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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON SHAWN BURRUS,

Defendant and Appellant.

D057249

(Super. Ct. No. SCD219172)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey F. Fraser, Judge. Affirmed.

A jury found Brandon Shawn Burrus guilty of kidnapping and multiple sex crimes against one victim but was unable to reach verdicts on whether Burrus committed sex crimes against another victim. The trial court sentenced Burrus to prison for 105 years to life. Burrus challenges his convictions on several grounds, including insufficiency of the evidence, erroneous admission of evidence concerning an uncharged earlier sex crime, erroneous denial of a motion to sever the counts concerning the two victims for trial,

erroneous refusal to read back certain testimony to the jury and cumulative effect of error. We reject these challenges and affirm the judgment.

I

STATEMENT OF THE CASE

This case arises out of Burrus's alleged sex crimes against Cristina B. and Andrea A. Because the facts are numerous and different facts pertain to different claims of error, we postpone a detailed factual presentation until the portions of the Discussion section to which the facts pertain. Here we set out the procedural background of the case.

A. *The Charges Against Burrus*

The People charged Burrus with 10 crimes arising out of an alleged sexual assault on Cristina on February 20, 2009:

Count 1: kidnapping to commit rape or forcible oral copulation (Pen. Code, § 209, subd. (b)(1));¹

Counts 2, 3, 4, 5, 7 and 10: forcible oral copulation (§ 288a, subd. (c)(2));

Counts 6 and 9: rape (§ 261, subd. (a)(2)); and

Count 8: sexual penetration by a foreign object (§ 289, subd. (a)(1)).

In connection with counts 1 and 5, the People alleged, for sentence enhancement purposes, that Burrus was armed with or used a deadly weapon (a knife). (§§ 1192.7, subd. (c)(23), 12022.3, subds. (a), (b).) The People further alleged, as aggravating circumstances and for purposes of sentence enhancement, that the charges of forcible oral

¹ Subsequent undesignated statutory references are to the Penal Code.

copulation, rape and sexual penetration by a foreign object involved kidnapping Cristina and were committed against more than one victim. (§§ 667.61, subds. (a), (b), (c), (e), 667.8, subd. (a).)

The People also charged Burrus with two crimes arising out of an alleged sexual assault on Andrea on December 27, 2008:

Count 11: forcible oral copulation (§ 288a, subd. (c)(2)); and

Count 12: forcible oral copulation while acting in concert (§ 288a, subd. (d)).

As an aggravating circumstance, the People further alleged Burrus committed the crimes against more than one victim. (§ 667.61, subds. (b), (c), (e).)

B. *The Jury's Verdicts*

On the charges arising out of the sexual assault on Cristina, the jury found Burrus guilty of kidnapping to commit rape or forcible oral copulation (count 1), two counts of rape (counts 6 & 9) and five counts of forcible oral copulation (counts 2, 4, 5, 7 & 10). As to the rape and forcible oral copulation counts, the jury found true the aggravating circumstance that Burrus kidnapped Cristina. The jury found Burrus not guilty of forcible oral copulation as charged in count 3. The jury was unable to reach verdicts on the charge of sexual penetration by a foreign object (count 8), the weapon enhancement allegations (counts 1 & 5) and the multiple-victim circumstance allegations (counts 2, 4, 5, 6, 7, 9 & 10).

On the charges arising out of the sexual assault on Andrea (counts 11 & 12), the jury was unable to reach a verdict.

C. *The Sentence*

The court sentenced Burrus to an aggregate term of 105 years to life in prison, which consisted of seven consecutive prison terms of 15 years to life each based on the convictions of rape and forcible oral copulation (counts 2, 4, 5, 6, 7, 9 & 10; §§ 261, subd. (a)(2), 288a, subd. (c)(2)) and the associated kidnapping circumstances (§ 667.61, subds. (b), (c)(1) & (7), (e)(1), (i)). The court also imposed an indeterminate term of life with the possibility of parole for the conviction of kidnapping to commit rape or forcible oral copulation (count 1) (§ 209, subd. (b)(1)), but stayed execution of that term (§§ 209, subd. (d), 654). Finally, the court stayed execution of the nine-year enhancement for kidnapping to commit a sex offense (§ 667.8, subd. (a)) on the convictions on counts 2, 4, 5, 6, 7, 9 and 10. (§ 654.)

II

DISCUSSION

Burrus challenges his convictions on several grounds: (1) insufficient evidence; (2) erroneous admission of a prior uncharged sex crime; (3) erroneous denial of his motion to sever the trial as to the charges involving Cristina and those involving Andrea; (4) erroneous refusal to read back certain testimony to the jury; and (5) cumulative effect of error. As we shall explain, none of these grounds has merit.

A. *Sufficient Evidence Supports Burrus's Convictions*

Burrus contends the evidence was insufficient to support his convictions of forcible oral copulation and rape. We shall summarize the evidence pertaining to the sex crimes, excluding evidence related only to counts on which the jury found Burrus not

guilty (count 3) or was unable to reach verdicts (counts 8, 11 & 12), and then determine the legal sufficiency of the evidence to support the convictions.

1. *Summary of the Evidence*

a. *The People's Case*

In February 2009, Cristina, age 21, attended college and lived in Pacific Beach. She regularly went to a local bar to socialize with friends. On one such occasion, Cristina drank two cocktails at home and then rode her bicycle to the bar to meet her sister and other friends.

While at the bar, Cristina continued drinking cocktails and became "pretty intoxicated" as the night went on. At some point, Burrus approached Cristina and offered to buy her a shot, but she declined. Burrus talked to Cristina and her friends for several minutes and then walked away. Cristina chatted with Burrus two or three additional times before the bar closed, but she was not attracted to, and did not flirt with, him.²

By the time the bar closed at 2:00 a.m., Cristina had drunk seven or eight cocktails. Burrus offered to give her a ride home because he had an SUV that could accommodate her bicycle. Cristina accepted the offer with the understanding that Burrus would pick up her bicycle, return to the bar to pick up her friends and then drop them all

² Cristina's friends also testified, based on their observations of her interactions with Burrus at the bar, that Cristina had no romantic or sexual interest in him.

off at her house. As Cristina walked with Burrus to his SUV, she sent text messages to a friend she planned to meet at her house.³

After Cristina's bicycle was loaded into the SUV, Cristina and Burrus got in, and Burrus drove away from the bar. When Cristina asked Burrus where he was going, he said he was not going back to the bar. Cristina then directed Burrus toward her house, but he did not proceed in that direction. Cristina started to panic and continued to ask Burrus where he was going, but he simply told her to "shut up."

Burrus drove onto a side street, parked the SUV, turned to Cristina and said, "Bitch, suck my dick." When Cristina asked whether he was kidding, Burrus said he was serious. Cristina tried to exit the SUV but could not get out because the door was locked. Burrus then exposed his penis, hit Cristina's face and arms, grabbed her head and forced his penis into her mouth. Cristina could not breathe because she was "crying hysterically." Burrus kept on hitting her and calling her a bitch.

Burrus started driving again and proceeded to a freeway. He pulled over to the side of the freeway and told Cristina to perform fellatio and get on top of him. Cristina refused and tried to get out of the SUV, but Burrus struck her, threatened to sell her in Mexico, and forced his penis into her mouth. Burrus then grabbed Cristina's neck, choked her, and told her he knew from serving in the military how to strangle people without leaving a mark. He again pushed his penis into her mouth, but she "squeezed on

³ The friend testified he planned to meet Cristina at her house and went there, but Cristina never showed up.

his penis really hard and tried to hurt him." Cristina feared for her life and told Burrus she thought he was going to kill her and dump her body on the side of the road. Burrus assured her he was not going to kill her and said, "I'm going to take you to a motel and f*** you. I'm not done with you."

Burrus then drove to a motel several miles away from Pacific Beach. He made Cristina pay for the room so he could "cover his tracks." When they arrived in the room, Burrus disrobed and ordered Cristina to do likewise. Cristina refused, and Burrus tore off her clothes. Once they were naked, Burrus climbed on top of Cristina on the bed and inserted his penis into her vagina. Burrus removed his penis from Cristina's vagina before ejaculation, forced her to perform fellatio, and ordered her to swallow his semen. After Burrus ejaculated in Cristina's mouth, he went to the bathroom, and Cristina spit his semen on the floor.

Burrus then told Cristina to get in the shower to rinse off. After showering briefly, Cristina returned to the bedroom and started to dress while Burrus showered. Burrus came back into the bedroom, told Cristina to get undressed, and inserted his penis into her vagina a second time. Burrus eventually withdrew his penis from Cristina's vagina and made her perform fellatio so that he could ejaculate in her mouth. Burrus ended up masturbating instead.

After Burrus finished, Cristina told him she needed to get to class, and he agreed to take her home. When Burrus dropped Cristina off, he said, "Please don't call the cops." As soon as Cristina was safely inside the house, she called 9-1-1 to report the

attack. The police arrived, interviewed Cristina, and took her to have a sexual assault examination.

The nurse who performed the physical examination of Cristina documented the following injuries: abrasions behind the left ear, on the neck and below the left knee; and bruises on the face, the left leg, the vulva and the perineum. The nurse also closely examined Cristina's vagina, where she found numerous abrasions and lacerations.⁴ Based on the examination and her performance of approximately 800 sexual assault examinations since 2000, the nurse testified Cristina "had much more injury than the majority of my patients by far." The nurse further testified Cristina's injuries were of the type expected in cases of sexual assault.

The People also presented DNA evidence through police investigators. A forensic biologist analyzed a blood stain found on the carpet of Burrus's SUV and determined the blood contained DNA profiles matching Cristina's profile. A criminalist who tested the bed sheet from the motel room in which Burrus had sexual intercourse with and orally copulated Cristina found sperm cells with DNA profiles matching Burrus's profile. Another criminalist analyzed a sample collected from Cristina's vagina and found sperm cells with DNA profiles matching Burrus's profile.

b. *The Defense Case*

Burrus testified to a different version of the events at trial. He admitted having sexual relations with Cristina but claimed everything was consensual. Specifically,

⁴ The People introduced photographs of Cristina's injuries at trial.

Burrus testified that as he was driving Cristina home from the bar, she touched his leg and asked, "So what now?" Burrus parked his SUV on "some random street" so they could "start making out." He and Cristina then came up with a plan to go to a motel room to have sex. Burrus then drove on the freeway toward the motel. He and Cristina were fondling each other on the way when she grew impatient and "moan[ed,] 'Are we there yet?'" Because Cristina was so eager to have sex, Burrus drove off the freeway onto a street, where Cristina performed fellatio. Still wanting to have sexual intercourse, but not in the SUV, Burrus and Cristina continued to the motel. When they finally arrived at the motel, Cristina agreed to pay for a room, and they had sexual intercourse twice in the room. After they had sex, Burrus drove Cristina home. On the way, Cristina asked Burrus if he was going to call her, and he said "no" because he thought it was "a one-night stand." Upon hearing this, Cristina "was kind of pissed off" and told Burrus to take her home. Burrus complied.

Burrus called a forensic psychiatrist to testify about the intoxicating effects of alcohol. Based on a test that determined Cristina's blood alcohol level the morning after her sexual encounter with Burrus, the psychiatrist extrapolated that at 2:00 a.m. that day, when Cristina left the bar, her blood alcohol level would have been so high that "alcoholic blackouts" were possible. According to the psychiatrist, during such blackouts intoxicated persons may be walking around and appear to be awake, "but their ability to understand their surroundings [and] their ability to remember what happened is very impaired, and usually they will wake up the next morning and not remember what had happened."

Burrus called witnesses who examined the articles of clothing Cristina wore on the night she met him and also inspected Burrus's SUV. No rips, frays or tears were found on any of Cristina's garments. The witnesses also testified the passenger door could be opened from the inside when the door was locked simply by pulling on the interior door handle.

Finally, Burrus called family members and friends to testify about his character. These witnesses testified Burrus was truthful and treated young women politely and respectfully.

2. *Legal Analysis*

In deciding Burrus's claim of insufficient evidence, we examine the record as a whole to determine whether it contains evidence that is reasonable, credible and of solid value from which a rational jury could find the defendant guilty beyond a reasonable doubt. (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028; *People v. Barnes* (1986) 42 Cal.3d 284, 303 (*Barnes*)). We defer to the jury's determinations of credibility and the truth or falsity of the facts on which those determinations depend, and we presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. (*People v. Smith* (2005) 37 Cal.4th 733, 739; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) Viewing the record in this light, we ask whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

Applying these standards, we shall analyze separately the evidence supporting the two rape convictions and the evidence supporting the five forcible oral copulation convictions.⁵ We shall then address Burrus's arguments for reversal.

a. *Evidence To Support Rape Convictions (Counts 6 & 9)*

To find Burrus guilty of rape, the jury had to find beyond a reasonable doubt that he had "sexual intercourse" with Cristina against her will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (§ 261, subd. (a)(2).) As used in the rape statute, "sexual intercourse" means penetration of the vagina (or at least the vulva) by the penis. (*People v. Holt* (1997) 15 Cal.4th 619, 676; *People v. Quintana* (2001) 89 Cal.App.4th 1362, 1371.) Any such penetration, however slight, is sufficient to complete the crime. (§ 263.)

The evidence supporting the rape convictions was abundant. Burrus admitted he had sexual intercourse with Cristina twice at the motel. There was also evidence that the intercourse was accomplished against Cristina's will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (§ 261, subd. (a)(2).) For example, Cristina testified: (1) she was not attracted to Burrus; (2) she got into his SUV expecting to be driven home; (3) Burrus beat her and threatened to take her to Mexico to

⁵ Burrus does not expressly challenge his conviction on count 1 of kidnapping to commit rape or forcible oral copulation (§ 209, subd. (b)(1)) or separately discuss the evidence as it pertains to that conviction. We therefore deem Burrus to have forfeited any claim of error regarding the count 1 conviction and do not separately discuss the elements of the crime or the evidence supporting the conviction. (See, e.g., *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 200, fn. 10; *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29.)

sell her; (4) Cristina told Burrus she feared he would kill her and dump her body on the road; and (5) she refused his demands that she disrobe so they could have intercourse at the motel. (See *People v. Hart* (1999) 20 Cal.4th 546, 611 (*Hart*) [sexual assault victim's "own testimony, which provided graphic detail of the attack, would have been sufficient by itself"].) In addition, the nurse who performed the sexual assault examination found multiple injuries on Cristina's body, including the vulva, vagina and perineum, which were consistent with a sexual assault. On these facts, a reasonable jury could have found Cristina's acts of sexual intercourse with Burrus were "induced either by force, fear, or both, and, in any case, fell short of a consensual act." (*Barnes, supra*, 42 Cal.3d at p. 305; see, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*) [inference victim did not consent to sexual intercourse arose from her testimony she feared for her life, defendant refused to take her home, and she disrobed only after defendant ordered her to do so]; *People v. Knox* (1988) 204 Cal.App.3d 197, 204 [force or fear of bodily injury element of rape was established by evidence defendant accosted victims in remote areas late at night, beat them and drove them away in his vehicle]; *People v. Ogden* (1940) 41 Cal.App.2d 447, 454 ["battered and bruised condition of [rape victim's] body" constituted evidence of force].) Sufficient evidence therefore supports the two rape convictions.

b. *Evidence To Support Forcible Oral Copulation Convictions
(Counts 2, 4, 5, 7 & 10)*

To find Burrus guilty of forcible oral copulation, the jury had to find beyond a reasonable doubt that he inserted his penis into Cristina's mouth against her will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily

injury." (§ 288a, subd. (c)(2).) "Any penetration of the mouth, no matter how slight, constitutes a violation of the section." (*People v. Hickok* (1950) 96 Cal.App.2d 621, 628.)

There was ample evidence to support the convictions of forcible oral copulation. Burrus admitted one act of fellatio occurred when he pulled off the freeway on the way to the motel. Cristina testified Burrus inserted his penis into her mouth on at least five separate occasions: once on a side street in Pacific Beach (count 2); twice on the freeway on the way to the motel, before and after he strangled her (counts 4 & 5); and twice at the motel, after each of the two acts of sexual intercourse (counts 7 & 10). Cristina's additional testimony that she feared for her life; that Burrus duped her into entering his SUV, drove to various locations, beat her, strangled her, threatened to sell her in Mexico and repeatedly grabbed her head to push his penis into her mouth; and that she tried to hurt Burrus by squeezing his penis, showed that Burrus orally copulated Cristina against her will "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury." (§ 288a, subd. (c)(2); see, e.g., *People v. Minor* (1980) 104 Cal.App.3d 194, 197 ["The offense is complete when, as occurred here according to the testimony of the victim, the mouth is forcibly placed upon the genital organ of another."]; *People v. King* (1979) 94 Cal.App.3d 696, 701-702 [misleading victim as to defendants' intent, taking victim to secluded area, ordering victim to perform oral copulation, and threatening victim that she was "'going to go through it again'" established forcible compulsion element of offense]; *People v. Campbell* (1978) 87 Cal.App.3d 678, 684 [defendant's threatening victim with bodily injury and choking victim established forcible

compulsion element of offense].) Sufficient evidence therefore supports Burrus's convictions of five counts of forcible oral copulation.

c. *Burrus's Arguments for Reversal*

Despite the strong evidence of guilt discussed above, Burrus argues we must reverse the judgment because "the evidence that [he] sexually assaulted Christina [*sic*], as opposed to having engaged in consensual sexual conduct with [her], was highly suspect." In support of this argument, Burrus reminds us that Cristina was "extremely intoxicated" throughout her encounter with him; and he then parses the trial record, pointing out inconsistencies in Cristina's testimony and conflicts with other evidence. But, the testimony of a victim alone, if believed by the jury, is generally sufficient to sustain a perpetrator's conviction of a sex crime. (Evid. Code, § 411; *Hart, supra*, 20 Cal.4th at p. 611; *People v. Poggi* (1988) 45 Cal.3d 306, 326 (*Poggi*).) On appeal, we may reject the victim's testimony only if it related to events that were physically impossible or inherently improbable, or if the testimony was otherwise obviously false on its face. (*People v. Thompson* (2010) 49 Cal.4th 79, 124 (*Thompson*); *People v. Young* (2005) 34 Cal.4th 1149, 1181; *Barnes, supra*, 42 Cal.3d at p. 306.) We cannot describe Cristina's testimony in any of these ways.

Moreover, even if we had doubts about Cristina's testimony, such doubts alone would not permit us to reverse the judgment. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends." (*Maury, supra*, 30

Cal.4th at p. 403; accord, *People v. Lee* (2011) 51 Cal.4th 620, 632.) In other words, "if the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment." (*People v. Medina* (2009) 46 Cal.4th 913, 924, fn. 2.) Thus, Burrus's arguments about Cristina's lack of credibility and the persuasiveness of the evidence supporting his version of the events were proper for the jury, but not for us. "We reject [his] attempt to reargue the evidence on appeal and reiterate that 'it is not a proper appellate function to reassess the credibility of the witnesses.'" (*Thompson, supra*, 49 Cal.4th at p. 125.)

B. *The Trial Court Properly Admitted Evidence of a Prior Uncharged Sex Crime*

Burrus argues the trial court erred when it admitted evidence concerning a sexual encounter he had with Jessica H. in October 2007. According to Burrus, the court should have excluded this evidence because "its probative value was substantially outweighed by its prejudicial effect." We shall set forth additional pertinent facts and then explain why this contention has no merit.

1. *Additional Facts*

Before trial, Burrus moved to exclude evidence pertaining to an uncharged sexual assault against Jessica. As described in Burrus's motion, the uncharged assault occurred after midnight on October 7, 2007, when Burrus was stationed on a military base and he and Jessica were together in a friend's apartment. Jessica had been drinking heavily,

recently smoked marijuana and taken one pill of ecstasy.⁶ Jessica claimed that after the friend went to bed, Burrus grabbed her, threw her onto a couch and ordered her to "suck his dick." When Jessica objected, Burrus told her to "shut up," choked her and forced her to perform fellatio. In his motion, Burrus did not dispute the potential admissibility of this evidence under Evidence Code section 1108, but argued the evidence should be excluded under Evidence Code section 352 because of "the extreme consumption of time; the severe burden to Mr. Burrus in defending the allegations; and the significant lack of certainty that the incident occurred as alleged." The trial court denied Burrus's motion.

At trial, several witnesses testified about Burrus's alleged assault against Jessica. Jessica herself testified to the events as they were described in Burrus's motion. On cross-examination, Burrus's trial counsel impeached Jessica by getting her to admit several inconsistencies between her then-present recollection of the uncharged assault and the version she previously had reported to authorities. Other witnesses called by Burrus testified Jessica had a reputation for dishonesty and adultery. Burrus testified he had an ongoing consensual sexual relationship with Jessica, and she willingly performed fellatio on him at the friend's apartment on October 7, 2007.

⁶ According to the Web site of the National Institute on Drug Abuse, ecstasy (3,4-methylenedioxymethamphetamine) is a psychoactive drug that is chemically similar to the stimulant methamphetamine and the hallucinogen mescaline. The drug, usually taken orally as a capsule or tablet, produces feelings of increased energy, euphoria, emotional warmth, and distortions in time, perception and tactile experiences. (See NIDA InfoFacts: MDMA (Ecstasy) <<http://www.drugabuse.gov/Infofacts/ecstasy.html>> [as of Feb. 16, 2012].)

2. *Legal Analysis*

Generally, evidence of a defendant's character is not admissible to prove his conduct on a specific occasion conformed to his character. (Evid. Code, § 1101, subd. (a).) An exception to this rule provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).) Because evidence a defendant committed prior sex offenses is "particularly probative" in a sex offense case (*People v. Story* (2009) 45 Cal.4th 1282, 1293),⁷ such propensity evidence is presumptively admissible unless, under Evidence Code section 352, its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of

⁷ Regarding evidence of prior crimes in general, our Supreme Court has observed: "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402; accord, *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1223-1224 (*Alcala*)). Under this reasoning, Burrus's prior acts of forcible oral copulation against Jessica would tend to negate his assertion that a later victim consented to perform fellatio on him. (Cf. *People v. Stitely* (2005) 35 Cal.4th 514, 532 (*Stitely*) ["The chance that defendant acted with innocent intent [in committing a sex act on one victim] is sharply reduced by evidence that he committed a forcible, nonconsensual sex act upon [another victim] a few months earlier."].)

undue prejudice,⁸ confusing the issues or misleading the jury. (*People v. Loy* (2011) 52 Cal.4th 46, 62 (*Loy*).

On appeal, a trial court's ruling under Evidence Code section 1108 is subject to review for abuse of discretion. (*Loy, supra*, 52 Cal.4th at p. 61; *People v. Dejourney* (2011) 192 Cal.App.4th 1091, 1104.) We will reverse such a ruling only if the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116 (*Nguyen*)). Here, Burrus contends "the trial court abused its discretion in allowing [a] mini-trial to unfold, unduly burdening the defense, unduly consuming time to present the highly suspect and far from credible propensity evidence, and giving the jury the opportunity to 'convict' [him] of this incident on the lesser preponderance of the evidence standard, causing the jury undue confusion." We disagree.

The evidence regarding Burrus's uncharged sexual assault on Jessica was probative of his disposition or propensity to commit sex offenses. "Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense." (*People v. Fitch* (1997) 55 Cal.App.4th 172, 179; see also *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 141 [evidence of other offenses is "extremely relevant, especially

⁸ Evidence may cause "undue prejudice" within the meaning of Evidence Code section 352 if it tends to evoke an emotional bias against a person or to cause a jury to prejudge a person or cause on the basis of extraneous factors. (*People v. Cowan* (2010) 50 Cal.4th 401, 475.) "Evidence is not 'unduly prejudicial' under the Evidence Code merely because it strongly implicates a defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence." (*People v. Robinson* (2005) 37 Cal.4th 592, 632.)

with regard to sexual offenses"].) The uncharged assault on Jessica and the assault on Cristina bore striking similarities: Both incidents occurred late at night after the victims had consumed intoxicants; using the same obscene language, Burrus ordered the victims to perform fellatio on him; and, when the victims refused, Burrus became angry and choked them. Thus, the propensity evidence was highly probative because "the uncharged conduct [was] similar enough to the charged behavior to tend to show the defendant did in fact commit the charged offense." (*Nguyen, supra*, 184 Cal.App.4th at p. 1117.)⁹

Burrus contends, however, that "the prejudicial effect of the propensity evidence outweighed the probative value, and [the evidence] should not have been admitted." (See Evid. Code, § 352.) Burrus's main argument, which is based on his view of the evidence, is that the "degree of certainty" of his commission of the uncharged assault on Jessica was so low that the trial court should not have admitted evidence of that assault. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 917 [listing degree of certainty of commission of prior offense as one of many factors to be considered in undue prejudice analysis].) It is true, as Burrus points out in his brief, that Jessica's credibility was impeached, and her

⁹ We reject Burrus's assertion, unsupported by any authority, that "the incidents were not similar" because (1) Burrus knew Jessica but not Cristina; and (2) the incident with Jessica involved only one act of oral copulation but the incident with Cristina involved multiple acts of oral copulation, as well as sexual intercourse and kidnapping. "[T]he prior and charged offenses are considered sufficiently similar, for admissibility [under Evidence Code section 1108], if they are both the type of sexual offenses enumerated there." (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1099 (*Miramontes*)). Here, both incidents involved forcible oral copulation, one of the enumerated sex crimes. (Evid. Code, § 1108, subd. (d)(1)(A).)

version of the assault was contradicted by other testimony. But, her testimony, if believed, would constitute evidence of Burrus's disposition to commit acts of forcible oral copulation, including those charged in this case. (See *id.* at p. 915 [evidence defendant committed other sex offenses is circumstantial evidence he committed charged sex offenses]; fn. 7, *ante.*) Whether to believe Jessica, or instead to believe Burrus and the other witnesses who contradicted her, was for the jury to decide. (See, e.g., *Maury*, *supra*, 30 Cal.4th at p. 403.) We cannot say Jessica's testimony that Burrus forced her to perform fellatio on him was so equivocal or lacking in certainty that it had little or no probative value, or that its admission unduly prejudiced him.

Burrus also complains the jury was "presented with irrelevant, inflammatory details surrounding the incident," including Jessica's adultery and illicit drug use. It was Burrus, however, who brought these details to the jury's attention through his trial counsel's cross-examination of Jessica and direct examination of witnesses he called to impeach her credibility. Because "the testimony about which [Burrus] now complains was elicited by his own counsel[,], any error was invited, and [Burrus] may not challenge that error on appeal." (*People v. Williams* (2009) 170 Cal.App.4th 587, 620.)

Finally, Burrus contends the propensity evidence likely confused, misled or distracted the jury from its main inquiry of determining his guilt for the current offenses by "turn[ing the trial] into a mini-trial regarding the incident in Kansas." We agree with Burrus there was a risk the jury would be tempted to convict him of the current charges to assure he was punished for the prior uncharged offense. (See *People v. Branch* (2001) 91 Cal.App.4th 274, 284; *People v. Frazier* (2001) 89 Cal.App.4th 30, 42.) We conclude,

however, that instructions which focused the jury's attention on the current charges and the limited way in which the jury could consider the evidence of the uncharged assault on Jessica in relation to those charges¹⁰ effectively "counterbalanced" that risk. (*Frazier*, at p. 42; see also *Miramontes*, *supra*, 189 Cal.App.4th at p. 1103 [instructing jury on limited purpose of evidence of prior uncharged sex crimes reduced possibility of jury confusion].)

In sum, we hold the probative value of the evidence of the uncharged sexual assault on Jessica was not "substantially outweighed" by the possibility of undue prejudice, confusion of the issues or misleading the jury. (Evid. Code, §§ 352, 1108, subd. (a).) Thus, the trial court did not abuse its discretion in admitting that evidence. (*Loy*, *supra*, 52 Cal.4th at pp. 61-64; *Nguyen*, *supra*, 184 Cal.App.4th at p. 1119.)

¹⁰ The trial court instructed the jury with CALCRIM No. 1191. Specifically, the court advised the jury: (1) it could consider the evidence of the uncharged assault on Jessica only if the People proved by a preponderance of the evidence that Burrus committed the uncharged assault; (2) if the jury decided Burrus committed the uncharged assault, it could, but was not required to, conclude he "was disposed or inclined to commit sexual offenses," including those charged in the current case; (3) Burrus's commission of the uncharged assault was "only one factor to consider along with all the other evidence" and was not sufficient by itself to prove his guilt of the current charges; and (4) the People had the burden to prove the current charges and allegations beyond a reasonable doubt. These instructions correctly stated the law (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87), and we presume the jury understood and followed them (*People v. Butler* (2009) 46 Cal.4th 847, 873; *People v. Romo* (1975) 14 Cal.3d 189, 195).

C. *The Trial Court Properly Denied Burrus's Motion To Sever Counts for Trial*

Burrus claims the trial court erroneously denied his motion to sever for trial the counts involving Cristina and those involving Andrea. After relating additional pertinent facts, we shall set forth the reasons we reject this claim of error.

1. *Additional Facts*

Before trial, Burrus moved to sever the charges arising out of the alleged assault on Cristina from those arising out of the alleged assault on Andrea. Burrus advanced four grounds for separate trials on the two sets of charges: (1) the facts underlying the charges were "materially dissimilar"; (2) evidence would not be cross-admissible if the charges were tried separately; (3) the weight of the evidence regarding the charges was "greatly different"; and (4) the punishment for the charges was life in prison.

In his motion, Burrus summarized the facts supporting the two sets of charges. His factual summary pertaining to the assault on Cristina was consistent with the testimony as summarized in part II.A.1.a, *ante*. Burrus's factual summary pertaining to the alleged assault on Andrea was as follows:

On the evening of December 27, 2008, Andrea, age 19, and two female friends were socializing at the home of a third female friend. Andrea was drinking alcoholic beverages. At approximately 9:00 p.m., a boyfriend of one Andrea's friends arrived at the house with Burrus and another man. Andrea had never met Burrus or the other man.

A short while after the men arrived, Andrea and two of her friends got into Burrus's vehicle and accompanied the men to a local liquor store. Andrea went into the store with Burrus, who purchased a bottle of vodka. The two returned to the vehicle.

Burrus then drove the group to a park near the liquor store. He asked Andrea to get out of the vehicle with him so that one of his friends could have sex with one of her friends. Andrea knew her friend was a prostitute.

Andrea exited the vehicle, and Burrus led her down an embankment. When they reached the bottom, Burrus pushed Andrea up against a fence; grabbed her throat; called her a "bitch"; "told her that he was a pimp and that she was going to suck his dick"; and slapped her. When Andrea resisted, Burrus grabbed her by the hair, pushed her onto her knees and put his penis in her mouth. He ejaculated in her mouth and forced her to swallow the semen.

After orally copulating Andrea, Burrus telephoned his friend and invited him to come down the embankment so that Andrea could perform fellatio on him. When the friend arrived, Andrea orally copulated him. When Andrea finished, Burrus told her "she performed [fellatio] so well that he was going to take her with him to Reno the following day, and that she was his bitch." Burrus and Andrea exchanged telephone numbers, and he drove her back to her friend's house.

Andrea notified the police the following day. The police did not contact Burrus, however, until he was arrested after the sexual assault on Cristina.

The People filed opposition to Burrus's motion to sever. They did not materially dispute the facts detailed in Burrus's motion, but argued severance was not required because the cross-admissibility of the evidence underlying the charges involving Andrea and those involving Cristina eliminated any prejudice that might result from a joint trial.

At the hearing on the motion, the trial court noted the legislative preference for joint trials and Burrus's burden to demonstrate a substantial danger of undue prejudice to overcome that preference. In assessing prejudice, the court stated that highly inflammatory offenses were not joined with noninflammatory offenses; the offenses involved similar conduct; the evidence supporting the offenses was very similar in weight; and the evidence was most likely cross-admissible. The trial court therefore denied Burrus's motion for severance.

2. *Legal Analysis*

In reviewing a challenge to a denial of a motion to sever charges for trial, we begin with the premise that "[t]he law prefers consolidation of charges." (*People v. Ochoa* (2001) 26 Cal.4th 398, 423; accord *People v. Thomas* (2011) 52 Cal.4th 336, 349-350; *Alcala, supra*, 43 Cal.4th at p. 1220.) We review the trial court's denial of a defendant's severance motion for abuse of discretion (*People v. Stanley* (2006) 39 Cal.4th 913, 934 (*Stanley*)), which occurs only if the trial court's ruling falls outside the bounds of reason (*People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*)). We consider the record before the trial court when it ruled on the motion. (*Alcala*, at p. 1220.) As we shall explain, the trial court did not abuse its discretion in denying Burrus's severance motion.

a. *Joinder Was Permissible*

The People were entitled to join the charges arising out of Burrus's alleged assault on Andrea with those arising out of his assault on Cristina. If offenses are "of the same class of crimes," the People may charge them in the same accusatory pleading. (§ 954.) Here, both sets of charges included a common offense, forcible oral copulation (§ 288a,

subd. (c)(2)): counts 2, 3, 4, 5, 7 and 10 alleged Burrus committed that offense against Cristina; and counts 11 and 12 alleged he committed it against Andrea. Hence, these charges were subject to joinder because they involved offenses "of the same class of crimes." (§ 954; see *Soper, supra*, 45 Cal.4th at p. 771 [charges of same crime against two victims were of same class]; *People v. Poon* (1981) 125 Cal.App.3d 55, 69 (*Poon*) [sex offenses against two victims were properly joined].)

b. *Severance Was Not Required*

Although the statutory requirements for joinder were met, the trial court had discretion to order severance of the charged offenses "in the interests of justice and for good cause shown." (§ 954.) "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." (*People v. Bean* (1988) 46 Cal.3d 919, 938; see also *Stanley, supra*, 39 Cal.4th at p. 934 ["defendant can only predicate error in the denial of severance on a clear showing of potential prejudice"].) This is a heavy burden, for the benefits to the state in conserving judicial resources and public funds "often weigh strongly against severance of properly joined charges," and also give the trial court broader discretion in ruling on a severance motion than it has in ruling on the admissibility of evidence. (*Soper, supra*, 45 Cal.4th at pp. 774, 775, fn. 7.) Thus, where, as here, charges meet the requirements for joinder, the burden of showing prejudice from denial of a severance motion "is so great that the courts almost invariably reject the claim of abuse of discretion.'" (*People v. Matson* (1974) 13 Cal.3d 35, 39; accord, *Poon, supra*, 125 Cal.App.3d at p. 69.) Burrus has not met that burden here.

Burrus argues the joint trial prejudiced him because the evidence underlying the charges involving Cristina and the evidence underlying the charges involving Andrea would not have been cross-admissible in separate trials. According to Burrus: (1) the incidents involving Cristina and Andrea were so dissimilar that evidence of one incident would not have been admissible in a trial concerning the other if separate trials had been ordered; (2) the charges involving Andrea were likely to inflame the jury; and (3) because both cases were weak, especially the case involving Andrea, the "spillover effect" of the aggregate evidence most likely resulted in the convictions of the charges involving Cristina. We reject these arguments.

First, contrary to Burrus's contentions, the incidents involving Cristina and Andrea were not so dissimilar that evidence concerning one incident would have to be excluded in a trial concerning the other. As we explained earlier (see pt. II.B.2., *ante*), in a trial of sex offenses, evidence the defendant committed other sex offenses is presumptively admissible. (Evid. Code, § 1108, subd. (a); *Loy, supra*, 52 Cal.4th at p. 62.) Here, both sets of charges included forcible oral copulation (§ 288a, subd. (c)(2)), one of the sex offenses enumerated in Evidence Code section 1108, subdivision (d)(1)(A). As long as sex offenses committed on separate occasions are enumerated in that section, as they are here, the offenses are considered sufficiently similar for purposes of admissibility under Evidence Code section 1108. (*Miramontes, supra*, 189 Cal.App.4th at p. 1099.)

Second, the similarity between the incidents involving Cristina and Andrea was so great that it removed any likelihood that either incident would unduly inflame the jury against Burrus. In both incidents: (1) the victims were young women who had been

drinking; (2) Burrus was a stranger to the victims; (3) he transported the victims to secluded locations; (4) he called the victims "bitch"; (5) using the same obscene language, he ordered the victims to perform fellatio on him; (6) when the victims resisted, Burrus slapped them and grabbed their throats; and (7) he forced the victims to orally copulate him and swallow his semen. Contrary to Burrus's assertions, then, the two sets of charges were "similar in nature and equally egregious—hence neither, when compared to the other, was likely to unduly inflame a jury against defendant." (*Soper, supra*, 45 Cal.4th at p. 780; see also *Alcala, supra*, 43 Cal.4th at p. 1227 [one set of offenses was not unusually likely to inflame jury against defendant when both sets were similar in nature and equally gruesome].)

Third, the purported weakness of the evidence supporting the two cases, especially that involving Andrea, did not, as Burrus erroneously contends, "result[] in a prejudicial spillover effect." "As an initial matter, based upon the information before the trial court at the time it ruled on the severance motion, it was not clear that the evidence supporting [one set of charges] was significantly weaker than that underlying [the other set]."

(*Soper, supra*, 45 Cal.4th at p. 780.) The information before the trial court consisted of Cristina's and Andrea's preliminary hearing testimony, as summarized in Burrus's motion and in the People's opposition. That testimony, if repeated at trial and believed by the jury, would have been sufficient to support convictions of the charged offenses. (See *Poggi, supra*, 45 Cal.3d at p. 326 ["In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix."].) "In any event, as between any two charges, it always is possible to point to individual aspects of one case

and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial 'spillover effect,' militating against the benefits of joinder and warranting severance of properly joined charges." (*Soper*, at p. 781.)

In sum, we hold Burrus has not sustained his burden to "show that a substantial danger of prejudice compelled severance." (*Stitely, supra*, 35 Cal.4th at p. 531.) Accordingly, he has not shown the trial court abused its discretion in denying his motion to sever counts for trial. (*Soper, supra*, 45 Cal.4th at p. 774.)

Our conclusion Burrus has not shown error in the trial court's denial of his severance motion does not end our inquiry, however. Our Supreme Court has "held that even if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law." (*People v. Rogers* (2006) 39 Cal.4th 826, 851.) We hold there was no such deprivation here, for several reasons: (1) the evidence of each offense was ""simple and distinct""; (2) there was no "great disparity in the nature of the two charges—the facts pertaining to each crime, compared to the other[s], were not likely to unduly inflame the jury"; (3) the evidence underlying the two sets of charges did not differ significantly in strength; (4) the trial court instructed the jury that each count charged was a separate crime the jury had to consider separately and for which it had to return a separate verdict (*Soper, supra*, 45 Cal.4th at p. 784; see CALCRIM No. 3515); and (5) the jury found Burrus guilty of some charges, not guilty of others, and was unable to reach verdicts on

others, indicating "that the jury was capable of differentiating [among his] various [crimes]" and that "no improper spillover effect is evident here" (*Soper*, at p. 784).

D. *The Trial Court Did Not Erroneously Deny a Request for Testimony To Be Read Back to the Jury*

Burrus contends the trial court's denial of the jury's request for a readback of his testimony and that of Cristina deprived him of a fair trial. After setting forth additional pertinent facts, we shall explain why we reject this contention.

1. *Additional Facts*

During deliberations, a juror sent a note to the trial court requesting a readback of the testimony of Cristina and Burrus. The following day, the court replaced two jurors with alternates. After the replacement, the court advised the jury:

"[W]e had some issues, including we're going to have to substitute in a couple people for personal reasons. And, so, I'm going to . . . reread you an instruction, and you're going to go back in and deliberate. Before we do that, *if you want readback, that's fine. But readback, you read both direct and cross, redirect, recross. And it can take — take some time. . . . It may take a day or so. But it's up to you. I'm not discouraging you, I'm just making you aware of that fact. . . .*

"I just want to be very clear. . . . You're going to start your deliberations from the beginning. *I'm going to disregard those other notes about readback. . . . Until you tell me you need them, I'm not going to act on them, because you're starting from scratch.* So until you tell me you need them. But just understand this is not Monday Night Football. There is no instant replay. *[The court reporter] will go in and read to you, but it takes time. And, again, if you want it, it's there. I'm not discouraging it, but I just want to let you know that it does take some time. So, again, start anew.*" (Italics added.)

After beginning deliberations anew, the jury did not request a readback of either Burrus's or Cristina's testimony.

2. *Legal Analysis*

The trial court did not err by refusing to read back certain trial testimony to the jury. If a jury desires to rehear certain testimony after it has begun deliberations, the testimony must be read back upon request. (§ 1138; *People v. Hillhouse* (2002) 27 Cal.4th 469, 506 (*Hillhouse*)). Although section 1138 is primarily concerned with a jury's right to information needed to reach a verdict, it also implicates a defendant's right to a fair trial. (*People v. Solomon* (2010) 49 Cal.4th 792, 824; *People v. Ayala* (2000) 23 Cal.4th 225, 288.) A trial court does not violate a defendant's rights under section 1138 when, in response to a jury request for a readback of testimony, the court advises the jury that the testimony may take a long time to read, provided the court also advises the jury that the testimony will be read back if requested. (*People v. Anjell* (1979) 100 Cal.App.3d 189, 202-203 (*Anjell*), disapproved on unrelated grounds by *People v. Mason* (1991) 52 Cal.3d 909, 943, fn. 13.) That is all that happened here.

When the court received the note requesting a readback of Cristina's and Burrus's testimony, it advised the jury that the readback "may take a day or so"; but the court also stated that it was "not discouraging" a readback and that testimony would be read upon request. After the jury was reconstituted and restarted deliberations, however, it did not request a readback of the testimony. Hence, because "the court made clear it *would* provide any requested rereading of material testimony," its comments about the amount of time it might take to read the requested testimony did not amount to impermissible jury coercion or otherwise violate "defendant's right to have the jury provide a rereading

of testimony on request." (*Hillhouse, supra*, 27 Cal.4th at pp. 506, 507, citing *Anjell, supra*, 100 Cal.App.3d at pp. 202-203.)¹¹

E. *No Cumulative Effect of Error Requires Reversal*

Finally, Burrus contends the cumulative effect of the errors discussed above requires reversal. Because we have concluded the trial court did not make any of the errors asserted by Burrus, however, we necessarily reject his cumulative-error claim.

(See, e.g., *People v. McWhorter* (2009) 47 Cal.4th 318, 377.)

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.

¹¹ This case is unlike any of those on which Burrus relies. In *People v. Butler* (1975) 47 Cal.App.3d 273, 277-279, the trial court denied the jury's request for a readback of testimony of several key witnesses. In *People v. Henderson* (1935) 4 Cal.2d 188, 194, the jury was misled because only some, not all, of the requested testimony was reread. In *People v. De La Roi* (1944) 23 Cal.2d 692, 701, the trial court improperly instructed the jury that during deliberations it could not send out any communications. Finally, in *People v. York* (1969) 272 Cal.App.2d 463, 464, the bailiff mistakenly informed the jury a transcript of requested testimony was not available.