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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEOBARDO MENDOZA,

Defendant and Appellant.

F064214

(Super. Ct. No. CRM016007C)

**OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

A jury found defendant Leobardo Mendoza guilty of rape in concert, forcible rape, false imprisonment, and unlawful sexual intercourse with a minor. On appeal, defendant

contends: (1) the court erred in admitting needless gang evidence, denying defendant due process and a fair trial; (2) defendant was denied his Sixth Amendment right of confrontation because the presence of a support person during the complaining witness's testimony lacked any particularized showing of need; (3) the prosecutor committed four instances of misconduct; (4) the court erred in failing to instruct on juror unanimity with respect to the charge of rape in concert; (5) the written pinpoint instruction on gang evidence was overbroad and unfair; (6) the court erred in failing to sua sponte instruct the jury that evidence of an oral admission of a defendant should be viewed with caution; (7) failure to allege or at least secure instructions and jury findings as to the age of the victim under the rape counts violated state law and further denied defendant due process of law and the right to a jury determination on a fact increasing the maximum term; (8) the statutory rape conviction must be reversed because it is based on the same act of intercourse as relates to the rape conviction; and (9) the cumulative effect of these errors deprived defendant of due process and the right to fair trial by an impartial jury. We will affirm the judgment.

### **PROCEDURAL HISTORY**

In an amended information filed September 6, 2011, by the Merced County District Attorney, defendant was charged with rape in concert (Pen.<sup>1</sup> Code, § 264.1; count 1), forcible rape (§ 261, subd. (a)(2); count 2), false imprisonment by violence, menace, fraud, or deceit (§§ 236, 237; count 3), and unlawful sexual intercourse with a minor more than three years younger (§ 261.5, subd. (c); count 4). Defendant pled not guilty to all counts.

On September 14, 2011, the jury returned guilty verdicts on all counts.

On January 13, 2012, defendant was sentenced to the upper term of 11 years for forcible rape (count 2), and a consecutive three-year midterm for rape in concert (count 1). As to each of the remaining counts (false imprisonment by violence and unlawful

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<sup>1</sup>All further statutory references are to the Penal Code unless otherwise indicated.

sexual intercourse) the upper term of three years was imposed and stayed pursuant to section 654. Accordingly, defendant was sentenced to a total of 14 years in state prison.

### FACTS

On January 16, 2011, 15-year-old Kayla was staying overnight at her friend Adrianna's house; Adrianna was also 15. The girls were looking for a ride to a high school event being held in Modesto. Neither girl had a driver's license or a car. Eventually, Adrianna's friend Rudy Gamboa or "Poet" agreed to give them a ride.

When Gamboa arrived, he was accompanied by three others: defendant or "Caco," Edgar Partida, and a third individual<sup>2</sup> whose name Kayla did not know. Although Kayla had met Gamboa once before, she had never met the others.

Kayla sat next to defendant in the backseat of the car. She noted defendant had gang-related tattoos on his face, including "Ene" and "Livingston" over his eyebrows, and horns tattooed above that. She believed defendant was a gang member. She was "kinda creeped out" by defendant's appearance.

Gamboa said he did not want to take them to Modesto, so the girls were going to "chill with them in Livingston" instead. During the drive to Livingston, Kayla introduced herself and then referred to herself as "guera," meaning "white girl"; she also mentioned her upcoming 16th birthday.

The car stopped at a Valero gas station because the men wanted to buy alcohol. Edgar Partida snatched \$40 from Kayla and used her money to buy beer. She was angry. When they stopped at a house nearby, their group joined others "partying" in a garage. They started drinking beer and smoking, playing cards, and listening to music. Specifically, they were listening to local gangster rap. The rap was about "Livas," a gang in Livingston and included songs about gangs and "killing Scraps." Kayla believed the people at the house were gang members.

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<sup>2</sup>This individual is referred to by others as "Miklo." He was never identified or charged.

After drinking eight to ten Budweiser beers and smoking from two “blunts” or marijuana cigarettes, Kayla was drunk. She was a “little bit stumbly” and her speech was slurred. Kayla recalled hearing gunshots while in the garage partying; although the shots sounded close, she did not know where they had come from. Kayla was “spooked” by the gunshots, but there was no way to leave the party because her parents thought she was at Adrianna’s house.

Kayla went inside to use the bathroom. She ran into Edgar Partida near the front door. He threw his arms around her and said, “Come with me” or “Let’s go,” pushing her into a bedroom. She could not get away from him. He shut the door and turned off the lights. He pushed Kayla onto the bed and started putting on a condom. Kayla asked, “What the fuck? What are you doing?” and Edgar Partida told her to be quiet. He unbuttoned her pants and tried to pull them open. Kayla was trying to keep her pants on and pushed him away. Edgar Partida prevailed, pulling down her pants and restraining her, before forcing his penis inside her vagina. She repeatedly asked him to stop and told him she did not want to have sex with him. She yelled at him but did not scream to get anyone’s attention. The assault did not last long because Edgar Partida heard gunshots and became upset that “they were shooting the gun.” He left the room. Kayla dressed and also left the room.

Once in the hallway, Kayla ran into the other individual who had been in the car earlier. She did not know his name. He attempted to follow her into the bathroom; she tried shutting the door “in his face.” She caught Gamboa’s eye and waved for help, but he smiled and looked away. In the bathroom, the man locked the door and “was all over” her; she shoved him back and told him to get out. He said, “[N]aw, I want to fuck.” He tried to take off her clothes, putting his hands in her pants and tugging. He shoved her and hit her in the face with a handgun he had been carrying in his pants; she fell to the floor. Kayla was terrified and thought he was going to kill her. She struggled, cried, and cussed at him. He pulled her pants down and told her she was going to “ride” him. She refused and he called her a bitch. He forced his penis into her vagina. She did not want

to have sex with him. The man stopped his assault when someone spoke to him through the door.

Kayla managed to get out of the bathroom and into the hallway. A group of people were standing quietly and all the lights had been turned off. Kayla saw a flashlight shine through the window near the front door. Gamboa came up behind her and put his left arm across her, covering her mouth with his hand. He told her to be quiet because the cops were outside as a result of the gunshots. No one opened the door for the police and they eventually left.

After the police left, the lights were turned back on and people went back out into the garage. Kayla found Adrianna on the couch in the living room and she sat down nearby. At first she did not say anything to her friend, but Kayla later told Adrianna that “something had happened” that she “didn’t want to happen.” Kayla recalled Edgar Partida sitting on the couch with Adrianna before Adrianna fell asleep there.

Kayla did not try to leave the house, nor did she try to call anyone. She had her cell phone, but she could not call her family because they thought she was at Adrianna’s house. Additionally, she was afraid her family would retaliate and she did not want her brothers to get hurt. She had no one to call for help.

After sitting in the living room for a long time, Kayla recalled defendant grabbing her by the arm and leading her into a room. Two others—Gamboa and Adrian Partida—followed behind. Once inside the back bedroom, the door was shut and locked behind them. Defendant told Kayla to take off her clothes. She refused. The men laughed at her and Gamboa shoved her onto the bed. She tried to get back up, but he just pushed her back down again. Defendant walked around the bed and held Kayla’s arms while Gamboa pulled off her pants. Kayla recalled Adrian Partida standing at the end of the bed, recording with a cell phone; she believed he was recording because of the way he was holding the phone and because there was a light pointed in her direction.

After removing Kayla’s pants, Gamboa put on a condom and put his penis in her vagina. It was painful. Although he was talking to her, Kayla does not remember what

he was saying. She was crying. She told him to stop, to get off of her and to get away. Defendant continued to hold her down while Gamboa assaulted her. Kayla recalls Gamboa leaving the room and returning with Saran Wrap. Gamboa gave the Saran Wrap to defendant, who wrapped it around his penis before putting it into Kayla's vagina. She did not want to have sex with defendant and it hurt. Then, although she could not see Gamboa and Adrian Partida, she heard them rummaging in a dresser. Gamboa was saying something about a knife or blade in the dresser. Defendant said they should carve their names into Kayla's stomach. Adrian Partida then got on top of her and put his penis in her vagina; she does not know whether he used a condom or not. She told him he was "fucked up and cruel." Kayla fought him, but he held her down. After he stopped, Adrian Partida left the room.

Kayla "felt disgusting [and] terrified." She was afraid they would kill her; she knew there was a gun and had heard gunshots. She gathered her stuff, put on her clothes, and went into the living room where Adrianna was sleeping. Kayla stayed in the living room. She did not try to leave; she had nowhere to go.

Adrianna told Kayla the men were "talking hella shit" about her, and they were saying she was a whore and that they had video of her they were going to put on the Internet. Kayla told Adrianna they had forced her, and she couldn't stop them. She told Adrianna she wanted to go home. Adrianna, however, said she did not know when they would be able to leave. Gamboa would have to take them home and he was afraid to do so because the cops knew his car. Kayla was terrified but stayed put on the couch.

Eventually, Gamboa and defendant drove Adrianna and Kayla home. It was about 5:00 or 5:30 in the morning. They dropped Adrianna off first, but Kayla did not want to go to Adrianna's house. She wanted to go home, but did not want to walk home in the dark by herself. It would have taken her 25 to 30 minutes to walk from Adrianna's house to her house.

When the car stopped near Kayla's house, Gamboa asked her what was the matter. She told them they were "fucked up." She "blew up" and cussed them out. Defendant

called her a bitch and said they had not done anything bad; he said, “All we did is fuck.” Defendant told her she had better not tell anyone or they would kill her. Kayla was scared when she was cussing at Gamboa and defendant, but she knew she was close to home. She was frightened by defendant’s threat. She believed he was capable of hurting her and he looked scary. Kayla did not want to tell anyone about what had happened. It made her “feel disgusting.”

Once home, Kayla got inside by climbing through a window. She did not knock on the door or ring the doorbell because she didn’t want anyone to see her coming in. She went into the bathroom where her brother’s girlfriend Jessica later found her crying.

When Jessica asked Kayla what was wrong, Kayla told her she had been raped. Jessica hugged her and Kayla made Jessica promise not to tell anyone. She did not want her parents or family to know. She feared her family would retaliate.

Nothing more was said until a month later on February 18, 2011, when Kayla was caught shoplifting from a local market. The deputy who responded to the call was familiar to Kayla. Kayla admitted to Merced County Sheriff’s Deputy Justin Ussery that she had been stupid; she told him she had fought with her parents and left the house very mad. Deputy Ussery asked her about cuts on her face, and she told him she had been cutting herself.<sup>3</sup> Kayla then told Deputy Ussery she had been “raped by five guys.”

Subsequently, Kayla told Officer John Ramirez with the Livingston Police Department what had happened. She and Ramirez located the house where the rapes had occurred after Kayla described the surroundings and specifics about the garage.

Officer Ramirez asked her to make contact with defendant since his phone number was in her cell phone. She did so via text message and defendant sent a picture of himself in reply. Later, Ramirez took possession of the underwear Kayla had been

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<sup>3</sup>Kayla began cutting her arm, neck, and face because she was ashamed of herself and what had happened. She did not want to think about it or deal with it. She thought if she cut her arms, face, and throat she would lose enough blood to die. Because she “felt disgusting,” Kayla tried to make herself ugly.

wearing on the evening of the assaults; she found it unwashed at the bottom of her laundry basket.

Kayla had never met defendant before January 16, 2011. She is not certain whether Adrianna knew the men other than Gamboa, but because of the way she spoke with them, Kayla thought Adrianna knew them “from before.”

In January 2011, Jessica was living with Kayla’s brother in the home of his family. One morning a few days before Kayla’s birthday, Jessica got up early to get ready for her 7:00 a.m. shift at work. She found Kayla in the bathroom, crying. She hugged Kayla and asked her what had happened. Kayla explained she had been raped by some guys; she was scared and did not know what to do. Kayla asked Jessica not to tell anyone about what had happened. She was afraid she would get in trouble for going out, and she was concerned no one would believe her. Jessica did not call police.

On February 18, 2011, Deputy Ussery was dispatched to a local market regarding a petty theft. Kayla was the suspect. She admitted stealing lighters and advised the deputy that she wanted to go to jail. During this contact, Ussery noted cuts on Kayla’s face in a hash mark pattern. He asked her about them and she indicated she had been cutting herself with razor blades and a kitchen knife. Eventually, Kayla admitted to him that she had been pistol whipped and gang raped. She was very upset. Kayla gave him the “bare bones” story; he did not ask about details. As the rapes had occurred in Livingston, the deputy knew the matter would have to be turned over to the Livingston Police Department. Deputy Ussery transported Kayla to that agency to be interviewed and stayed briefly to make her feel comfortable.

Livingston police officer Ramirez was assigned to take a report on February 18, 2011, regarding a sexual assault. He spoke with Kayla twice; the second interview was more detailed as a result of his questions. Kayla reported she had been assaulted in Livingston. She advised the first assault occurred in the bathroom by an unknown assailant, that a second assault occurred in a bedroom, and that a third assault was perpetrated by three other individuals in a back bedroom. The officer located the

residence where the assaults occurred based upon Kayla's description—it was the home of Edgar and Adrian Partida. Kayla indicated defendant was one of the individuals who raped her, and she showed the officer a text message she had received from him. On February 19, 2011, Ramirez collected a pair of panties as evidence. Kayla had located the panties at the bottom of her dirty laundry basket.

Adrianna knew Kayla from school; they were friends but not close. On January 16, 2011, both she and Kayla tried to find a ride to Modesto. Gamboa picked them up after Kayla called him. Defendant, Edgar Partida and Miklo were with Gamboa. Adrianna knew Gamboa and defendant through mutual friends in Livingston; she did not know Edgar Partida or Miklo.

Gamboa did not want to take them to Modesto because he wanted to “hang out,” and Kayla wanted to “hang out” with him. After stopping at a gas station where Adrianna and Kayla used the bathroom, the group went to Edgar Partida's house. They were in the garage, listening to music and playing cards. Although others were drinking, Adrianna did not drink because she doesn't like to and because she and Kayla were the only girls there. They did not smoke marijuana and Adrianna testified she would be surprised if someone testified they had.

Although Adrianna had known defendant for a little while, she did not notice the tattoos on his head. Nor was she familiar with the Livas gang, although she did acknowledge listening to Norteno music at the party and recognized that the Norteno gangs were affiliated with the color red.

While the group was partying in the garage, Kayla was sitting on Miklo's lap. Adrianna denied telling a detective that Kayla had been sitting next to Miklo. Kayla appeared to be having fun.

When Kayla went inside the house to use the bathroom, Adrianna went with her. They used the bathroom together and returned to the garage. She does not recall telling the detective that she stayed in the garage. Adrianna then admitted telling the detective

that Kayla left the garage, went inside the house, and was gone for awhile. Adrianna claimed her testimony on the stand was truthful.

While they were in the bathroom, Adrianna and Kayla heard gunshots. Adrianna did not recall telling the detective that she heard the gunshots while she was in the garage and Kayla was inside the house. Adrianna was not scared when she heard the gunshots. She was in the bathroom and not paying attention. In any event, she considered it normal to hear gunshots.

Just before the police arrived in response to a report of the gunshots, the garage door was closed and the lights were turned off. Everyone stayed quiet, standing in the kitchen or hallway area. Afterward, Adrianna tried to call a friend for a ride home because she was afraid. She could not get a ride and was not sure where Kayla was. Gamboa told her he could not give her a ride home because the cops knew his car and had already been to the house that night.

Adrianna recalled seeing Kayla come out of the bathroom with Miklo. It was dark inside the house but she could still see their faces. Adrianna had been talking to Edgar Partida in the living room. She did not remember telling the detective that after the police left, Kayla had told her she wanted to leave and that “some of the guys had touched her.”

Adrianna slept on the living room couch. She slept for about one to two hours; she did not recall telling the detective she was asleep for five hours. She woke up about 3:00 or 4:00 a.m. and Kayla was not there.

After hearing Adrian Partida, Gamboa, and defendant talking and laughing about a video they had made of Kayla, Adrianna told Kayla about it. The men said they were going to put the video on YouTube. Although she did not see the video, Adrianna understood it depicted sex acts. Kayla said she was uncomfortable and that the men touched her; she wanted to leave. She also said she wanted to die. Adrianna felt bad, believing Kayla regretted her actions because she had a boyfriend. Adrianna did not remember Kayla telling her that she did not want to be touched.

Eventually Gamboa and defendant drove them home. Kayla told them to drop Adrianna off first.

After that night, Kayla text messaged Adrianna, “saying something about—oh, something about trying to lie or have her back or something like that.” Adrianna did not tell the detective about Kayla’s text message, nor did she tell the prosecutor or defense attorney. She did not save the message.

The first time Adrianna learned Kayla had been raped was when the detective contacted her. Between the time she first spoke with an officer in February and the second occasion in March, she had contact with mutual friends of Gamboa and defendant. However, while they “discuss[ed] what was going on,” those friends did not say anything to her or tell her not to talk. No one had frightened or intimidated her. Adrianna testified she had not spoken to either Gamboa or defendant since that night. Because defendant was present that night, Adrianna was surprised to hear he had denied being at the party.

On cross-examination, Adrianna testified Kayla had been smiling and laughing, that she held Edgar Partida’s hand and went willingly into a room with him, and also went willingly into a bedroom with Gamboa and Adrian Partida. “[A]t the last minute,” Kayla told Adrianna that she was uncomfortable. She looked sad and said some guys had touched her, but did not say which guys. Adrianna also testified that while the group was at the gas station earlier that evening, it was Kayla’s idea to get beer and cigarettes; Kayla gave her money willingly. Adrianna further testified that Kayla never mentioned her upcoming 16th birthday while the group was in the car.

Adrianna also testified on cross-examination that at one point Gamboa and Adrian Partida told her Kayla was calling for her. Adrianna went to the door and asked Kayla if she had called her. Kayla was hiding behind the door and just laughed.

Sergeant Jose Silva with the Livingston Police Department recalled being dispatched to a residence at 11:40 p.m. on January 16, 2011, in response to a report of gunfire. As he approached the house, all the lights went out. Although he and another

officer tried to make contact with the house's occupants, no one responded. He could hear people inside whispering. Beyond the gate and outside near a door that led from the garage to a side yard, the sergeant observed spent shell casings on the ground.

Livingston Police Detective Robert Silva arrested defendant on February 21, 2011. Initially, defendant denied being at a party at the Partida residence on January 16, 2011. Defendant admitted he knew Kayla, but denied having sex with her. Later, a DNA sample was obtained from defendant. The results of the DNA testing were inconsistent with defendant's claim that he did not have sex with Kayla. Detective Silva also testified regarding a number of inconsistencies between Adrianna's statements and her trial testimony.

The DNA testing of Kayla's panties revealed the presence of multiple sperm contributors, one of whom was defendant.

## **DISCUSSION**

### **I. Admission of Gang-Related Evidence**

Defendant contends the trial court committed prejudicial error in admitting needless gang evidence, thus denying him due process and a fair trial. The People maintain the gang evidence admitted was minimal and properly limited. That evidence related to Kayla's fear—an element of defendant's crimes—and her credibility, and also to Adrianna's credibility.

#### **A. The applicable standards for admission of gang evidence**

“Gang evidence is admissible if it is logically relevant to some material issue in the case other than character evidence, is not more prejudicial than probative, and is not cumulative....

“However, gang evidence is inadmissible if introduced only to ‘show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense. [Citations.]’ [Citations.] In cases not involving a section 186.22 gang enhancement, it has been recognized that ‘evidence of gang membership is potentially prejudicial and should not be admitted if its probative value is minimal. [Citation.]’ [Citations.] Even if gang evidence is relevant, it may have a highly inflammatory impact on the jury. Thus, ‘trial courts should

carefully scrutinize such evidence before admitting it. [Citation.]’  
[Citations.]

“A trial court’s admission of evidence, including gang testimony, is reviewed for abuse of discretion. [Citations.] The trial court’s ruling will not be disturbed in the absence of a showing it exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. [Citation.]” (*People v. Avitia* (2005) 127 Cal.App.4th 185, 192-193.)

Gang evidence is unquestionably admissible when it serves to establish motive or intent, or to establish the criminal offense, and is not highly inflammatory, even if it may prove prejudicial to the defendant. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1048-1051.)

## **B. Procedural background**

The People asked that Kayla “be allowed to mention her belief that ... Defendant was a Livas gang member” because it contributed to her fear and “helps explain her actions and inactions.” Additionally, the People contended “such evidence should be admissible concerning witness Adrianna[’s] credibility” because her conflicting statements to law enforcement could be “explained by her fear of testifying against [Livas gang members].” During the motions in limine hearing, the trial court reserved ruling on the issue. Specifically, the following colloquy occurred:

“[THE COURT]: So there is no 186.22 charge alleged?”

“[PROSECUTOR]: No, there is not. We’d request the Court grant motion in limine Number 14 with the limiting instruction, which is jury instruction CALCRIM 1403.

“[DEFENSE COUNSEL]: Your Honor, we oppose anything having to do with testimony regarding gangs or gang status or gang membership.

“THE COURT: Okay. I’m going to need to review the preliminary hearing transcript. I’m going to reserve on 14. Court reserves ruling on whether or not the alleged victim can testify about her belief that [defendant] was a Livas gang member and that contributed to her fear and submission.

“[DEFENSE COUNSEL]: Your Honor, we’d ask the Court to note in its review of the preliminary transcript that there is no testimony besides her belief that certain people might be Livas gang members. There is no testimony about her being especially fearful because they’re gang members.

“THE COURT: Okay. She socialized with them or evidence she socialized with them or they were friends.

“[DEFENSE COUNSEL]: She knew at least one of them, I think more than one of them prior to this date of the alleged incident.

“THE COURT: The issue of fear. Thank you.”

That afternoon, the trial court found as follows:

“THE COURT: Okay. With respect to the motions in limine, the Court has reviewed a portion of the preliminary hearing transcript,<sup>[4]</sup> but not all of it. I think I’ve reviewed enough to be able to rule on the various matters.

“With respect to the People’s motion to allow the victim to testify to her belief that defendant was a Livas gang member, the Court is going to allow that as to defendant’s [*sic*: victim’s] state of mind and to explain why she did or did not take certain actions with respect to the assault. I think it’s relevant to those issues.

“With respect to issue number—now, as far as the evidence that would suggest gang activity, it’s limited to hearing Livas local rap music, it’s her belief that hearing the gun shot, the police arriving, and I don’t want you to go into all of the traditional evidence associated with gang activity in Livingston, all the acts of violence that they’ve engaged in?

“[PROSECUTOR]: I would limit it to her observations, to the music, to the gunshots. I would like to ask her what they were wearing and if that contributed to her belief, and also if she saw any tattoos that would have contributed to her belief and to her fear; and I won’t go beyond that.

“THE COURT: Okay. So you’re limiting it to the observations on the evening of January 16th?

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<sup>4</sup>Kayla testified about listening to “gangster rap” and “local music” that referred to “gangs and gangsters—in the town, like, Livas.” She testified about hearing gunshots. She testified that defendant had tattoos on his face. Kayla testified about being afraid, and in particular, that she “thought [she] was going to die that night.” Finally, Kayla testified about being threatened not to tell anyone.

“[PROSECUTOR]: Yes.

“THE COURT: Fine.”

The following day, defense counsel raised the issue and further discussion ensued:

“[DEFENSE COUNSEL]: And then, Your Honor, the other issue I had, we discussed yesterday where the Court made a ruling about [the victim] being able to testify about what she observed regarding gang membership or gang type rap music or what she observed that day. Your Honor, I just wanted to ask for a 402 hearing prior to her testimony. I reviewed her preliminary hearing testimony. There is essentially no testimony from [the victim] saying that she is afraid of these men because they are gang members. She states on three occasions at that hearing that she didn’t tell anybody because she was afraid of getting in trouble with her parents.

“THE COURT: She gave two reasons. She said she was afraid of what would happen to her, and secondly, afraid of getting in trouble, or what would happen to her or something bad would happen.

“[DEFENSE COUNSEL]: And that’s as specific as she got. She didn’t ever say, I thought because these guys were bad guys that because of their gang membership that I was especially afraid. She made comments about thinking somebody had a gun, she wasn’t sure who, she never saw who. She heard from somebody that one of these gentlemen had a gun, not our defendant. She also heard about a joke or something about let’s carve our names in her stomach. She never saw who said that nor did she see a knife.

“THE COURT: Well, I think the only real issue about gangs is that they’re listening to the Livas rap music, and I think it’s relevant to the general atmosphere and circumstance that she was in with this group of ten or so people. So there isn’t a lot more than that about the gang-related activity.

“[PROSECUTOR]: From what I recall, she just testified to the music that was playing, to the gunshots, to the gang-related tattoos that she saw, and I don’t recall if she mentioned any items of clothing. I don’t know if that was just in the police report or the preliminary hearing transcript.

“THE COURT: I don’t remember any testimony about, you know, the colors or clothing. All I remember is the tattoos, the music, and the gunshot. The gunshot is kind of neutral, but adds to the atmosphere of contributing to her state of mind or belief that something could happen to her if she told.

“[DEFENSE COUNSEL]: But without having a foundation of why she believes this is gangster rap or also why she believes certain tattoos are gang-related, we believe that that would be inadmissible character evidence that would be coming in, and that would be in violation of in fact [the prosecutor] cited to this case, it’s *People versus Avitia* and that would be 127 Cal.App.4th 185.

“THE COURT: 127 Cal.App.4th. What does the case hold?

“[DEFENSE COUNSEL]: The case holds that this was a case where I think there was—it was a 12021 and the prosecution wanted to bring in evidence that there was certain gang writing on some—I think this was ammunition or boxes of ammunition, I think the word was Chivo or something like that. There was no 186.2(a) [*sic*] crimes alleged nor the (b)(1) enhancement alleged. They limited, I guess, the evidence to simply what I was just talking about, I think that the boxes containing the magazines of ammunition—that Chivo was written on the butt of one of the ammunition boxes and that Chivo was tattooed on Mr. Avitia’s hand. Counsel had offered to stipulate that Mr. Avitia owned the rifle that was found, and that was all that came in.

“And then the Court held that that was reversible error that was inadmissible in that case, that was not relevant to the charges at hand. And that would be the same situation that we are at here in our case today.

“THE COURT: Well, you’re not—are you arguing that the hearing of the gunshots isn’t relevant?

“[DEFENSE COUNSEL]: The hearing of gunshots could be relevant, but that is—

“THE COURT: So the gunshots come in.

“[DEFENSE COUNSEL]: Right.

“THE COURT: Okay. You’re arguing that the characterization or description of the music being played as Livas rap music—okay. [Prosecutor], your argument?

“[PROSECUTOR]: Your Honor, the case that [defense counsel] is citing in that case, it was 12021, is that what you said?

“[DEFENSE COUNSEL]: I think it was, I’m not sure, or negligent discharge of a firearm.

“[PROSECUTOR]: One of the elements is not showing fear or force. In this case one of the elements is fear or force, and listening to the Norteno music, the Livas music, it goes to the victim’s state of mind and how what she heard—what she observed affected how she perceived what was going on and the genuine threat that she felt to her safety, and that all contributes to that from the very beginning of this case. From the police report to the preliminary hearing, she refers to them as Livas gang members, refers to it as Livas music. That’s what she recognized it as through—I mean, [defense counsel] is free to inquire of her why she believed what it was, that it was gang music, but that was her belief. That was her state of mind, and that is very relevant when it comes to the elements of the charges in this particular case.

“THE COURT: I agree. I think the fear element and also the delayed reporting, the statements—the statements made and any impressions that she had as to whether or not these people would actually carry out those threats or statements is relevant to the case. I think it would just get—it sanitizes it a little too much in a case such as this. So the ruling is going to stand. She can describe the music as Livas rap music.

“Now I didn’t read any testimony from her as to what the tattoos said, okay? All she saw was tattoos, one of the attackers had tattoos over his forehead. And one of them had tattoos, he had his shirt off and she saw tattoos. I did not—I don’t recall any testimony as to what those tattoos said, if they were 187 or if they were Livas or Norte or what’s the Aztec—

“[PROSECUTOR]: The Huelga bird?

“THE COURT: I didn’t hear any testimony describing that. If there’s anticipated to be testimony regarding that, then we do need to have a 402 hearing on that; but if not, then we’ll just go with that she saw, that there were tattoos and that solely to the issue of being able to identify the attacker.

“[PROSECUTOR]: And that’s the situation I would also be requesting a 402 with [defense counsel]. In the police report she identified the tattoos and identified them having some gang significance, and she—and I believe that also contributed to her belief and her state of mind.

“THE COURT: Okay, we’ll have a 402 hearing on that area of her testimony.”

Subsequently, outside the presence of the jury, the Evidence Code section 402 hearing was held. Kayla testified regarding defendant’s gang-related facial tattoos, and gangster rap music specifically referencing the “Livas,” which Kayla understood to be associated

with a northern gang. After argument by counsel, wherein defense counsel characterized Kayla's fear as unrelated to gang members and instead argued her fear related to "getting in trouble" and the "alleged weapons," the following discussion occurred:

"THE COURT: Yeah. On the 352 issue, the Court has considered the inflammatory nature of defendant being identified as a gang member, but a central element in two of the charges is rape as a result of fear or duress and it's—it is a key element in the case, so the significance of the basis for her fear is highly relevant. There's no question that we would—that gang evidence is prejudicial, but the probative value outweighs any unduly prejudicial impact, and I don't think it creates an undue consumption of time on collateral issues. I just don't see that. I think it's central to the case, so it's received.

"[DEFENSE COUNSEL]: Will our objection be noted at this point to those two issues, the Livas music and the tattoos so I don't need to object during—

"THE COURT: You need not repeat it, you have protected your record. You are objecting to the admissibility of her description of the tattoos and more importantly her belief as to what those tattoos represented and her interpretation of the music they were listening to as being gang rap music. Okay. That's concludes the 402?

"[PROSECUTOR]: Your Honor, just really quickly, as I mentioned before, we would ask the Court to give a jury instruction to let the jury know the limited purpose of the evidence so there isn't a risk of them misusing the information, and the jury instruction I found was CalCRIM 1403 and it discusses the limited purpose of evidence of gang activity.

"THE COURT: Okay, this evidence is received for the limited purpose of—relative or regarding [the victim]'s state of mind and whether she had a reasonable basis for fear. Okay."

### **C. Relevancy**

Relevant evidence is "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Here, it is plain that the complained-of evidence is relevant to the issue of Kayla's fear, an element of rape by force. It is also relevant to the credibility of both Kayla and Adrianna. These are all material issues.

#### **D. More probative than prejudicial**

A court may elect to exclude otherwise relevant evidence where “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) “[T]he trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.) For Evidence Code section 352 purposes, “‘prejudicial’ is not synonymous with ‘damaging,’ but refers instead to evidence that “‘uniquely tends to evoke an emotional bias against defendant’” without regard to its relevance on material issues. [Citations.]” (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) Here, as shown above, the trial court carefully considered the evidence and its prejudicial effect versus its probative value.

This case is readily distinguishable from *People v. Albarran* (2007) 149 Cal.App.4th 214. Albarran was charged with attempted murder, shooting at an inhabited dwelling, and three counts of attempted carjacking. A gang enhancement (§ 186.22) was alleged as to all counts. (*People v. Albarran, supra*, at p. 219.) At the Evidence Code section 402 hearing, a detective testified that the defendant admitted to being an active member of the 13 Kings gang, he had gang tattoos, and gang graffiti had been found at his home. The detective acknowledged there was no direct evidence to link the 13 Kings or Albarran to the crimes. (*Albarran*, at p. 220.) Nevertheless, the trial court found the evidence was relevant to the issues of motive and intent, and determined it was more probative than prejudicial. (*Ibid.*) The appellate court concluded the gang evidence “was so extraordinarily prejudicial and of such little relevance that it raised the distinct potential to sway the jury to convict regardless of Albarran’s actual guilt.” (*Id.* at p. 228.) Unlike *Albarran*, the evidence in this case is relevant to Kayla’s fear, and thus, to elements of the crimes charged. Kayla noticed defendant’s facial tattoos (“Ene,” “Livingston” and a set of horns) and was “kinda creeped out” when she met him for the

first time in the car. When the group arrived at the party, local gangster rap music was playing, and during the course of the evening, gunshots were heard. All of this is relevant to understanding Kayla's action or inaction that evening. Moreover, the trial court acknowledged the potential for prejudice, but determined the probative value of the evidence outweighed its prejudicial effect. The trial court did not abuse its discretion in so finding.

In *People v. Avitia*, after a neighbor reported hearing gunfire one afternoon, an investigation commenced. Deputies discovered a number of firearms, magazines, and ammunition in Avitia's home. "Chivo" was scratched onto the butt of an assault rifle, written on an ammunition box, and was tattooed on Avitia's left hand. Gang graffiti was also noted on several posters in his bedroom. (*People v. Avitia, supra*, 127 Cal.App.4th at pp. 188-189.) Avitia was charged with discharging a firearm, possession of an assault weapon, the manufacture, sale, import or loan of a large-capacity magazine, and possession of a firearm by a misdemeanor. No gang enhancements were alleged. (*Id.* at p. 191.) The appellate court determined that the gang evidence admitted was "completely irrelevant to any issue at trial." (*Id.* at p. 193.) In this case, however, unlike *Avitia*, the gang evidence presented was relevant to Kayla's fear as detailed above.

Neither did the trial court err by admitting this evidence as it related to Adrianna's credibility. Although defendant characterizes Adrianna's testimony as "neutral," the record establishes otherwise. It is Adrianna's testimony that is, to borrow defendant's word, "rife" with inconsistencies. The gang evidence is relevant and was properly admitted for this purpose. (*People v. Valdez* (2012) 55 Cal.4th 82, 137; *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 [gang evidence may also be relevant on the issue of a witness's credibility].)

#### **E. Limitation and admonitions**

Defendant's characterization of the court's limiting instructions as "spotty" is not supported by the record. Our review of the record supports the People's assertion that when these topics arose during the course of Kayla's testimony, the trial court

immediately admonished the jury as to its limited purpose.<sup>5</sup> Moreover, the trial court further instructed the jury with CALCRIM No. 1403 prior to deliberations.

Even were the court's limiting instruction ambiguous, our duty is to consider the defendant's instructional challenge in the context of the entire charge to the jury, to assume that jurors are intelligent persons who are capable of understanding and correlating all of the court's instructions, and to determine whether the defendant has shown a reasonable likelihood that the jury improperly applied the instructions. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72-73 & fn. 3; *People v. Clair* (1992) 2 Cal.4th 629, 663.) Defendant has cited to nothing in the record to establish juror confusion regarding the limiting instruction or any other instruction. Therefore, on this record, we presume the jurors understood and followed the court's instructions. (*People v. Welch* (1999) 20 Cal.4th 701, 773.)

In sum, the gang-related evidence admitted here was relevant to material issues in this case, and was neither more prejudicial than probative, nor cumulative. The trial court carefully scrutinized the impact of the evidence. The exercise of its discretion was not arbitrary, capricious, or patently absurd. Thus, we find no error under either state or federal standards.

## **II. The Presence of a Support Person**

Defendant contends his conviction must be reversed because his Sixth Amendment right of confrontation and Fourteenth Amendment right to a fair trial were

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<sup>5</sup>Regarding the tattoo evidence, the trial court instructed as follows: "Ladies and gentlemen, I need to give you a little bit of an instruction here. This testimony regarding the tattoos is offered for a limited purpose as to this witness's state of mind and whether or not it will provide a reasonable basis for fear in connection with all the other testimony that you may hear. This evidence is not received to prove the truth of the matter that [defendant] is a gang member. Do you understand the difference? It's not offered for the truth of the matter that he is a gang member, it's offered as to her state of mind and a basis for any fear. Okay."

Similarly, the jury was instructed regarding the gangster rap or music evidence: "[T]his evidence ... is received for the limited purpose" of Kayla's "state of mind relative to the issue of fear .... It is not offered for the truth of the matter ...."

violated when the trial court did not conduct the required inquiry regarding the necessity of a support person. The People maintain this claim was forfeited by defendant's failure to object. The People also contend the claim lacks merit.

**A. Relevant statutory authority**

In certain criminal cases, a prosecuting witness is entitled to the supporting attendance of two persons at the preliminary hearing and at the trial, one of whom may accompany the witness to the witness stand. (§ 868.5, subd. (a).) If a support person is also a prosecuting witness, the support person's testimony must be presented first and the prosecuting witness excluded from the courtroom. (§ 868.5, subd. (c).) When a prosecuting witness is chosen as a support person, "the prosecution shall present evidence that the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness," and "[u]pon that showing, the court shall grant the request unless information presented by the defendant or noticed by the court establishes that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony." (§ 868.5, subd. (b).)

**B. Procedural background**

At the preliminary hearing held March 17 and 18, 2011, a witness advocate was present during Kayla's testimony.

On September 6, 2011, the People filed their motions in limine or pretrial motions, including a request that Kayla "be allowed to have the presence and accompaniment of a support person while testifying ...." Defendant did not object to this specific request during the hearing, nor did defendant file any written objection to the People's request. The request was granted.

On September 8, 2011, before Kayla's testimony commenced, the trial court instructed the jury as follows:

"Ladies and gentlemen, in cases of this nature, the person who is alleged to have been victimized by the act is entitled to have a support person present,

so you will notice there's somebody seated behind her. That person is an employee of the County and is there just to provide support and not provide any information whatsoever, just so you understand why there is somebody there, because of the nature of the case. You may proceed.”

Defendant did not object on this occasion either.

### C. Analysis

As noted above, defendant argues his constitutional right to confront witnesses and his right to a fair trial were violated because the trial court did not conduct an inquiry into the necessity of a support person in this case. His argument is based primarily on *People v. Adams* (1993) 19 Cal.App.4th 412, 443, 444 (*Adams*), which rejected a constitutional challenge to the support person statute, but held there must be a case-by-case showing of necessity for a support person present at an evidentiary hearing.<sup>6</sup>

A defendant may forfeit the claim he or she was denied a constitutional right to an evidentiary hearing on the necessity of a support person. (*People v. Lord* (1994) 30 Cal.App.4th 1718, 1722 (*Lord*.) In *Lord*, the defendant argued the trial court erred by failing to hold the hearing required by *Adams* and to determine whether the six-year-old victim had a need for the presence of a support person, who sat next to the victim while

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<sup>6</sup>*Adams* involved a 16-year-old rape victim. The victim's father was permitted to remain in the courtroom during her testimony and sat next to or behind the victim while she testified. (*People v. Adams, supra*, 19 Cal.App.4th at p. 434.) There were also allegations that the father physically abused the victim. The *Adams* court rejected the claim that section 868.5 was inherently prejudicial and deprived Adams of a fair trial. (*Adams*, at p. 437.) However, that court found that having a support person present next to the victim during her testimony deprived the jury of the opportunity to view the demeanor of the witness “by changing the dynamics of the testimonial experience for the witness.” (*Id.* at p. 438.) That conclusion was based on *Coy v. Iowa* (1988) 487 U.S. 1012.

In *Coy*, the defendant was convicted of sexually assaulting two 13-year-old girls. At trial, the girls testified behind a large screen. The defendant's ability to see the witnesses was impaired; the witnesses could not see the defendant at all. (*Coy v. Iowa, supra*, 487 U.S. at pp. 1014-1015.) The defendant objected strenuously to the use of the screen. (*Id.* at p. 1015.) The Supreme Court concluded that the defendant's Sixth Amendment right includes the right to face-to-face confrontation of the witnesses against him. (*Coy*, at pp. 1016-1020.) It then concluded the procedure used by the trial court violated that right and reversed the judgment. (*Id.* at pp. 1020-1022.)

she testified at trial. The appellate court noted the showing required at such a necessity hearing is “debatable,” but suggested in dicta the required showing is that set forth in section 868.5, subdivision (b), i.e., that “the support person’s attendance ‘is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness[,]’” and that in the case of a molested six-year-old victim, such a showing would be perfunctory, as in that situation “it is almost given that the support person’s presence is desired and would be helpful.” (*Lord, supra*, at pp. 1721-1722.) The court did not resolve that point, however, because the defendant “waived any claim of error by failing to request a hearing and determination of necessity, or otherwise object to the presence of a support person.” (*Id.* at p. 1722.)

Here, like *Lord*, defendant did not request a hearing and determination of necessity or otherwise object to the presence of a support person during Kayla’s testimony. Accordingly, he has forfeited any claim of error.

Defendant urges us to either reject the holding of *Lord* or find it inapplicable here. He asserts the trial court had a sua sponte duty to ensure the requisite necessity exists before the support person’s presence is permitted, citing *Adams* and the cases that court relied on: *Maryland v. Craig* (1990) 497 U.S. 836 and *Coy v. Iowa, supra*, 487 U.S. 1012. In those cases, however, an objection to the procedure was made and, therefore, the cases are not authority for a court’s duty to conduct a hearing in the absence of an objection. (See *Maryland v. Craig, supra*, at p. 842; *Coy, supra*, at p. 1015; *Adams, supra*, 19 Cal.App.4th at p. 434.)

Next, defendant asserts a sua sponte duty to hold a necessity hearing should be imposed since trial courts have been held to bear some sua sponte duties in ensuring that minimum foundational evidentiary showings are met. However, a necessity hearing cannot be analogized persuasively to the showing of foundational facts necessary to support the admissibility of evidence. The presence of a support person is a statutory right granted to the complaining witness, not an item of evidence one party seeks to introduce against another. (See, e.g., Evid. Code, §§ 402, 403, subd. (a) [proponent of

proffered evidence has burden of producing evidence as to the existence of disputed preliminary fact].) For this reason, defendant's reliance on *People v. Keelin* (1955) 136 Cal.App.2d 860, 870-871, is misplaced. There, the appellate court concluded the trial court erroneously admitted certain statements under the spontaneous declaration exception to the hearsay rule over defense counsel's objections without sufficiently assessing whether there was sufficient evidence to establish the exception. The issue here does not concern the court's role in admitting evidence and, unlike *Keelin*, defendant did not object to the procedure.

Defendant argues we should excuse his failure to object because the statute is apparently mandatory, discouraging an objection, yet the case law regarding whether a case-specific showing of necessity is required remains unsettled. While it is not clear from *Adams* and *Lord* precisely what showing is required in all cases, because *Lord* was decided in 1994, there is no dispute the failure to object to the absence of a showing of necessity constitutes a waiver. Thus, it was clear that defendant could have objected to the presence of a support person.

Defendant's argument that his failure to object should be excused because he lacked an opportunity to object also lacks merit. Here, Kayla was assisted by a support person at the preliminary hearing. Additionally thereafter, defendant had an opportunity to object during the pretrial motions hearing, two days prior to Kayla's trial testimony. In sum, defendant was on notice a support person was likely desired in light of Kayla's use of such an individual at the preliminary hearing and yet he failed to object in any way, having had an opportunity to do so. He subsequently also failed to object to the People's request, either in written form or at the hearing on the motion.

Lastly, defendant asks us to exercise our discretion to review the issue despite his failure to object. We decline to do so since by not objecting, he has deprived the trial court of the opportunity to make an evidence-based finding as to the witness's need for a support person. (*Lord, supra*, 30 Cal.App.4th at p. 1722.) Therefore, we conclude he has forfeited the issue. (*Ibid.*)

### **III. Prosecutorial Misconduct**

Defendant asserts the prosecutor committed four instances of misconduct denying him due process of law and a fair trial. The People maintain the prosecutor's comments were not deceptive or reprehensible, nor did those comments result in a violation of defendant's rights to due process and a fair trial.

#### **A. Legal standards**

“The applicable federal and state standards regarding prosecutorial misconduct are well established. “A prosecutor's ... intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so “egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Prosecutorial misconduct requires reversal only if it results in prejudice to the defendant. (*People v. Fields* (1983) 35 Cal.3d 329, 363.) Where it infringes upon the defendant's constitutional rights, reversal is required unless the reviewing court determines beyond a reasonable doubt that the misconduct did not affect the jury's verdict. (*People v. Harris* (1989) 47 Cal.3d 1047, 1083.) Prosecutorial misconduct that violates only state law is cause for reversal when it is reasonably probable that a result more favorable to the defendant would have occurred had the prosecutor refrained from the objectionable conduct. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

The issue of prosecutorial misconduct is forfeited on appeal if not preserved by timely objection and request for admonition in the trial court. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000.) If an objection has not been made, “the point is reviewable only if an admonition would not have cured the harm caused by the misconduct”” (*id.* at pp. 1000-1001) or if an objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

## **B. The instances of alleged misconduct**

### **1. Reference to dangerousness**

When questioning Detective Silva, the prosecutor asked, “Now, is it dangerous to testify against a gang member?” Defense counsel immediately objected, the trial court sustained the objection, and the jury was admonished as follows: “Ladies and Gentlemen, this evidence of gang activity is received for a limited purpose as to the issue of fear, whether it was reasonable basis for fear, okay.” Defendant contends this question “was a rather direct affront to the court’s pointed rulings limiting gang evidence to nontruth fear, not proof of actual gang status or membership of anyone.”

Here, the witness did not answer the question and an admonition was promptly given. Moreover, the jury was instructed that “[n]othing that the attorneys say is evidence. In their opening statements and closing arguments the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses’ answers are evidence.” Jurors are presumed to follow the trial court’s instructions and to decide the question of guilt on proper evidence. (See, e.g., *People v. Barnett, supra*, 17 Cal.4th at p. 1157; *People v. Clair, supra*, 2 Cal.4th at p. 663, fn. 8.) Additionally, in the absence of evidence to the contrary, and there is none in this record, we presume the jury abided by the trial court’s admonitions and instructions. (*People v. Stitely* (2005) 35 Cal.4th 514, 559.)

### **2. Comment regarding Adrianna**

Defendant contends the prosecutor erred by arguing that Adrianna was “either afraid of Livas or she’s a part of Livas. She told you she wasn’t afraid.”

At trial, defense counsel objected to the comment during a break outside the presence of the jury:

“[DEFENSE COUNSEL]: ... I wanted to note my objection to any characterization of [Adrianna] as being a Livas gang member.

“THE COURT: That was noted, I agree.

“[DEFENSE COUNSEL]: That’s inadmissible.

“THE COURT: I don’t find that it was so prejudicial, but still the focus was on her credibility on other issues that are more pertinent. I don’t remember anything about that in her testimony. That inference I think was inappropriate.

“[DEFENSE COUNSEL]: Thank you.

“THE COURT: Okay; but I don’t find that it was prejudicial error or requires any type of mistrial, no.”

While defense counsel objected to the comment, she did not request an admonition be given. As a result, the issue is forfeited for purposes of appeal. (*People v. Cunningham, supra*, 25 Cal.4th at p. 1000 [issue preserved by timely objection and request for admonition].)

Notably, a review of the argument preceding the specific comment about which defendant complains finds support for the People’s claim that Adrianna “may have been a gang associate or ‘wanna be.’” In that case, the comment is not improper, argue the People, because a prosecutor has wide latitude to draw reasonable inferences or deductions from the evidence.

The prosecutor spent a considerable amount of time walking the jury through Adrianna’s testimony and its many inconsistencies. In that context, the prosecutor’s concluding comment regarding Adrianna—that “she’s either afraid of Livas or she’s a part of Livas. She told you she wasn’t afraid”—is arguably based upon the evidence.

Nevertheless, even assuming it was erroneous, defendant failed to request an admonition and thus has forfeited this claim for purposes of appeal.

### **3. Name calling**

Defendant contends the following comment, made during closing argument, demonized him and appealed to the passion of the jury: “These animals brutalized Kayla in the most personal, intimate way possible, but she had the courage to sit before him and tell you what happened.”

Defense counsel did not object to this comment. There is nothing in the record to suggest such an objection would have been futile. Accordingly, defendant has forfeited

his right to an appeal on this basis. (*People v. Dykes* (2009) 46 Cal.4th 731, 761 [“There was no objection and the claim is forfeited”]; *People v. Cunningham, supra*, 25 Cal.4th at p. 1000; *People v. Hill, supra*, 17 Cal.4th at pp. 820-821.) Nonetheless, we find the comment was not improper.

Defendant relies upon *People v. Talle* (1952) 111 Cal.App.2d 650 to support his assertion that the prosecutor’s name calling was inappropriate. But significantly in *Talle*, the court noted the prosecutor’s references to the defendant as a “despicable beast” were numerous. (*Id.* at pp. 673, 676.) Here, defendant cites to but a single instance. Also distinguishable is defendant’s reliance upon *People v. Fosselman* (1983) 33 Cal.3d 572. In that case, the prosecutor referred to the defendant as an “animal” after stating his belief that the defendant wanted to rape a woman. (*Id.* at p. 580.) Yet there, the defendant was not charged with rape. Rather, he was charged with attempted burglary, assault with a deadly weapon, false imprisonment, and battery causing serious bodily injury. (*Id.* at p. 578.) Additionally, the prosecutor’s belief regarding the defendant’s intent toward the victim is not evidence. (*Id.* at p. 580.) *Fosselman* is distinguishable. Neither are we persuaded by defendant’s citations to *People v. Mendoza* (1974) 37 Cal.App.3d 717, *People v. Turner* (1983) 145 Cal.App.3d 658, *People v. Whitehead* (1957) 148 Cal.App.2d 701, or *People v. Adams* (1939) 14 Cal.2d 154.

Moreover, unlike the cases upon which defendant relies to support his argument, the name calling here was based upon some evidence. Here, a young girl was victimized by several men in three separate incidents. She was under the influence of alcohol and was defenseless during each rape. Defendant and the others involved preyed upon Kayla’s weaknesses and vulnerabilities. ““A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence”” during closing argument. (*People v. Dykes, supra*, 46 Cal.4th at p. 768, quoting *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) Thus, in this case, the prosecutor’s reference to the perpetrators as animals is, in our view, a comment upon the evidence.

#### **4. Comment regarding Kayla**

Lastly, defendant complains that by asking the jurors to “honor [Kayla’s] courage” and to “[i]magine what it’s like for a 16-year-old to have to sit there and tell the story of how she was brutally violated over and over and over again with one of her rapists sitting right across from her,” the prosecutor improperly appealed to the sympathy and passion of the jury.

Significantly, no objection was made to this comment. Neither is there anything in this record to suggest such an objection would have been futile. Any harm could have been cured by an admonition. Therefore, defendant forfeited this claim. (*People v. Dykes, supra*, 46 Cal.4th at p. 761; *People v. Cunningham, supra*, 25 Cal.4th at p. 1000; *People v. Hill, supra*, 17 Cal.4th at pp. 820-821.) In any event, defendant’s argument lacks merit.

It is misconduct to appeal to the jury to view the crime through the eyes of the victim. (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, overruled on other grounds *sub nom. Stansbury v. California* (1994) 511 U.S. 318.) Such appeals invite jurors to depart from their duty to view the evidence objectively and allow sympathy for victims to influence their verdict. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406; see also *People v. Fields, supra*, 35 Cal.3d at p. 362.)

Here, however, the prosecutor did not ask to the jury to relive Kayla’s feelings during the perpetration of the crimes. (*People v. Leonard, supra*, 40 Cal.4th at p. 1418.) Rather, he asked the jury to view Kayla’s willingness to report the incident and to testify about it as praiseworthy. Lastly, viewed in context, the comment was very brief and was made during a nearly hour-long closing argument.

#### **5. Cumulative effect of prosecutorial misconduct**

Defendant contends the numerous instances of alleged prosecutorial misconduct rendered his trial fundamentally unfair, in violation of his federal constitutional right to due process and a reliable verdict. We disagree.

In a number of instances, defendant failed to object or request an admonition and so forfeited the claims. Despite forfeiture, we found the claims lacked merit. In the other instance, the trial court sustained the defense objection and admonished the jury. Thus, we reject defendant's claims of prejudicial misconduct. (*People v. Mendoza* (2007) 42 Cal.4th 686, 705; *People v. Hinton* (2006) 37 Cal.4th 839, 872.)

#### **IV. Unanimity Instruction**

Defendant contends state and federal constitutional error where the trial court failed to instruct the jury with CALJIC No. 17.01. More particularly, with regard to the rape in concert charge, defendant maintains “there was a real risk of a patchwork verdict” because some jurors could have found him to be guilty of an act involving intercourse whereas other jurors could have found he assisted others to engage in an act of intercourse with Kayla. The People assert a unanimity instruction was not required here because the jury did not have to agree on whether defendant was the direct perpetrator or an aider and abettor of that crime. Further, the People contend that even if the instruction was required, the error did not prejudice defendant.

##### **A. Relevant legal authority**

Under the California Constitution, a unanimous jury verdict is required to convict a person of a criminal offense. (Cal. Const., art. I, § 16; *People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The jury must agree unanimously that the defendant is guilty of a specific crime. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281.)

When a defendant is charged with a single criminal offense, but the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. (*People v. Russo, supra*, 25 Cal.4th at p. 1132; see CALJIC No. 17.01.) This requirement “is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.” (*Russo*, at p. 1132.) “On the other hand, where the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the

defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty." (*Ibid.*) A unanimity instruction is required as between discrete crimes, but is not required between theories of a case. Thus, a jury need not be instructed with CALJIC No. 17.01 on a determination as to whether the defendant is guilty as a direct perpetrator or as an aider and abettor of that crime. (*Russo*, at pp. 1132-1133.)

As explained in *People v. Russo*, *supra*, 25 Cal.4th at pages 1134 through 1135:

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]; it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction."

For example, a jury may convict a defendant of first degree murder without making a unanimous determination as to the theories proposed by the prosecution, e.g., that the murder was deliberate and premeditated or that it was committed during the course of a felony. (See *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1025; *People v. Beardslee* (1991) 53 Cal.3d 68, 92.)

Similarly, unanimity is not required "when the acts alleged are so closely connected as to form part of one transaction." (*People v. Benavides* (2005) 35 Cal.4th 69, 98.) More specifically, "[t]he 'continuous conduct' rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

## **B. Analysis**

Defendant essentially argues there was more than one act that could form the basis of a rape in concert conviction, therefore, a unanimity instruction was required. We are not persuaded.

Kayla testified that defendant was one of three individuals who raped her in a back bedroom following two earlier assaults. Defendant had intercourse with Kayla and also held Kayla down while Gamboa violated her. Whether the jury believed defendant was guilty for the act of intercourse or for holding Kayla down during Gamboa's assault speaks to the theory of the crime of rape in concert. Hence, under these circumstances, the jury "need not unanimously agree on whether the defendant is an aider and abettor or a principal even when different evidence and facts support each conclusion." (*People v. Jenkins, supra*, 22 Cal.4th at p. 1026.)

Moreover, despite defendant's assertion to the contrary, the rape in concert by defendant, Gamboa, and Adrian Partida is a continuous act, "so closely connected as to form part of one transaction." (*People v. Benavides, supra*, 35 Cal.4th at p. 98; see *People v. Mota* (1981) 115 Cal.App.3d 227, 233 ["The many continuous acts of forced sexual intercourse which were committed by each assailant were part of the same event since they were all committed within an hour's time in the back of the van"].) And defendant's defense was the same: the sexual encounters were consensual. (*People v. Stankewitz, supra*, 51 Cal.3d at p. 100.)

Given the above, the trial court was not required to give the unanimity instruction, and thus, no error occurred.

## **V. The Limiting Instruction**

Next, defendant complains the limiting instruction given was erroneous because it allowed for "improper expansive consideration of irrelevant, unreliable, untested, and inflammatory evidence improperly reduc[ing] the prosecution's burden of proof" and creating a risk the jury would convict him based upon "irrelevant and inflammatory evidence."

## Applicable standards and analysis

“It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. [Citations.] “[T]he fact that the necessary elements of a jury charge are to be found in two instructions rather than in one instruction does not, in itself, make the charge prejudicial.” [Citation.] “The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.” [Citation.]’ [Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 328.)

“It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court’s instructions. [Citation.]” (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) “In reviewing the purportedly erroneous instructions, ‘we inquire “whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way” that violates the Constitution.’ [Citations.] In conducting this inquiry, we are mindful that “a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.” [Citations.]” (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We consider the instructions as a whole, the jury’s findings, and the closing arguments of counsel. (*People v. Cain* (1995) 10 Cal.4th 1, 35-36; *People v. Eid* (2010) 187 Cal.App.4th 859, 883.) We will find error only if it is reasonably likely the instructions as a whole caused the jury to misunderstand the applicable law. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-527; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 74.)

“When evidence is admissible ... for one purpose and is inadmissible as to another ... purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.” (Evid. Code, § 355.) Here, at the request of the prosecution, the gang-related evidence was limited as to its admissibility.

As we have already found, the trial court properly admitted evidence regarding defendant’s gang-related tattoos and Livas gangster rap. The evidence was relevant to the issue of Kayla’s state of mind, as well as to issues of credibility. When Kayla

testified regarding those tattoos and that music, the trial court immediately admonished the jury about its proper consideration of that evidence: it was only to consider the evidence for Kayla's state of mind as a reasonable basis for her fear.

After the close of evidence, the trial court instructed the jury as follows:

“[THE COURT]: You may consider evidence of gang activity only for the limited purpose of deciding whether the defendant accomplished the intercourse by duress, menace or fear of immediate and unlawful bodily injury to the woman.

“You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is the person of bad character or that he has a disposition of that crime.”

CALCRIM No. 1403 is “neither contrary to law nor misleading. It states in no uncertain terms that gang evidence is not admissible to show that the defendant is a bad person or has a criminal propensity. It allows such evidence to be considered only on the issues germane to the gang enhancement, the motive for the crime and the credibility of witnesses.” (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1168.)

This instruction did not lessen the prosecution's burden. The jury was instructed as to the required burden of proof, and was also instructed at the time the testimony was elicited that it was admitted for a limited purpose. Considering the instructions as a whole, it is not reasonably likely the jury misunderstood the applicable law. Hence, we find no error.

## **VI. The Cautionary Language of CALCRIM No. 358**

Defendant contends the trial court's error in failing to include the cautionary language of CALCRIM No. 358 resulted in prejudicial error. He contends reversal is required. The People assert it is not clear whether the cautionary language was required in this case, but in any event, the failure to so instruct was harmless.

The general principles regarding review of claims of instructional error are set forth above. With specific regard to CALCRIM No. 358, a trial court must instruct the jury *sua sponte* to view evidence of a criminal defendant's oral admissions or confession with caution. The standard of review for erroneous failure to give such an instruction is

the normal standard for state law error, i.e., whether it is reasonably probable the jury would have reached a result more favorable to the defendant had the instruction been given. The purpose of the cautionary instruction is to help the jury in determining whether or not the statement was actually made. Thus, courts examining the prejudice in failing to give the instruction will examine the record for any conflict in the evidence about the exact words used, the meaning of those words, or whether the statements were repeated accurately. Where there is no conflict in the evidence, but simply a denial by the defendant of the statements attributed to him or her, the Supreme Court has found a failure to give the cautionary instruction to be harmless error. (*People v. Dickey* (2005) 35 Cal.4th 884, 905-907.)

Here, evidence elicited at trial—namely, that defendant suggested those participating in the rape in concert carve their names in Kayla’s stomach, and his later threat to Kayla that she not tell anyone of the incidents—warranted an instruction regarding defendant’s oral admissions. And, the trial court instructed the jury as follows:

“You have heard evidence that the defendant made oral statements before the trial. You must decide whether the defendant made any of these statements in whole or in part. If you decide the defendant made such statements consider the statements along with all the other evidence in reaching your verdict. It is up to you to decide how much importance to give the statements.”

The trial court did not read an optional paragraph that provides: “Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded.” (CALCRIM No. 358.)

Assuming the trial court erred by failing to include the cautionary language, we find the error to be harmless. Failure to give a cautionary instruction is harmless where there is no conflict in the evidence about the exact words used, their meaning, or the accuracy of the reporting of the admissions and there is simply a denial by the defendant that he made the statements attributed to him. (*People v. Dickey, supra*, 35 Cal.4th at pp. 905-906.) There is no conflict here about the exact words used or their meaning. Kayla’s accuracy in reporting the statements is challenged by defendant. Specifically, the

accuracy in reporting relates directly to Kayla's credibility. Yet, as accurately pointed out by the People, Kayla's story was consistent overall. While there are deviations between the reporting of the incidents to law enforcement, the testimony offered at the preliminary hearing, and the trial testimony, those deviations are reasonably understood to be clarifications or additional details elicited on a subsequent telling.

Moreover, we also look to other instructions given to the jury in assessing prejudice. (*People v. Sanders* (1995) 11 Cal.4th 475, 536-537.) Here, the jurors were thoroughly instructed on how to evaluate the testimony of witnesses. The jury was given CALCRIM Nos. 226, 301, 302 and 318. (*People v. Dickey, supra*, 35 Cal.4th at p. 906.) In particular, CALCRIM No. 226 extensively covers the jury's role in evaluating a witness's testimony, including a variety of factors bearing on the truth or accuracy of that testimony. Those factors included a witness's bias, interest, or other motive; prior consistent or inconsistent statements; ability to remember the matter in question; and admissions of untruthfulness.<sup>7</sup> Each of the statements with which defendant is concerned occurred in the presence of Kayla and the perpetrators of the crimes committed against her. There were no other testifying witnesses to the statement about carving names into Kayla's stomach or the threat that Kayla not tell anyone about what had occurred that evening. And, as noted, Kayla's testimony was consistent overall. So, too, the jury was expressly instructed by CALCRIM No. 359 that defendant could "not be convicted of any crime based on his out-of-court statements alone."

For the reasons given above, it is not reasonably probable that the jury would have reached a more favorable result had the omitted language from CALCRIM No. 358 been given. To the degree defendant contends federal constitutional error occurred, we are not persuaded. "Mere instructional error under state law regarding how the jury should

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<sup>7</sup>We think it can be reasonably inferred from the questions posed by the jurors during deliberations that they carefully evaluated Kayla's testimony before ultimately finding her to be credible. For example, the jury wanted to know how Kayla got defendant's phone number, how she knew him, and if she had any prior interest in "any of the boys." They also wanted readback of Kayla's testimony concerning the rape in concert.

consider evidence does not violate the United States Constitution.” (*People v. Dickey*, *supra*, 35 Cal.4th at p. 905, citing *Estelle v. McGuire*, *supra*, 502 U.S. at pp. 71-75.)

## **VII. The Upper Term Was Properly Imposed**

Defendant maintains the trial court erred in imposing the upper term of 11 years on count 2 for forcible rape. He contends the “prosecution’s failure to plead the non-included factual (age) issue, or even present it to the jury, requires reversal *per se* of the enhanced terms as waived.” Additionally, he contends that, in violation of federal due process, he was “denied notice of both facts and ... notice of the greater *charge* and intent to seek the added punishment.” He asserts that the trial court “repeatedly (and seriously) misstated the maximum exposure even applying the usual three-six-eight year triads” during discussions regarding a plea. Defendant contends jury findings were required “on issues which greatly elevated the maximum terms.” The People assert the penalty provisions pled afforded defendant notice, the trial court acted within its discretion, and the provisions relating to the victim’s age did not have to be pled and proven because they were not additional terms added to the base term.

### **A. The charging document**

The first amended information filed September 6, 2011, alleges the following:

#### **“Count 1 [¶] PC264.1: Rape—Acting in Concert By Force or Violence—Felony**

“On or about January 16th, 2011, Rudy Gamboa and Leobardo Mendoza voluntarily acted in concert with another person, by force and violence and against the will of the victim, committed an act described in Section 261, 262 and 289 of the Penal Code, to wit: FORCIBLE RAPE IN CONCERT, either personally and/or by aiding and abetting another person, within the meaning of PENAL CODE SECTION 264.1.

#### **“Count 2 [¶] PC261(a)(2): Forcible Rape—Felony**

“On or about January 16, 2011 Rudy Gamboa and Edgar Partida and Leobardo Mendoza did unlawfully have and accomplish an act of sexual intercourse with Confidential Victim, a person not his/her spouse, against said person’s will, by means of force, violence, duress, menace and fear of

immediate and unlawful bodily injury on said person and another, in violation of PENAL CODE SECTION 261(a)(2).

**“Count 3 [¶] PC237: False Imprisonment by violence, menace, fraud, deceit—Felony**

“On or about January 16, 2011 Rudy Gamboa and Edgar Partida and Leobardo Mendoza did unlawfully violate the personal liberty of Confidential Victim, said violation being effected by violence, menace, fraud or deceit, in violation of PENAL CODE SECTIONS 236 AND 237(a).

**“Count 4 [¶] PC261.5(c): Unlawful Sexual Intercourse—Minor More than 3 Yrs Younger—Felony**

On or about January 16, 2011 Leobardo Mendoza did unlawfully engage in an act of sexual intercourse with Confidential Victim, a minor who was not the spouse of the defendant, and who was more than three years younger than the defendant, Leobardo Mendoza, in violation of PENAL CODE SECTION 261.5(c).”

**B. The sentence imposed**

The trial court imposed sentence, in relevant part, as follows:

“THE COURT: [Defendant] was convicted of Count 1, a violation of ... section 264.1, rape in concert of a minor over 14. Of Count 2, a violation of ... section 261(a)(2), rape of minor over [*sic*]; Count 3, a violation of ... 237(a), false imprisonment; Count 4 a violation of 261.5(c), unlawful sexual intercourse with a minor more than three years younger than he. [¶] ... [¶] The Court selects the upper term and makes Count 2, a violation of ... section 261(a), rape of a minor over 14, the principal term and sentence[s] the defendant to the upper term of 11 years. The Court finds that Count 1, the rape in concert of a minor over 14 is a subordinate term.”

**C. The applicable law**

It is exclusively within the province of the Legislature to define crimes and fix penalties. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631, superseded by statute on other grounds as stated in *People v. Carlson* (1974) 37 Cal.App.3d 349, 355; *People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1385.) The Penal Code requires that prosecutors plead and prove sentence enhancements. (§ 1170.1, subd. (e).) An enhancement is “an additional term of imprisonment added to the base term.” (Cal. Rules of Court, rule

4.405(3); see *People v. Hernandez* (1988) 46 Cal.3d 194, 207, overruled on other grounds in *People v. King* (1993) 5 Cal.4th 59, 78, fn. 5.) The reason for the pleading and proof requirement is simple. A defendant is entitled to notice that the prosecution is seeking enhanced punishment for a crime and should have an opportunity to defend against it. (*People v. Wandick* (1991) 227 Cal.App.3d 918, 926; *People v. Neal* (1984) 159 Cal.App.3d 69, 73.) Due process requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial. (*People v. Toro* (1989) 47 Cal.3d 966, 973, disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Lohbauer* (1981) 29 Cal.3d 364, 368-369.) Indeed, the federal constitutional rule to determine what must be pleaded and proven by the prosecution similarly focuses on facts that increase the punishment for a crime beyond the statutory maximum. (*Cunningham v. California* (2007) 549 U.S. 270.)

#### **D. Analysis**

Section 261, subdivision (a)(2) provides that forcible rape “is accomplished against a person’s will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.” Potential punishments for the crime of rape are provided for in section 264. In particular, subdivision (c)(2) of section 264 provides that “[a]ny person who commits rape in violation of paragraph (2) of subdivision (a) of Section 261 upon a minor who is 14 years of age or older shall be punished by imprisonment in the state prison for 7, 9, or 11 years.” Because the charging document expressly referenced section 261, subdivision (a)(2) (count 2), and the penalties for rape are spelled out in section 264, defendant’s claim lacks merit. Additionally, as to the victim’s age, count 4 of the charging document expressly referred to the victim as a minor. Because the offenses against the single victim all occurred on January 16, 2011, one reference to the victim as a minor meant the victim was a minor as to all counts. Defendant was clearly given notice that he faced a possible conviction for a violation of “section 261(a)(2),” or forcible rape of a minor.

““Notice of the specific charge is a constitutional right of the accused. [Citation.] An information which charges a criminal defendant with multiple counts of the same offense does not violate due process so long as (1) the information informs defendant of the nature of the conduct with which he is accused and (2) the evidence presented at the preliminary hearing informs him of the particulars of the offenses which the prosecution may prove at trial. [Citations.] *The information plays a limited but important role—it tells a defendant what kinds of offenses he is charged with* and states the number of offenses that can result in prosecution. However, the time, place, and circumstances of charged offenses are left to the preliminary hearing transcript. This is the touchstone of due process notice to a defendant....” [¶] ... [¶] ... [A]n information need *not* notify a defendant of all the particulars of the crime charged. *That role is left to the preliminary hearing transcript.* Where ... the particulars are *not* shown by the preliminary hearing transcript, the defendant is *not* on notice in such a way that he has the opportunity to prepare a meaningful defense.” (*People v. Peyton* (2009) 176 Cal.App.4th 642, 657.)

Here, unlike the defendant in *Peyton* who waived his right to a preliminary hearing, defendant was further on notice of Kayla’s age as a result of testimony elicited during the preliminary hearing. Kayla testified she told defendant and others in the car that evening that her 16th birthday was approaching. That knowledge, coupled with the charges alleged in the criminal complaint, served to provide the required notice to defendant. At that point, if not before, defendant was aware of the victim’s minority. The complaint and the amended information consistently charged forcible rape and rape in concert and, significantly, Kayla is the only victim of the crimes alleged.

Defendant complains that notice was denied also when the trial court “misstated the maximum exposure” he faced during plea negotiations. A review of those discussions reveals no error.

First, defendant contends the court referenced six or eight years in a discussion regarding the People’s offer.<sup>8</sup> It is clear, however, that the court’s comments were offered as an estimate only:

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<sup>8</sup>The offer provided that defendant plead guilty to a violation of section 261.5, unlawful sexual intercourse with a person under 18 years old, and that he admit a prison prior, for a total term of four years (upper term of three years plus one year for prison prior). He would have

“You know, you could be looking at anywhere from approximately 6, 8 to 8, 8 years in prison and with less credits and it would be mandatory prison. It could not be local time. [¶] ... [¶] Okay. I don’t know what the facts are in this case. I haven’t read the preliminary hearing transcript yet. I haven’t looked at the police report ....”

Next, defendant complains of subsequent comments by the court referencing nine or ten years. In that instance, the People had moved to amend the information to allege the prison prior previously referenced, and a discussion ensued regarding whether the previous offer would be renewed. After defendant indicated he had no desire to accept an offer, the trial court stated as follows:

“Okay. Mr. Mendoza, you understand if the Court allows this amendment, that it increases your—the risk of a greater prison sentence if in fact you’re convicted of any of these charges by at least an additional year? So I don’t know what the total time is, but it looks like it could be somewhere from nine to ten years in prison if you’re convicted. That’s just an estimate.”<sup>9</sup>

It is plain during each discussion that the court was approximating or estimating the sentence defendant faced were he to be convicted. More importantly, and as previously discussed, defendant had notice of the charges against him as a result of the information and testimony taken at the preliminary hearing. Each made some reference to the fact the victim was a minor, and the statutory punishment for one of the crimes alleged permitted imposition of a term of 11 years, absent any enhancement.

Defendant relies upon the Supreme Court’s decision in *People v. Najera* (1972) 8 Cal.3d 504, disapproved on other grounds in *People v. Wiley* (1995) 9 Cal.4th 580, 587-588, to support his position. It does not further his argument. In *Najera*, the defendant was charged with robbery, and the information further alleged the defendant “was ‘armed with a deadly weapon, to-wit, a gun.’” (*Id.* at p. 506.) The evidence established the defendant used a gun during a robbery. However, the information did not include a

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been required to serve 28 months in custody and 20 months on supervised release; sexual offender registration would not have been required.

<sup>9</sup>The People’s motion to amend was ultimately denied.

former section 12022.5 gun-use allegation. Our Supreme Court, in addressing the issue of whether the enhancement provided in section former 12022.5 could be imposed where it had not been pleaded in the information or found true by the jury, held that (1) the jury, as trier of fact, rather than the trial judge, had to make the necessary gun-use enhancement finding, but (2) remand for a further jury trial on the applicability of section former 12022.5 was precluded because the People, by failing to request jury instructions covering that section, waived its application. (*Najera*, at p. 512.) The court stated further:

“[T]he information did not charge defendant with a violation of section 12022.5 [enhancement for use of gun]; instead, the information charged that defendant was *armed* with a deadly weapon, an allegation more appropriate to charging a violation of section 12022.... Although defendant has raised no objection to the adequacy of the information in this regard, it is clearly the better practice, in terms of giving defendant fair notice of the charges against him, to set forth in the information whether or not application of section 12022 or 12022.5 will be sought.” (*Id.* at p. 509, fn. 4.)

Here, however, regardless of defendant’s references to an “age enhancement,” a separate enhancement was not required to be pled. Simply calling it an enhancement does not make it so. Rather, the statute concerning the crime of rape itself provides for stricter punishment where the victim is a minor. Therefore, *People v. Najera* is inapplicable to defendant’s case.

Similarly, defendant relies upon *People v. Mancebo* (2002) 27 Cal.4th 735. It, too, is distinguishable. California Rules of Court, rule 4.405(3) defines an “enhancement” as “an additional term of imprisonment added to the base term.”

“Enhancements typically focus on an element of the commission of the crime or the criminal history of the defendant which is not present for all such crimes and perpetrators and which justifies a higher penalty than that prescribed for the offenses themselves. That is one of the very purposes of an enhancement’s existence.” (*People v. Hernandez, supra*, 46 Cal.3d at pp. 207-208.)

*People v. Mancebo* involved enhanced sentencing provisions that would apply if certain specified circumstances were pleaded and proved. (*People v. Mancebo, supra*, 27

Cal.4th at pp. 741–742 [§ 667.61 elevation of sentence for certain sexual offenses committed under specified aggravating circumstances from determinate term to a lengthy indeterminate term—either 15 years to life or 25 years to life, depending on the particular circumstances].) However, subdivision (c)(2) of section 264 and subdivision (b)(2) of section 264.1 are not enhancement provisions; instead, they provide for a base term or statutory maximum for the crimes of rape and rape in concert.

In a recent decision, issued after briefing had been completed in this matter, the United States Supreme Court determined that facts that increase a mandatory minimum sentence must be submitted to the jury. (*Alleyne v. United States* (2013) 570 U.S. \_\_\_\_ [133 S.Ct. 2151] (*Alleyne*)). In so holding, the court overruled its earlier contrary decision in *Harris v. United States* (2002) 536 U.S. 545. Because of its potential applicability to this case, we address *Alleyne* here.<sup>10</sup>

In *Alleyne*, the jury convicted the defendant of robbery affecting interstate commerce (18 U.S.C. § 1951(a)) and using or carrying a firearm in relation to a crime of violence (18 U.S.C. § 924(c)(1)(A)). Using or carrying a firearm subjects an offender to a term not less than five years, brandishing the firearm subjects an offender to a term not less than seven years, and discharging the firearm subjects an offender to a term not less than 10 years (18 U.S.C. § 924(c)(1)(A)(i)-(iii)). More specifically, the jury’s verdict indicated the defendant had used or carried a firearm during the commission of the offense. (*Alleyne, supra*, 133 S.Ct. at p. 2156.)

The presentence report recommended a seven-year sentence, which reflected the mandatory minimum sentence relative to an offender who had brandished a firearm during commission of the offense. *Alleyne* objected to the recommended seven-year term, contending it would violate his Sixth Amendment right to a jury trial as the jury did not find brandishing beyond a reasonable doubt. The district court, however, relied upon

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<sup>10</sup>A decision of the United States Supreme Court that results in a new rule will apply to all criminal cases still pending on direct review. (*Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

*Harris v. United States* in overruling *Alleyne*'s objections, explaining that brandishing was a sentencing factor it could properly find by a preponderance of the evidence. Thus, it imposed the seven-year term. The court of appeals affirmed. (*Alleyne, supra*, 133 S.Ct. at p. 2156.) In reversing, the Supreme Court stated:

“In *Apprendi*[ v. *New Jersey* (2000) 530 U.S. 466], we held that a fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed. [Citation.] While *Harris* declined to extend this principle to facts increasing mandatory minimum sentences, *Apprendi*'s definition of ‘elements’ necessarily includes not only facts that increase the ceiling, but also those that increase the floor. Both kinds of facts alter the prescribed range of sentences to which a defendant is exposed and do so in a manner that aggravates the punishment. [Citations.] Facts that increase the mandatory minimum sentence are therefore elements and must be submitted to the jury and found beyond a reasonable doubt.” (*Alleyne, supra*, 133 S.Ct. at p. 2158.)

The *Alleyne* court held that “[d]efining facts that increase a mandatory statutory minimum to be part of the substantive offense enables the defendant to predict the legally applicable penalty from the face of the indictment.” (*Alleyne, supra*, 133 S.Ct. at p. 2161.)

Here, unlike *Alleyne*, however, there was no finding by the trial court that increased the floor or minimum. Rather, the jury—in convicting defendant of unlawful sexual intercourse with a minor (count 4)—found beyond a reasonable doubt that Kayla was a minor at the time of the alleged crimes. Thus, even assuming the jury was required to have made a separate finding that Kayla was a minor for purposes of section 261, subdivision (a)(2)—the forcible rape (count 2)—any error was harmless. Because the jury determined that defendant was guilty of unlawful sexual intercourse with a minor, there is no doubt the jury would have found Kayla was also a minor for purposes of section 261, subdivision (a)(2). (See *Washington v. Recuenco* (2006) 548 U.S. 212, 216, 222 [*Apprendi/Blakely* error not “structural error” requiring automatic reversal]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327 [*Apprendi* error reviewable under harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24].)

In sum, the trial court did not err by imposing a determinate term under section 264, subdivision (c)(2). Defendant had adequate notice that Kayla was a minor at the time of his offense, and the jury found beyond a reasonable doubt that she was a minor at the time of the offense.

There is nothing in the record to suggest defendant would have prepared his defense differently had the victim's age been specifically enumerated in the information as to all counts or that he was surprised by this fact. Because we find defendant had notice of the charges against him, and the jury made the necessary findings, we conclude no due process violation occurred.

### **VIII. The Statutory Rape Conviction**

Defendant contends his statutory rape conviction must be reversed because, even assuming the rape in concert count was not based on a single act of intercourse, the rape and statutory rape counts were based on the same act of intercourse. The People contend defendant was properly convicted of unlawful sexual intercourse with a minor as well as forcible rape.

At sentencing, as relevant to this issue, the trial court noted defendant's convictions of forcible rape pursuant to section 261, subdivision (a)(2) (count 2) and unlawful sexual intercourse with a minor pursuant to section 261.5, subdivision (c) (count 4). The forcible rape count was made the principal term and the court imposed a term of 11 years. As to the unlawful sexual intercourse count, the court imposed the upper term of three years, yet stayed that sentence pursuant to section 654.

Defendant relies upon *People v. Smith* (2010) 191 Cal.App.4th 199 in support of his argument that he cannot be convicted of rape and unlawful sexual intercourse with a minor where a single act of intercourse is involved. In *Smith*, the Third Appellate District held that Smith's convictions for rape of an intoxicated woman and rape of an unconscious woman could not stand "because 'only one punishable offense of rape results from a single act of intercourse, though it may be chargeable in separate counts when accomplished under the varying circumstances specified in the subdivisions of

section 261 ....” (*Id.* at p. 205, quoting *People v. Craig* (1941) 17 Cal.2d 453, 458.) Unlike *Smith* or *Craig*, however, defendant here has not been convicted of two separate counts arising from charges brought under the same statute but different subdivisions. Instead, defendant was convicted under two different statutory provisions of the code: section 261 and section 261.5.

“Prior to 1970, section 261 ..., which is the section defining ‘rape,’ contained, as subdivision 1 of the section, sexual intercourse with a female under the age of eighteen years. [I]n 1970, the Legislature amended section 261 by deleting the old subdivision (1) and enacting a new section, section 261.5, creating a new crime denominated ‘unlawful sexual intercourse.’ The distinction was carried forward by the amendment of section 264 by the same statute, expressly setting forth different penalty provisions for ‘rape’ and for ‘unlawful sexual intercourse.’ We think it plain that, after 1970, ‘rape,’ as used in section 220, meant only rape as now defined in section 261 and that it does not include the offense, separately denominated, created by section 261.5.” (*People v. Puckett* (1975) 44 Cal.App.3d 607, 610-611; see also *People v. Lohbauer, supra*, 29 Cal.3d at p. 372.)

*People v. Smith* is simply inapplicable here. Defendant was not convicted of two crimes arising from the same statutory provision based upon a single act of intercourse. Said another way, defendant was not convicted of committing the same offense in two different ways. Significantly, he was convicted of two separate crimes arising under two separate statutes. Because two separate statutes are involved, and different elements were required to be proven, the fact the crimes arose from a single act of sexual intercourse does not prohibit the convictions. (See, e.g., *People v. Tideman* (1962) 57 Cal.2d 574, 576-577; *People v. Duarte* (1984) 161 Cal.App.3d 438, 446.)

Notably, although defendant was convicted of different offenses involving a single act of intercourse, he was not punished twice. The sentence imposed pursuant to count 4—unlawful sexual intercourse with a minor—was stayed pursuant to section 654. In conclusion, defendant’s convictions under both sections 261, subdivision (a)(2), and 261.5 are proper. Reversal is not required.

**IX. Cumulative Error**

Finally, defendant contends the cumulative effect of the errors alleged deprived him of a fair trial by an impartial jury and therefore requires reversal.

Nevertheless, we have rejected defendant’s contentions on appeal. Accordingly, we also reject his claim of cumulative error. “There was ... no error to cumulate.” (*People v. Phillips* (2000) 22 Cal.4th 226, 244.) And, to the extent there was any error, defendant was not prejudiced thereby. (*People v. Jenkins, supra*, 22 Cal.4th at p. 1056 [“trial was not fundamentally unfair, even if we consider the cumulative impact of the few errors that occurred”]; accord, *People v. Sapp* (2003) 31 Cal.4th 240, 316.) As a result, reversal is not in order.

**DISPOSITION**

The judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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CORNELL, Acting P.J.

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KANE, J.