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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEREK ANTHONY BANKS III, Defendant and Appellant.	E061755 (Super.Ct.No. RIF1200678) O P I N I O N

APPEAL from the Superior Court of Riverside County. W. Charles Morgan, Judge. (Retired judge of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed with directions.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Charles C. Ragland and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Derek Anthony Banks III, of rape (count 1; Pen. Code, § 261, subd. (a)(2)),[1] oral copulation by force (count 2; § 288a, subd. (c)(2)), sexual penetration by force (count 3; § 289, subd. (a)(1)), three counts of robbery (counts 4, 5, & 7; § 211), and kidnapping for the purpose of rape (count 6; § 209, subd. (b)(1)). In addition, the jury found true allegations defendant had personally used a firearm and dangerous and deadly weapon in the offenses in counts 1, 2, and 3 (§§ 12022, 12022.3, 12022.5, 12022.53), had personally used a firearm in all seven counts (§ 12022.53, subd. (b)), had kidnapped separate victims in his commission of the offenses in counts 1, 2, and 3 (§§ 207, 208, 209, 209.5), and that the kidnappings in counts 1, 2, and 3 substantially increased the risk of harm to the victims over and above that level of risk necessarily inherent in the underlying offenses (§ 667.61, subd. (d)(2)). The court sentenced defendant to a total term of 96 years eight months to life in prison consisting of three consecutive terms of 25 years to life on counts 1 through 3 and a determinate term of 21 years eight months on the remaining counts and allegations.[2]

On appeal, defendant contends the court erred in imposing consecutive 25-year-to-life terms on counts 1 through 3. Defendant additionally alleges the sentence on count 6 for aggravated kidnapping must be stayed. Defendant further argues that most of the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The sentencing minute order and abstracts of judgment incorrectly reflect the imposition of a determinate term of 22 years eight months. Pursuant to our inherent power to correct clerical errors, we shall direct the superior court to correct the sentencing minute order and abstracts of judgment.

fines included in the sentencing minute order and abstracts of judgment must be stricken because the court never imposed them. Finally, defendant claims the abstract of judgment must be corrected to accurately reflect the judgment. We agree with defendant's contentions with respect to the fines and fees and abstract of judgment and shall order the fines stricken and the abstract of judgment corrected. In all other respects, the judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2012, Victim #1 walked through the park on her way home from school while carrying her phone and listening to music. Defendant approached her and asked for spare change. The victim told him she did not have any. Defendant asked her if the phone she was carrying was the new iPhone. She responded that it was not.

Defendant took a gun out of his waistband and told her to give him the phone; the victim did so. Defendant told her to unlock the pass code on the phone; the victim unlocked it.

Defendant told her to walk with him. The victim was afraid defendant would shoot her. Defendant asked her for money; she told him she did not have any. Defendant told her to open her purse; she did and he looked inside. Thereafter, defendant left.

The victim went home and told her stepfather what had occurred. They called the police who showed up at her home. Two months later, the police came to the victim with a photographic lineup in which she was able to identify defendant.

On March 2, 2012, Victim #3 picked up Victim #2[3] at her work sometime after 6:00 p.m. and drove them to the park, where they arrived after dark. They started talking, but then moved to the backseat of the vehicle where they engaged in sexual intercourse. Afterward, Victim #3 exited the vehicle to check one of the tires. Defendant approached Victim #3 and asked if he needed any help. Victim #3 responded that he did not. He then looked up and saw that defendant had a gun. Defendant had a sock on his hand with a hole cut out for his finger and thumb. Defendant was wearing a beanie.

Defendant said he wanted money. Victim #3 gave defendant all the money he had. Defendant then told Victim #3 to have Victim #2 exit the car. Victim #3 told Victim #2 to get out of the vehicle. Victim #2 exited the car. Defendant kept pointing the gun back and forth between the two of them.

Defendant asked Victim #2 for her identification; she got her purse out of the car and gave it to him. Defendant asked if she had any money; she gave him the $10 she had with her.

Defendant told them both to strip down to nothing. Victim #2 confirmed that defendant meant for her to remove all her clothing. She felt "scared, embarrassed, and was upset. I didn't know what was going to happen." They began removing their clothing. Victim #2 asked if she could leave her bra and underwear on, but defendant

[3] At the time of the incident, Victims #2 and #3 had been dating for three years. At the time of trial, they had been married for a year.

told her she could not. She removed all her clothing. Victim #3 left his boxers on as defendant instructed him.

Defendant had Victim #2 hand over her purse with all her clothing. He then pointed the gun at both the victims and told them to move to the other side of the car, the side which was away from the street that ran along the parking lot. Victim #2 "was scared that he was going to kill us." The victims walked to the other side of the car.

Defendant told Victim #3 to move over to a cement parking block and sit down; he did so. Defendant then pointed the gun at Victim #2, told her to get down on her knees, and ordered her to orally copulate him. When she got down on her knees, defendant walked toward her and pointed the gun at her head. She put her mouth on his penis and began fellating him. Defendant continued to point the gun back and forth between she and Victim #3.

After a while, defendant told Victim #2 to get up. He opened the driver's side door and had her continue while he leaned against the inside of the door. The door blocked her view of Victim #3. Defendant told Victim #2 that she "gave good head" and told Victim #3 to watch. Victim #3 got up and moved to where he could see; he was crying. Defendant asked Victim #3 if Victim #2 gave him head too. Defendant told them that if they tried anything he would kill them.

After about five minutes, defendant told Victim #2 to lay back on the driver's seat so that he could have sexual intercourse with her. Defendant asked Victim #3 if he could

"fuck your girlfriend." Defendant put the tip of his penis inside her a couple times, but wasn't able to obtain a full erection. The victim was "screaming."

Defendant orally copulated her during one of his attempts to have sexual intercourse with her. Thereafter, defendant put his finger inside her a couple of times. Defendant also touched her breast, kissed her on the mouth, and made her masturbate herself. Defendant engaged in sexual activity with her for about 20 minutes. Victim #2 told defendant to come inside the car because it was cold; she believed it would give Victim #3 an opportunity to go for help.

At some point, a man in a marked police vehicle shined a light on the park.[4] Defendant exited the vehicle and ducked behind the car. The police volunteer drove off, but turned around and came back in their direction. Defendant took off running with Victim #2's purse and clothing.

Victim #3 came around the side of the car and started flagging down the police volunteer. He told the officer they had been robbed and that Victim #2 had been raped. The victims pointed in the direction in which they could see defendant fleeing. Victim #3 gave the man a description of defendant. Victim #2 was completely naked. Both victims were "very scared." Victim #2 was constantly spitting. The police volunteer called into dispatch a report of the incident and a description of defendant.

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[4] Both victims believed the man to be a police officer since he was in a marked police vehicle. However, as he testified later, the individual was actually a police volunteer.

Additional officers arrived thereafter. One responding officer arrived on the side of the park toward which defendant had been fleeing. The officer saw a lone individual who matched the suspect's description; the officer started following him. Defendant began to run into the adjacent residential neighborhood where the officer lost sight of him. The officer called for additional officers, who set up a perimeter and began searching the residential backyards. They saw someone running. Thereafter, they saw defendant inside a residence peering out the curtains. They took defendant into custody.

Two officers later escorted the victims in separate vehicles to a residential area on the opposite side of the park. The victims identified defendant, who then had on different clothing, as the perpetrator.

Officers searching the path of defendant's flight found a discarded sweatshirt and beanie, a tan purse, a woman's bra, and a woman's shirt. They found a wallet with Victim #2's identification in defendant's bedroom. They also found a Ruger, nine-millimeter semiautomatic firearm loaded with one round in the chamber and a fully loaded, eight-round magazine. At the crime scene, officers found a pair of socks with a hole cut in them.

An officer interviewed defendant after he waived his *Miranda*[5] rights. A recording of the interview was played to the jury. Defendant reported that he had been at the park, where he was jumped. He thereafter grabbed a gun, loaded it, chambered a round, put gloves on, and went back out to the park, where he saw people having sex in a

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

truck. Victim #2 was still naked, so he asked if he could join; Victim #2 agreed and he ended up having sex with her. She also gave him oral sex. Defendant was wearing a blue sweatshirt and beanie.

Defendant ran with her possessions and clothing so that he would not get caught by the police with the gun. He dumped the bag and dropped the gun. Defendant ran into a backyard and started hopping fences on the way to his home. He threw off his sweatshirt and beanie.

Defendant later admitted that he initially thought Victim #3 was one of the men who had jumped him; he had the gun out and asked the victim for all his money. Victim #3 said he did not have any money. Defendant then asked Victim #2 for money. Victim #2 said she would give him oral sex if he did not hurt them. Defendant told her to strip. Defendant then terminated the interview by asking for a lawyer.

Defendant testified that he had taken a large amount of his aunt's prescription medications and drank a lot of alcohol on March 2, 2012. He was so high he felt like a zombie; he was floating in and out of consciousness.

Defendant went to the park where he was hit on the back of head. He started fighting with three or four guys. The assailants took off running. Defendant went back to his house and grabbed a gun. He obtained some gloves, wiped all nine bullets for fingerprints, reinserted the magazine, chambered a round, and returned to the park with the gun in his waistband.

Defendant saw a truck and approached the driver's side. He saw a man at the truck whom he believed to be one of the men who jumped him; defendant pulled out his gun. He soon thereafter concluded that it was not one of the men who jumped him. Defendant saw something move inside the truck and told Victim #3 to get everyone out of the truck.

Victim #2 climbed out of the truck. She was in a bra and panties with a jacket. Defendant told the victims to give him their cash. Victim #3 told him they did not have any money. Victim #2 told him she would give him oral sex if he did not hurt them. She said: "I'm the best dick sucker in the world. If you want your d[i]ck sucked, I will do whatever."

Victim #2 told defendant that he was cute and that she was irritated with Victim #3. She told defendant to come with her to the side of car; he followed her. Victim #2 opened the car door and told him to come over. Defendant sat down. Victim #2 unzipped his pants, pulled out his penis, and performed oral sex on him. She "was just smiling and giggling and talking, and just telling me all kind[s] of crazy things." Victim #3 remained sitting on the concrete curb, "[l]ike a little bitch."

Victim #2 then told defendant "she wanted me to fuck her." Defendant stood up, Victim #2 laid down on the driver's seat and spread her legs. She was masturbating in an attempt to give him an erection. Defendant never penetrated her. Instead, they went inside the vehicle, closed the door, and talked.

Victim #2 flirted with him, telling him she was trying to ditch Victim #3, that defendant was "pretty cute," and that they could party later. She pulled his penis out of his boxers again and said they could finish "the party" there or go back to the house. She began giving him oral sex again, but he could not achieve an erection. They never engaged in sexual intercourse.

Defendant then saw a bright flash of light coming from the street. It was the police. Defendant opened the door, grabbed the gun, took Victim #2's purse and clothing, and fled through the park. Defendant opined that if the police found the victims naked, it would slow them down in attempting to go after him. He was afraid he would go to jail for possessing the gun.

While he was fleeing, defendant saw a police cruisier so he dumped the purse in which he had left the gun. The cruiser passed defendant and turned around. Defendant took off running into a backyard and began hopping fences. He took off his beanie and sweatshirt, dropping them on the side of a house. Defendant went home. A few minutes later, the police arrived and took him into custody.

Defendant admitted initially lying to the police during his interview. He denied ever meeting or robbing Victim #1. He denied raping Victim #2.

II. DISCUSSION

A. *Consecutive Sentencing on Counts 1 and 3*

Defendant contends the court erred in imposing consecutive sentences on counts 1 and 3. He maintains the offenses in counts 1 and 3 both occurred during the course of the

rape; thus, because they were inflicted upon the same victim and on the same occasion as described in section 667.6, subdivision (d), the court could only have imposed two consecutive 25-year-to-life sentences. Defendant additionally argues that pursuant to section 654, the offenses in counts 1 and 3 arose out of an indivisible transaction and had a single intent and objective; thus, again, the court erred in imposing consecutive sentences. Finally, defendant claims that even if the court had discretion to impose consecutive sentences, it abused that discretion in imposing consecutive sentences here. We disagree.

1. Section 667.61

"[T]he court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subd. (i).) "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (§ 667.6, subd. (d).)

"A finding that the defendant committed the sex crimes on separate occasions 'does not require a change in location or an obvious break in the perpetrator's behavior.' [Citation.] Once the trial court has found, under section 667.6, subdivision (d), that a defendant committed the sex crimes on separate occasions, we will reverse 'only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior.' [Citation.]" (*People v. King* (2010) 183 Cal.App.4th 1281, 1325, fn. omitted [momentary pause between separate digital insertions into the victim's vagina sufficient to show reflection].)

"What the trial court must decide is whether 'the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior.' A violent sexual assault cannot and should not be considered in the same light as sexual acts shared between willing participants. Consensual sex may include times when the participants go back and forth between varied sex acts, which they consider to be one sexual encounter. By contrast, a forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter. Such a sexual assault consisting of multiple types of sex acts committed against the victim is not motivated by sexual pleasure. Instead, it is frequently intended to degrade the victim. Sexual acts, such as those committed by defendant, are the antithesis of a consensual sexual encounter and should not be viewed

the same way." (*People v. Irvin* (1996) 43 Cal.App.4th 1063, 1070-1071, quoting § 667.6, subd. (d).)

Here, the court acted within its discretion in determining that defendant had an opportunity to reflect upon his actions when he stopped one sexual act and began another. Indeed, the court expressly noted when sentencing defendant on count 2 that he was imposing a consecutive term "because of [defendant's] opportunity to stop and reflect and have an independent sexual crime of violence occur but still pursued it [*sic*]." Likewise, the court noted in imposing a consecutive sentence on count 3: "Once again, a violent sex crime having an interval of time where the defendant had an opportunity to reflect on his actions and then pursue the next sex crime." The court's determination finds ample support in the record.

First, defendant's sexual acts against Victim #2 appear largely motivated out of desire to degrade and humiliate her rather than as conducted in a single course of conduct motivated by sexual desire. Defendant ordered Victim #2 to strip her clothing completely while in a public place where it was cold. He ordered her to do so in front of her boyfriend. Victim #2 was "scared, embarrassed, and was upset."

While forcing her to orally copulate him at the point of a gun, defendant told her she "gave good head" and forced Victim #3 to watch. Victim #3 was crying. Defendant asked Victim #3 if Victim #2 gave him oral sex too. Defendant asked Victim #3 if defendant could "fuck [his] girlfriend." He made Victim #2 masturbate herself. She was screaming during the encounter. Defendant fled the scene with all of Victim #2's

clothing, continuing to leave her vulnerable. Thus, the court could reasonably have concluded that each sexual act inflicted upon Victim #2 was designed as a direct reflection on what acts would degrade her the most. Therefore, the court's imposition of consecutive sentences was within its discretion.

Second, even if motivated at all by sexual desire, sufficient evidence supports the court's conclusion that defendant had ample time to separately reflect upon each of the offenses. The court could reasonably have concluded that defendant's original intention was solely to have Victim #2 orally copulate him. It was only some time later that defendant opened the car door, had Victim #2 move over to the open door, asked Victim #3 if he could "fuck his girlfriend," and had her lay back on the driver's seat. This was sufficient evidence from which the court could have concluded that defendant separately reflected upon an intention to rape Victim #2 only after she had been orally copulating him for some time.

Likewise, it was only after defendant was unable to achieve a sufficient erection to enable him to engage in the prolonged rape of Victim #2 that he inserted his fingers inside her. Thus, the court could reasonably have concluded that defendant's digital penetration of the victim was conducted only after becoming frustrated with his inability to maintain a sufficient erection to engage in a prolonged rape of her and/or in a further effort to degrade her. The record supports the court's conclusion that defendant had a reasonable opportunity to reflect upon his actions and nevertheless resumed separate,

sexually assaultive behaviors upon the victim, justifying imposition of consecutive sentences for each act.

Defendant cites *People v. Corona* (1988) 206 Cal.App.3d 13 and *People v. Pena* (1992) 7 Cal.App.4th 1294 for the contention that imposition of consecutive sentences requires separate occasions marked by a change of spatial location and/or a temporal detachment between the sexual acts. However, the court in *People v. Irvin*, *supra*, 43 Cal.App.4th at pages 1070 and 1071 expressly disagreed with both *Corona* and *Pena* for precisely this proposition. We agree with *Irvin*. Where the court provides a statement of reasons for its sentencing choices and a reasonable trier of fact could find that the separate acts were committed on separate occasions, the court acts within its discretion in imposing consecutive terms. (*People v. Irvin*, *supra*, at p. 1071.) Here, the court provided such a statement of reasons which was reasonable under the circumstances as discussed above.

2. Section 654

Defendant contends that regardless of whether separate, consecutive terms would have been permissible under section 667.61, they would be impermissible pursuant to section 654. We disagree.

"Section 654 provides that '[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.' The section 'applies when there is a course of

conduct which violates more than one statute but constitutes an indivisible transaction.' [Citation.] Generally, whether a course of conduct is a divisible transaction depends on the intent and objective of the actor: 'If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.' [Citation.]" (*People v. Alvarez* (2009) 178 Cal.App.4th 999, 1006.)

"However, the rule is different in sex crime cases. Even where the defendant has but one objective—sexual gratification—section 654 will not apply unless the crimes were either incidental to or the means by which another crime was accomplished. [Citations.]" (*People v. Alvarez, supra*, 178 Cal.App.4th at p. 1006.) "[S]ection 654 does not apply to sexual misconduct that is 'preparatory' in the general sense that it is designed to sexually arouse the perpetrator or the victim. [Citation.] That makes section 654 of limited utility to defendants who commit multiple sex crimes against a single victim on a single occasion. As our Supreme Court has stated, '[M]ultiple sex acts committed on a single occasion can result in multiple statutory violations. Such offenses are generally "divisible" from one another under section 654, and separate punishment is usually allowed. [Citations.]' [Citation.]" (*Ibid*. [where acts of kissing, digital penetration, and fondling during one incident could be viewed as being conducted for the defendant's arousal, rather than as facilitation of the ultimate act, the court could reasonably impose separate punishment for each act].) "A defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act." (*People v.*

Perez (1979) 23 Cal.3d 545, 553 [§ 654 did not preclude multiple punishment for a defendant who was convicted of forcible rape, forcible sodomy, and two counts of oral copulation committed over the course of 45 minutes to an hour].)

"Indeed, the Courts of Appeal have routinely applied *Perez* to uphold separate sentences for each sex crime committed in a single encounter, even where closely connected in time. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 336.) "[I]t is defendant's intent to commit a number of separate base criminal acts upon his victim . . . which renders section 654 inapplicable." (*Id*. at pp. 337-338.) "[T]he nature and sequence of the sexual 'penetrations' or offenses defendant commits is irrelevant for section 654 purposes. Whether defendant ends a break in the activity by renewing the same sex act . . . or by switching to a new one . . . the result under section 654 is the same." (*Id*. at p. 338.) "[O]ne offense is complete and another one begins whenever the perpetrator stops and resumes unlawful activity during a sexual assault. Thus, in the vast majority of cases, multiple convictions [have] been sustained without regard to the sequence or nature of the underlying acts or the cause or length of any break between them. [Citation.]" (*People v. Scott* (1994) 9 Cal.4th 331, 345.)

For many of the same reasons discussed above, section 654 similarly does not prohibit the imposition of consecutive sentences for defendant's multiple sex acts against Victim #2. Here, even if all of defendant's acts were directed at an objective of appealing to his own sexual gratification, the acts of digital penetration and oral copulation were neither incidental to nor the means by which to facilitate the rape of the victim.

Defendant's digital penetration of the victim could reasonably be viewed as an afterthought after defendant became unable to achieve a sufficient erection to maintain the rape; thus, it was meant to supplant the further rape of the victim and/or foster her additional humiliation. Therefore, defendant's commission of multiple sex crimes against the victim were divisible and the court's imposition of separate, consecutive punishment within its discretion.

3. Abuse of Discretion

Defendant further argues that even if statutorily permissible, the court abused its discretion in imposing separate, consecutive sentences. We disagree.

"The trial court has broad discretion with regard to sentencing, and its decision will be affirmed on appeal, so long as it is not arbitrary or irrational and is supported by any reasonable inferences from the record. [Citation.] The party attacking the sentence must show the sentencing decision was irrational or arbitrary and if it fails to do so, '"the trial court is presumed to have acted to achieve legitimate sentencing objectives . . . ."' [Citation.]" (*People v. King*, *supra*, 183 Cal.App.4th at p. 1323 [second digital penetration of victim after the defendant removed his hand when a car passed by, warranted imposition of separate, consecutive sentences as allowing the defendant the opportunity to reflect upon his action and for the humiliation imposed upon the victim].) "Only one criterion is necessary to impose a consecutive sentence. [Citation.]" (*Ibid.*)

Here, defendant threatened to kill the victim; had the opportunity to stop his conduct at any time; forced the victim to strip completely naked outside in the cold;

committed additional, uncharged sex acts upon her; forced her to commit an uncharged sex act upon herself; forced the victim's boyfriend to watch; mocked both victims; and left the victim without her clothing when he was done. Any one of these reasons alone would have justified the court's imposition of separate, consecutive sentences. Defendant's relative youth and lack of a prior record, when compared against the gravity and depravity of his current offenses, would not require the court to impose concurrent sentences. The court acted within its discretion.

B. *The Life Term on Count 6*

Defendant argues that the life sentence imposed on count 6 must be stayed because the kidnaping of Victim #3 was the same conduct used to enhance defendant's sentence under the "One Strike" law on counts 1 through 3 as to Victim #2 and was prohibited by section 209, subdivision (d). We disagree.

"Any person who kidnaps or carries away any individual to commit robbery, rape, spousal rape, oral copulation, sodomy, or any violation of Section 264.1, 288, or 289, shall be punished by imprisonment in the state prison for life with the possibility of parole." (§ 209, subd. (b)(1).) "This subdivision shall only apply if the movement of the victim is beyond that merely incidental to the commission of, and increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense." (*Id.*, subd. (b)(2).) "Subdivision (b) shall not be construed to supersede or affect Section 667.61. A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and

Section 667.61 for the *same act* that constitutes a violation of both subdivision (b) and Section 667.61." (*Id.*, subd. (d), italics added.) "Except as provided in subdivision (j), (*l*), or (m), any person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for 25 years to life." (§ 667.61, subd. (a).)

"[S]ection 654 does not apply to crimes of violence against multiple victims. [Citation.] The reason is that '"[a] defendant who commits an act of violence with intent to harm more than one person or by means likely to cause harm to several persons is more culpable than a defendant who harms only one person."' [Citation.]" (*People v. Correa* (2012) 54 Cal.4th 331, 341, fn. omitted.) Kidnapping is a violent crime for purposes of the multiple victim exception. (*People v. Centers* (1999) 73 Cal.App.4th 84, 100-101.) "Penal Code section 209, which prescribes the offense of kidnaping for the purpose of robbery does not require that the robbery and kidnaping must relate to the same person." (*People v. Zurica* (1964) 225 Cal.App.2d 25, 32.) "'[T]hough two victims respond to the same force, such as being ordered about at gun point, and are simultaneously subjected to the same indignities, there are nevertheless two kidnaping offenses. [Citation.]' [Citation.]" (*Ibid.*)

Here, defendant's kidnapping of Victim #3, even if used to facilitate his sexual offenses against Victim #2 and, therefore, arguably constituting the same act as the kidnapping of Victim #2, was, nevertheless, conducted against a separate victim. Thus,

defendant's kidnapping of Victim #3 constituted a separate offense which subjected a separate victim to increased risk of harm above that necessary to commit the sexual offenses against Victim #2. Ergo, defendant's act of kidnapping Victim #3 rendered defendant more culpable than had he kidnapped only Victim #2. Staying sentence on count 6 would allow defendant to escape punishment for the kidnapping of Victim #3. Thus, imposition of sentence on count 6 was appropriate.

In *Zurica*, the defendants argued that the court erred in imposing punishment for the kidnapping of a second and third victim who were not robbed, unlike the first victim who was, because it occurred during a single course of criminal conduct. (*People v. Zurica*, *supra*, 225 Cal.App.2d at p. 32.) The court held that simply because no property was taken from the second and third victims it did not preclude the defendant's conviction and punishment for the kidnapping of those victims. Indeed, the kidnapping of the latter victims facilitated the robbery of the first victim by preventing them from spreading an alarm. (*Ibid*.) Here, defendant's kidnapping of Victim #3 similarly facilitated his offenses against Victim #2.

C. *Fines and Fees*

Defendant contends the reflection in the minute order and abstracts of judgment of the imposition of several fines and fees which were not ordered by the court must be stricken. The People agree, but maintain the matter must be remanded so that the court may make ability to pay determinations on the statutorily mandated fees. We agree with defendant that all fines and fees not imposed by the court must be stricken.

In her report, the probation officer recommended the imposition of a number of fines and fees. At sentencing, the court ordered $296 restitution to Victim #3, $300 to Victim #1, and a $5,000 restitution fine pursuant to Penal Code section 1202.4, subdivision (b). The People did not request imposition of any additional fines or fees. Nevertheless, the sentencing minute order and abstracts of judgment reflect a booking fee of $434.08 pursuant to Government Code section 29550; a $70 fine pursuant to Penal Code section 264, subdivision (b); $30 in fines pursuant to Penal Code section 1202.5; and a $1,300 fine pursuant to Penal Code section 290.3.

On a silent record where no fee was imposed, we presume that the trial court resolved issues of a defendant's ability to pay fees in favor of not imposing those fees. (See *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1517.) The People forfeit imposition of even mandatory fines and fees by the appellate court or on remand to the sentencing court where they failed to raise the issue below. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303.)

Here, the People failed to request imposition of the above listed fees and fines and the court never ordered them. Thus, we shall direct the superior court to strike them.

D. *Correction of the Abstract of Judgment*

Defendant contends the abstract of judgment does not accurately reflect the judgment imposed by the court and must be corrected. The People agree. We agree as well.

"It is well settled that '[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]' [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge's verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

Defendant notes that the court imposed a consecutive one-year sentence on count 5 plus an additional consecutive three years four months on the section 12022.53, subdivision (b) enhancement. However, the abstract of judgment reflects a sentence of three years on count 5 plus a consecutive four years four months on the enhancements. Moreover, the court sentenced defendant to one year consecutive on count 7 plus a consecutive three years four months for the section 12022.53, subdivision (b) enhancement. However, the abstract of judgment indicates a one-year sentence on count 7 plus a consecutive one year four months on the enhancement. Finally, the jury convicted defendant of three counts of robbery, not robbery in concert as incorrectly indicated on the abstract of judgment. We shall direct the superior court to correct the abstract of judgment.

III. DISPOSITION

The trial court is directed to strike the imposition of a booking fee of $434.08 pursuant to Government Code section 29550; a $70 fine pursuant to Penal Code section

264, subdivision (b); $30 in fines pursuant to Penal Code section 1202.5; and a $1,300 fine pursuant to Penal Code section 290.3 as reflected in the abstracts of judgment and sentencing minute order. The trial court is further directed to correct the abstract of judgment to reflect that the court imposed a consecutive one-year sentence on count 5 plus an additional consecutive three years four months on the Penal Code section 12022.53, subdivision (b) enhancement; one year consecutive on count 7 plus a consecutive three years four months for the Penal Code section 12022.53, subdivision (b) enhancement; and that the jury convicted defendant of three counts of robbery, not robbery in concert. Finally, the trial court is directed to forward a copy of the new abstracts of judgment and sentencing minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.