

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON ARA ERPINAR,

Defendant and Appellant.

G049153

(Super. Ct. No. 09NF2881)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,  
James Edward Rogan, Judge. Affirmed.

Michael B. McPartland, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and  
Heather F. Crawford, Deputy Attorneys General, for Plaintiff and Respondent.

\* \* \*

## INTRODUCTION

Jason Ara Erpinar (Defendant) was charged by information with three counts: count 1—rape of an intoxicated person (Pen. Code, § 261, subd. (a)(3)), victim C.; count 2—rape of an intoxicated person (*ibid.*), victim D.; and count 3—forcible rape (*id.*, § 261, subd. (a)(2)), victim A. In October 2011, the trial court granted Defendant’s motion to withdraw his guilty plea and his motion to represent himself at trial. In August 2012, on the day scheduled for trial after months of continuances, Defendant moved to withdraw his waiver of counsel and have counsel appointed for him. The trial court denied the motion.

Defendant represented himself at trial, and the jury convicted him as charged. The court sentenced Defendant to the upper term of eight years on each count, with the terms to run consecutively, for a total sentence of 24 years in prison.

We conclude (1) the trial court did not err by denying Defendant’s motion for appointment of counsel; (2) the court did not err by denying Defendant’s request for a trial continuance made on the first day of trial; (3) substantial evidence supported the conviction on count 2; (4) any error in permitting testimony on the subject of date rape drugs was harmless; (5) the court correctly instructed the jury on evidence of Defendant’s voluntary intoxication; (6) the court did not err by instructing the jury with CALCRIM No. 852; (7) because the convictions on all three counts are affirmed, we do not consider Defendant’s argument based on CALCRIM No. 1191; and (8) the trial court’s statement of reasons justified imposition of the upper term on each count. We therefore affirm.

## FACTS

We view the evidence in the light most favorable to the verdict and resolve all conflicts in its favor. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Barnes* (1986) 42 Cal.3d 284, 303.)

## I.

### **Count 2, Rape of an Intoxicated Person, Victim D.**

In February 2008, 22-year-old D. met Defendant on the MySpace social networking Web site. On MySpace, Defendant used the moniker “\$JUICES\$” and represented himself as being 21 years of age. D. and Defendant exchanged messages on MySpace for about a few weeks before agreeing to exchange telephone numbers. After communicating by text message for awhile, they spoke by phone. Eventually, they made plans to meet in person at a Starbucks coffee shop.

On March 26, 2008, at sometime between 8:00 p.m. and 9:00 p.m., D. drove her Ford Mustang, which she kept clean and let no one else drive, to the designated Starbucks coffee shop. As she sat in her car, Defendant walked up and got inside. They decided to get a drink in downtown Fullerton.

On the drive, Defendant told D. he left his identification at home and suggested they go to a grocery store, buy a bottle of liquor, and drink it at a park. D. agreed, and drove to a supermarket where she bought a bottle of rum and Pepsi with money Defendant had given her. They next went to a fast food restaurant to get cups and then to a park, where they talked and drank rum mixed with Pepsi. D. had two drinks, which she mixed herself using more Pepsi than rum. After finishing the mixed drinks, Defendant poured rum shots. D. mixed hers with Pepsi. Defendant drank more than one shot. D. believed they drank the entire bottle of rum because Defendant threw the bottle away.

D. agreed to Defendant’s suggestion to drive to a park in Laguna Niguel which had a good view of a lake. At this point, D. did not feel intoxicated, but, about 20 minutes into the drive to the park, began to feel “different.” Along the way, Defendant asked D. to stop at a store to buy more alcohol. She said she was feeling “a little intoxicated” and did not want anything more to drink, but would stop and buy

alcohol for him. D. stopped at a store and bought a “medium sized” bottle of vodka for Defendant.

D. and Defendant arrived at the park in Laguna Niguel, where they sat on a bench looking out at a lake and talked. D. had a “dizzy feeling,” as though she were in a “dreamlike state.” Defendant drank some of the vodka and told D. three or four times that she should drink some too. She did not want anything more to drink and pretended to take a drink from the bottle of vodka so he would stop asking. Defendant realized that D. had not taken a drink and handed the bottle back to her. She took a small sip and said, “I’m done. I don’t want anymore.” Defendant and D. kissed for a short time, then she blacked out.

The next thing D. remembered was waking up on a bed in a hotel room and Defendant telling her he had blood on his penis. She felt “fuzzy” and did not know how she got there. D. walked out of the hotel room, took the elevator down to the hotel lobby, and walked outside. She was so disoriented that she did not know where she was or where she left her car. When she walked back into the hotel lobby, a receptionist asked her if she was all right. D. replied, “yeah, I’m fine.” She went back to the room and fell asleep on a couch.

When D. woke up, her face hurt. The right side of her face was swollen, her lips were bloody and swollen to three times their normal size, and half of a front tooth had chipped off. She woke up Defendant and asked him what had happened to her face and “why he didn’t take me to the hospital.” When pressed for more information about what had happened the night before, Defendant told D. that they had had sex, she “wanted it,” it was her idea to go to the hotel, and she was “all over him.” She did not believe him. Although she could not remember anything, it was not her character to consent to having sex on the first night after meeting someone.

D. wanted to go home. She managed to find her car, and, upon opening the car door, smelled vomit. She looked inside and saw vomit all over the rear seat and in the

front passenger seat. Defendant told her that she had thrown up “everywhere.” D. could not find her debit card and credit card in her purse. Defendant said that he had used D.’s credit card to pay for the hotel room and that she had given him her debit card to withdraw cash.

Defendant directed D. to a location where he could be dropped off. On the way, he told D. that while they were at the park in Laguna Niguel, she “was screaming and throwing up and acting like . . . a child.” After dropping off Defendant, D. drove home. She was crying and upset at what Defendant had done. She had already called her mother, who met her at the door of their home. D. said she thought she had been drugged and raped. Her mother thought she looked as if she had been dragged across the pavement. Within five minutes, D.’s mother took D. to the hospital, where she was examined by a nurse and spoke with a police officer. A blood sample was drawn from D. Testing of the sample did not detect the presence of drugs and determined her blood-alcohol level was between 0.019 and 0.020 at the time of the draw.

At some point, D.’s mother called Defendant and asked him what had happened to D. He said D. was “a baby,” got drunk after two drinks, threw up on herself, and fell and injured herself. When D.’s mother asked Defendant how he could have sex with someone in that condition, he replied, “I could have any girl I want.”

At the suggestion of Newport Beach Police Detective Darrin Joe, D. made a “covert” telephone call to Defendant on April 23, 2008. Detective Joe listened in on the call, which was recorded and played for the jury. During the call, Defendant told D. she had been extremely drunk, was “out of control” and “rolling all over the floor” in the parking lot, and had vomited in her car. He told D. she had rolled out of the car several times after he had pulled to the side of the road to let her vomit, and she vomited again inside the car when he stopped at an ATM. He claimed that D. had sobered up at the hotel, acted in a sexually aggressive manner, and grabbed his genitals. When D. said she had not consented to have sex, Defendant replied that he had lied about his age, he was

actually 18 years old, and also had not consented. He later said, "I guess maybe I should have been the more mature adult here and not have done something like that." Near the end of the call, he twice said, "I'm glad this call was recorded."

On May 13, 2008, Detective Joe called Defendant to get his side of the story. The conversation was recorded and played for the jury. Defendant first made up a story: He claimed that D. wanted to buy the alcohol, they went to a park where she drank and he did not drink at all, afterwards D. bought another bottle of alcohol, they went to the park in Laguna Niguel, and she drank more. He said he was afraid to be in a car with D., so he called his mother and had her pick him up from the park. He claimed that D. called his mother at about 3:00 or 4:00 a.m. from the hotel parking lot. His mother drove him to the hotel parking lot, where he found D., who "looked like a mess." Using a credit card D. had given him, Defendant rented a room at the hotel, escorted her there, and returned home with his mother. The next day, he returned to the hotel to check on D. and make sure she made it home. Asked by Detective Joe whether Defendant was sure that was what had happened, he replied, "[o]h most definitely yeah" and said his mother would confirm this version of events. He again claimed that he never entered the hotel room and, aside from kissing D., had not touched her in any sexual way.

Detective Joe employed a ruse by asking Defendant if he knew of any reason why his DNA would be found inside D.'s vagina. Defendant said that he and D. did have sex in the backseat of her car. When Detective Joe pressed Defendant for the truth, he admitted having had sex with D. in the hotel room. Defendant said D. had been drunk, had fallen down at the second park, and had "puked" everywhere in her car as he drove them to the hotel. Along the way, they stopped at a market where Defendant bought water and cigarettes for himself and a sandwich for D. Her lip was swollen and she looked "like a mess." In the hotel room, while Defendant lay on the bed in his underwear, D. went into the bathroom and stripped naked. After they talked for a half hour to 45 minutes, D. gave Defendant a massage and they began to have sex.

Intercourse ended before Defendant ejaculated. He went into the bathroom and said, “what the hell you on your period like that’s disgusting.” D. left the room for about half an hour. When she returned to the room, she again massaged Defendant’s back, and he fell asleep. Defendant woke up at about 2:00 p.m. and D. drove Defendant home. He claimed he had nothing to drink that night. When Detective Joe asked Defendant why he had told D. in their telephone conversation a few weeks earlier that he had been drunk, he asserted he never said that. Defendant said he did not know the earlier conversation was being recorded.

## **II.**

### **Count 1, Rape of an Intoxicated Person, Victim C.**

C. met Defendant on MySpace sometime in early 2009, when she was 18 or 19 years old. After exchanging messages on MySpace for several weeks, they started sending text messages to each other and spoke by telephone a few times. They eventually agreed to go to a party together along with several other people.

On March 7, 2009, sometime after 8:00 p.m., Defendant, Jennifer Vongdang, and two of her friends (called Ryan and Rabbit), picked up C. at her house. C. did not know Vongdang, whom Defendant also had met on MySpace, Ryan, or Rabbit. In a car driven by Rabbit, they went to a music studio used by Defendant’s father, which had a downstairs work area and an upstairs living space with a bed and bathroom. All of them went upstairs to the living space and drank alcoholic beverages. C. drank straight rum, sometimes out of a bottle and sometimes from cups that had been filled by “someone.” C. did not view the evening as a “date” with Defendant, and she made no romantic gestures toward him. She was menstruating and therefore would not consider sexual intercourse.

C. drank a lot—a lot more than the others—and became very drunk. Her speech became slurred, she had trouble walking, and she was sick to her stomach. She passed out on the bed and vomited on herself. Defendant put C., fully clothed, in the

shower and turned the water on. She held herself upright by one of the shower walls and, after making sure the shower door was closed, removed her turtleneck sweater, shirt, camisole, and bra. Defendant stepped into the shower naked. C. was having difficulty standing, and Defendant grabbed her arm to prop her up. He removed the rest of her clothing, turned off the water, took her out of the shower, and laid her on the floor of another room. C. was still drunk. She felt as though the room was spinning, and she was cold. Although she was blacking out, she remembered Defendant on top of her and his penis penetrating her vagina. She wanted him to stop but she could not do anything.

Vongdang entered the room and saw C., naked and passed out, lying on the floor next to Defendant, who was also naked. Vongdang was shocked. When she asked Defendant what happened, he replied, "I just fucked her, get this bitch out." Realizing that C. was unable to take care of herself, Vongdang put one of her own sweaters on C. and helped her walk outside to the car. Vongdang, Ryan, and Rabbit took C. home.

C. awoke in her bed in the afternoon, feeling "dirty and drunk." Her genital area hurt, and she could feel her tampon "stuck all the way." Vongdang called to make sure that C. was all right. When Vongdang related the comments made by Defendant, C. became hysterical. C.'s grandmother took her to the police station, where C. was interviewed by a female police officer. Vongdang also contacted the police. A police officer took C. to a hospital, where a nurse conducted a sexual assault examination. C. was still sore and had a bruised lip.

At some point, Defendant telephoned C. to find out how much she remembered and whether she had contacted the police. She vaguely remembered him telling her to take the "morning after" pill. C. later told a police detective that, when she told Defendant she could not remember having sex with him, he replied, "I guess I wasn't very good."

While investigating C.'s rape report, La Habra Police Detectives Dean Capelletti and Jose Rocha learned of a similar report made by D. Detective Capelletti

contacted D., who told him what Defendant had done to her in March 2008. D. said she believed she might have been drugged. Capelletti compared what D. had told him with what she had previously told law enforcement and concluded the two accounts were almost exactly the same.

### **III.**

#### **Count 3, Forcible Rape, Victim A.**

In August 2009, Detective Rocha telephoned Defendant's ex-girlfriend, A., after learning she had made a domestic violence report several years earlier. As was his practice, Detective Rocha identified himself as a police detective but did not disclose the type of case he was investigating; however, from Detective Rocha's questions, A. figured out that he had called about rape allegations involving Defendant. She described her relationship with Defendant as "abusive" and related several instances in which he had been violent with her during sexual intercourse. A. also told Detective Rocha (either during the telephone call or when they later met in person) that Defendant had raped her.

Defendant and A. began dating when they were both 17-years-old high school students. During their 14-month-long relationship, Defendant hit, pushed, and choked A. on many occasions. On one occasion, he hit her in the face, causing her to bleed profusely and leaving a scar on her nose. She did not tell her parents or report the abuse because she wanted to help him. When A. considered ending the relationship, Defendant would threaten to call her or come by her house late at night and disrupt her parents. Defendant was very muscular; his nickname was "Juice" because he used and sold steroids. At times, A. was scared of Defendant, particularly when drinking caused him to burst into anger.

A. became pregnant by Defendant. She had an abortion in June 2007 out of fear the child would be raised in an abusive home.

After the abortion, Defendant became more aggressive and violent toward A. On a couple of occasions when A. would not have sexual intercourse with Defendant,

he held down her arms or choked her and forced himself on her. In June or July 2007, A. was recovering from the abortion and was not permitted to have sexual intercourse. She told Defendant she did not want to have sex, and tried to avoid it, but he held her down and raped her. She could not stop him because he was so much stronger than she was.

By September 2007, A. and Defendant were living in an apartment rented in her name. Their relationship was tenuous and A. was trying to end it. When she went to the apartment to collect some of her belongings, Defendant pushed her against a wall and broke some of her things. A. reported the incident to the Orange County Sheriff's Department, and, as a consequence, Defendant was temporarily jailed. A. obtained an emergency restraining order against Defendant, but the case was dismissed. Defendant continued to try to contact A. after they broke up in October 2007. To avoid him, A. continually changed her telephone number. When Detective Rocha contacted A. in August 2009, she initially declined to meet with him out of fear it was a ruse by Defendant to get in touch with her.

#### **IV.**

##### **Police Interview**

Detective Capelletti arrested Defendant in October 2009 and questioned him at the La Habra police station. The interview was audio-recorded and the recording was played for the jury. A transcript of the recording was received in evidence as exhibit No. 14.

Detective Capelletti informed Defendant he was being accused of rape by a woman named C. Defendant commented he had "had sex with girls on MySpace before," claimed not to remember C., and asked for a description of her. He eventually said he remembered C. and agreed to give Detective Capelletti "the whole story."

Defendant said he met up with an Asian girl (Vongdang) and two of her male friends at a 7-Eleven store. They bought some rum and cola, picked up C., and went to his father's shop, where they went upstairs to the living area, played music, and

drank. C. got drunk and, according to Defendant, “was hugging me . . . she was giving me the look like you know and I know man I’ve been with girls before okay so but anyways I know I could have her whenever I wanted to.” C. became sick, vomited on the bed, and asked if she could take a shower. Defendant put her in the shower and, when he turned on the water, C. acted “like . . . it was just kind of like an open invitation like you can come in too.” So Defendant got in the shower with C., who was “not un-coherent,” and “everything was cool.” When they stepped out of the shower, they wrapped themselves in a bedsheet and “just kind of started doing it like right on the floor outside of the shower.” Defendant claimed that everything was fine until Vongdang walked in and was “like, oh my God she was drunk, blah, blah, blah you just had sex with her what were you thinking.” Defendant helped C. get dressed and she left with Vongdang and her friends.

Defendant said that Vongdang called him the next day and asked if she and some of her friends could come by. Defendant said he was “no . . . dummy” and refused to meet with her. Sensing that something was wrong, Defendant called C. and asked if she was all right. C. told Defendant she had on a tampon when they had sex and had to have it removed by a physician. Otherwise, C. said, everything was “fine.” Defendant told Detective Capelletti that C. consented to have sex.

When Detective Capelletti told Defendant another woman had accused him of rape, he started talking about D. Defendant claimed that D. had not accused him of rape before because she did not remember what had happened that night. He said that he and D. got drunk on alcohol she had purchased. D. drank a whole bottle of vodka at the first park, they bought another bottle of vodka, and drank it at the second park. D. became so drunk she was unable to walk and had to hang on to Defendant to get back to the car. She fell and hit her tooth either on the car mirror or on the ground. Defendant drove to Dana Point, where D. got out and urinated in the front of a house. After stopping at a gas station to get food, Defendant drove them to the Newport Marriott and

got a room, using D.'s credit card to pay. By that point, D.'s lip was so swollen, it "kinda looked all like . . . this guy socked her up," so Defendant had her walk behind him so it would not appear as though they were together. In the room, they both undressed and had sex. D. woke up Defendant at 7:30 or 8:00 a.m. and insisted on leaving. When they got in the car, Defendant noticed vomit was everywhere.

D.'s mother called Defendant about what had happened. He told her he was only 18 years old and in high school, he and D. drank too much, D. supplied the alcohol, D. bought the hotel room, and he did not force himself on her. D.'s mother asked if Defendant put anything in D.'s drink. He claimed never to have put anything in D.'s drink and claimed to have no knowledge of "drugging pills" or where to get date rape drugs. Defendant told Detective Capelletti he did know of a weight loss drug which, when taken with alcohol, would cause you to forget. Defendant told Detective Capelletti, "I really didn't drug that woman."

When asked why he had sex with C. when she was drunk, Defendant said: "Why not? Man I've had sex with a lot of women, a lot of women." He explained his "plan" was to meet with a girl, get food or coffee first, get alcohol—"there'd always be alcohol," maybe go to a hookah bar, go to a park and drink, "and then we'd have sex." No relationship was "serious" and, Defendant claimed, "nothing was very violent."

Defendant said his relationship with A. was never healthy and "we had an equal amount of disrespect for each other."

Defendant said he always drank with the girls he had met on MySpace because "you have more fun when you're drunk."

### **PROCEDURAL HISTORY**

A three-count complaint against Defendant was filed in October 2009. Defendant was represented by Deputy Public Defender Linda Hewitt until December 11, 2009, when he substituted retained counsel, Randall T. Longwith, as attorney of record. Longwith represented Defendant at the preliminary hearing on November 30 and

December 1, 2010. On the latter date, an information was filed charging Defendant with two counts of rape of an intoxicated person and one count of forcible rape.

On March 25, 2011, Defendant substituted retained counsel, R. Dennis Rentzer, in place of Longwith. On August 22, 2011, the day set for trial to begin, Defendant, who was still represented by Rentzer, as well as Gale Rentzer and Daniel Blatt, withdrew his not guilty plea, pleaded guilty to all three counts, and accepted a sentence of 15 years in prison. In September 2011, Defendant wrote letters to the trial court, asking to withdraw his guilty plea on the ground he was mentally incapacitated when he changed his plea.

At a hearing on October 17, 2011, Defendant was allowed to withdraw his guilty plea because, as it turned out, the law did not permit the proposed sentence. He then terminated his retained counsel, declined a public defender, and asked that he be permitted to represent himself. The trial court asked Defendant about his education and ability to represent himself and presented him with a *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) waiver form. The court painstakingly advised Defendant of the dangers of self-representation: “When somebody represents themselves, by law the court cannot help you. I cannot give you advice. I cannot make suggestions to you as to what you should or should not do. I have to hold you to the exact same standard that I have to hold the district attorney. And you will be putting yourself in a position in a case that has significant state prison exposure, at a decided disadvantage if you do not have the benefit of counsel.” In prescient words, the court told Defendant: “If you represent yourself, there is no guarantee that you will have anybody to work on your case by way of an investigator or investigators which the public defenders ha[ve] at their disposal. You could change your mind at the last minute and decide you’re in way over your head and you’d like a lawyer. There is no guarantee that the court will continue the case for that. [¶] And so you have to assume that if you represent yourself, you will be at a very significant disadvantage both in your ability to investigate the case and in the

presentation of the case.” After advising Defendant of the perils of self-representation, the trial court found that Defendant freely, knowingly, intelligently, and voluntarily waived his right to counsel.

At the same hearing, the court told Defendant that he could request appointment of counsel at a later time, but advised: “The problem is that if [you] make[] it too late or we’re on the eve of trial and the witnesses are ready and the prosecution is ready and [you] just had a last minute change of heart, there is no guarantee that the court is going to grant that request. And then [you]’ll be stuck going pro per. So it’s in [your] interest to do it at the earliest possible date. [¶] And the appellate courts have, in a number of cases, refused to reverse defendants’ convictions who at the last minute have decided, oh, gee, I’d like to have a defense attorney after all; I’m in over my head.” The trial court continued the trial to November 28, 2011.

On November 21, 2011, the trial court continued the trial to January 20, 2012. On December 16, 2011, the court granted Defendant’s request for an investigator and appointed Ann Ciulla. The court continued the trial to February 10, 2012.

On January 20, 2012, the trial court granted Defendant’s request to continue the trial to allow him and Ciulla to further review discovery. The court continued the trial to March 9, 2012, with the warning, “[n]o further continuances will be granted.”

At a hearing on February 24, 2012, the trial court considered Defendant’s motion to continue the trial for another six months. The court agreed to continue the trial to May 18, 2012, but again warned Defendant: “[Y]ou were given pro per status four months ago. At your request I’m entertaining a motion to continue this case for three more months. I am not inclined to continue it beyond that date unless there is a showing of good cause.” When the court set the pretrial for March 23, Defendant asked the pretrial be set six weeks away because his investigator was doing the “leg work.” The trial court said to Defendant: “[Y]ou may recall that over four months ago when you

requested to go in pro per, not only did the court provide you with *Faretta* waivers, the court had a lengthy colloquy with you and I told you that there are a number of difficulties in representing [your]self, particularly when one is in custody. That being that you are in custody and have to rely upon others to help you out. I urged you in the strongest terms, particularly in light of the exposure that you face on these cases, to reconsider your request. [¶] I told you that the court would not be able to grant you special favors and that I would have to hold you to the same standard that I would every other attorney.” (Italics added.)

On May 17, 2012, Defendant filed another motion for a trial continuance. The next day, the prosecution filed a motion to continue trial. The trial court granted the prosecution’s motion and continued the trial to August 17, 2012.

On June 8, 2012, Defendant brought a motion to remove Ciulla as his appointed investigator. By this time, she had visited Defendant at least 20 times. Ciulla had sent a letter to the court, requesting to be relieved as investigator. The trial court granted Defendant’s motion, with the comment: “M[s.] Ciulla is an absolute consummate professional. This court has great, great confidence in her abilities as an investigator.” The court again advised Defendant of the difficulties of self-representation and bluntly told him, “I think you are compounding your personal mistake in asking the court to relieve M[s.] Ciulla as your investigator.” The court appointed Martin Dante as Defendant’s investigator.

Defendant had asked Ciulla to interview 43 potential character witnesses. The court ordered that Defendant show relevance and obtain court approval for the new investigator to proceed with further witness interviews.

On July 31, 2012, the trial court granted Defendant’s request for appointment of a DNA expert “to consult with defendant on DNA evidence.” On August 3, Defendant filed a “Declaration, Volume One in Support of Investigation Permission” in which he asked to be able to meet in person with Dante two days per

week to review 247 “pieces of provided discovery.” Defendant stated he was “very familiar with my discovery pages” but believed it necessary that he and his investigator review “together” the discovery “in detail.” Defendant also asked to be able to watch or listen to 18 DVD’s or CD’s of witness interviews.

On August 17, 2012, the day set for trial, Defendant requested another continuance. He contended that the jail staff had deprived him of the ability to defend himself by taking his notes and research and revoking his in propria persona privileges. Specifically, he claimed that after he was transferred to a different module in the jail, six brown file folders and four manila folders were not returned to him, five law books purchased by his mother had been taken from him, his law library privileges had been revoked, he had been transferred 11 times in 16 days, and he had not been allowed to meet with his investigator since June.

To address those claims, the trial court conducted an evidentiary hearing, at which Sergeant Ray Wert of the Orange County jail and Dante testified. The court found that “jail staff has not acted in any fashion that has encumbered defendant’s ability to represent himself.” The court stated: “The Court finds no basis to accept defendant’s claim that jail staff has removed or deprived him of his trial preparation notes. The Court finds the defendant has engaged in dilatory tactics to delay the jury trial. The Court denies defendant’s motion to continue.” The court ordered a jury panel for August 20, 2012.

On August 20, Defendant requested another trial continuance based on a declaration from his expert stating the expert needed 30 to 45 days to review records and documents. Noting the many continuances Defendant already had been given, the court denied the request. The court stated: “[W]hat we are left with is a defendant who has been given virtually every accommodation necessary to adequately prepare and defend against the charges, including almost a year of continuances. [¶] In light of the investigation being completed at least a month and probably two months ago, over two

months ago, the defendant's habit of filing motions and subpoenas that, when questioned in camera as to their relevance, he then withdraws the request, and the defendant's latest hearing where he provided the court with complaints the court found insincere, it is apparent now to this court that [Defendant] is now attempting to manipulate the process and create error rather than making a good faith attempt to represent himself, as he has continually demanded over this last year, despite the court's repeated warnings and the court's repeated encouragement that he is at a severe disadvantage acting in pro per and should reconsider and have counsel appointed." The court found that by seeking another trial continuance, Defendant was engaging in "dilatory tactics to delay the trial date indefinitely."

Within moments after the trial court denied the request for a trial continuance, Defendant asked for appointment of counsel to represent him, stating he was "out of [his] league" and not defending himself properly. The trial court asked the prosecution whether it would suffer prejudice if the court granted Defendant's request. The prosecutor replied, "[t]his case has been delayed numerous times by [Defendant]. [¶] . . . [¶] Obviously, as time goes on, individuals' recollections may be compromised. Their availability may also be compromised."

The trial court denied Defendant's motion for appointment of counsel. The court reminded Defendant that he had been repeatedly warned of the dangers of self-representation and that it would be in his best interest to have counsel appointed. The court stated it was nonetheless "always open to entertaining a motion for reappointment of counsel if the motion is timely and if it is made in a way that would be appropriate." The court then looked to the totality of the circumstances "including prior history of substitutions, waivers taken, reasons for the request, the stage of the proceedings, the disruption that might ensue, and the likelihood of defendant's effectiveness defending against the charges."

The trial court made these findings on the record: “[W]ith respect to prior history of substitutions, this case was something like two years old when [Defendant] had private counsel. I note the charges . . . emanate from March of 2009, which is three and a half years ago; March of 2008, which is four and a half years ago; and May of 2007, which is now five, almost five and a half years ago. [¶] . . . [¶] . . . [Defendant] had counsel appointed up to the date of trial then. And on the date of trial he entered a plea of guilty. Within I think a day or two after the entr[y] of that plea, [Defendant] began sending correspondence and messages to the court that he wished to withdraw his plea. [¶] At a hearing, the court allowed him to withdraw his plea. At that time, he fired his counsel and demanded his right to go pro per. [¶] And what we have seen is that every time since then, that a jury trial date has been set, [Defendant] has continued to make the same request for a continuance because he claimed he was not prepared. [¶] . . . [T]his court has taken extraordinary steps to accommodate him both in those motions for continuance and to appoint resources for him so that he would be prepared. [¶] With respect to the waivers that were taken, he filed a *Faretta* waiver form, as I indicated. The court went through a lengthy colloquy that I need not repeat because the record is there of how many times [Defendant] has been warned with respect to the dangers of self[-]representation. [¶] The court has also considered the reasons for the request at this stage of the proceedings and the disruption that might ensue.” The court earlier had noted that a panel of 100 prospective jurors had been ordered for that day and had already been “time qualif[ied].”

Following the lunch recess, the trial court announced it had conducted substantial research and would reconsider Defendant’s request for a continuance to permit his DNA expert to prepare for trial. The court stated that if it granted a trial continuance, “I would be obliged to appoint the public defender for you.” The court asked whether the prosecution intended to use DNA evidence because, if it did, “[Defendant] is entitled to at least have an expert to explain to him and coach him on the

nuances of DNA.” The prosecutor replied that the prosecution would not be using DNA evidence, either in its case-in-chief or in rebuttal (“I will take DNA off the table”). The trial court thereupon confirmed its denial of Defendant’s request for a continuance.

The case went to trial, and the jury found Defendant guilty on all three counts. After the verdict, Defendant retained counsel, who brought a motion for a new trial, which the trial court denied. The trial court sentenced Defendant to the upper term of eight years on each of the three counts for a total of 24 years in prison.

## **DISCUSSION**

### **I.**

#### **The Trial Court Did Not Err by Denying Defendant’s Motion for Appointment of Counsel.**

Defendant contends the trial court abused its discretion and violated his constitutional right to counsel by denying his motion to withdraw his waiver of counsel and for appointment of counsel. This record establishes the trial court did not err by denying Defendant’s motion.

A criminal defendant has a constitutional right to self-representation. (*Faretta, supra*, 422 U.S. at pp. 833-834.) Once a defendant has waived the right to counsel and to exercise the right of self-representation, the trial court has discretion to grant or deny a subsequent request to revoke the waiver of counsel and to have counsel appointed. (*People v. Lawrence* (2009) 46 Cal.4th 186, 188, 191-192 (*Lawrence*)). “[T]he trial court must exercise its discretion under the totality of the circumstances, considering factors including the defendant’s reasons for seeking to revoke the waiver, and the delay or disruption revocation is likely to cause the court, the jury, and other parties.” (*Id.* at p. 188.) The trial court also should consider (1) the defendant’s prior history of substituting counsel and changing from self-representation to representation by counsel; (2) the reasons for the request; (3) the length and stage of the trial proceedings; (4) disruption or delay which might reasonably be expected from granting a request to

withdraw a waiver of counsel; and (5) the likelihood the defendant would be effective in defending against the charges if required to continue to act as his or her own counsel. (*Id.* at p. 192.)

“The abuse of discretion standard is used in many . . . contexts and reflects the trial court’s superior ability to consider and weigh the myriad factors that are relevant to the decision at hand. A trial court will not be found to have abused its discretion unless it “exercised its discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice.” [Citation.]’ [Citation.]” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1180.)

Here, based on the totality of the circumstances, the trial court could conclude that by seeking appointment of counsel, Defendant was being dilatory, manipulating the system, or trying to create reversible error. Defendant had a history of changing counsel. He initially was represented by a deputy public defender; he then substituted Longwith as attorney of record, and then substituted retained counsel, Rentzer, in place of Longwith. Defendant pleaded guilty in August 2011 (the original trial date) but soon asked to withdraw the plea. At a hearing in October 2011, he was allowed to change his plea, terminated retained counsel, and represent himself.

Defendant’s reason for the request for appointment of counsel was he was “out of [his] league” and unable to defend himself effectively, and that he needed “time to prepare further.” When Defendant waived his right to counsel, the trial court warned him of the perils of self-representation, a warning which was repeated on several occasions over the next nine months. Defendant was told that if he waited until commencement of trial to request appointment of counsel, the court might not be able to grant his request. As the trial court acknowledged, the failure to heed those warnings did not mean that Defendant lost his right to appointment of counsel. However, “[t]hat defendant was told of—and affirmed his understanding of—the risks and disadvantages of self-representation before he waived counsel reflected on his reasons for later seeking

to revoke the waiver.” (*Lawrence, supra*, 46 Cal.4th at p. 195.) At best, Defendant simply changed his mind at the last minute after reweighing the pros and cons of self-representation. “Because defendant had been fully advised before he chose self-representation, his later change of mind properly bore less weight in the trial court’s discretionary decision on the revocation request.” (*Id.* at pp. 195-196.)

The trial court was entitled to draw the inference that Defendant was trying to delay trial, and substantial evidence supported the trial court’s finding that appointing counsel for Defendant would cause disruption and delay. The charged offenses occurred in May 2007, March 2008, and March 2009, and the complaint was filed in October 2009. Defendant requested counsel on August 20, 2012—the first day of trial—while a panel of 100 potential jurors was waiting for voir dire. Trial already been continued many times at Defendant’s request, and another continuance would have been required to permit newly appointed counsel to prepare for trial. Although Defendant asserts that only a three- to five-month continuance would have been required, such a continuance would have come on top of months of continuances already granted. The prosecution was ready to proceed with trial, and was justifiably concerned about witness recollection and availability.

Defendant’s asserted inability to effectively represent himself does not in itself mean the trial court abused its discretion in denying his request for appointed counsel. “Defendant was untrained in the law and may not have been especially experienced in court procedures, but the same could be said of many, if not most, in propria persona criminal defendants. That defendant’s defense would have been more effectively presented (or a better sentence obtained through a negotiated plea) had he been represented is likely. But if that fact were determinative, virtually all self-representing defendants would have the right to revoke their counsel waivers at any time during trial. That is not the law.” (*Lawrence, supra*, 46 Cal.4th at p. 196.) And, in this case, the trial court found that Defendant “does appear to have the intelligence and

mental capacity to adequately represent himself,” was “very familiar” with discovery, had filed numerous pretrial motions, and, apparently had been assisted by former retained counsel in preparing for trial.

Defendant argues he made his request for counsel before jury selection, and appellate courts have found an abuse of discretion in denying appointment of counsel at such an early stage of the trial proceedings. (*People v. Hill* (1983) 148 Cal.App.3d 744, 760-761 [abuse of discretion to deny request to reinstate counsel made before jury selection when no showing of disruption from the necessary five-day continuance]; *People v. Cruz* (1978) 83 Cal.App.3d 308, 319-322 [abuse of discretion to deny request to reinstate counsel before assignment to trial department on first day of trial].) We agree that Defendant’s request for appointment of counsel was not made at a particularly late stage of the trial. But he contended a three- to five-month continuance was necessary, in contrast to the five-day continuance necessary in *People v. Hill* or the three-week minimum continuance necessary in *People v. Cruz*.

Even if the factor of the stage in the proceedings supported appointment of counsel, “[t]he standard is whether the court’s decision was an abuse of its discretion under the totality of the circumstances [citation], not whether the court correctly listed factors or whether any one factor should have been weighed more heavily in the balance.” (*Lawrence, supra*, 46 Cal.4th at p. 196.) Under the totality of the circumstances, the trial court did not abuse its discretion in denying Defendant’s request for appointment of counsel.

## II.

### **The Trial Court Did Not Err by Denying Defendant’s Request for a Trial Continuance.**

Defendant asserts the trial court abused its discretion and violated his constitutional rights by denying his request for a trial continuance made on August 20, 2012, the date on which the jury trial was to start. He argues the circumstances

established he was not ready for trial, he was still reviewing evidence against him and attempting to have potential witnesses interviewed, and he needed to have an expert review DNA evidence. We conclude the trial court did not err by denying the request for a trial continuance.

“A continuance in a criminal case may be granted only for good cause. [Citation.] Whether good cause exists is a question for the trial court’s discretion.” (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) The court must consider the potential benefit to the party requesting the continuance, the burden on witnesses, jurors, and the court, and whether granting or denying the request will result in substantial justice. (*Ibid.*) A showing of good cause requires the defendant and counsel to demonstrate they have prepared for trial with due diligence, but the court may not exercise its discretion in a way that would deprive the defendant or his or her attorney a reasonable opportunity to prepare for trial. (*Ibid.*)

“A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court’s denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court’s denial does not warrant reversal. [Citation.]” (*People v. Doolin, supra*, 45 Cal.4th at p. 450.) Discretion is abused “only when the court exceeds the bounds of reason, all circumstances being considered.” (*People v. Beames* (2007) 40 Cal.4th 907, 920.)

In considering the circumstances, we start with the reasons Defendant presented for his request for a continuance. The stated reason for Defendant’s August 20 request for a trial continuance was his DNA expert needed 30 to 45 days to review records and documents. After initially denying the motion for a continuance, the trial court asked whether the prosecution intended to use DNA evidence because, if it did, “[Defendant] . . . is entitled to at least have an expert to explain to him and coach him on the nuances of DNA.” The prosecutor replied that the prosecution would not be using

DNA evidence, either in its case-in-chief or in rebuttal. Because the prosecution was not going to present DNA evidence, a continuance was unnecessary for Defendant's DNA expert to prepare to respond to that evidence. Defendant did not argue he needed expert DNA opinion for any purpose other than responding to the prosecution's DNA evidence. DNA evidence would appear to have had no relevance to the issue of whether the victims consented to sexual intercourse.

In requesting a continuance, Defendant failed to demonstrate he had prepared for trial with due diligence, despite having more than reasonable opportunity to do so. Defendant made the August 20 request for a continuance 1,048 days after he had been charged and 308 days after he was granted self-representation status. He was represented by counsel for most of that time. The trial court had continued the trial date on November 21, 2011 and again on December 16, 2011, after granting Defendant's request for a court-appointed investigator. On January 20, 2012, the trial court granted Defendant's request to continue the trial to allow him and the investigator to further review discovery. The court continued trial to March 9, 2012, and stated, "[n]o further continuances will be granted." Nonetheless, on February 24, 2012, the trial court considered Defendant's motion to continue the trial for another six months and granted a continuance to May 18, 2012. Defendant filed another motion for a continuance on May 17. Although the trial court did not rule on that request, on May 18, the court granted the prosecution's motion for a continuance, which gave Defendant three more months to prepare for trial.

On August 3, 2012, Defendant filed another request to meet in person with his investigator to review discovery together in detail. He also asked to be able to watch DVD's and listen to CD's of witness interviews, but provided no explanation why he had not already done so. Ciulla had shown Defendant 8 of the 15 DVD's or CD's, and Defendant acknowledged he was "very familiar" with discovery. On August 17, the day scheduled for trial, Defendant requested another continuance on the ground that the jail

staff took his notes and research and revoked his in propria persona privileges. After conducting an evidentiary hearing, the trial court rejected those claims, set the trial for August 20, and ordered a jury panel.

Substantial justice would not have been served by granting Defendant's August 20 request for a continuance. As the prosecution pointed out, memories of witnesses fade over time, and their availability might have been compromised by another continuance. In denying Defendant's request for a continuance on August 20, the trial court stated: "[W]hat we are left with is a defendant who has been given virtually every accommodation necessary to adequately prepare and defend against the charges, including almost a year of continuances." The trial court found that, by seeking another trial continuance, Defendant was engaging in "dilatory tactics to delay the trial date indefinitely." The record supports those findings.

### III.

#### **Substantial Evidence Supported the Conviction on Count 2.**

The jury convicted Defendant of the crime charged in count 2—rape of an intoxicated person, of which D. was the alleged victim. Defendant contends the conviction on that count must be reversed because there was insufficient evidence that (1) D. was too intoxicated to resist the act of sexual intercourse and (2) Defendant knew or reasonably should have known she was too intoxicated to resist.

“In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if “upon no

hypothesis whatever is there sufficient substantial evidence to support” the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

Penal Code section 261, subdivision (a)(3) provides: “(a) Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] . . . [¶] (3) Where a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, or reasonably should have been known by the accused.”

There was more than substantial evidence from which the jury could find that D. was too intoxicated to resist sexual intercourse and that Defendant knew it. D. testified that while she and Defendant were at the park in Laguna Niguel, she felt intoxicated, “like I was in a dreamlike state.” After she and Defendant kissed for a little while, she blacked out, and the next thing she remembered was waking up in a bed in a hotel room. She felt “fuzzy” and did not know how she got there. D. testified she walked out of the hotel room, took the elevator down to the hotel lobby, and walked outside. She was so disoriented that she did not know where she was or where she left her car. A front desk clerk at the hotel told Detective Joe that D. appeared incoherent, staggered as she walked, and looked as though she had been beaten. D. went back to the room and fell asleep on a couch. When D. woke up, her face hurt. The side of her face swollen, her lip was bloody and swollen, and half of a front tooth had chipped off. She did not know how she got into that condition. D.’s car had vomit all over the rear seat and in the front passenger seat, and Defendant told her that she had thrown up “everywhere.” D. testified it was not her character to consent to having sex on the first night after meeting someone or to have sex while menstruating.

In addition, during the pretext telephone call, Defendant told D. she had been so intoxicated that she was “out of control” and almost vomited inside of her car. Defendant claimed that D. somehow had quickly sobered up at the hotel room, but the

jury could disregard the last comment, finding it patently incredible that a person in D.'s intoxicated state could sober up so quickly.

Defendant argues there was not substantial evidence he knew or reasonably should have known D. was too intoxicated to resist sexual intercourse in that she did not testify about how she was acting when they had sexual intercourse and there was no evidence about how he interpreted her state of intoxication. He adds that he told Detective Capelletti that he believed D. had consented to sexual intercourse. During the interview with Detective Capelletti (exhibit No. 14), Defendant said that D. drank a whole bottle of vodka, and fell and hit her tooth on either the car mirror or the ground. He told Detective Capelletti that, soon thereafter when it was decided to get a hotel room, “[D.] was drunk I mean at this point yeah dude she was drunk” and he “d[id]n’t wanna be stuck at a park with some drunk chick.” D. looked so bad that when they got to the hotel, Defendant did not want to walk next to her for people would think “this guy socked her up.” Defendant told Detective Capelletti that, at the hotel, “[w]e got into the bed I was in the bed we were so drunk at this point . . . I didn’t force anything man.” The jury could fairly infer from this evidence that Defendant knew or reasonably should have known that D. was too intoxicated to resist sexual intercourse.

#### **IV.**

##### **Any Error in Permitting Testimony on the Subject of Date Rape Drugs Was Harmless.**

Defendant asserts the trial court erred by permitting Detective Capelletti to testify about “generically described date rape drugs.” He argues such evidence was irrelevant because no admissible evidence was presented that he had possession of date rape drugs or that he administered them to D. We will assume for purposes of analysis that Defendant made all objections necessary to preserve appellate review or that objection would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

The specific testimony challenged by Defendant is:

“Q. [The prosecutor:] Do you have any experience, either through your training or through contact with victims of a crime, regarding substances that are sometimes generically described as date rape drugs?”

“A. [Detective Capelletti:] I do.

“Q. Is it within your experience, as well as your training, easily detected whether or not someone has been given a date rape drug?”

“[Defendant]: Objection. Irrelevant.

“The Court: Overruled.

“The witness: It is not easily detected, no.

“Q. By [the prosecutor]: And why is that?”

“A. It comes out of the system very quick[ly]. The body metabolizes it so quickly, unless there is a blood draw almost immediately after, it may never be detected.”

Later, the prosecutor asked Detective Capelletti if there was a connection between “date rape” drugs and steroids. Detective Capelletti answered that one of the drugs commonly used by bodybuilders is the same drug used for “date rape.” Detective Capelletti related a conversation with Defendant in which he stated a friend had told him about a drug which, when mixed with alcohol and consumed, would cause someone to pass out and not remember anything.

The matter of “date rape” drugs was first raised, however, during Defendant’s cross-examination of D. Defendant elicited testimony from her that, while at the park in Laguna Niguel, he asked her to drink more vodka, she took a little sip, gave the bottle back to him, and said she was done. She started to feel “dazey” and believed it was from the alcohol, even though she had not had that reaction to alcohol before. Defendant asked her whether she remembered that, during the covert telephone call, he had told her to go and get tested for drugs. D. remembered that she told him that she had not yet been drug tested. Referring back to the night at the hotel room, Defendant asked,

“[w]ould you blame the way that you felt that night on alcohol?” D. answered, “I didn’t know if it was alcohol. What I just know, I felt different and I’ve never blacked out for 12 hours and not known what had happened.”

During cross-examination of Detective Joe, Defendant asked if “drugs [were] found in [D.’s] system.” Detective Joe answered, “I don’t believe so, no.” Defendant asked Detective Joe if he “look[ed] into the matter if [D.] was on drugs.” Detective Joe’s answer was the toxicology report did not detect the presence of drugs in D.

Defendant opened the door to Detective Capelletti’s testimony by trying to establish, through his cross-examination of D. and Detective Joe, that he did not give drugs to D. The prosecution was free to put on testimony that date rape drugs metabolize quickly and, therefore, would not necessarily have been detected by blood or urine tests.

Any error in permitting Detective Capelletti to testify on the subject of date rape drugs was harmless. The standard for assessing harmless error in the admission of evidence is whether “it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*People v. Watson* (1956) 46 Cal.2d 818, 836.) As we have explained, the evidence was overwhelming that D. was too intoxicated to resist sexual intercourse. There was no reasonable probability the jury would have reached a decision more favorable to Defendant if the trial court had precluded Detective Capelletti from testifying about date rape drugs.

## V.

### **The Trial Court Correctly Instructed the Jury on Evidence of Defendant’s Voluntary Intoxication.**

At the prosecution’s request, the trial court instructed the jury: “You may not consider evidence of voluntary[y] intoxication by the defendant for any other purpose. Voluntar[y] intoxication is not a defense to rape.” Defendant argues this

instruction was erroneous because voluntary intoxication was relevant to the charge of rape of an intoxicated person. The instruction correctly stated the law.

Penal Code section 29.4, subdivision (a) provides that evidence of voluntary intoxication is inadmissible “to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.” However, “[e]vidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent . . . .” (Pen. Code, § 29.4, subd. (b).)

Thus, while evidence of voluntary intoxication is inadmissible to negate the existence of general criminal intent, such evidence is admissible to negate the existence of specific intent. (*People v. Atkins* (2001) 25 Cal.4th 76, 80-81.) ““When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant’s intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.” [Citation.] General criminal intent thus requires no further mental state beyond willing commission of the act proscribed by law.” (*People v. Sargent* (1999) 19 Cal.4th 1206, 1215.)

Rape of all forms is a general intent crime because it requires only the perpetrator’s criminal intent to commit sexual intercourse without the victim’s consent. (*People v. Linwood* (2003) 105 Cal.App.4th 59, 70.) The knowledge requirement under Penal Code section 261, subdivision (a)(3) for rape of an intoxicated person does not refer to a defendant’s intent to do an act or achieve a consequence in addition to the general intent to commit sexual intercourse without the victim’s consent. “Rape of an intoxicated person ([Pen. Code,] § 261, subd. (a)(3)) is a general intent crime. [Citation.]

This is so even though there is an additional knowledge requirement—that ‘the accused either must have known or reasonably should have known of the victim’s particular condition that precluded consent.’ [Citations.] In other words, the general intent and knowledge requirements are separate elements, and the latter does not transform rape of an intoxicated person into a specific intent crime.” (*People v. Braslaw* (2015) 233 Cal.App.4th 1239, 1248-1249.)

In reliance on *People v. Mendoza* (1998) 18 Cal.4th 1114 (*Mendoza*), Defendant argues the knowledge requirement under Penal Code section 261, subdivision (a)(3), makes rape of an intoxicated person a specific intent crime for purposes of Penal Code section 29.4 In *Mendoza*, the California Supreme Court held that the mental state for aider and abettor liability, which has both intent and knowledge components, is a “required specific intent” for purposes of Penal Code former section 22, subdivision (b) (now section 29.4). (*Mendoza, supra*, at p. 1131.) An aider and abettor must “act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.” (*Id.* at p. 1123.)

The *Mendoza* court concluded the intent required for aider and abettor liability met the definition of specific intent because “[t]o be culpable, an aider and abettor must intend not only the act of encouraging and facilitating but also the *additional* criminal act the perpetrator commits.” (*Mendoza, supra*, 18 Cal.4th at p. 1129.) This conclusion raised the additional question of whether the jury could consider intoxication “on both the defendant’s knowledge and intent or only on intent.” (*Id.* at p. 1131.) The court recognized that Penal Code former section 22 did not refer to knowledge. (*Mendoza, supra*, at p. 1131.) “However, for these purposes we cannot mechanically divide the defendant’s mental state into knowledge and intent. One cannot intend to help someone do something without knowing what that person meant to do.” (*Ibid.*) For purposes of aiding and abetting liability, knowledge of the perpetrator’s intent is

“closely akin” to specific intent. (*Ibid.*) Evidence of voluntary intoxication is relevant to the extent it establishes whether an aider and abettor knew of the direct perpetrator’s criminal purpose and intended to facilitate achieving that goal, even in cases in which the perpetrator intended to commit a “general intent” crime. (*Id.* at pp. 1131-1133.)

The *Mendoza* court described its holding as “very narrow” (*Mendoza, supra*, 18 Cal.4th at p. 1133) and its reasoning, which was based on the intent required for aider and abettor liability, does not extend to the crime of rape of an intoxicated person, which has different knowledge and intent components. In addition, while aider and abettor liability requires actual knowledge, the crime of rape of an intoxicated person requires either actual knowledge or constructive knowledge; that is, “[w]here a person is prevented from resisting by any intoxicating or anesthetic substance, or any controlled substance, and this condition was known, *or reasonably should have been known by the accused.*” (Pen. Code, § 261, subd. (a)(3), italics added; see *People v. Linwood, supra*, 105 Cal.App.4th at p. 71 [Penal Code section 261, subdivision (a)(3) “sets a standard of knowledge or constructive knowledge”].) Constructive knowledge is an objective test: “[I]f a *reasonable person* in defendant’s position would have been aware of the risk involved, then defendant is presumed to have had such an awareness.”” (*People v. Linwood, supra*, at p. 71.)

Defendant also relies on *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425, and *People v. Reyes* (1997) 52 Cal.App.4th 975, 985, which held that receiving stolen property is a specific intent crime under Penal Code former section 22, subdivision (b) because knowledge the property was stolen is an element of the offense. The crime of receiving stolen property requires actual knowledge that the property had been stolen. (Pen. Code, § 496, subd. (a) [“knowing the property to be so stolen or obtained”]; see *People v. Land* (1994) 30 Cal.App.4th 220, 223 [“the defendant knew the property was stolen”].) In contrast, either actual knowledge or constructive knowledge

satisfies the knowledge requirement for the crime of rape of an intoxicated person under Penal Code section 261, subdivision (a)(3).

## VI.

### **The Trial Court Did Not Err by Instructing the Jury with Modified CALCRIM No. 852.**

Defendant contends the trial court erred by instructing the jury with this portion of CALCRIM No. 852 (as modified): “If you decide the defendant committed the uncharged domestic violence, you may but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit domestic violence, and based on that decision also conclude the defendant was likely to commit and did commit the crime of rape as charged in count 3 against A[.] [¶] If you conclude that he committed the uncharged domestic violence, that conclusion is only one factor to consider, along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of the crime of rape as charged in count 3 against A[.]” While acknowledging evidence of uncharged acts of domestic violence is admissible under Evidence Code section 1109, Defendant argues that giving the quoted section of CALCRIM No. 852 was erroneous because the acts of uncharged domestic violence against A. were not the same as or similar to forcible rape.

At trial, A. testified that Defendant pushed her, choked her, held down her arms, and hit her during their 14-month-long relationship that ended in October 2007. She testified he would threaten her whenever she considered reporting the abuse. A. described one instance in which Defendant struck her in the nose, causing her to bleed profusely, and leaving a scar that was apparent at trial. She described another instance in which Defendant pushed her against a wall, which prompted her to get an emergency restraining order against him. Defendant did not pose objections to any of this testimony.

During discussions on jury instructions, it was Defendant who requested the court to give CALCRIM No. 852. The prosecutor objected to giving CALCRIM

No. 852 on the ground it restricted the jury's ability to use evidence of uncharged domestic violence. The trial court overruled the prosecutor's objection. The court then turned to Defendant, read him the part of CALCRIM No. 852, which, he now contends, was erroneously given, and asked him if he really wanted the court to give the instruction. Defendant stated: "But that's not a lesser included offense. So maybe we should strike that portion of the instruction." After the court stated, "[t]hat's part of the standard instruction," Defendant asked, "[d]oes that indicate that we can give a lesser included offenses for domestic violence then?" The court answered that domestic violence is not a lesser included offense of rape, and asked Defendant again if he wanted the court to give CALCRIM No. 852. He replied: "Yes, Your Honor." The court then explained how it would fill the blank on the instruction to read, "the crime of rape, as charged in count 3 against A[.]" The court asked, "[i]s everybody okay with that?" Both the prosecutor and Defendant said yes.

The Attorney General argues Defendant invited any error by requesting the trial court to give CALCRIM No. 852. "The doctrine of invited error bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction." [Citations.] [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 436.) We agree with Defendant that he prevented invited error by requesting the trial court to strike the portion of CALCRIM No. 852 that he challenges on appeal. But, as the Attorney General argues also, Defendant forfeited his claim of error by failing to object to the instruction. (*People v. Valdez* (2004) 32 Cal.4th 73, 137.)

Nonetheless, Defendant's challenge to CALCRIM No. 852 is without merit. CALCRIM No. 852 is a correct statement of the law. (*People v. Reyes* (2008) 160 Cal.App.4th 246, 252-253.) "Evidence of prior criminal acts is ordinarily inadmissible to show a defendant's disposition to commit such acts. (Evid. Code, § 1101.) However, the Legislature has created exceptions to this rule in cases involving sexual offenses

(Evid. Code, § 1108) and domestic violence (Evid. Code, § 1109).’ [Citation.] ‘[T]he California Legislature has determined the policy considerations favoring the exclusion of evidence of uncharged domestic violence offenses are outweighed in criminal domestic violence cases by the policy considerations favoring the admission of such evidence.’ [Citation.] Section 1109, in effect, ‘permits the admission of defendant’s other acts of domestic violence for the purpose of showing a propensity to commit such crimes. [Citation.]’ [Citations.] ‘[I]t is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited.’” (*People v. Brown* (2011) 192 Cal.App.4th 1222, 1232-1233.)

Defendant argues the acts of uncharged domestic violence were not sufficiently similar to rape to permit the jury to conclude that he committed the crime of forcible rape as charged in count 3 against A. Rape is a form of domestic violence. (*People v. Poplar* (1999) 70 Cal.App.4th 1129, 1138-1139 (*Poplar*)). The defendant in *Poplar* was charged with, and ultimately convicted of, forcible rape. (*Id.* at p. 1131.) The trial court permitted the prosecution to introduce evidence that the defendant had assaulted his victims to show his propensity to violence against women with whom he had an intimate relationship. (*Id.* at pp. 1135-1136.) On appeal, the defendant argued the evidence of uncharged domestic violence was inadmissible under Evidence Code section 1109 to establish his propensity to commit rape. (*Id.* at p. 1138.) The Court of Appeal concluded the evidence was admissible because “rape is a higher level of domestic violence, a similar act of control.” (*Poplar, supra*, at p. 1139.)

Following *Poplar*, the Court of Appeal in *People v. Garcia* (2001) 89 Cal.App.4th 1321, 1332-1333, held that evidence of uncharged acts of domestic violence was admissible under Evidence Code section 1109 to establish the defendant had committed spousal rape. The defendant asserted his prior acts, though showing he was “capable of being obnoxious, offensive, perhaps even violent and brutish,” did not show

he had a tendency to commit “sexually assaultive behavior.” (*People v. Garcia, supra*, at p. 1333.) The Court of Appeal, rejecting that argument, stated, “we are persuaded that the analysis of the court in *Poplar* correctly links other acts of domestic violence with sexual assault or rape as an act of domestic violence.” (*Ibid.*; see *People v. Brown, supra*, 192 Cal.App.4th at pp. 1232-1235 [evidence of uncharged acts of domestic violence admissible to prove murder].)

We agree with *Poplar* and *Garcia*. Evidence of Defendant’s uncharged acts of domestic violence against A. was admissible under Evidence Code section 1109 to show his disposition to commit forcible rape—a form of domestic violence—against her. The uncharged acts of domestic violence in this case were sufficiently brutal and similar to the force Defendant used to rape A. to permit the jury to conclude that Defendant committed forcible rape. The trial court did not err in instructing the jury with CALCRIM No. 852.

Defendant argues CALCRIM No. 852 violates due process because it relieves the prosecution of proving each element of a charged offense beyond a reasonable doubt. In *People v. Reliford* (2003) 29 Cal.4th 1007, 1011-1016 (*Reliford*), the California Supreme Court upheld against constitutional challenge CALJIC No. 2.50.01, which permitted the jury to infer the defendant had a disposition to commit sex crimes from evidence the defendant had committed other similar sexual offenses. *Reliford* reasoned the instruction did not authorize the jury to use preponderance of the evidence as the burden of proof on any issue other than the preliminary determination whether the accused committed a previous sexual assault. (*Reliford, supra*, at p. 1016.) On that basis, the Supreme Court rejected the argument that a jury could reasonably interpret the instruction to authorize a guilty verdict of a charged offense on the basis of a lowered standard of proof. (*Ibid.*)

The reasoning of *Reliford* has been used to uphold the constitutionality of CALJIC No. 2.50.02, the precursor to CALCRIM No. 852. (*People v. Reyes, supra*, 160

Cal.App.4th at p. 251; *People v. Pescador* (2004) 119 Cal.App.4th 252.) “There is no material difference between CALJIC No. 2.50.02 and CALCRIM No. 852.” (*People v. Reyes, supra*, at p. 253.) We agree with those opinions which have held, based on the reasoning of *Reliford*, that CALCRIM No. 852 does not violate a defendant’s due process rights. (*People v. Johnson* (2008) 164 Cal.App.4th 731, 738-740; *People v. Reyes, supra*, 4th at pp. 251-253.)

## VII.

### **Because the Convictions on All Three Counts Are Affirmed, We Do Not Consider Defendant’s Argument Based on Modified CALCRIM No. 1191.**

The trial court instructed the jury with a modified version of CALCRIM No. 1191 as follows: “The People presented evidence that the defendant committed the crime of Rape. This crime is defined for you in these instructions. [¶] If you decide that the defendant committed one or more of these offenses beyond a reasonable doubt, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit and did commit other charged offense or offenses of Rape.”<sup>1</sup> Defendant argues, based on this instruction, that if we reverse any of the three convictions of rape, then we should reverse the other convictions. As we are affirming the convictions on all three counts, we do not consider this argument.

## VIII.

### **The Trial Court’s Statement of Reasons Justified Imposition of the Upper Term on Each Count.**

Defendant argues the trial court erred by relying on “nonexistent or improper factors” in imposing the upper term of eight years for each of the three counts.

---

<sup>1</sup> In *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159, 1167, the trial court instructed the jury with a modified version of CALCRIM No. 1191. The California Supreme Court concluded the trial court did not err in giving the instruction. (*People v. Villatoro, supra*, at p. 1169.)

The trial court's statement of reasons justified imposition of the upper term sentence on each count.

When three prison terms are authorized for an offense or an enhancement, the sentencing court must give a statement of reasons for its sentencing choice. (Cal. Rules of Court, rule 4.406(b)(4).) "If the sentencing judge is required to give reasons for a sentence choice, the judge must state in simple language the primary factor or factors that support the exercise of discretion." (Cal. Rules of Court, rule 4.406(a).) The statement of reasons may be made orally on the record. (*Ibid.*) California Rules of Court, rule 4.421 sets forth circumstances in aggravation which the sentencing court must consider to justify imposition of the upper term of three possible prison terms. We review the trial court's sentencing choices for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

In this case, the trial court stated it was basing its sentencing decision on the evidence presented at trial and the victim impact statements. In compliance with California Rules of Court, rule 4.406, the court identified four circumstances in aggravation under California Rules of Court, rule 4.421 to justify the imposition of the upper term on each count: (1) "[t]he crime[s] involved great violence" (Cal. Rules of Court, rule 4.421(a)(1)); (2) "[t]he victim[s] w[ere] particularly vulnerable" (*id.*, rule 4.421(a)(3)); (3) "[t]he manner in which the crime[s] w[ere] carried out indicate[d] planning [and] sophistication" (*id.*, rule 4.421(a)(8)); and (4) "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (*id.*, rule 4.421(b)(1)).

Defendant argues three of the four circumstances identified by the trial court (circumstances (1), (2), and (4)) did not justify imposition of the upper term sentence either because the circumstance was an element of or inherent to the offense, or because he used only enough force to commit the offense. However, "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for

the upper term.” (*People v. Black* (2007) 41 Cal.4th 799, 813.) The evidence at trial showed that Defendant carried out the offenses of rape of an intoxicated person with planning and sophistication, starting with locating his victims on MySpace. As for forcible rape, the evidence showed that A. was particularly vulnerable because she was Defendant’s girlfriend and the victim of domestic violence. Defendant displayed “a high degree of cruelty, viciousness, or callousness” (Cal. Rules of Court, rule 4.421(a)(1)) toward A. by raping her while knowing she had recently undergone an abortion and should not have sexual intercourse.

In addition, Defendant was on probation when he committed the offense charged in count 1, and his probation performance had been unsatisfactory. (Cal. Rules of Court, rule 4.421(b)(4) & (5).) The probation report identified no circumstances in mitigation. Finally, any error in setting forth proper circumstances in aggravation was harmless. Were we to remand for resentencing, there would be no reasonable probability that Defendant would receive a more favorable sentence.

### **DISPOSITION**

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.