758, 803.)

or trial testimony true. (*Felix, supra*, 160 Cal.App.4th at p. 859.) We reject appellant’s instructional error claim.

IV. *Substantial Evidence Supports the Prior Serious Felony Conviction Finding*

Appellant contends the court’s prior serious felony conviction finding is unsupported by substantial evidence.

“The People must prove each element of an alleged sentence enhancement beyond reasonable doubt. [Citation.] . . .

“A common means of proving the fact and nature of a prior conviction is to introduce certified documents from the record of the prior court proceeding and commitment to prison, including the abstract of judgment describing the prior offense. [Citations.]

“ ‘[The] trier of fact is entitled to draw reasonable inferences from certified records offered to prove a defendant suffered a prior conviction’ [Citations.] ‘[O]fficial government records clearly describing a prior conviction presumptively establish that the conviction in fact occurred, assuming those records meet the threshold requirements of admissibility. [Citation.] Some evidence must rebut this presumption before the authenticity, accuracy, or sufficiency of the prior conviction records can be called into question.’ [Citation.]

“Thus, if the prosecutor presents, by such records, prima facie evidence of a prior conviction that satisfies the elements of the recidivist enhancement at issue, and if there is no contrary evidence, the fact finder, utilizing the official duty presumption, may determine that a qualifying conviction occurred. [Citation.] [¶] . . .

“On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained its burden of proving the elements of the sentence enhancement beyond a reasonable doubt. [Citation.]” (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065-1066.)

The amended information alleged, as a prior serious felony conviction and prior strike, that on or about December 16, 2006, appellant was convicted of second degree robbery (§ 211) in Santa Clara Superior Court.

At the bifurcated court trial on the prior conviction allegation, the prosecution relied on exhibit 14 to prove the prior conviction. Exhibit 14 contains two sets of certified documents. The first set contains documents from an unrelated 2005 Alameda Superior Court case against appellant offered by the prosecutor because appellant's name and information identifying him set out in those documents matched the identification information contained on the documents in the instant case. The second set contains an information filed on September 14, 2007, in Santa Clara Superior Court in case No. CC651919 (Santa Clara case) charging appellant with six counts, including a first degree robbery committed on or about November 20, 2006. The Santa Clara case information also includes a handwritten count 8, charging appellant with second degree robbery on November 20, 2006. The Santa Clara case documents also contain a December 11, 2007 minute order reflecting appellant's no contest plea to the count 8 second degree robbery, and a May 27, 2008 minute order reflecting appellant's grant of probation.

Defense counsel stated he reviewed exhibit 14, understood it was a certified copy and submitted. After reviewing exhibit 14, the court noted there were "certifications specifically in reference to the minute order and the information related to" the Santa Clara case and that the birthdates matched. It took judicial notice of its files and found beyond a reasonable doubt that appellant suffered the Santa Clara case prior robbery conviction, which constituted a prior strike and prior serious felony conviction. The remaining prior conviction allegations were stricken.

On appeal, appellant notes that the court minutes in the Santa Clara case reflect a second degree robbery conviction on *December 11, 2007*, not *December 16, 2006*, as alleged in the amended information in the instant case. He argues there is no reason to believe the December 16, 2006 second degree robbery alleged as a prior in the instant amended information is the same as the December 11, 2007 second degree robbery conviction in the Santa Clara case.

The probation report from the instant case reflects appellant's lengthy criminal history stemming from 1988; the offenses are listed by arrest date. The probation report contains only a single robbery—a December 16, 2006 Milpitas arrest resulting in appellant's May 27, 2008 robbery conviction and three-year prison term, which was suspended. The report also states that appellant was currently being held on a warrant on the Santa Clara case, corresponding to his December 16, 2006 arrest.

The record before us establishes that appellant suffered only one second degree robbery conviction in Santa Clara County, to wit, the Santa Clara case. As to that case, appellant was arrested on December 16, 2006; an information charging him with second degree robbery was filed on September 14, 2007; he pled no contest to second degree robbery on December 11, 2007; he was sentenced on May 27, 2008; and, at the time of the instant offense, he was being held on a warrant in the Santa Clara case. Based on this undisputed evidence, it is evident that the prior conviction allegation in the amended information in the instant case erroneously alleged the date of appellant's arrest for the Santa Clara case second degree robbery (December 16, 2006) instead of the date he pled no contest to that offense (December 11, 2007).

Appellant appears to concede the error here was clerical and could easily have been cured by the prosecutor amending the amended information to allege a different date of the Santa Clara case robbery conviction. Section 1009 authorizes amendment of an information "for any defect or insufficiency, at any stage of the proceedings, . . . unless the substantial rights of the defendant would be prejudiced thereby . . ." (See *People v. Brown* (1973) 35 Cal.App.3d 317, 322.) The express language of the statute permits a trial court to amend an information sua sponte. (§ 1009; see *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1057.)

In this case, we presume the trial court impliedly, on its own motion, amended the amended information to conform to the undisputed proof that appellant was convicted of robbery in the Santa Clara case on December 11, 2007. Thereafter, the court properly found the prosecution sustained its burden of proving the elements of the prior second degree robbery conviction beyond a reasonable doubt. At no time did appellant assert

that he did not have notice of the prior conviction in the Santa Clara case; therefore, he has failed to show he was prejudiced. No error is demonstrated.

V. The Restitution Fine Imposed Was Not an Abuse of Discretion

Appellant contends the court failed to exercise informed discretion in imposing a \$10,000 restitution fund fine under section 1202.4, subdivision (b).

At sentencing, after the court stated it would impose a \$10,000 restitution fund fine pursuant to section 1202.4, subdivision (b)(1), defense counsel objected, stating there was no showing the victim suffered any “damages that have to be repaid.” The court responded that it did not order any victim restitution; it had ordered a restitution fund fine. When appellant asked if the restitution fund fine would “follow [him] to San Quentin,” the court responded, “It will, but I’m actually cutting you a break in that area. I think it’s supposed to be . . . \$2,000 per conviction. They have some kind of formula. It should have been higher than what I ordered. That’s what the probation officer recommended, that’s why I did that.”⁹

Section 1202.4, subdivision (b) provides, in relevant part: “In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record. [¶] (1) The restitution fine shall be set at the discretion of the court and commensurate with the seriousness of the offense” Based on the version of section 1202.4 in effect at the time of sentencing, the restitution fine may not be less than \$200; and for a person convicted of a felony, the maximum restitution fine that may

⁹ In recommending a \$10,000 fine, the probation report did not provide any explanation regarding calculation of the fine or the relevant circumstances supporting the amount of the recommended fine. However, in recommending appellant be sentenced to the “maximum allowed by law,” the probation report noted that, at the time of the current offenses, appellant was on probation in Alameda and Santa Clara Counties for pimping and attempted pimping, this was not his first time pimping minor victims, and he had an extensive criminal history.

be imposed is \$10,000. (Former § 1202.4, subd. (b)(1); Stats. 2011, ch. 45, § 1, eff. July 1, 2011.)¹⁰

Subdivision (b)(2) of section 1202.4 provides: “In setting a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine pursuant to paragraph (1) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.”

Subdivision (d) of section 1202.4 provides: “In setting the amount of the fine pursuant to subdivision (b) in excess of the minimum fine pursuant to paragraph (1) of subdivision (b), the court shall consider any relevant factors, including, but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. . . . Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required.”

Within the range authorized by statute, the court has wide discretion in determining the amount of the restitution fine. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1321; *People v. Urbano* (2005) 128 Cal.App.4th 396, 406.)

Appellant argues, based on the court’s comments, it was not sufficiently familiar with the restitution fine statute to exercise informed discretion in imposing the \$10,000 fine. In particular, he asserts the court mistakenly believed that the statutory formula was \$2,000 per conviction and that a restitution fine in excess of \$10,000 could be imposed. He also asserts that the court failed to consider the “relevant factors” pursuant to subdivision (d) of section 1202.4.

Express findings by the court as to the factors bearing on the amount of the restitution fine are not required. (§ 1202.4, subd. (d).) We are entitled to presume (Evid.

¹⁰ As of January 1, 2012, the minimum restitution fine is \$240. The maximum remains \$10,000. (§ 1202.4, subd. (b)(1).)

Code, § 664) that the trial court considered “any relevant factors” pursuant to subdivision (d) of section 1202.4. Application of the statutory formula in subdivision (b)(2) of section 1202.4 would have yielded a restitution fine amount of \$57,600,¹¹ well in excess of the \$10,000 statutory maximum.

Taken together, the seriousness and gravity of appellant’s offenses against the minor victim and his long and extensive criminal history, including prior pimping and attempted pimping convictions, are sufficient to support the \$10,000 restitution fine imposed, and did not exceed the bounds of reason. (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.) Because the amount imposed is within the statutory range and is justified by the seriousness and gravity of defendant’s crime, it is not arbitrary or capricious, constituting an abuse of discretion. (See *ibid.*)

VI. *The Matter Must Be Remanded for Resentencing*

Finally, appellant contends the court erred in imposing a full, consecutive sentence following its revocation of probation. He argues the court should have imposed a consecutive sentence of one-third the midterm, or 16 months.

After the jury returned its verdict, the court found appellant in violation of the probation imposed in Alameda County case No. H39257A (Alameda County case) following his September 2005 conviction for pimping (§ 266h). At sentencing, the court imposed a consecutive six-year term for the probation violation. The court stated appellant would be given a total of 990 days of credit for time served on the probation violation.

Preliminarily, we reject the People’s assertion that this court lacks jurisdiction to decide this issue because appellant did not appeal from the order revoking his probation in the Alameda County case and appellant’s notice of appeal is solely from the instant case.

California Rules of Court, rule 4.452 provides: “If a determinate sentence is imposed under section 1170.1[, subdivision] (a) consecutive to one or more determinate

¹¹ A minimum fine of \$200, multiplied by 32 years, multiplied by nine convictions equals \$57,600.

sentences imposed previously in the same court or in other courts, the court in the current case must pronounce a single aggregate term, as defined in section 1170.1[, subdivision] (a), stating the result of combining the previous and current sentences. In those situations: [¶] (1) The sentences on all determinately sentenced counts in all of the cases on which a sentence was or is being imposed must be combined as though they were all counts in the current case. [¶] (2) The judge in the current case must make a new determination of which count, in the combined cases, represents the principal term, as defined in section 1170.1[, subdivision] (a). [¶] (3) Discretionary decisions of the judges in the previous cases may not be changed by the judge in the current case. Such decisions include the decision to impose one of the three authorized prison terms referred to in section 1170[, subdivision] (b), making counts in prior cases concurrent with or consecutive to each other, or the decision that circumstances in mitigation or in the furtherance of justice justified striking the punishment for an enhancement.”

“ [T]he components of an aggregate term are properly viewed as interdependent when calculating and imposing sentence, and an aggregate term of imprisonment under the determinate sentencing law constitutes a total prison term which is “a single term rather than a series of separate terms.” [Citations.]’ [Citations.]” (*People v. Kelly* (1999) 72 Cal.App.4th 842, 846.) Consequently, the aggregate sentence imposed in the instant case encompasses the sentence imposed following the court’s revocation of probation in the Alameda County case. We next turn to the merits of appellant’s sentencing claim.

Section 1170.1, subdivision (a) provides, if a sentencing court elects to impose consecutive sentences when a defendant is convicted of multiple offenses, it must first select and impose a principal term (consisting of the greatest term of imprisonment for any of the offenses including any term imposed for applicable enhancements) and then impose a consecutive subordinate term of one-third the midterm for the other offenses.

There is no dispute that, at the time the instant offenses were committed, appellant was on probation in the Alameda County case following his September 2005 conviction of pimping, pursuant to section 266h. The problem is the record before us does not clearly reflect whether appellant was convicted of pimping (§ 266h, subd. (a)), pimping a

minor over age 16 (§ 266h, subd. (b)(1)) or pimping a minor under age 16 (§ 266h, subd. (b)(2)). The information in the Alameda County case charged appellant in count 1 with soliciting a prostitute under the age of 16, in violation of subdivision (a) of section 266h. The clerk's minutes reflect that, at the September 12, 2005 change of plea hearing, the court granted the People's motion to orally amend count 1 to allege a violation of subdivision (b) of section 266h, appellant pled no contest thereto, and the remaining charges were dismissed. However, the minutes from the October 11, 2005 sentencing hearing reflect appellant's conviction of subdivision (a) of section 266h.¹² The probation report in the instant case references the Alameda County case as a conviction under subdivision (b) of section 266h.

The midterm for subdivisions (a) and (b)(1) of section 266h is four years; the midterm of subdivision (b)(2) for section 266h is six years.

Because, under section 1170.1, subdivision (a) the court was required to sentence appellant to one-third the midterm, its imposition of a six-year term under section 266h was erroneous, regardless of which subdivision of section 266h appellant was convicted. Consequently, the case must be remanded for resentencing under section 1170.1, subdivision (a).

DISPOSITION

The matter is remanded for resentencing. Upon remand, the trial court shall exercise its discretion under Penal Code section 1170.1, subdivision (a) in determining

¹² In his opening brief, appellant asserts he was convicted in the Alameda County case under subdivision (b) of section 266h. In his reply brief, he states he was in fact convicted under subdivision (a) of section 266h.

the aggregate sentence, including the subordinate term to be imposed for the Alameda County case. The judgment is otherwise affirmed.¹³

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

¹³ While this appeal was pending, appellant filed a separate petition for writ of habeas corpus (A136917). We deny that petition by separate order filed this date.