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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN MICHAEL RODRIGUEZ,

Defendant and Appellant.

C065565

(Super. Ct. No.  
SF08206)

A jury convicted defendant Jonathan Michael Rodriguez of kidnapping to commit specified sex offenses, sexual penetration with a foreign object, commission of a lewd act on a child at least 10 years younger than defendant, first degree burglary, and misdemeanor resisting arrest. The jury found other enhancement allegations true and defendant admitted a prior strike conviction. The trial court sentenced him to 59 years to life in prison.

Defendant contends (1) his admissions should have been excluded at trial because his *Miranda* rights were violated (*Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694] (*Miranda*); (2) the trial court abused its discretion in admitting evidence of five of his prior convictions for impeachment purposes; (3) he cannot be punished for both sexual penetration with a foreign object and lewd conduct because the jury's verdict might have been based on the same act; (4) it violates Penal Code section 654 to punish defendant for (a) kidnapping to commit specified sex offenses, and (b) the sex offenses; and (5) the trial court abused its discretion in denying his request to dismiss the prior strike conviction.

Defendant's fourth contention has merit. Accordingly, we will stay the sentence on the kidnapping conviction. In all other respects, we will affirm the judgment. We will also direct the trial court to correct clerical errors in the abstract of judgment.

#### BACKGROUND

On the morning of June 18, 2008, Robert Griffiths and his wife went to work, leaving their five children at home. The children were ages 2, 5, 8, 10, and 12. Their babysitter, Jane Doe, was going to arrive later that morning. After the Griffiths left but before Jane Doe arrived, defendant came to the side door and asked Kyle, who was eight, if his parents were home. When Kyle indicated they were not, defendant said, "I need to go to the bathroom and get a drink." Defendant entered the Griffiths's home holding an open pocket knife in his hand.

Jane Doe arrived shortly after defendant entered the home. Kyle informed her that there was a strange man in the house, but when she checked the home she did not find anyone. Around 15 minutes later, Jane Doe went into the girls' bedroom to change the diaper of the youngest Griffiths child. Defendant was standing behind the door holding a knife in his hand. Jane Doe was "taken aback" and asked what he wanted. Defendant "herded [her] into the room" and then shut the door and locked it. Defendant was dressed "haphazardly" in a black beanie with blue sequins, a partially buttoned long-sleeved shirt, and gray shorts. Jane Doe asked again what he wanted, and defendant replied he did not know. Defendant played with the knife intermittently, in a manner that made Jane Doe think he was reminding her that he was in power.

When defendant saw Kyle looking in through the bedroom window, defendant led Jane Doe down the hall to the master bedroom and locked the door. She felt like she was losing control of the situation, and her primary concern was for the toddler, whom she was carrying. Jane Doe tried to make conversation and told defendant that it was her 14th birthday that day. She urged defendant to leave and not to make "bad choices," but he was not "buying it." She noticed that defendant had a "swirly" tattoo on his stomach. The Griffiths boys began throwing rocks at the master bedroom window, and then used their slingshot on the bedroom door.

Defendant moved Jane Doe into the master bathroom, still carrying the toddler. He became more "touchy feely," touching

her back and the top of her bottom. Jane Doe told him to stop but he ignored her. Defendant told her to turn and face the wall, but she refused. Defendant started getting angrier and, while holding his knife, told her to take off her clothes or he would cut them off. The knife blade was very close to Jane Doe's face. They went back into the master bedroom and she asked defendant if he was going to rape her. He replied no, he "just want[ed] to see her."

Defendant lifted up Jane Doe's shirt and cut her sports bra in half before removing her tee shirt and undershirt. He sat behind her, grabbed her breasts, and rubbed her belly for one or two minutes. Jane Doe felt violated, sickened and repulsed during the assault. Defendant then stood up and told Jane Doe to stand up. Defendant removed her shorts and underwear. He stood behind her, put most of his finger "under the two flaps of skin" of her vagina and felt around.

Defendant told Jane Doe to lie down on the bed, and when she refused he dragged the dull side of the knife blade across her throat. He started to get "really mad," so she complied and lay face down. Defendant forced her legs apart, pulled back the skin and looked at her vagina. He attempted to penetrate her with his finger but, although his finger got past the flaps of skin, it did not go in her vagina.

Deputy Sheriff Mark Hollitz and other law enforcement officers were dispatched to the Griffiths's residence after receiving a call that there was a strange man in the house. Deputy Hollitz arrived right after defendant sexually penetrated

Jane Doe. Jane Doe heard someone knock on the bedroom door and announce "police." Deputy Hollitz asked if everything was alright; Jane Doe replied "No" and unlocked the bedroom door. When Deputy Hollitz entered the room, Jane Doe was naked and holding a toddler. She pointed to the bathroom window. Deputy Hollitz turned and saw someone leaving through the window.

Defendant ran from the residence, drove off in a red Nissan Sentra and crashed through a parking lot gate with police in pursuit. He was apprehended a short time later while hiding inside the home of Daniel Williams.

Defendant was interviewed. Both the recording and the written transcript of the interview were admitted at trial. Defendant admitted entering the Griffiths's residence, but claimed an 8 or 10-year-old boy gave him permission to do so. He denied committing any sex offenses on Jane Doe, but admitted he had a knife, Jane Doe told him "you're kind [of] scaring me," and he got the impression she wanted him to leave. Defendant was ashamed of "how it went down," but denied any penetration occurred and claimed that even if there was any sexual contact, it would have been no more than statutory rape.

The doctor who examined Jane Doe observed bruising on her hymen and small cuts on the edges, consistent with sexual penetration past the labia majora and labia minora.

Defendant testified at trial. He claimed he was with his friend, Travis Kneebone, on the day in question and that Kneebone stopped at the Griffiths's residence. The two went into the house and defendant used the bathroom. As defendant

walked down the hallway, he came upon Jane Doe, who was with a toddler. After a brief conversation, they went into the girls' bedroom and Jane Doe asked him to close and lock the door. She changed the toddler's diaper while defendant fiddled with his folding knife as a "nervous habit."

After changing the toddler's diaper, Jane Doe suggested going to see what Kneebone was doing. Defendant put his hand on her shoulder, making an "after you" gesture, and they walked to the master bedroom where they found Kneebone. Kneebone locked the door and defendant offered Jane Doe some marijuana, but she declined. Defendant took out his knife again and accidentally cut his finger. He went into the master bathroom to wash the cut.

Defendant came out of the bathroom when he heard a loud noise like a rock on the window. Kneebone and Jane Doe were sitting on the bed, and Kneebone gestured for defendant to leave. Defendant went into the bathroom and sat on the toilet seat. After a time, the door opened and Kneebone came in with Jane Doe, who was still holding the toddler. The other children came to the door and Jane Doe told them to go away. After they left, Kneebone and Jane Doe went back into the bedroom, and within five minutes defendant heard sirens. Defendant went into the bedroom and saw Kneebone on the bed with Jane Doe, who was naked from the waist up. Defendant denied he sexually touched the victim. He also denied using the knife to threaten her, or to cut off her clothing.

Defendant testified that when the police knocked on the door, Jane Doe instructed him to leave via the window and told Kneebone to get into a trunk at the foot of the bed. Defendant jumped out of the window and ran to his car. He drove away from the officer in the parking lot because he was being tailgated. He left his car at a park and eventually went to Daniel Williams's house, where he was arrested.

A detective who participated in the initial walkthrough of the crime scene said he did not notice the trunk at the foot of the bed because it was covered with a sheet. However, he searched the trunk later in the afternoon and it was filled with neatly folded bedding and clothing. It would have been very difficult for Kneebone to either fit or be concealed in the trunk.

Travis Kneebone testified that defendant came by his house that day but Kneebone did not go with him to the victim's house. Kneebone did not have any tattoos on his stomach. Neither Kyle nor Jane Doe saw another man inside the house that day. None of the fingerprints lifted from the Griffiths's house and the Nissan Sentra matched Kneebone, but four fingerprints from the house and five from the car matched defendant.

A jury convicted defendant of kidnapping to commit specified sex offenses (Pen. Code, § 209, subd. (b)(1)),<sup>1</sup> sexual penetration with a foreign object (§ 289, subd. (a)(1)),

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

commission of a lewd act on a child at least 10 years younger than defendant (§ 288, subd. (c)(1)), first degree burglary (§ 459), and misdemeanor resisting arrest (§ 148, subd. (a)(1)). The jury found that defendant used a knife in the commission of the offenses (§ 12022, subd. (b)(1)) and that he committed the offenses while out on bail on another felony charge (§ 12022.1). Regarding the sexual penetration conviction, the jury found the offense was committed during the commission of a burglary and kidnapping. (§ 667.61, subs. (d)(2)&(4), (e)(1)&(2).) Defendant admitted a prior strike conviction within the meaning of section 667, subdivisions (b)-(i) and that he had served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced defendant to 59 years to life in prison.

#### DISCUSSION

##### I

Defendant contends the trial court erred in ruling that he waived his *Miranda* rights and that his incriminating statements to the police were voluntary and not coerced. Defendant says his statements were involuntary because he believed he would not be fed unless he submitted to an interrogation, and he believed he would experience retaliation of some kind unless he cooperated. He also contends that later in the interview he invoked his right to counsel and right to remain silent; accordingly, any subsequent statements should have been excluded.

A

At the suppression hearing, the prosecution presented evidence that Deputy Sheriff Jeff Martin arrested defendant around 1:30 p.m. and transferred him to the county jail where he was placed in a "dry cell." Deputy Martin instructed the jail to withhold food to facilitate an evidentiary medical examination later that day, but did not instruct them to withhold water. Detectives were working on obtaining a search warrant for the evidentiary medical examination, and it is standard operating procedure to withhold food pending the examination.

Defendant requested water but none was provided. He began pacing and banged his head and hands on the cell window. Around 3:00 p.m., a criminal investigator photographed defendant with and without clothing. Around 8:30 p.m., Sergeant Guy Selleck transported defendant to the hospital for the evidentiary medical examination. Upon defendant's request, he was given four or five cups of water at the hospital. On the ride back to the jail, defendant stated he was hungry. Sergeant Selleck suggested to Detective Robert Jakobs that defendant would be more cooperative if he was given food.

Detective Jakobs met with defendant around midnight. Defendant was given some pizza and a cup of water. Defendant already had a partial can of soda. Detective Jakobs waited until defendant had finished eating and then read him his *Miranda* rights. Defendant indicated that he understood by nodding his head. Detective Jakobs asked if defendant was

willing to talk to him, stating, "If you want to talk I'll ah, I'll let you start." Defendant replied he had always heard he should not make statements, but "first off" he wanted to know the charges against him. Detective Jakobs advised defendant of the charges. Defendant then told Detective Jakobs his version of events and answered questions.

About halfway through the interview defendant said, "I don't know, maybe I should just wait and talk to my attorney cause, I mean . . . I'm sure . . . people say things when they're being questioned by a police officer that they normally wouldn't necessarily say." Without pausing, however, defendant continued talking to Detective Jakobs and related that it was a madhouse when the officers found him at Williams's house.

Defendant continued answering questions until Detective Jakobs asked him if there was anything else he wanted to add to the conversation. Defendant queried if Detective Jakobs meant "based on what [Jane Doe] said, based on the evidence," and Detective Jakobs replied in the affirmative. Defendant asked if they were going forward with the charges against him. When Detective Jakobs replied, "Absolutely, absolutely," defendant stated, "Nah, I don't got nothing else to say." Detective Jakobs said, "I mean," at which point defendant spontaneously volunteered that the charges were false. Defendant said he told Jane Doe he did not want to have sex with her because she was a virgin. He said he did not assault her and there was no burglary because he was invited into the residence.

Defendant testified at the suppression hearing. He stated that it made him uncomfortable when he was photographed in the nude. He also claimed he requested water about 20 times but was only given water once while he was in the dry cell. No one gave him food, but defendant admitted he did not ask for any. He saw a tray of food on the counter outside his cell and assumed it was for him but he did not receive it.

Defendant testified that during his transportation back to his cell following the evidentiary medical examination, he told Sergeant Selleck that he was hungry, but they did not stop for food. When they arrived back at the jail, defendant "felt that this would be the opportune time to get [food]" because they would not be serving breakfast for several hours, "[s]o if [he] was going to get anything, this would have been the time." He let the people in charge know that he would like some food and water. He said that if he had not received food or water, he would not have spoken with them. Defendant admitted, however, that Detective Jakobs never said defendant had to talk to him to receive food and water, and no one threatened defendant or told him that anything bad would happen if he did not talk. In fact, Detective Jakobs was courteous to him.

The trial court found that defendant's waiver of rights and his subsequent statements were voluntary. It found that defendant received food and water prior to his waiver and interrogation, and the promise of food and water had not been used to coerce him into talking. The trial court concluded that the mere recognition that someone might be more cooperative

after being fed did not make the situation coercive unless food and water were used as leverage, which they were not. The trial court found that defendant's subsequent references to perhaps needing an attorney and not talking further were not consequential because defendant continued talking of his own accord.

B

Under the familiar requirements of *Miranda*, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently waives the right to remain silent, to the presence of an attorney, and to appointed counsel if the suspect is indigent. (*People v. Sims* (1993) 5 Cal.4th 405, 440.) "The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501-502, quoting *Moran v. Burbine* (1986) 475 U.S. 412, 421 [89 L.Ed.2d 410, 421].)

We independently review the totality of the circumstances to determine whether the prosecution has met its burden and

proved the statements were voluntary. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 285-286 [113 L.Ed.2d 302, 315]; *People v. Thompson* (1990) 50 Cal.3d 134, 166, disapproved on other grounds in *Creutz v. Superior Court* (1996) 49 Cal.App.4th 822, 829.) In making this determination, we consider factors such as the length of the interrogation, its location, its continuity, and the defendant's sophistication, education, physical condition, and emotional state. (*People v. Williams* (1997) 16 Cal.4th 635, 660; *In re Shawn D.* (1993) 20 Cal.App.4th 200, 209.) "[A]ny factual findings by the trial court as to the circumstances surrounding an admission or confession, including "the characteristics of the accused and the details of the interrogation" [citation], are subject to review under the deferential substantial evidence standard. [Citation.]" (*Williams, supra*, 16 Cal.4th at p. 660.)

The circumstances in the present case support the trial court's finding that defendant voluntarily waived his *Miranda* rights. When Jakobs asked defendant if he understood the advisement of his rights, defendant nodded affirmatively. When Jakobs asked defendant if he wished to talk and invited him to start doing so, defendant began speaking to Jakobs and answered his questions. "[A]n express waiver [of *Miranda* rights] is not required where a defendant's actions make clear that a waiver is intended." (*People v. Whitson* (1998) 17 Cal.4th 229, 250; see also *North Carolina v. Butler* (1979) 441 U.S. 369, 373 [60 L.Ed.2d 286, 292] ["waiver can be clearly inferred from the actions and words of the person interrogated"]; *People v. Medina* (1995) 11 Cal.4th 694,

752 [express statement of waiver not required when defendant was read his rights and thereafter made a statement].)

Defendant's claim that the waiver was coerced by his desire to avoid untoward consequences and to obtain food is not supported by the record. He admitted no one threatened him or told him that anything bad would happen if he did not talk. And no one told him he had to answer any questions in order to be fed. Indeed, defendant received food, soda and water prior to being *Mirandized*, which means there was no longer any need for him to agree to waive his rights and talk to Detective Jakobs.

Furthermore, the totality of the circumstances show that defendant's statements following the waiver were voluntary and uncoerced. During the interview, which was not lengthy, Detective Jakobs was not overbearing or intimidating. He made sure defendant had been fed, retrieved more water for him during the interview, and treated him courteously. In determining voluntariness, the critical issue is "whether the defendant's will was overborne at the time he confessed." (*People v. Maury* (2003) 30 Cal.4th 342, 404; see also, e.g., *In re Shawn D.*, *supra*, 20 Cal.App.4th at p. 208.) It was not.

As for defendant's claim that the questioning should have ceased when he requested an attorney, he did not unequivocally do so. He simply asserted, "I don't know, maybe I should just wait and talk to my attorney," and then continued speaking to Jakobs without pause. Law enforcement officers are not required to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney, where "a reasonable officer in

light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel . . . . [Citations.] [¶] Rather, the suspect must unambiguously request counsel.” (*Davis v. United States* (1994) 512 U.S. 452, 459-460 [129 L.Ed.2d 362, 371-372].) Defendant did not. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105-1107.)

The same standard applies to assertions of the right to remain silent. (*Berghuis v. Thompkins* (2010) 560 U.S. \_\_\_, \_\_\_ [176 L.Ed.2d 1098, 1110-1111].) Here, in response to Jakobs’s question whether defendant had anything more to add, defendant replied he had nothing else to say. But when Jakobs merely said, “I mean,” defendant interjected that the charges were false and continued speaking. Viewed in context, defendant was not invoking his right to remain silent such that Jakobs was required to cease all questioning.

Accordingly, substantial evidence supports the trial court’s denial of defendant’s motion to exclude his statements on the ground they were obtained in violation of his *Miranda* rights.

## II

Defendant next contends the trial court abused its discretion in admitting evidence of five of his prior convictions for impeachment purposes. Over defense counsel’s objection based on Evidence Code section 352, the trial court allowed the prosecution to impeach defendant with prior convictions for threatening a witness, battery on a school employee, auto theft, forgery, and grand theft.

"No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (*People v. Beagle* (1972) 6 Cal.3d 441, 453, superseded by constitutional amendment on other grounds as described in *People v. Rogers* (1985) 173 Cal.App.3d 205, 208-209.) Article I, section 28, subdivision (f), paragraph (4) of the California Constitution provides that "[a]ny prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment . . . in any criminal proceeding." However, the trial court retains discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially outweighed by their prejudicial effect. (*People v. Clair* (1992) 2 Cal.4th 629, 654.)

In exercising that discretion, the trial court is guided by whether the prior conviction reflects adversely on the witness's honesty or veracity, its nearness or remoteness in time, its similarity to the present offense, and the potential effect on the defendant's failure to testify.<sup>2</sup> (*People v. Green* (1995) 34 Cal.App.4th 165, 182.) "The first factor goes to admissibility of the prior convictions, which determination the trial court must first reach before exercising its discretion based on the remaining factors. [Citations.]" (*Ibid.*) The trial court has broad discretion in determining whether to admit

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<sup>2</sup> The last factor is irrelevant in the present case because defendant testified at trial.

or exclude evidence under Evidence Code section 352 and its ruling will not be overturned absent an abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1170.)

Defendant contends the trial court abused its discretion because the five admitted prior convictions are too remote: they took place in 2000, while the present crimes occurred in 2008 and he testified in 2009. Even if defendant's convictions in 2000 could be construed as remote (but see *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1554), remoteness would not make the priors inadmissible because defendant did not lead a blameless life since then. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925-926.) He received additional felony convictions in 2006.

Defendant also contends it was needless and prejudicial to admit all five convictions, and any probative value was outweighed by the prejudicial effect of admitting so many priors. (Evid. Code, § 352.) But courts have placed no arbitrary limits on the number of prior convictions admissible for impeachment, and admission of multiple prior convictions is permitted. (*People v. Green, supra*, 34 Cal.App.4th at p. 183; *People v. Dillingham* (1986) 186 Cal.App.3d 688, 695.) "A series of crimes relevant to character for truthfulness is more probative of credibility than a single lapse . . . ." (*People v. Duran* (1983) 140 Cal.App.3d 485, 500.) Defendant's extensive record disqualifies him from testifying with the aura of veracity that might attend a lone felony conviction.

In any event, given that Jane Doe's testimony was unwavering and supported by other evidence, and defendant's

defense involving Kneebone was implausible and refuted by other evidence, it is not reasonably probable the jury would have returned a more favorable verdict if the trial court had limited the number of prior convictions the prosecution could use to impeach defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

### III

Defendant posits that the sentence on his conviction for lewd conduct must be stayed because the act was the same as that underlying his conviction for sexual penetration with a foreign object. He relies on the multiple punishment prohibition in section 654 and *People v. Siko* (1988) 45 Cal.3d 820 (*Siko*), but his reliance is misplaced.

In *Siko*, the defendant was convicted of rape, sodomy and lewd conduct, but the charging instrument and the verdict identified the lewd conduct as consisting of the rape and sodomy. The California Supreme Court held that punishment for the lewd conduct conviction must be stayed because the defendant could not be punished twice for one act, and there was nothing to indicate that the jury's verdict was based on any lewd act other than the rape or sodomy. (45 Cal.3d at pp. 823, 826.) In other words, the defendant could not be punished for three acts when only two were committed.

In contrast, here there were three sexual acts and only two convictions. There was evidence of lewd conduct when defendant groped Jane Doe's breasts as well as evidence of two foreign object penetrations by defendant's finger inside Jane Doe's

labia.<sup>3</sup> The information did not specify that the lewd conduct was sexual penetration with a foreign object, and the prosecutor referred to the fact that defendant fondled Jane Doe's breast and belly in support of the lewd conduct charge. Thus, both convictions were not necessarily based on the same act of sexual penetration.

Defendant counters that the prosecutor also referred to sexual penetration as conduct that is a lewd and lascivious touching when he argued, "The penetration of her is that kind of touching." According to defendant, there is "nothing in the record to demonstrate that this was not the route followed by the jury."

But this is not sufficient to establish a violation of the multiple punishment prohibition of section 654 because there is nothing in the record from which the jury could find that defendant may have committed some, but not all, of the offenses. Rather, defendant's primary defense was that he did not commit any of the charged crimes; Kneebone was the culprit. Jane Doe said otherwise. The jury clearly resolved the credibility dispute against defendant because it convicted him on all counts. Moreover, because there were two acts of sexual penetration, the jury could use one of them to support a

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<sup>3</sup> Sexual penetration with a foreign object is completed when a defendant's finger contacts the external female "genitalia inside the exterior of the labia majora . . . ." (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371; § 289, subd. (k)(1) & (2).)

conviction for lewd and lascivious conduct and the other to support the conviction for sexual penetration with a foreign object, as long as they unanimously agreed upon which act formed the basis for which conviction. The jury was given appropriate unanimity instructions, which we must presume they followed. (*People v. Gray* (2005) 37 Cal.4th 168, 231.)

Defendant fails to demonstrate that he was impermissibly punished twice for the same act.

#### IV

Defendant asserts that it violates the multiple punishment prohibition of section 654 to punish him for (a) kidnapping to commit specified sex offenses, and (b) the sex offenses. We agree.

Relevant to his contention, defendant was convicted of the following: (1) sexual penetration with a foreign object committed during the commission of a residential burglary and kidnapping, which offenses were committed with the intent to commit a sexual penetration (§§ 289, subd. (a), 667.61, subds. (d)(4), (e)(1)); (2) lewd and lascivious conduct with a child 14 years of age and at least 10 years younger than defendant (§ 288, subd. (c)(1)); (3) kidnapping Jane Doe for the purpose of committing the sexual offenses charged under sections 288 and 289 (§ 209, subd. (b)(1)); and (4) first degree burglary (§ 459).

The trial court sentenced defendant on the relevant counts as follows: (1) 25 years to life for sexual penetration with a foreign object because the crime was committed during the

commission of a residential burglary with the intent to commit the sex offense, doubled because defendant had a prior strike (see §§ 667, subd. (e)(1), 667.61, subds. (a), (c)(5), (d)(4)); (2) an indeterminate life term for aggravated kidnapping, to be served concurrently "because it's the same conduct that invokes the [section] 667.61 [one] strike sentencing regime;" (3) a consecutive six-year term for lewd conduct; and (4) six years for burglary, stayed under section 654 because the burglary was the same conduct that triggered the increased punishment for sexual penetration.

Defendant contends that because section 654 precludes double punishment for an indivisible course of conduct motivated by a single intent or objective (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207-1209), kidnapping to commit specified sex offenses is not separately punishable when defendant has been punished for the sex offenses. (*Id.* at p. 1216.) Here, the kidnapping was committed for the purpose of committing the sex offenses because defendant was convicted of aggravated kidnapping under section 209, not simple kidnapping under section 207, and the jury also found that the sexual penetration was committed during a kidnapping in violation of section 209 (i.e., with the intent to commit the sex offense). (§ 667.61, subd. (e)(1).)

The Attorney General counters that defendant may be punished for both the kidnapping and the sex offenses without violating section 654, relying on section 667.6, *People v. Hicks* (1993) 6 Cal.4th 784 (*Hicks*) and *People v. Andrus* (1990) 226

Cal.App.3d 73 (*Andrus*). Section 667.6 permits full term consecutive sentences for certain enumerated sex offenses under specified circumstances. (§ 667.6, subds. (c), (d), (e).) *Hicks, supra*, 6 Cal.4th 784, held that in enacting section 667.6, the Legislature impliedly created a statutory exception to section 654, thereby permitting a defendant to be punished for a burglary committed in order to commit one or more of the enumerated sex offenses. (*Id.* at pp. 792, 796-797.) *Andrus, supra*, 226 Cal.App.3d 73, held the same with respect to a kidnapping committed for the purpose of committing an enumerated sex offense. (*Id.* at pp. 78-79.)

Based on those authorities the Attorney General argues, "It follows that if consecutive sentences are permitted then a concurrent sentence as was imposed here does not offend section 654." We disagree. Section 667.6 is a statutory exception to section 654 and may be used only when the circumstances delineated in the statute apply, the trial court indicates it is sentencing the defendant under section 667.6 rather than section 1170.1, and the trial court states reasons supporting its sentencing choice. (*People v. Belmontes* (1983) 34 Cal.3d 335, 346-348.) In this case the trial court did not sentence defendant under section 667.6, and the Attorney General points to no similar applicable statutory exception to section 654.

Under the circumstances, defendant may not be punished for both kidnapping and the sex offenses. Moreover, as defendant points out, it is not sufficient that the indeterminate life term for aggravated kidnapping was imposed

concurrent to the 50-year-to-life term for sexual penetration. The kidnapping sentence must be stayed. (*People v. Pearson* (1986) 42 Cal.3d 351, 359-360 [when section 654 applies, the proper procedure is to stay imposition of sentence on one of the crimes, with the stay to become permanent on completion of the term imposed on the other].)

V

Defendant contends the trial court abused its discretion in denying his *Romero* motion to dismiss the prior strike allegation. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).)

A trial court has discretion under section 1385 to dismiss a prior strike allegation, but dismissal of a strike is a departure from the sentencing norm. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*).) The trial court has discretion to do so only if the defendant falls outside the spirit of the three strikes law. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *Romero, supra*, 13 Cal.4th at pp. 529-530.) In exercising its discretion, the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.)

A trial court's ruling on a motion to dismiss a prior strike is reviewed for abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 375.) Defendant has the burden of establishing that the trial court's denial of the motion was arbitrary or irrational, such as where the trial court was not aware of its discretion, considered impermissible factors, or imposed a sentence that is absurd under the particular facts of the case. (*Id.* at pp. 376-377.)

In reaching its decision in this case, the trial court employed the factors required under *Williams* by considering the nature and circumstances of the present felony conviction and the prior strike, along with defendant's background, character, and prospects. The trial court noted defendant's cruelty to the victim, his use of a knife, and the fact the crime was committed in the presence of small children. The trial court observed that defendant's criminal conduct had been escalating in terms of seriousness. It considered defendant's mental illness, but stated the illness was more evident in his prior crimes than in the current ones. The trial court indicated defendant's prospects on the outside were bleak, despite having a supportive family. It concluded defendant was "exactly the kind of person [that the voters] were thinking about" when they adopted the three strikes law.

The trial court's decision is supported by the record. Defendant subjected a 14-year-old girl to a humiliating and terrifying sexual assault, committed in the immediate presence of a two-year-old child she was babysitting and while the other

children were nearby. In his statement submitted in connection with his motion to dismiss the prior strike, defendant downplayed what he had done, indicating it was inappropriate for him to serve such a long sentence when the only consequence to Jane Doe was for her to go "about pouting for a week." Defendant's prior strike was for attempted first degree burglary, and he had prior convictions for battery and threatening a witness. All of these crimes involved violence or the potential for violence. Furthermore, defendant had a long history of criminality dating back 10 years.

Defendant contends the trial court failed to give sufficient weight to defendant's serious mental illness. But the record indicates the trial court considered his mental illness, saying the illness was more evident in his prior crimes than in the current ones. Defendant simply disagrees with the weight the trial court gave to the various factors. This is not an appropriate basis on which to find an abuse of discretion. (*Carmony, supra*, 33 Cal.4th at p. 379.)

Defendant also argues the trial court failed to give sufficient weight to doubts regarding whether defendant actually committed the attempted burglary that formed the basis for the prior strike allegation. However, defendant admitted the strike allegation in this case. Although he subsequently suggested that he entered a plea to the prior charge solely due to lack of money and a desire to avoid imprisonment, he did not submit any evidence demonstrating factual innocence. Defendant has not met

his burden. (*People v. Wallace* (2004) 33 Cal.4th 738, 750, 754, fn. 3.)

In his reply brief, defendant contends the imposition of enhanced penalties under the three strikes law for relatively minor priors may constitute cruel and unusual punishment. This contention is forfeited because it is raised for the first time on appeal in his reply brief, and because it is not supported by any meaningful analysis and argument. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 [a reviewing court need not address arguments raised for the first time in reply briefs]; *People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2 [a reviewing court need not discuss claims that are asserted perfunctorily and insufficiently developed].)

## VI

We have also identified three clerical errors on the abstract of judgment that require correction: (1) defendant was convicted of Penal Code sections 289, subdivision (a)(1)/667.61, subdivision (d)(4), rather than "289(a)/667.6(d)(4)" as indicated on the abstract of judgment; (2) defendant was sentenced to 50 years to life on count 2, rather than "25" years to life on count 2 as indicated on the abstract of judgment; and (3) defendant's date of birth is October 8, 1978, rather than "10-00-78" as indicated on the abstract of judgment. We will direct the trial court to correct these clerical errors.

## DISPOSITION

The judgment is modified to reflect that the imposition of sentence on the aggravated kidnapping count is stayed, with the

stay to become permanent upon completion of the term imposed on the convictions for sexual penetration with a foreign object and lewd conduct. The judgment is affirmed in all other respects. The trial court is directed to amend the abstract of judgment to reflect the modified judgment, and the trial court is further directed to correct the abstract of judgment to reflect that defendant was convicted of Penal Code sections 289, subdivision (a)(1)/667.61, subdivision (d)(4), he was sentenced to 50 years to life on count 2, and his date of birth is October 8, 1978. The trial court shall forward a certified copy of the amended and corrected abstract of judgment to the Director of the California Department of Corrections and Rehabilitation.

\_\_\_\_\_ MAURO \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, J.