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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY M. TOWNES,

Defendant and Appellant.

B153897

(Los Angeles County
Super. Ct. No. TA057355)

APPEAL from a judgment of the Superior Court of Los Angeles County. Gary R. Hahn, Judge. Affirmed in part; reversed in part; and remanded with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez and Steven D. Matthews, Supervising Deputy Attorneys General, Alene M. Games and Deborah J. Chuang, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Gary M. Townes, appeals from his multiple sex offense convictions and related findings involving a single victim, Jasmine H. Defendant argues the trial court: abused its discretion in admitting evidence of prior acts of sexual misconduct; improperly instructed the jury with CALJIC No. 2.50.01; improperly denied his motions to exclude evidence of deoxyribonucleic acid testing; and improperly sentenced him to consecutive terms for counts 2 and 3 and to three five-year enhancements pursuant to Penal Code,¹ section 667, subdivision (a)(1). The Attorney General argues the trial court should have either imposed or struck the section 12022.3, subdivision (a) sentence as to the lewd conduct conviction and the abstract of judgment must be corrected to more accurately reflect the convictions and fines imposed. The judgment is reversed in part; affirmed in part; and remanded with directions to exercise sentencing discretion as to the section 12022.3, subdivision (a) enhancement.

II. FACTUAL BACKGROUND

A. Monique A.

The victim of the charges in counts 4 and 5 was Monique. As will be noted, the jury was unable to reach a verdict as to these two counts. Monique left her home shortly before 8 a.m. on November 2, 1999. Monique walked alone to her nearby high school. Along the way, Monique saw defendant standing near the trunk of his dark blue, four-door car. As Monique walked by, defendant walked around the trunk of the car and spoke to her. Defendant then grabbed Monique's arm, while holding a small pocket knife in his other hand. Monique suffered a cut on her left wrist, which bled slightly. Monique

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

began screaming. Defendant put his hand over Monique's mouth. Defendant forced Monique into the back seat of his car and closed the door. Monique tried to open the door, but the lever did not work. Defendant then got into the driver's seat. Defendant told Monique to lay down and "shut up."

Monique could see between the front seats of the car. Monique saw defendant place the knife on the passenger seat. Defendant drove away. Monique asked where he was taking her, but defendant did not answer. Defendant drove on a freeway. After exiting the freeway, defendant drove Monique to a vacant apartment. Defendant got out of the car briefly. Monique was too scared to even try to get out of defendant's car. Defendant returned to the car and drove to the back of the apartment. Defendant opened the car door for Monique. Defendant told Monique to hold his hand and pretend he was her boyfriend. Defendant took Monique into an upstairs bedroom of the apartment. There was no furniture in the apartment.

Monique asked defendant his name. Defendant told her it was Anthony. Monique asked defendant if he had any children. Defendant claimed to have a son. Monique asked defendant if he had a girlfriend. He responded, "No." Monique asked if defendant liked children her age. Defendant said he did. Monique believed that she could divert defendant's attention from her by asking him questions. Defendant took Monique's hand and kissed the backside. Thereafter, defendant walked Monique out of the apartment. Defendant put Monique in the front passenger seat of the car and closed the door. Defendant drove Monique back to Locke High School. Monique told defendant she would not tell anyone what had happened. Defendant asked Monique for her phone number. Monique told him she could not give out her phone number. This was because it was her grandmother's telephone number. Defendant let Monique out of the car. Monique had been with defendant for a period of one or two hours.

Monique walked onto the high school campus. Monique encountered a friend, Regina. Monique told Regina what had happened. Later that day, Monique told another friend, Ebony, about the encounter with defendant. Monique also told her godfather, Mr. Andrews, who worked at the school as a band teacher, what occurred. Mr. Andrews

dropped Monique off at her grandmother's home. Monique told her grandmother what had happened. The grandmother then telephoned Monique's mother. Monique told the campus police about the incident the following day. Monique described defendant as having a braided "duck tail" in the back of his head. Monique told the police that defendant wore a short-sleeved white T-shirt and blue pants.

Los Angeles Police Detective Lyle Barnes interviewed Monique on November 15, 1999. Detective Barnes showed Monique a composite drawing, which she identified as looking like the person that kidnapped her. Monique described defendant as a medium complected Black man with a mustache, light beard, and a braid in the back of his head. Monique stated defendant was 5 feet, 5 inches to 5 feet, 8 inches tall and weighed approximately 120 pounds. Monique told Detective Barnes that defendant's car was a four-door dark Oldsmobile with tinted windows in the back.

Detective Barnes met with Monique at Locke High School again on November 19, 1999. Detective Barnes showed Monique a six-pack photographic lineup. Following an admonition, Monique identified defendant's photograph as the individual who kidnapped her. Monique wrote on the form, "The man, number 6, is the person that kidnapped me, drove me around, and took me to the apartment." Monique also identified defendant at the preliminary hearing as the man who kidnapped her.

B. Jasmine

Jasmine was an 11-year-old student at Perry Middle School in Gardena on November 8, 1999. Jasmine took the bus to and from school. Jasmine walked from the bus stop near Locke High School to her home, which was 10 blocks away. On November 8, 1999, Jasmine got off the school bus near Locke High School at approximately 3:30 p.m. and began to walk home. Upon arriving home, Jasmine normally telephoned her mother, Donna H., at work between 4 and 4:10 p.m. As Jasmine began to walk by herself, she saw a black four-door car with tinted windows parked on the same side of the street. As Jasmine passed by the car, she saw a man's legs hanging

out of an open rear passenger door. Defendant got out of the car. Defendant stopped Jasmine stating, "I have a screwdriver and if you don't get in the car, I'll stab you with it." Defendant pulled Jasmine into the back seat of the car. Defendant told Jasmine to get on the floor of the back seat. When Jasmine attempted to get up, defendant told her to lay back down. Defendant closed the back door and got into the driver's seat.

Defendant drove Jasmine, who was afraid, to an unknown place. Defendant got into the back seat with Jasmine. Defendant told Jasmine to get up on the seat. Defendant removed one leg of Jasmine's pants. Defendant also pulled down Jasmine's underwear. Defendant pulled up Jasmine's shirt and bra. Defendant later removed his clothing from the waist down. Defendant put his penis in Jasmine's vagina five or six times. Thereafter, defendant touched Jasmine's breast with his hand and kissed her mouth and her breasts. Jasmine told defendant several times that he was hurting her. Defendant told Jasmine that his name was Anthony. Defendant also said he was 18 years old. Jasmine put her clothes back on. Defendant also put his clothes on. Thereafter, defendant drove Jasmine back to where he had abducted her. While en route, defendant gave Jasmine a dollar and told her to buy some candy "or something." Defendant told Jasmine not to tell her mother she was with him. Defendant told Jasmine to say she was at the library or a friend's house. When defendant stopped the car, Jasmine opened the back door.

After Jasmine began walking, she saw Donna's car. Jasmine immediately said that she had been kidnapped. Both Donna and Jasmine were crying. They returned to their home to tell Jasmine's sister. Once they arrived at home, Jasmine said that defendant had raped her. Thereafter, they went to the police station, where Jasmine gave Los Angeles Police Officer George Chavez a description of the man who kidnapped her. Jasmine described her assailant as a Black man with black hair, brown eyes, who was 5 feet, 5 inches to 5 feet, 6 inches tall, 120 to 130 pounds in weight, and was 18 to 20 years old. Jasmine said that defendant was wearing a black sweat shirt, gray T-shirt with letters, blue shorts, white Nike shoes, and white socks. Jasmine also said that the man had a four-inch braid in the back of his head, was of medium complexion, and wore a thin mustache. Jasmine described the car as a four-door black sedan with tinted windows

and beige cloth interior, and said it “could be a Chevy Caprice.” Officer Chavez booked the dollar bill defendant gave to Jasmine into evidence. Officer Zufal interviewed Jasmine regarding what had occurred. At trial, Jasmine again described the man who kidnapped and hurt her as having a braid at the back of his head and Black skin. Jasmine did not recall the other details of her description to police. Jasmine was taken to the hospital. Jasmine was examined for sexual assault by a nurse practitioner, Julie Lister. Ms. Lister followed the required procedures in collecting evidence of: oral secretions of rectal evidence; external and internal vaginal evidence; and pubic hair combings. Ms. Lister also placed Jasmine’s clothing in bags. Jasmine’s clothing was sealed in individual bags, labeled, and turned over to Officer Chavez.

On November 12, 1999, Donna took Jasmine to the police station to give a further description for a composite drawing. On November 13, 1999, Los Angeles Police Detective Raul Nunes went to Jasmine’s home and showed her a photographic lineup that included defendant’s photo. Jasmine was unable to identify anyone from the photographic lineup.

On November 17, 1999, Donna drove Jasmine around the area in an effort to find the car driven by the rapist. They located a car that looked similar to the one Jasmine remembered. A subsequent check by Detective Barnes revealed that car had been parked for some time as it had cob webs, thick dust, and dirt under the car and on the windows. Thereafter, Detective Barnes drove around the area in an attempt to locate a car matching Jasmine’s description. Detective Barnes saw a black four-door Oldsmobile with dark tinted windows driven by a Black man on Central Avenue. When the car approached Detective Barnes’s car, it made an immediate right turn onto a freeway. Because of traffic, Detective Barnes was unable to follow the car.

However, Detective Barnes’s spoke with Officers Dan Dau and Jill Oliva and requested that they patrol the area. Later that day, Officers Dau and Oliva saw a car fitting the description given by Jasmine. The officers had a crime bulletin sheet with descriptions of the suspect, the car, and a composite sketch. After determining that the automobile had expired registration tags, Officer Dau conducted a traffic stop. The car,

which was driven by defendant, had heavily tinted rear windows. As Officer Dau approached on the passenger side, he saw two screwdrivers on the center console area. Defendant had a four-inch braid on the back of his head. Officer Oliva then approached the driver's side. After defendant produced his driver's license, he was asked to get out of the car. Defendant acknowledged that he was on parole. The officers arrested defendant and took him and his car to the police station. An inventory search of defendant's car revealed: two screwdrivers on the console; a screwdriver and kitchen knife in the trunk; white Nike tennis shoes; white socks; a gray crew neck pocket T-shirt; a black long-sleeved sweat shirt; a gray T-shirt; a long-sleeved gray T-shirt; a pair of black jean shorts; and another pair of black jean shorts with a gray and white pattern on top. Detective Barnes returned to the police station where he saw defendant. Defendant had a three-to-four-inch braid in the center of the back of his head. Detective Barnes took a Polaroid photo of defendant. Defendant's braid was not visible in the photo. The photo was placed into a photographic six-pack as photo number six.

Later that evening, Jasmine was taken to the police station. Detective Barnes read an admonition to Jasmine. Thereafter, Detective Barnes showed Jasmine the photographic lineup. Jasmine identified number six, circled the photograph, and wrote: "The man in number 6 is the person who raped me. I'm sure that he is the one." Jasmine was taken to the police station parking lot, where 25 to 30 cars were parked. Jasmine walked around for two or three minutes before stating, "That's the man's car, the one who raped me." Detective Barnes got inside the black car with tinted windows that Jasmine had identified. He was unable to open either of the rear passenger doors from the inside.

A blood sample was taken from defendant in Detective Barnes's presence. The blood vial was immediately sealed, initialed by the nurse, placed in an envelope, and given to Detective Barnes. Detective Barnes in turn placed police department red seals on the package and booked the items at the scientific investigation division analyzed evidence section.

Mike Mastrocovo, a criminalist with the Scientific Investigation Division of the Los Angeles Police Department, analyzed the evidence in this case for deoxyribonucleic acid typing utilizing polymerase chain reaction DQA1 polymarker procedures. This test examines six locations on the deoxyribonucleic acid molecule. The laboratory where Mr. Mastrocovo works is accredited to do deoxyribonucleic acid testing. Mr. Mastrocovo follows internal controls to insure the typing results are accurate. Mr. Mastrocovo found evidence of seminal fluid in Jasmine's sweat pants and cuttings from the crotch of her panties. The cuttings from the panties were utilized in the DQ/Alpha test and compared to defendant's blood sample as well as Jasmine's cheek cell swab. The genetic profile from the sperm cell fraction from the panties was approximately one in 5,300 persons.

Samples of Jasmine's panties as well as defendant's blood and her oral swab were later sent to Cellmark Diagnostics for additional deoxyribonucleic acid testing. Cellmark Diagnostics received these samples on August 4, 2000. Cellmark Diagnostics's employee, Kimberly Duncan, performed the polymerase chain reaction testing on the samples utilizing the Profiler Plus COfiler AmpFLSTR kits. Lewis Maddox, a molecular geneticist with Cellmark, reviewed Ms. Duncan's analysis and the reports she prepared in connection with this case. Mr. Maddox testified that Ms. Duncan followed the standard operating procedures employed by Cellmark Diagnostics. The testing revealed deoxyribonucleic acid from more than one individual, one male and one female, in the sample from Jasmine's panties. The deoxyribonucleic acid test results from the non-sperm fraction for the panties matched the profile of the swab obtained from Jasmine. The primary deoxyribonucleic acid profile obtained from the sperm fraction matched that of defendant. The frequency of this deoxyribonucleic acid profile result demonstrated that defendant was the only African-American out of 430 trillion that matched that profile. This is a very, very rare profile out of a world population of six billion people.

C. Mary H.

Pursuant to Evidence Code sections 1101, subdivision (b) and 1108, the prosecution also called Mary as a witness. On September 1, 1988, 11-year-old Mary was walking to her friend's house in Long Beach. A man approached Mary, chased her, and grabbed her by her arm and neck. The man forced Mary to walk with him to a nearby truck stop. The man took Mary into the back of a big rig. Mary was afraid. The man got into the truck with Mary, closing the door behind him. The man pulled out a little knife and forced Mary to take her clothes off. The man removed Mary's pants and underwear. The man removed his own pants and got on top of Mary. The man attempted to penetrate Mary's vagina with his penis. The man was moving his body up and down. Although this caused pain between Mary's legs, she was afraid to say anything. The man got off Mary, pulled his pants up and picked up his belongings. He told Mary not to get out of the truck. The man exited the truck, closed the door, and left Mary inside. Mary waited 5 or 10 minutes before attempting to leave the truck. Mary had difficulty opening the truck door as the man had placed a piece of wood against the door outside. When she stepped out of the truck, Mary was still naked. She picked up her clothes and planned to go home. As she stepped around the truck, Mary saw police officers. The officers had the man laying on the ground. The man was handcuffed.

A police officer took her into the patrol car. Mary told the officer what had occurred. The officer then drove Mary back to where the man was detained. Mary identified defendant as the rapist. Mary told the police what happened and was then examined at a hospital. Mary testified in court on two occasions regarding the incident. Each time she testified, Mary identified defendant as the man who hurt her. In this case, Mary was shown a photograph of defendant from 1988. Defense counsel stipulated that the photograph depicted defendant in 1988. After viewing the photograph, Mary identified defendant as the man who kidnapped and raped her. Mary testified that at the time of this trial, defendant looked like the man who hurt her. Although defendant had

no hair at the time she testified in this case, Mary remembered his facial structure and eyes.

II. DISCUSSION

A. Evidentiary Issues

1. Prior sex offense

Defendant argues the trial court improperly admitted evidence of his prior 1988 rape of Mary. Defendant further argues the introduction of this evidence violated his constitutional rights to due process and a fair trial.

a. Evidence Code section 402 Hearing

Prior to trial in this case, the prosecutor sought to introduce evidence of defendant's prior incident involving the kidnap and rape of then 11-year-old Mary in 1988 pursuant to Evidence Code sections 1101, subdivision (b)², and 1108³. The

² Evidence Code section 1101 provides in pertinent part: “(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person’s character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.”

³ Evidence Code section 1108 provides in pertinent part: “(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s

prosecutor explained that she sought to introduce the evidence pursuant to Evidence Code section 1101, subdivision (b) to demonstrate motive, identification, common scheme, and plan. The prosecutor explained the similarities between the present two offenses and the one involving Mary: all three girls were abducted while walking down the street; a weapon was used in each instance; all the girls were taken to a different place; and Jasmine and Mary, who were both 11 years old, were raped at the other places. In finding the evidence of the prior sexual assault admissibility, the trial court noted: “[A]s far as the [section] 1108 issue, the Legislature passed [section] 1108 and made prior sexual offenses relevant. That took it out of our decision. The Legislature made it relevant by [section] 1108. The only thing this court can do is weigh it against [section] 352. [¶] I don’t think it’s too old a crime. I agree with what [the prosecutor] argued. [Defendant] did go to prison, I guess, for up to 12 years. [Defendant] was out in May of 1999. I don’t find the crime too remote under [section] 352. [¶] . . . [¶] [Section] 1101(b), I agree with [defense counsel]. It’s not admissible for motive, but it appears to be close enough to be admissible for identity. The facts are close enough. The fact [defendant] kidnapped a child 11 years old, he kidnapped a minor under the age of 14 in both cases. [¶] In the open case here, [defendant] kidnapped her using a knife or screwdriver. He kidnapped her using a car. She was taken some other place, and [defendant] committed the rape. In the next case she talked herself out of it. In the prior case [defendant] kidnapped her, took her to a different place and raped her in the truck bed. So that’s close enough for me to use for [section] 1101(b) for identity. I’ll allow it for that reason.”

commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.”

b. admissibility of evidence

We review the trial court's decision on the admissibility of evidence for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People v. Alvarez* (1996) 14 Cal.4th 155, 201; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) In *People v. Falsetta* (1999) 21 Cal.4th 903, 911, the California Supreme Court held: "Available legislative history indicates [Evidence Code] section 1108 was intended in sex offense cases to relax the evidentiary restraints [Evidence Code] section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and defendant's credibility. In this regard, [Evidence Code] section 1108 implicitly abrogates prior decisions of this court indicating that 'propensity' evidence is per se unduly prejudicial to the defense." (*Ibid.*; see also *People v. Branch* (2001) 91 Cal.App.4th 274, 281; *People v. Frazier* (2001) 89 Cal.App.4th 30, 40.) The *Falsetta* court clarified: "Under [Evidence Code] section 1108, courts will retain broad discretion to exclude disposition evidence if its prejudicial effect, including the impact that learning about defendant's other sex offense makes on the jury, outweighs its probative value. (See, e.g., [*People v.*] *Harris* [(1998)] 60 Cal.App.4th [727,] 740-741 [reversing conviction]; [*People v.*] *Fitch* [(1997)] 55 Cal.App.4th [172,] 183.) We have no reason to assume . . . that 'the prejudicial effect of a sex prior will rarely if ever outweigh its probative value to show disposition.'" (*People v. Falsetta, supra*, 21 Cal.4th at p. 919.)

Because the trial court found that the evidence was admissible under both Evidence Code sections 1101, subdivision (b), and 1108, we could find error only if the testimony was inadmissible under both sections. (See *People v. Branch, supra*, 91 Cal.App.4th at pp. 280-281.) In fact, without abusing discretion, the trial court could have concluded the testimony was admissible under both sections. The current offenses and the 1985 crime committed against Mary were within those defined by Evidence Code section 1108, subdivision (d), as qualifying "sexual offenses." (*Id.* at p. 281.) Defendant claims the offenses were not sufficiently similar to be admissible. However, as our

colleagues in Division Seven of this appellate district held: “The . . . crimes need not be sufficiently similar that evidence of the [prior sex offenses] would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in [Evidence Code] section 1108.” (*People v. Frazier, supra*, 89 Cal.App.4th at p. 41, fn. omitted; see *People v. Falsetta, supra*, 21 Cal.4th at p. 916.) In addition, the trial court properly found that the evidence of a prior sex offense was admissible to establish identity pursuant to Evidence Code section 1101, subdivision (b). (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405; *People v. Pierce* (2002) 104 Cal.App.4th 893, 900.)

Also, the trial court did not abuse its discretion in failing to exclude the evidence of prior sexual misconduct pursuant to Evidence Code section 352⁴. Citing to *People v. Falsetta, supra*, 21 Cal.4th at page 917, defendant argues the trial court did not comply with its following duty, “[T]rial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant’s other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” We disagree.

The trial court here gave detailed reasoning for admitting the prior sex offense evidence and indicated that it was weighing those matters pursuant to Evidence Code section 352. The trial court specifically stated the prior offense was not too remote and Mary’s testimony would not be unduly time consuming. The California Supreme Court

⁴ Evidence Code section 352 provides: “The court in its discretion may exclude evidence if 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.”

has held that a trial judge need not *expressly* weigh prejudice against probative value or expressly state that he has done so. (*People v. Crittenden* (1994) 9 Cal.4th 83, 135; *People v. Garceau* (1993) 6 Cal.4th 140, 179.) As our colleagues in Division Seven of this appellate district held: “Section 352 does not require the recitation of any ‘magic words.’ What is important is that the trial court ‘make apparent on the record, prior to exercising its discretion, its consideration of the factors which threatened prejudice against the probative value of the evidence.’” (*People v. Garrett* (1987) 195 Cal.App.3d 795, 801 [].)” (*Burns v. 20th Century Ins. Co.* (1992) 9 Cal.App.4th 1666, 1674; see also *In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1845.) The trial court reasonably concluded: the challenged evidence was not unduly prejudicial; the evidence demonstrated that defendant had a pattern of abducting young girls for purposes of committing sex offenses; the evidence did not confuse the jury or involve an inordinate amount of time; and the prior offense was not remote in time. As the trial court pointed out, defendant was in prison for the crime directed at Mary until five months before the present offenses. No abuse its discretion occurred.

c. harmless error

Nonetheless, any error in admitting the evidence of defendant’s prior sex offense was harmless. It was not reasonably probable that a more favorable verdict would have been reached absent the admission of the evidence. (*People v. Ayala* (2000) 23 Cal.4th 225, 271; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Jasmine observed defendant for one or two hours, participated in the drawing of a composite sketch, and immediately identified his photo from a photographic lineup. Both Jasmine and Monique told police that defendant had a braid at the middle of the back of his head and drove a dark-colored car with dark rear tinted windows, a bench-style back seat, and separate front seats. When defendant was arrested, he wore his hair in a braid down the middle of the back of his head, and drove a black car with dark rear tinted windows, a bench rear seat, and separate front seats. Finally, scientific testimony demonstrated that defendant was the

only African-American match out of 430 trillion to that deoxyribonucleic acid profile. No defense of any consequence was presented.

d. no due process violation resulted

Finally, defendant's constitutional rights to due process and a fair trial were not violated by the admission of the prior sex offense evidence. In *People v. Falsetta, supra*, 21 Cal.4th at pages 912-922, the California Supreme Court held that the admission of evidence regarding the defendant's propensity to commit a sex offense under Evidence Code section 1108 does not violate his right to due process of law. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1009.) Defendant argues that the trial court's alleged abuse of discretion in ruling pursuant to Evidence Code section 352 that the evidence was admissible, is an ipso facto due process violation. In light of our determination that the trial court did not abuse its discretion, no due process violation resulted.

2. Admissibility of deoxyribonucleic acid evidence

a. *Kelly* hearing

Prior to trial in this case, defendant stipulated to follow the findings of a *Kelly* hearing held regarding three unrelated cases for purposes of a discovery motion. (*People v. Kelly* (1976) 17 Cal.3d 24, 30-41; see *People v. Roybal* (1998) 19 Cal.4th 481, 505.) Now retired Judge Dino J. Fulgoni presided over a hearing pursuant to Evidence Code section 402 to determine whether deoxyribonucleic acid evidence was admissible pursuant to *Kelly*. The hearing involved 19 days of testimony and argument on whether the mixed source sampling of deoxyribonucleic acid testing had gained general

acceptance in its field pursuant to prong one of *Kelly*. Thereafter, Judge Fulgoni reached the conclusion that the evidence was generally accepted in the scientific community.

b. *Kelly* determination

Defendant argues that following an extended hearing, Judge Fulgoni and in turn Judge Gary R. Hahn in this case, improperly determined that the technology utilized in deoxyribonucleic acid testing for analysis of mixed source samples was *generally accepted in the scientific community*. Judge Fulgoni defined the technology in question, “The (new) technology involved in this case is a technology which purports to identify the DNA at a crime scene compared with samples donated by suspects and victims to see if a match can be declared that incriminates the defendant or not.” We recently held that mixed sample deoxyribonucleic acid testing was accepted in the scientific community. (*People v. Smith* (2003) 107 Cal.App.4th 646, 671-672.) For purposes of that finding’s application here, we will repeat the analysis utilized in *Smith*.

i. the *Kelly* test

Formerly, the federal rule for evaluating the admissibility of new scientific evidence was that specified in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, 1014. *Frye* was adopted by the California Supreme Court in *People v. Kelly, supra*, 17 Cal.3d at page 32. (See *People v. Venegas* (1998) 18 Cal.4th 47, 76; *People v. Leahy* (1994) 8 Cal.4th 587, 594.) In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 585-589, the United States Supreme Court held that *Frye* had been abrogated by rule 702 of the Federal Rules of Evidence (28 U.S.C.). (See *United States v. Scheffer* (1998) 523 U.S. 303, 311, fn. 7.) After *Daubert* replaced *Frye* as the pertinent federal court test, the California Supreme Court held, “[W]e conclude that the *Kelly/Frye* formulation (or now more accurately, the *Kelly* formulation) should remain a prerequisite to the admission of expert testimony regarding new scientific methodology in this state.”

(*People v. Leahy, supra*, 8 Cal.4th at p. 591; see *People v. Venegas, supra*, 18 Cal.4th at p. 76, fn. 30.) In *Kelly*, the California Supreme Court set forth the following “general principles of admissibility” for opinion testimony based on new scientific techniques: “(1) [T]he *reliability of the method* must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly *qualified as an expert to give an opinion* on the subject. [Citations.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]” (*People v. Kelly, supra*, 17 Cal.3d at p. 30, original italics; see also *People v. Diaz* (1992) 3 Cal.4th 495, 526.) In *People v. Soto* (1999) 21 Cal.4th 512, 519, the California Supreme Court held: “However, *Kelly* ‘does not demand that the court decide whether the procedure is reliable as a matter of scientific fact: the court merely determines from the professional literature and expert testimony whether or not the new scientific technique is accepted as reliable in the relevant scientific community and whether ““scientists significant either in number or expertise publicly oppose [a technique] as unreliable.”’ [Citations.]’ (*People v. Axell* (1991) 235 Cal.App.3d 836, 854 []) ““General acceptance” under *Kelly* means a consensus drawn from a typical cross-section of the relevant, qualified scientific community.’ (*People v. Leahy, supra*, 8 Cal.4th at p. 612.)” Moreover, the California Supreme Court has held: “[T]he trial courts, in determining the general acceptance issue, must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique. Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value” (*People v. Leahy, supra*, 8 Cal.4th at p. 612; accord, *People v. Venegas, supra*, 18 Cal.4th at p. 85.) Defendant’s challenge relates only to the first prong of the *Kelly* test—whether the mixed samples testing that occurred in the present case meets the *Kelly* reliability test.

ii. description of deoxyribonucleic acid

In the recent case of *U.S. v. Trala* (D. Del. 2001) 162 F.Supp.2d 336, 339-340, the District Court of Delaware explained the basic principles pertaining to deoxyribonucleic acid: “Each human body contains a large number of cells, each of which descends from successive divisions of the fertilized egg that was its origin. Virtually all non-reproductive cells in the body contain identical copies of a complex structure called deoxyribonucleic acid or, DNA. This structure represents the genetic code for that individual. The DNA is in the form of microscopic chromosomes, which are located in the nucleus of a cell. A chromosome is a thread of DNA surrounded by other materials, mainly protein. A fertilized egg contains 23 chromosomes, with one member of each pair being contributed by the mother and father, respectively. Each cell contains identical, duplicates of the 46 cells from the fertilized parent cell. Therefore, each cell in the human body has the same DNA. [¶] The structure of DNA consists of two strands, coiled in the form of a double helix (i.e., a twisted ladder). Each strand is composed of a string or a sequence of nucleotide bases held together by a sugar-phosphate backbone. To use the ladder metaphor, running between the sugar-phosphate strands (the side rails of the ladder) are billions of rungs, each of which is composed of two bases. There are only four possible types of bases--A, T, G, C. ‘A, T, G, C’ represent adenine, thymine, guanine, and cytosine, respectively. The order in which the base pairs appear on the DNA ladder constitutes an individual’s genetic code. [¶] A gene is a particular DNA sequence located along a chromosome, ranging from a few thousand to tens of thousands of base pairs, that produces a specific product in the body. In other words, a gene is a site (a sequence of letters) on the DNA that encodes for a protein. A marker is a site on the DNA that does not code for proteins; the marker is also known as the locus (or location). [¶] In essence, the specific base sequence on the gene acts as an encoded message to the body to produce certain amino acids, which ultimately combine to form a protein. The function of a given gene is determined by the order of bases in the gene. The position that gene occupies along the DNA thread is known as its locus. [¶] Human beings share

more biological similarities than differences. Thus, over 99% of human DNA does not vary from person to person. Each person's DNA, however, has certain regions where the rungs of the ladder will be different. This area where a locus is different is polymorphic. The possible arrangements of base pairs that could occur in one of these polymorphic areas (i.e., the alternative forms of a gene that an individual could possess) are known as alleles. These alleles can result from differences in single base pairs, differences in multiple base pairs, or differences in the number of base pairs found in a given region. The individual genetic makeup described by the alleles is known as the genotype. In forensic analysis, the genotype for a group of analyzed loci is called the DNA profile. When a sample of DNA is typed, the lab examiner looks at predetermined polymorphic loci, identifies the alleles that make up the DNA sequence at those polymorphic loci, and then determines how likely it is for this sequence to appear in a given population." (See also Nat. Research Council, *The Evaluation of Forensic DNA Evidence* (1996) pp. 12-14, and glossary, pp. 214-218.)

iii. deoxyribonucleic acid testing

In *Trala*, the district court described deoxyribonucleic acid testing as follows: "[Polymerase chain reaction (PCR) testing] is used to amplify targeted loci of the sample of DNA by replicating the process by which DNA duplicates itself naturally. Thus, the lab is able to produce a substantial number of specific, targeted segments of DNA which can then be typed and compared. Short Tandem Repeats, or STR's, are a group of loci which are used to type and compare the DNA. Finally, statistics are used to evaluate how likely it is that a similar match would occur if the DNA sample were drawn randomly from the population. . . . [¶] a. PCR Amplification Process [¶] PCR, a sample preparation technique, is a laboratory process for copying a short segment of DNA millions of times. The PCR process is analogous to the process by which cells replicate their DNA naturally. See *United States v. Gaines* [(S.D. Fla. 1997)] 979 F.Supp. [1429,] 1435. By using this process, a lab can produce a substantial number of specific, targeted

segments of DNA which can then be typed and compared. PCR allows the laboratory to amplify only those specific DNA regions which exhibit genetic variations within the population, allowing for DNA typing. Moreover, the PCR process enables the analysis of very tiny amounts of DNA. PCR also permits the analysis of old and/or degraded DNA samples. [¶] The PCR process is comprised of three steps. First, the double-stranded segment of DNA is separated, or denatured, into two strands by heating. This denatured DNA strand forms a template that can allow the manufacture of a new strand that is identical to its former complimentary strand. [¶] Next, each of the single-strand segments are hybridized with primers. Primers are short DNA segments that are designed to bind with the template at particular loci. The primers are designed to compliment a sequence just outside of a target sequence of bases. [¶] Finally, each primer serves as a starting point for the replication of the target sequence. In this third step, a type of enzyme called a polymerase becomes active. In essence, the polymerase facilitates repeated additions of bases to the primer until a new, complimentary strand of the targeted DNA locus is created. [¶] This process is repeated a number of times, creating an exponentially increasing number of copies of the targeted area of the original DNA. Eventually, the PCR amplification process yields a sufficient quantity of the DNA sample to be typed. If the laboratory wants to type the DNA sample at multiple sites, it can add additional primers which will bind simultaneously to their respective target sites. This process is known as multiplexing. According to Dr. [Bruce] Budowle [Senior Scientist at the Federal Bureau of Investigation Laboratory Division], multiplexing allows the laboratory to minimize the chance of human error and contamination in the PCR process. Using current technology, the [Federal Bureau of Investigation] laboratory can multiplex up to fifteen or sixteen markers with reliable results. [¶] b. Short Tandem Repeats [¶] The PCR process is performed to amplify a targeted locus (or loci) for analysis. These loci are selected because they are polymorphic, thus, making them amenable to typing. One group of such loci involve a class of repeated units, distributed widely throughout the DNA structure, known as short tandem repeats ('STR's'). A tandem repeat involves multiple copies of an identical DNA sequence arranged in direct

succession in a particular region of a chromosome. A STR is a tandem repeat in which the core repeat units are just a few base pairs. Loci containing STRs are scattered throughout the chromosomes in enormous numbers. Such loci have a fairly large number of alleles and are usually capable of unique identification. See *Commonwealth v. Rosier* [(Mass. 1997)] [] 685 N.E.2d 739, 742 []. [¶] Once the amount of DNA is amplified by the PCR process[,] the analyst proceeds to identify fragments of different sizes by their migration in an electric field. In order to detect variations, analyst[s] use a process known as electrophoresis. During the PCR amplification of the STR fragments, the primers that are used contain fluorescent tags, which become incorporated into the STR fragments during amplification. During electrophoresis, the amplified fragments will pass through a gel and eventually pass through a detection window at the end of the gel. The fragments can be passed through either a flat slab gel or through a small-diameter capillary that contains a gel or liquid polymer. The difference between these two methods is that the flat gel permits multiple samples to be run at the same time, while capillary electrophoresis only permits one sample to be run at a time. The scientific principles underlying both techniques are the same. [¶] After the fragments pass through the detection window at the end of the gel, a laser fires, striking the fluorescent tags, and causing the tags to emit light. A camera will detect the light and convert it into data. By measuring the amount of time that it takes a particular fragment to reach the laser, the laboratory will be able to determine the size of the fragment and, therefore, it will be able to determine the number of sequence repeats. The faster a fragment moves through the window, the smaller it is in size and vice versa. [¶] The data generated is analyzed by an accompanying computer software program which determines the size of the alleles based on the rate at which they reach the window.” (*U. S. v. Trala, supra*, 162 F.Supp.2d at pp. 341-342, fns. omitted; *United States v. Hicks* (9th Cir. 1996) 103 F.3d 837, 844-845; *United States v. Beasley* (8th Cir. 1996) 102 F.3d 1440, 1445-1446; see also Nat. Research Council, *The Evaluation of Forensic DNA Evidence, supra*, pp. 21-23.)

The products used to analyze the deoxyribonucleic acid in all four cases for which the *Kelly* hearing was conducted were manufactured by Perkin-Elmer, which is also

known as Applied Biosystems. Utilizing the AmpFLSTR Profiler Plus PCR Amplification Kit, the laboratory is able to amplify nine short tandem repeat loci and amelogenin gender loci. (Exhibit 20, pp. 1-1 – 1-5; see also http://www.appliedbiosystems.com/products/productdetail.cfm?prod_id=100.) In addition, the AmpFLSTR COfiler PCR Amplification Kit amplifies: four short tandem repeats loci; the amelogenin locus; and two of the short tandem repeats loci amplified by Profiler Plus. The Combined DNA Index System (CODIS) was developed by the Federal Bureau of Investigation as a national database containing deoxyribonucleic acid profiles of convicted felons. By using the AmpFLSTR Profiler Plus PCR Amplification Kit and the AmpFLSTR COfiler PCR Amplification Kit, information is generated regarding all 13 core short tandem repeats loci established by the CODIS. (Budowle, *STR Allele Concordance Between Different Primer Sets – A Brief Summary*, 3 Profiles in DNA, No. 3, pp. 1-2; *U.S. v. Trala*, *supra*, 162 F.Supp.2d at pp. 342-343; see also http://www.appliedbiosystems.com/products/productdetail.cfm?prod_id=97.) The Applied Biosystems Prism 310 genetic analyzer utilizes the Genescan and Genotyper software. This software was described by the district court in *Trala* as follows: “The software detects the light being emitted and converts it into peaks of different sizes. The analyst then compares the configuration of these peaks against known reference standards in order to determine the number of alleles present at the target loci in a given sample.” (*U.S. v. Trala*, *supra*, 162 F.Supp.2d at p. 342; see also *People v. Hill* (2001) 89 Cal.App.4th 48, 57-58; Rosenblum, *Improved Single-Strand DNA Sizing Accuracy in Capillary Electrophoresis* (1997) 25 Nucleic Acids Research, No. 19, pp. 3928, 3929; http://www.appliedbiosystems.com/products/productdetail.cfm?prod_id=38.) As our colleagues in the Court of Appeal for the First Appellate District held: “Once the PCR analysis is complete, there may or may not be a need to perform a statistical analysis. If the subject of the investigation is not compatible with the blood evidence, statistics or genetic frequency data is irrelevant. If the person has the same traits as the evidentiary specimen, then the question is how common or rare are those traits, i.e., what percentage of the population are potential donors of such a specimen.” (*People v. Morganti* (1996)

43 Cal.App.4th 643, 669.) Where the samples of the evidence and the defendant's deoxyribonucleic acid are found to be sufficiently similar to have originated from the same source, the analyst calculates the profile frequency or the probability that an unrelated person chosen at random from the population would have the same deoxyribonucleic acid profile as the unknown sample. The analyst calculates the statistical frequency by multiplying the frequency of each of the alleles in the profile, then corrects the result to account for inbreeding or substructuring effects in the population. (See *U.S. v. Trala*, *supra*, 162 F.Supp.2d at p. 343; *People v. Brown* (2001) 91 Cal.App.4th 623, 634 [substructures].)

As Judge Fulgoni explained in his written decision following the *Kelly* hearing: “[D]ifficult problems concern two further situations which do not occur in pristine samples. ¶ The first is mixtures of DNA sources. In cases of rape, epithelial cells from the victim and the assailant can be present in a swab. Other persons who have had intercourse with the victim can deposit sperm. And frequently there is an inability to separate a sperm fraction from a nonsperm fraction of the evidenced DNA. ¶ There is also frequently an inability to separate major from minor contributors to a mixed evidentiary sample. ¶ The second difficulty is stutter. This is a phenomenon that occurs unpredictably and can mask small alleles or actually be an allele that occurs in a stutter position.”

iv. Evidence presented

(1) prosecution evidence

Rhonda Roby, the senior forensic specialist for Applied Biosystems, testified as part of the prosecution case. Ms. Roby testified regarding various reports and Applied Biosystems procedures related to AmpFLSTR Profiler Plus and COfiler kits.

Dr. Bruce McCord, associate professor of analytical and forensic chemistry at Ohio University, also testified for the prosecution. In that capacity, Dr. McCord taught

classes in deoxyribonucleic acid typing and instrumental analyses. He also did research in the areas of deoxyribonucleic acid analysis. Dr. McCord was previously employed by the Federal Bureau of Investigation, where he taught courses in forensic chromatography and polymerase chain reaction testing using capillary electrophoresis. Dr. McCord published approximately 30 articles. Dr. McCord was also on the editorial boards of the Journals of Electrophoresis and Capillary Electrophoresis. He attended and made presentations at numerous conferences each year related to capillary electrophoresis and human identification.

Dr. McCord conducted tests to check the accuracy of the Applied Biosystems Prism 310 genetic analyzer as compared to those of other manufacturers. Dr. McCord ran approximately 100 to 200 samples that had been initially analyzed by the Applied Biosystems Prism 310 genetic analyzer and compared the results with the Molecular Dynamics prototype system. With one exception, all of the genotypes were exactly the same. The exception was made by the Molecular Dynamics system. Based on his experiments, Dr. McCord concluded that capillary electrophoresis is an effective and efficient technique for use in the genetic typing of polymerase chain reaction amplified deoxyribonucleic acid. Dr. McCord further deduced the results demonstrated the capability of capillary electrophoresis to rapidly and precisely type deoxyribonucleic acid.

Dr. McCord relied in part on an article entitled, "*Validation of STR Typing by Capillary Electrophoresis.*" The article was the result of an Federal Bureau of Investigation validation paper on capillary electrophoresis utilizing the Applied Biosystems Prism 310 genetic analyzer as well as Profiler Plus and COfiler typing kits. The article concluded, "The results support the reliability of 310 for the electrophoresis and detection of DNA samples amplified using Profiler Plus and COfiler and of genescan and genotyper software for sizing and designating alleles." (Moretti, *Validation of STR Typing by Capillary Electrophoresis* (Federal Bureau of Investigation, 1999) pp. 25-26.) Based on his education, professional experience with the Applied Biosystems Prism 310 genetic analyzer, review of peer review literature and papers he had written, attendance at

conferences where electrophoresis results were presented, and discussions with other scientists, Dr. McCord believed that capillary electrophoresis and specifically the Applied Biosystems Prism 310 genetic analyzer are accepted in the scientific community for the analysis of short tandem repeats loci used in criminal cases. Dr. McCord believed the Applied Biosystems Prism 310 genetic analyzer provides precise data regarding fragments analyzed in short tandem repeats loci utilizing AmpFLSTR Profiler Plus and COfiler kits. Dr. McCord testified he wrote an article entitled, *The Application of Capillary Electrophoresis in the Analysis of PCR Products Used in Forensic DNA Typing*. In that article, Dr. McCord explained that when analyzing a mixed sample using the Applied Biosystems Prism 310, a competent analyst can determine more precisely which individual is the major contributor and which one is the minor contributor. Dr. McCord also wrote a chapter related to capillary electrophoresis in forensic biology and deoxyribonucleic acid mixture analysis using the Applied Biosystems Prism 310 in a book written by Eric Buel, a lead scientist from the Vermont state crime laboratory. The chapter describes the quality control factors required to ensure accurate measurement of mixed samples.

Dr. Robin Cotton, forensic laboratory director for Cellmark Diagnostics, testified for the prosecution. Dr. Cotton was responsible for the supervision of all forensic case work conducted at Cellmark Diagnostics, including research and validation. Dr. Cotton was a member of the: American Academy of Forensic Sciences; American Society of Human Genetics; and American Society of Crime Laboratory Directors. Dr. Cotton was also a fellow of the American Academy of Forensic Science. Dr. Cotton attended and made presentations at professional meetings regarding short tandem repeats forensic case work. Cellmark Diagnostics used the Profiler Plus and COfiler to type both unknown evidence samples and reference samples. Cellmark Diagnostics conducted a series of experiments for purposes of validating the use of the Profiler Plus and COfiler systems on the Applied Biosystems Prism 310 genetic analyzer. Based on those experiments, Cellmark Diagnostics established a stutter value per locus per allele percentage. That data is utilized when examining non-optimal samples. Cellmark Diagnostics conducted

similar experiments with mixed sample analysis. Its standard operating procedures were derived from the validation studies conducted on Profiler Plus and COfiler and other deoxyribonucleic acid typing systems.

Dr. Cotton believed the Profiler Plus and COfiler systems were generally accepted within the forensic community for the typing of samples such as in the present case. Dr. Cotton's belief was based upon several factors: the number of actual users of these kits in the forensic community for the same purpose utilized in these cases; numerous papers in the general scientific literature regarding the use of short tandem repeats for genetic mapping; the use of the same detection technology by forensic science groups outside the United States; the wide use of Perkin-Elmer instruments because of their versatility and reliability as supported by a large body of scientific peer review literature; and the use of genescan and genotyper was not unique to forensics. Based on validation experiences in the Cellmark Diagnostics lab as well as those of the peer review community, Dr. Cotton believed the use of these kits to evaluate a sample involving a forensic mixture will give reliable results when used correctly by those with appropriate experience.

Dr. Arthur J. Eisenberg, associate professor in the Department of Pathology and Anatomy at the University of North Texas Health Science Center and director of the DNA Identity Laboratory and Gene Link Repository, testified for the prosecution. Dr. Eisenberg taught medical students in the applications of deoxyribonucleic acid based molecular biological technology. Dr. Eisenberg also taught in a graduate program in forensic molecular genetics. As director of the deoxyribonucleic acid laboratory, Dr. Eisenberg was responsible for the operation of the lab, including techniques used, training of technicians, and assignment of reports on case work samples processed. Dr. Eisenberg also served as chairperson of the DNA Advisory Board. In addition to other systems, Dr. Eisenberg's laboratory utilized two Applied Biosystems Prism 310 fluorescent detection systems as well as Profiler Plus and COfiler kits.

Dr. Eisenberg previously worked at Life Codes Corporation, where his responsibilities included the development of methodologies, reagents, and materials

utilized in the various human identification systems. Dr. Eisenberg was also a member of the: American Association of Blood Banks; American Academy of Forensic Science; Working Group on DNA Analysis Methods; and the Association of Forensic Lab Analysts. Dr. Eisenberg was involved in the writing of the Technical Working Group on DNA Analysis Methods and DNA Advisory Board guidelines. He also presented numerous papers at professional forensic science meetings. Dr. Eisenberg believed the Profiler Plus and COfiler kits had been properly validated for the use in forensic case work in the United States because they had been “scrutinized by literally hundreds of laboratories throughout the world” subject to the standards specified by the DNA Advisory Board. The systems were examined through concordant studies on a wide variety of adjudicated forensic evidence samples, in terms of dilutions and mixtures, and found to have reliable, accurate typing results.

Dr. Eisenberg participated in the audits of crime scene forensic laboratories throughout the country. Dr. Eisenberg was familiar with people’s exhibit No. 40, a paper prepared by the Federal Bureau of Investigation, which detailed the validation studies related to commercial kits for short tandem repeats multiplexing, including Profiler Plus and COfiler kits. (Moretti, *Validation of Short Tandem Repeats (STRs) for Forensic Usage: Performance Testing of Fluorescent Multiplex STR Systems and Analysis of Authentic and Simulated Forensic Samples* (Federal Bureau of Investigation 1999).)

Dr. Eisenberg agreed with the conclusions that the procedures used in those commercial kits were robust and reliable. Dr. Eisenberg also believed the criteria for evaluating a forensic mixture as set forth in the Federal Bureau of Investigation paper were adequately understood and discussed within the literature and the scientific community.

Dr. Eisenberg believed that primer binding mutation may occur in the analysis of a sample. But Dr. Eisenberg believed primer binding imitation was of no consequence in the interpretation of the results because what affects the known sample will also affect the evidentiary sample. Dr. Eisenberg believed Cellmark Diagnostics was “a very competent, thorough testing laboratory” that “strive[s] to do the best possible job they can and in general produce very good, quality results.”

The prosecution's final witness was Dr. Frederick Robert Beiber, associate professor of pathology at Harvard Medical School. Dr. Beiber taught medical and graduate students on subjects related to genetics, pathology, and forensic science. Dr. Beiber was also a medical geneticist at the Brigham and Women's Hospital in Boston. Further, Dr. Beiber was a member of the: DNA Advisory Board; Technical Working Group on DNA Analysis Methods; American Society of Human Genetics, the American Board of American Genetics; American Academy and Forensic Science; and American Prosecutors Research Institute. He also served as a consultant to the Connecticut State Police forensic science laboratory. In addition, Dr. Beiber attended annual forensic meetings and authored publications in peer review journals and books. In the year 2000, Dr. Beiber authored a paper entitled, "Combined Probability of Exclusion Estimates, Their Use in Forensic Analysis of Complex DNA Mixtures."

Dr. Beiber believed: the Profiler Plus and COfiler kits had been widely used in 70 to 80 percent of the crime labs in North America and other parts of the world; the reliability of these kits had been validated by the various labs ; the Profiler Plus and COfiler kits rendered reliable results when used properly and correctly ; and that primer binding site mutations had no effect in any particular individual case because "samples from known individuals and samples from evidentiary exhibits would be typed or profiled using the same reagent . . . or the same kit, using the same primers." As a result, if the deoxyribonucleic acid sample comes from a single individual, it would be the same. Dr. Beiber concluded, "[T]he net effect of the presence of these variations would be negligible on the determination of allele or genotype or profile frequencies, virtually no effect." With respect to mixed forensic samples, Dr. Beiber testified: "[I]n the context of sexual assaults, when intimate samples are taken, mixtures tend to be often the rule rather than the exception . . . [O]nce the electropherograms are obtained from the various samples and the known individuals, it's often possible to quite clearly identify a so-called major contributor and a so-called minor contributor through the DNA mixture from the evidence." Dr. Beiber further related that the calculation for a mixed sample is essentially the same calculation made in single source samples.

The prosecution also introduced as exhibits: various manuscripts; validation studies; operating procedures utilized by Cellmark Diagnostics; publications; professional manuscripts and presentations attributable to professional scientific conferences; and related court decisions. The substance of some of these exhibits will be discussed later.

(2) defense evidence

The defense called Marc Taylor, a forensic scientist and owner of a laboratory known as Technical Associates Incorporated. In the course of his business, Mr. Taylor reviewed forensic casework involving deoxyribonucleic acid evidence. These cases utilized the Applied Biosystems Prism 310 genetic analyzer as well as Profiler Plus and COfiler kits, and genescan and genotyper programs. Mr. Taylor reviewed the validation studies filed under protective order in this case by Perkin-Elmer (Applied Biosystems). Mr. Taylor testified that the articles did not appear to be a complete validation in the context of the Technical Working Group on DNA Analysis Methods guidelines. Mr. Taylor's comparison of Federal Bureau of Investigation validation studies on Profiler Plus and COfiler with Perkin-Elmer's data demonstrated different percentages of stutter occurrence as well as different peak-height ratios at one locus. Mr. Taylor acknowledged that there were over a hundred validation studies on the loci that are used in the Profiler Plus and COfiler. Mr. Taylor also agreed that much of the data already in the public domain of the scientific community applied to some extent to Profiler Plus and COfiler kits.

Dr. Laurence Mueller, a professor at the University of California at Irvine, testified for the defense. Dr. Mueller did research related to population genetics and evolutionary biology. Dr. Mueller was an editor of a journal entitled "Researches on Population Ecology." He also studied forensic issues regarding population studies related to deoxyribonucleic acid evidence, lectured on the subject, published papers, and reviewed databases and casework from forensic laboratories. Dr. Mueller explained the "Hardy-Weinberg law" as follows: "[It involves an estimation of] how likely it would be

to find a person in the population that has [a] particular combination of copies of [a] gene that you observe in the evidence. . . . If a person has two similar copies of a gene then that individual's called a homozygote, and the frequency of that pattern is given by the Hardy-Weinberg law simply by taking the frequency of that genetic variant or allele and squaring it or multiplying it by itself. [¶] If the individual has two different forms of the particular gene, the individual is called a heterozygote. And the Hardy-Weinberg law states that the frequency of people that will be heterozygote for that particular combination of alleles is given by twice the product of the constituent allele frequency.” Dr. Mueller believed that if a particular allele was not properly amplified in the polymerase chain reaction so that only one of the two copies of that individual's gene was amplified, the individual may be a heterozygote but appear to be a homozygote, thereby causing a departure from the Hardy-Weinberg law.

Dr. Mueller's review of the Federal Bureau of Investigation population databases for Caucasian and African-American groups revealed a 13 to 14 percent departure from linkage equilibrium. That signaled a potential problem with the assumption of linkage equilibrium for the Caucasian population that is correctable. There were no significant departures of linkage equilibrium for the African-American population. Also, the 13 to 14 percent departure presented a fundamental problem with a technique based on multiplication across loci. Dr. Mueller also reviewed reports related to the Perkin-Elmer databases for the 13 CODIS loci contained within Profiler Plus and COfiler. Dr. Mueller testified he needed further data regarding the complete multi-locus genotypes for each of the samples used to fully analyze the database utilized by Perkin-Elmer. Dr. Mueller acknowledged that scientists who prepare peer review articles normally present data by providing the allele frequencies rather than the genotype profiles for each person in the database.

Dr. William Shields, a professor at the State University of New York, College of Environmental Science and Forestry, also testified for the defense. Dr. Shields taught and did research in population genetics and behavior of birds and mammals. Dr. Shields performed deoxyribonucleic acid typing in his work. Dr. Shields did not personally

perform forensic deoxyribonucleic acid testing but had reviewed the literature on the procedures. Dr. Shields supervised deoxyribonucleic acid testing at the university to determine maternity and paternity in swallows, beavers, and giraffes as well as to examine genetic verification in rare or endangered species. Dr. Shields previously testified on the issue of validation sufficiency as it relates to Profiler Plus and COfiler as related to population genetic issues. Dr. Shields had modified protocols designed by others, but had not designed one himself.

Dr. Shields had never worked with capillary electrophoresis or done any criminal forensic case work. Dr. Shields had studied literature regarding validation studies and testified about the specific kits. Dr. Shields reviewed the Perkin-Elmer documents in people's exhibit Nos. 14 through 17 related to the validation of Profiler Plus and COfiler. Dr. Shields found the manuscripts lacking in data. Dr. Shields believed the validation report, people's exhibit No. 16, was inadequate because the sample sizes were too small to determine the error rate. When comparing the Perkin-Elmer data to that developed by the Federal Bureau of Investigation, Dr. Shields found "hard-to-explain" differences between the two. Dr. Shields testified he would like to see all laboratories have sufficient data to remove as much subjectivity from the testing process as possible.

The defense also called Dr. Donald Riley, Associate Professor of Urology and Pathobiology at the University of Washington. Dr. Riley conducted research related to prostate diseases, including deoxyribonucleic acid testing. The testing was performed to detect bacterial and viral deoxyribonucleic acid sequencing as well as genetic difference in various individuals. Dr. Riley also served as a reviewer of manuscripts submitted by other scientists to determine whether the paper is worthy of publication in a journal. Dr. Riley authored an article describing optimal hybridization temperatures for another type of deoxyribonucleic acid testing. Dr. Riley testified concerning polymerase chain reaction based testing approximately 50 times. Dr. Riley visited crime laboratories, including Cellmark Diagnostics, where he observed forensic testing. Dr. Riley did not conduct multiplex polymerase chain reaction testing.

Dr. Riley reviewed people's exhibit No. 20, the Profiler Plus polymerase chain reaction amplification kit user's manual. Dr. Riley believed the denaturing temperature at which the COfiler and Profiler Plus operated did not support the user's manual's representation that they were optimized to give reliable performance. However, Dr. Riley acknowledged that other articles supported the user's manual's claims. Dr. Riley did not believe that Perkin-Elmer provided adequate data regarding degraded deoxyribonucleic acid in the user's manual or in the relevant professional literature. Dr. Riley also believed the mixed specimen studies outlined in the user's manual did not indicate that the limitations of the system had been thoroughly reviewed. Nor did Dr. Riley believe the article written by Dr. Clyde Holt, people's exhibit No. 41, gave members of the scientific community adequate data to determine whether the manufacturer's claims were accurate. Dr. Riley was concerned with contamination, degradation and accuracy with the Profiler Plus, COfiler systems and Applied Biosystems Prism 310 genetic analyzer. Dr. Riley believed that the Profiler Plus and COfiler systems and Applied Biosystems Prism 310 genetic analyzer were not generally accepted for testing mixed forensic samples.

Dr. Kenneth Berger, Vice President of regulatory affairs at Lifepoint, Incorporated, testified for the defense. Dr. Berger's work experience involved the development of systems for quality assurance and product validation. At the time of his testimony, Dr. Berger was involved with the validation of saliva-based test kits for use with drugs and alcohol. Most of Dr. Berger's work related to validations by the Food and Drug Administration. Dr. Berger reviewed people's exhibit Nos. 15, 16, and 17 as well as the Perkin-Elmer user's manuals as well as other articles on the subject of short tandem repeats and capillary electrophoresis. Dr. Berger acknowledged that these documents contained the results of some validation studies. However, he did not believe any of those articles were complete validations. Dr. Berger was unaware how Profiler Plus and COfiler were used. Dr. Berger had never run a capillary electrophoresis platform or the Applied Biosystems Prism 310 genetic analyzer. Judge Fulgoni

determined that Dr. Berger was not qualified to testify regarding capillary electrophoresis and limited his testimony to validation.

v. prior validation and acceptance of mixed sample analysis

We agree with the Attorney General that the use of polymerase chain reaction and short tandem repeats technology to analyze a mixed-source forensic sample is neither a new or novel technique or methodology. As the Attorney General points out, several published rape cases involve mixed source samples that were analyzed by polymerase chain reaction or short tandem repeats. In *People v. Hill, supra*, 89 Cal.App.4th at pages 52-53, the victim was raped and sodomized by an intruder in her home. Vaginal and anal swabs were submitted for deoxyribonucleic acid testing. The forensic lab utilized a DQ-Alpha Polymarker test and a Profiler Plus test. The Profiler Plus test indicated the sperm's deoxyribonucleic acid and the defendant's deoxyribonucleic acid "had a unique genetic profile occurring in only one of 5.89 trillion African-Americans." (*Id.* at p. 53.) The other test found the defendant could not be excluded as a source of the sperm deoxyribonucleic acid. (*Ibid.*) In finding the Profiler Plus test kit did not embrace new scientific techniques, our colleagues in Division Six of this appellate district found: "California courts have recognized that two methodologies are widely used in forensic DNA testing: restriction fragment length polymorphism (RFLP) and PCR. (*People v. Venegas*[, *supra*,] 18 Cal.4th [at pp.] 57-58 & fn. 6 [].) There are three subtypes of PCR testing: DQ-Alpha, which tests a single genetic marker; Polymarker, which tests five genetic markers; and the STR, which tests three or more genetic markers. (*People v. Allen* [(1999)] 72 Cal.App.4th [1093,] 1097.) The RFLP and PCR methodologies, including the PCR subtypes, have acquired general acceptance in the scientific community. (*People v. Venegas, supra*, 18 Cal.4th at p. 79 [RFLP]; *People v. Wright* (1998) 62 Cal.App.4th 31, 34 [] [PCR/Polymarker]; *People v. Morganti, supra*, 43 Cal.App.4th at p. 666 [PCR/DQ-Alpha]; *People v. Allen, supra*, 72 Cal.App.4th at p. 1100 [PCR/STR].)" (*People v. Hill, supra*, 89 Cal.App.4th at p. 57.)

In *People v. Wright, supra*, 62 Cal.App.4th at pages 35-36, the defendant repeatedly raped a young girl and forced her to orally copulate him. Oral and vaginal swabs were submitted for forensic testing. The trial court and our colleagues in the Court of Appeal for the First Appellate District found that the polymerase chain reaction testing method utilized in that case was generally accepted as reliable and valid in the scientific community. (*Id.* at pp. 38-41.) As the *Wright* court pointed out: “[C]ase-by-case adjudication as to the “general acceptance” prong of the *Kelly* test is *not* required once the scientific technique in question has been endorsed in a published appellate opinion. ([*People v. Barney*] [(1992)] 8 Cal.App.4th [798,] 824-825.)’ (*Morganti, supra*, 43 Cal.App.4th at p. 658, italics added.)” (*People v. Wright, supra*, 62 Cal.App.4th at p. 42, fn. 2.)

More recently, in *U.S. v. Trala, supra*, 162 F.Supp.2d at page 339, the defendant, as does defendant here, specifically challenged the reliability of a *mixed* deoxyribonucleic acid sample utilizing the Profiler Plus and COfiler materials kits in combination with Genoscan and Genotyper software. The defendant in *Trala* claimed the systems had allelic drop out, stutter and differential amplification and problems that would “have to ‘be explained away through numbers set by laboratories to obtain a profile.’” (*U.S. v. Trala, supra*, 162 F.Supp.2d at p. 349.) After extensive testimony by competent professionals and the introduction of laboratory protocol evidence, the district court, after applying the standards of *Daubert v. Merrell Dow Pharmaceuticals Inc., supra*, 509 U.S. at pages 589-590, held, “In light of the controls to reduce the effects of inherent flaws such as stutter or allelic drop out, the court finds that the defendant’s challenges are directed to the weight of the evidence and not its admissibility.” (*U.S. v. Trala, supra*, 162 F.Supp.2d at p. 349.)

- vi. The deoxyribonucleic acid evidence, based upon analysis of mixed samples, was properly found to be generally accepted in the scientific community

In any event, even if the acceptance of such analysis was not previously established, the evidence presented at the *Kelly* hearing in this case supports Judge Fulgoni's finding. The trial court may consider the testimony of professionals in the field, decisions from other jurisdictions, and relevant scientific literature. (*People v. Brown* (1985) 40 Cal.3d 512, 530; *People v. Axell, supra*, 235 Cal.App.3d at p. 854; *People v. Smith* (1989) 215 Cal.App.3d 19, 25; *People v. Reilly* (1987) 196 Cal.App.3d 1127, 1134.) In *People v. Morganti, supra*, 43 Cal.App.4th at page 665, the court noted: "As our Supreme Court has recently confirmed, *Kelly* does not demand an absolute unanimity of views in the scientific community (*People v. Leahy, supra*, 8 Cal.4th at pp. 611-612.) "[I]f a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose [the technique] as unreliable, the court may safely conclude there is no such consensus at the present time." (*Id.* at p. 611, quoting *People v. Shirley* [(1982)] 31 Cal.3d [18,] 56.)" The general acceptance issue is a mixed question of law and fact. (*People v. Reeves* (2001) 91 Cal.App.4th 14, 38; *People v. Hill, supra*, 89 Cal.App.4th at p. 57.) When the trial court concludes that a new scientific technique is generally accepted in the scientific community, we independently review that decision. (*People v. Venegas, supra*, 18 Cal.4th at pp. 84-85; *People v. Ashmus* (1991) 54 Cal.3d 932, 971.)

Judge Fulgoni noted that while all of the defense witnesses were either qualified scientists or had laboratory experience in related forensic technology or validation of new drugs, none had any "appreciable experience in the application or evaluation of capillary electrophoresis in a forensic setting." Judge Fulgoni also noted, "Even more importantly, the defense witnesses do not regularly attend forensic meetings or have much contact with persons who do." On the other hand, Judge Fulgoni stated, "The People's witnesses in contrast, while lacking a great deal of hands-on experience with forensic samples, regularly attend forensic meetings, are conversant with the forensic community doing

capillary electrophoresis, and supervise persons who are technicians in the field.” Judge Fulgoni emphasized that validation of a new technique, while critical, is not synonymous with general acceptance within the scientific community. Judge Fulgoni noted, “The hearing[] failed to disclose a single article challenging the general acceptance of the technique in forensics.” There were excellent results from concordance studies involving comparison of results of the same testing completed by two distinct laboratories. Judge Fulgoni found that the revelation of a laboratory’s error rate was inappropriate: “[E]vidence of the error rate, the causes of errors, their magnitude and even possible causes of errors not detected are all admissible as separate evidentiary categories, and their significance or lack thereof can be argued vigorously by both sides.”

Judge Fulgoni found, “While validation of a new technique is critical since any technique which is generally accepted without some form of validation would be accepted irrationally, validation and general acceptance are not synonymous.” Judge Fulgoni noted that once the four then sealed manuscripts were released by Applied Biosystems (people’s exh. Nos. 14-17) their content was extremely helpful. (Budowle, *STR Allele Concordance Between Different Primer Sets – A Brief Summary*, *supra*; Fregeau, *Fingerprint Enhancement Revisited and the Effects of Blood Enhancement Chemicals on Subsequent Profiler Plus™ Fluorescent Short Tandem Repeat DNA Analysis of Fresh and Aged Bloody Fingerprints*, *Journal of Forensic Sciences* (2000); Moretti, *Validation of STR Typing by Capillary Electrophoresis*, *supra*; Budowle, *Concordance Study on Population Database Samples Using the PowerPlex™ 16 Kit and AmpFLSTR® Profiler Plus™ Kit and AmpFLSTR® COfiler™ Kit* (Federal Bureau of Investigation 2000); Moretti, *Validation of Short Tandem Repeats (STRs) for Forensic Usage: Performance Testing of Fluorescent Multiplex STR Systems and Analysis of Authentic and Simulated Forensic Samples*, *supra*; and Holt, *Practical Applications of Genotype Surveys for Forensic STR Testing* (2000) 112 *Forensic Science International* 91.) Judge Fulgoni held: “The requirement that every possibility, real or imagined, that might beset a technology must be addressed in a published article mischaracterizes the nature of both validation and general scientific acceptance. [¶] A technology can be

partially validated by recognition of previously demonstrated principles which are obviously applicable to the new technology.” Additionally, Judge Fulgoni relied on a collection of 33 articles from the Journal of Forensic Sciences. In reaching his conclusion, Judge Fulgoni also relied on forensic community meetings: “Furthermore, the exposure of these techniques to the forensic community at meetings devoted largely to this and related technology serves the twin requirements of validation and acceptance. The former is served by discussions, seminars, posters and lectures on the use of the techniques, their problems and how to compensate for and overcome them. The latter is shown by the number of attendees, their exposure to persons who use capillary electrophoresis and their failure to point out any defects of substantial significance.” Judge Fulgoni further relied on concordance studies completed by the Federal Bureau of Investigation and the Los Angeles County Sheriff’s Department, where in his view, excellent results were obtained. In his decision, Justice Fulgoni explored the various possibilities for error in the analysis of deoxyribonucleic acid by those systems in question. In each instance, he explained that procedures may be put in place to detect and prevent such errors.

Judge Fulgoni’s findings were supported by the testimony and documents presented. Dr. McCord’s testimony was premised on his education, professional experience with the Applied Biosystems Prism 310 genetic analyzer, review of peer review literature and papers he had written, attendance at conferences where electrophoresis results were presented, and discussions with other scientists. Dr. McCord believed that capillary electrophoresis in general and specifically the Applied Biosystems Prism 310 genetic analyzer are accepted in the scientific community for the analysis of short tandem repeats loci used in criminal cases. Dr. McCord also believed the Applied Biosystems Prism 310 genetic analyzer provides precise data regarding fragments analyzed in short tandem repeats loci utilizing AmpFLSTR Profiler Plus and COfiler kits. Dr. McCord further testified that, as explained in an article he wrote, *The Application of Capillary Electrophoresis in the Analysis of PCR Products Used in Forensic DNA Typing*, he found that when analyzing a mixed sample using the Applied Biosystems

Prism 310, the analyst can determine more precisely which individual is the major and which person is the minor contributor.

Dr. Cotton testified that the Cellmark Diagnostics staff conducted experiments with the Profiler Plus and COfiler systems on the genetic analyzer for purposes of validation with both single and mixed samples. Dr. Cotton reported that Cellmark's operating procedures were based on other validation studies conducted on Profiler Plus, COfiler, and other deoxyribonucleic acid typing systems. Dr. Cotton believed the Profiler Plus and COfiler systems were generally accepted within the forensic community based upon: the number of forensic scientists using the systems for the same purpose utilized in these cases; numerous papers published in scientific literature regarding the use of short tandem repeats for genetic mapping; use of the technology outside the United States; and the support of peer review literature. Dr. Eisenberg believed the Profiler Plus and COfiler kits had been properly validated for use in the scientific community because they had been "scrutinized by literally hundreds of laboratories throughout the world" subject to the standards specified by the DNA Advisory Board. Based on their personal experience, review of the extensive literature, studies, presentations at forensic conferences, and laboratory protocols, Dr. Cotton, Dr. Eisenberg, and Dr. Beiber all believed the use of the kits to evaluate mixed forensic samples would give reliable results when used correctly by those with appropriate experience.

The literature relied on by Judge Fulgoni further supports his findings. In people's exhibit No. 25, the author, Dr. Budowle, of the Federal Bureau of Investigation Scientific Analysis Section, reviewed the short tandem repeats allele concordance between different primer sets, including Profiler Plus and COfiler. Dr. Budowle concluded the Perkin-Elmer kits did not produce significant levels of allele dropout and produced reliable results as long as proper protocols were used. (Budowle, *STR Allele Concordance Between Different Primer Sets – A Brief Summary, supra*, p. 2.) People's exhibit No. 35, an article published in the Journal of Forensic Science in the year 2000, explored the effects of blood enhancement chemicals used for enhancing latent fingerprints from blood on subsequent Profiler Plus deoxyribonucleic acid analysis. The authors concluded

none of the chemicals examined had a deleterious effect on the polymerase chain reaction amplification of the nine short tandem repeats systems or the gender marker. (Fregeau, *Fingerprint Enhancement Revisited and the Effects of Blood Enhancement Chemicals on Subsequent Profiler Plus™ Fluorescent Short Tandem Repeat DNA Analysis of Fresh and Aged Bloody Fingerprints*, *supra*, p. 369.) People’s exhibit No. 38, a paper entitled *Validation of STR Typing by Capillary Electrophoresis*, concluded: “In addition to resolving and accurately designating alleles in single-source samples, the analysis of forensic samples may require the identification of components of mixtures of DNA from two or more donors. . . . [T]he analytical parameters used on the [Applied Biosystems] Prism 310 are effective operationally, and comparisons in forensic casework can be reliably made. . . .” (Moretti, *Validation of STR Typing by Capillary Electrophoresis*, *supra*, p. 19.) These results support the reliability of the Applied Biosystems Prism 310 Genetic Analyzer for the electrophoresis and detection of DNA samples amplified using the AmpFLSTR Profiler Plus and COfiler PCR Amplification kits and of the Genescan and Genotyper software for sizing and designating alleles. (*Id.* at pp. 25-26.) People’s exhibit No. 39 was a concordance study on population database samples. Dr. Budowle and Cynthia J. Sprecher, senior scientists at the Federal Bureau of Investigation and Promega Corporation respectively, concluded: “[O]ver 500 samples were typed and allele drop-out was observed rarely using primers from either manufacturer’s kit. Although allele drop-out can never be entirely eliminated, the extant data suggest that the primers used in the . . . Profiler Plus™, and COfiler™ kits are reliable for typing reference samples destined for use in CODIS. Furthermore, the data support that the sequences of the primers for STR loci do not need to be known to demonstrate validity.” (Budowle, *Concordance Study on Population Database Samples Using the Powerplex™ 16 Kit and AmpFLSTR® Profiler Plus™ Kit and AmpFLSTR® COfiler™ Kit*, *supra*, p. 10.) People’s exhibit No. 40 was a validation study on short tandem repeats for forensic usage conducted by the Federal Bureau of Investigation Forensic Science Research Unit. The study concluded Profiler Plus and COfiler could be used to amplify and type short tandem repeats loci successfully from human biological specimens,

including samples that include deoxyribonucleic acid from more than one contributor. (Moretti, *Validation of Short Tandem Repeats (STRs) for Forensic Usage: Performance Testing of Fluorescent Multiplex STR Systems and Analysis of Authentic and Simulated Forensic Samples*, *supra*, pp. 28-29.) People's exhibit No. 41, an article published in Forensic Science International, concluded that the product rule across the 13 short tandem repeats loci utilized in AmpFLSTR Profiler Plus test kits and the Applied Biosystems Prism 310 Genetic Analyzer is valid for estimation of multilocus genotype frequencies for human identification applications in African-American and Caucasian databases. (Holt, *Practical Applications of Genotype Surveys for Forensic STR Testing*; *supra*; pp. 94, 104-106.) Finally, people's exhibit No. 43, a collection of 33 articles from the Journal of Forensic Sciences (2000), included typing studies by means of short tandem repeats and polymerase chain reaction for world populations as well as the extraction of deoxyribonucleic acid from such diverse sources as stamps, envelope flaps, fingernails, toothbrushes, and fingerprints.

In addition, although Perkin-Elmer validation studies for Profiler Plus and COfiler, introduced at the *Kelly* hearing as people's exhibit Nos. 15-17, were sealed and relied upon by the witnesses subject to a protective order, they were subsequently published. We took judicial notice of these articles as well as two others published subsequent to the hearing, which were filed by the Attorney General and serve to support Judge Fulgoni's finding. (See *People v. Shirley*, *supra*, 31 Cal.3d at p. 56; *People v. Barney*, *supra*, 8 Cal.App.4th at p. 810; *People v. Axell*, *supra*, 235 Cal.App.3d at p. 854.) The three validation studies conclude that the test kits, when used with designated procedures, provide robust, reliable results in mixed deoxyribonucleic acid samples. In an article appearing in the Journal of Forensic Sciences, "*NIST Mixed Stain Studies #1 and #2: Interlaboratory Comparison of DNA Quantification Practice and Short Tandem Repeat Multiplex Performance with Multiple-Source Samples*", two interlaboratory comparison exercises conducted by the National Institute of Standards and Technology concluded: "Given an appropriate total amount of DNA in the reaction mixture, current STR multiplex systems reliably amplify multiple-source DNA." (Duewer, *NIST Mixed Stain*

Studies #1 and #2: Interlaboratory Comparison of DNA Quantification Practice and Short Tandem Repeat Multiplex Performance With Multiple-Source Samples (2001) 46 J. Forensic Sci. 1199, 1209.)

Finally, another article in the Journal of Forensic Sciences validated Profiler Plus and COfiler testing as robust and reproducible according to the guidelines provided by The Working Group on DNA Analysis Methods. The study involved mixed samples. The authors concluded: “The multiplex systems coupled with CE instrumentation, provide sensitive, accurate results even when forensic samples are exposed to extreme conditions. These attributes make the Profiler Plus and COfiler amplification kits powerful, investigative tools for the analysis of forensic samples.” (LaFountain, *TWGDAM Validation of the AmpFLSTR Profiler Plus and AmpFLSTR COfiler STR Multiplex Systems Using Capillary Electrophoresis* (2001) 46 J. Forensic Sci. 1197.)

Judge Fulgoni’s finding that the mixed sample analysis of deoxyribonucleic acid by means of short tandem repeats utilizing Profiler Plus and COfiler in conjunction with the Applied Biosystems Prism 310 Genetic Analyzer is accepted by the scientific community was well-reasoned, based upon extensive expert testimony, and exhaustive review of the literature and case law. Moreover, any challenges regarding errors in multiple sample deoxyribonucleic acid analysis should be directed to the weight of the evidence and not its admissibility.

vii. harmless error

We agree with the Attorney General that even if the mixed sample deoxyribonucleic acid evidence was improperly admitted, any resultant error was harmless. It is not reasonably probable that defendant would have had a more favorable verdict absent the purported error. (*People v. Venegas, supra*, 18 Cal.4th at p. 93; *People v. Watson, supra*, 46 Cal.2d at p. 836.) As noted previously, both Monique and Jasmine positively identified defendant from photographic lineups, at the preliminary hearing, and at trial. Defendant and his car fit the descriptions given by each young girl, particularly

with respect to his braid in the middle of the back of his head, which he wore at the time of his arrest. The prior sex offense related to Mary followed the same pattern of abducting young girls as they walked alone, taking them to a more isolated place, and sexually assaulting them. In addition, as the Attorney General points out, defendant does not challenge the deoxyribonucleic acid testing conducted by the Los Angeles Police Department Scientific Investigation Division. The results of that testing demonstrated defendant's deoxyribonucleic acid matched a sample found on Jasmine's panties. The genetic profile was one in 5,300 persons. Substantial evidence supports the verdict. (*People v. Hughes* (2002) 27 Cal.4th 287, 370-371; *People v. Welch* (1999) 20 Cal.4th 701, 756-759; *People v. Sanchez* (1995) 12 Cal.4th 1, 31-36.) Defendant would not have enjoyed a more favorable verdict absent any error in admitting the deoxyribonucleic acid evidence from the mixed sample sent to Cellmark Diagnostics.

C. Motion to Exclude Deoxyribonucleic Acid Test Results

Defendant argues that the trial court improperly denied his motion to exclude the short tandem repeats testing conducted by Cellmark Diagnostics as a sanction for the prosecutor's failure to provide the results in a timely manner.

1. Factual and procedural background

On October 25, 2000, defendant filed a motion to exclude the results of the short tandem repeats deoxyribonucleic acid testing as a sanction for alleged violations of the discovery process. The motion sets forth the chronological history as follows. On March 7, 2000, defendant's first preliminary hearing was held. Defendant was arraigned on March 21, 2000. Discovery compliance was set for April 12, 2000. On May 5, 2000, the defense reviewed the documents that had been provided and made copies of the papers. Some remaining materials were to be available "within a week or so." Trial was set for May 22, 2000. On May 22, 2000, defendant moved to continue the case "because

DNA testing had been sought by the [prosecutor]” and the results would be unavailable until that day. Trial was continued to July 5, 2000. On June 27, 2000, defense counsel received the underlying deoxyribonucleic acid data as well as exculpatory criminalist reports regarding defendant’s car. On July 5, 2000, defendant requested a continuance of the trial date. Trial was continued to September 11, 2000. On July 27, 2000, the prosecutor indicated that she was seeking short tandem repeats deoxyribonucleic acid testing, which would not have results available until September 15, 2000. Defense counsel filed a motion to exclude that new deoxyribonucleic acid testing because it would be prejudicial to the defense to prepare for appropriate evaluation and testimony of the test data. However, on September 11, 2000, the prosecutor advised the trial court she was unable to proceed and the case was dismissed. Thereafter, the present charges were refiled. Defense counsel received the short tandem repeats deoxyribonucleic acid results on September 9, 2000. On September 11, 2000, defense counsel indicated she needed all documents related to the short tandem repeats laboratory notes, photographs, and the like. On September 27, 2000, both sides waived a preliminary hearing. The matter was set for pretrial proceedings on October 26, 2000, and trial on November 27, 2000. On October 25, 2000, defendant filed another motion to exclude the short tandem repeats deoxyribonucleic acid test results.

On October 26, 2000, the prosecutor delivered the additional deoxyribonucleic acid testing materials to defense counsel. Defendant’s motion to exclude the short tandem repeats deoxyribonucleic acid testing was heard and denied by Judge John J. Cheroske. On November 20, 2000, the trial court reconsidered defendant’s motion. After extensive argument by both parties, the trial court denied the motion: “Having heard this motion, DNA testing makes things very confusing. I understand that. The first case was dismissed at the time of the trial because [defense counsel] did not get discovery. She did get discovery in advance for 30 days for this case refiled, and the People are allowed to do that. [¶] Trial was scheduled for November 27th. You did receive it. And I understand you continued the case under the first trial because you have to be competent counsel and you have to receive that. It could be exculpatory also. Put

everything together, you did get discovery in time, and the motion is denied.” Trial commenced on January 2, 2001.

2. The trial court could properly deny the sanctions motion

Section 1054.1 requires in part: “The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] . . . (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.” (See *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1078 [exculpatory material] *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4th 1305, 1312 [expert witness material].) Section 1054.7 sets forth the timing of the disclosures required by the discovery chapter as follows, “The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred.” (See *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1132-1133; *Sandefffer v. Superior Court* (1993) 18 Cal.App.4th 672, 677-678.) Section 1054.5, subdivision (b), allows the court to make any order necessary to enforce the provisions where a showing is made that a party failed to comply with the discovery chapters. However, a trial court may preclude a witness from testimony but only if all other sanctions “have been exhausted.” (§ 1054.5, subd. (c); see *People v. Walton* (1996) 42 Cal.App.4th 1004, 1016-1017; disapproved on another point in *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3; *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1623-1626.)

We review the trial court’s ruling on disclosure matters for an abuse of discretion. (*People v. Ayala, supra*, 23 Cal.4th at p. 299; *People v. Breaux* (1991) 1 Cal.4th 281,

312.) The *Ayala* court held: “[A] trial court may, in the exercise of its discretion, “consider a wide range of sanctions” in response to the prosecution’s violation of a discovery order.’ [Citation.]” (*People v. Ayala, supra*, 23 Cal.4th at p. 299, quoting *People v. Wimberly* (1992) 5 Cal.App.4th 773, 792.) The prosecutor in this case had a duty to disclose the evidence related to the short tandem repeats deoxyribonucleic acid tests to defense counsel and did so within 30 days prior to trial. (§§ 1054.1, subd. (f), 1054.7; *Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 484, fn. 2.) In fact, defense counsel had the materials over 60 days prior to the commencement of trial. Even if the delivery of the discovery was untimely, the California Supreme Court has held, ““It is defendant’s burden to show that the failure to timely comply with any discovery order is prejudicial, and that a continuance would not have cured the harm.’ [Citation.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 386-387, quoting *People v. Pinholster* (1992) 1 Cal.4th 865, 941.)

Our colleagues in Division Three of this appellate district has interpreted United States Supreme Court cases on the subject: “We interpret these authorities to instruct that preclusion sanctions may be imposed against a criminal defendant [party] only for the most egregious discovery abuse. Specifically, such sanctions should be reserved to those cases in which the record demonstrates a willful and deliberate violation which was motivated by a desire to obtain a tactical advantage at trial” (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1263, citing *Michigan v. Lucas* (1991) 500 U.S. 145, and *Taylor v. Illinois* (1988) 484 U.S. 400; see also *People v. Walton, supra*, 42 Cal.App.4th at p. 1017 [trial court did not abuse its discretion in allowing newly discovered witness to testify]; *People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1759-1760 [trial court improperly excluded surprise defense witness where no irremediable prejudice to prosecution shown]; *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203 [trial court did not abuse its discretion in precluding testimony of defense witness because of delayed disclosure].)

Defendant argues the deoxyribonucleic acid evidence was extremely prejudicial. However, that is not the measure of the prejudice. Rather, the prejudice must relate to the

delay. In this case, there was no such prejudice. Defendant had the initial deoxyribonucleic acid test results on September 9, 2000. The prosecutor delivered the related materials on October 26, 2000. Trial commenced on January 2, 2001. (See *People v. Ayala, supra*, 23 Cal.4th at pp. 299-300 [no abuse of discretion in trial court's refusal to impose a sanction where prosecution's failure to furnish documents within the time allotted before trial was remedied by a continuance]; see *People v. Walton, supra*, 42 Cal.App.4th at pp. 1016-1017.) Moreover, as our colleagues in Division Six of this appellate district held, "There is a significant difference between failure to gather evidence immediately or to find all evidence that might subsequently become important and willful failure to comply with discovery orders." (*People v. Hammond, supra*, 22 Cal.App.4th at p. 1623.) Defendant does not argue, nor does the record demonstrate, that the prosecutor purposefully sought to delay the trial or disclosure of relevant documents by ordering additional deoxyribonucleic acid testing. Rather, the prosecutor explained, she was unfamiliar with deoxyribonucleic acid testing and once she became aware that she must send the evidence to another laboratory for more extensive testing she was delayed by negotiations with her supervisor to expend the additional funds for the tests. The trial court did not abuse its discretion in denying the motion to exclude the evidence in question.

3. Harmless error

Finally, as noted previously, the overwhelming evidence of guilt in this case renders any error in denying the motion to exclude the short tandem repeats evidence harmless. There is no reasonable probability that had the evidence been excluded the verdict would have been different. (*People v. Bohannon* (2000) 82 Cal.App.4th 798, 807; see also *Kyles v. Whitley* (1995) 514 U.S. 419, 433-434; *United States v. Bagley* (1985) 473 U.S. 667, 682, 685; *In re Brown* (1998) 17 Cal.4th 873, 886-887.)

D. Instruction with CALJIC No. 2.50.01

Defendant argues the trial court improperly instructed the jury with the 1999 revision of CALJIC No. 2.50.01⁵ because the instruction eliminated the due process requirement that the jury find each element of the offense true beyond a reasonable doubt. This contention has no merit. (*People v. Reliford, supra*, 29 Cal.4th at pp. 1012-1017; *People v. James* (2000) 81 Cal.App.4th 1343, 1354.) Nonetheless, under any standard of reversible error, the alleged error was entirely harmless given the uncontradicted nature of the overwhelming and conclusive proof of guilt. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Watson, supra*, 46 Cal.2d at p. 836; see also *People v. Molina* (2000) 82 Cal.App.4th 1329, 1335-1336.)

⁵ The jury was instructed with CALJIC No. 2.50.01 as follows: “Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense other than that charged in this case. ‘Sexual offense’ means a crime under the laws of the state or the United States that involves any of the following: [¶] Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body. [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer the defendant has a disposition to commit the same or similar type sexual offenses. [¶] If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crimes of which he is now accused. [¶] However, if you find by a preponderance of the evidence the defendant committed a prior sexual offense, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crime he is now charged with. [¶] The weight and significance of the evidence, if any, are for you to decide. Unless you are otherwise instructed, you must not consider this evidence for any other purpose.”

E. Sentencing

1. Consecutive terms

Defendant argues the trial court improperly imposed consecutive terms on the rape and lewd conduct counts pursuant to sections 667.6, subdivision (d)⁶, and 667.61.

Defendant further argues, “The trial court’s determination that the actions that made up the charges in Counts Two and Three were two separate occasions is not supported by the record, and requires an absurd interpretation of the statute.”

a. factual and procedural background

At sentencing, the trial court designated the forcible rape of Jasmine as the principal count and sentenced defendant pursuant to section 667.71, subdivisions (a) and (d), to a 25-year-to-life sentence and then tripled the minimum term pursuant to sections 667, subdivision (e)(2)(A)(i) and 1170.12, subdivision (e)(2)(A)(i). (*People v. Acosta* (2002) 29 Cal.4th 105, 112-118; *People v. Snow* (2003) 105 Cal.App.4th 271, 278.)

Although the trial court referred to section 667.71, it apparently was referring to section 667.61 or there was an error by the court reporter. There were no 667.71 allegations in

⁶ Section 667.6, subdivision (d), provides in pertinent part: “A full, separate, and consecutive term shall be served for each violation of Section 220 . . . provided that the person has been convicted previously of violating Section 220 for an offense . . . if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.”

the information nor jury findings to that effect. In order for section 667.71 to apply, it had to be alleged in the information and findings had to be returned. (§ 667.71, subd. (d)⁷.) Further, the information repeatedly alleged the applicability of section 667.61. The jury returned two explicit section 667.61 findings. Also, the parties do not contend that the trial court acted pursuant to section 667.71. Even if the trial court proceeded pursuant to section 667.71, the sentence as to count 2 would be the same—25 years to life with the minimum term pursuant to sections 667, subdivision (e)(2)(A)(i) and 1170.12, subdivision (c)(2)(A)(i).

As to the forcible lewd acts with Jasmine count, the trial court noted: “I’m going to run count 3 consecutive to count 2 because at the time [defendant] committed this offense the victim was particularly vulnerable. I had a chance to see the victim testify, and [defendant] had time to think about the additional crime before committing it, and that additional 25 years to life as a third strike under Penal Code section 1170.12(a) through (d) prior convictions and again count 3 is consecutive to count 2.” In this case, 11-year-old Jasmine was kidnapped and taken to a remote, isolated place where defendant removed her clothing and forcibly raped her five or six times. Thereafter, defendant fondled and kissed Jasmine’s breasts before allowing her to dress.

b. the trial court could properly impose consecutive sentences

Defendant cites *People v. Jones* (2001) 25 Cal.4th 98, 106-107 to support his argument that consecutive sentences should not have been imposed as to counts 2 and 3. However, in *Jones*, the California Supreme Court found the defendant was improperly sentenced to a life term pursuant to section 667.61, subdivision (g), as to each count of

⁷ Section 667.71, subdivision (d) states: “This section shall apply only if the defendant’s status as a habitual sexual offender is alleged in the information, and either admitted by the defendant in open court, or found to be true by the jury trying the issue of guilt or by the court where guilt is established by a plea of guilty or nolo contendere or by trial by court sitting without a jury.”

forcible rape, oral copulation, and sodomy where the offenses against one victim occurred during a single occasion. In addition, the court imposed *additional* terms pursuant to section 667.6, subdivision (d), for *each* separate sex offense. (*People v. Jones, supra*, 25 Cal.4th at pp. 102-103.) The *Jones* court held: “[G]iven the harshness of the punishment dictated by Penal Code section 667.61, subdivision (g) . . . the Legislature intended to impose no more than one such sentence per victim per episode of sexually assaultive behavior. [Citation.]” (*Id.* at p. 107.)

Only one sentence was imposed in this case pursuant to section 667.61, subdivision (g), as to the forcible rape count. However, we agree with the Attorney General that the trial court could properly utilize the terms of section 667.6, subdivision (d), to impose a consecutive sentence as to the lewd conduct count as well as the criteria set forth in California Rules of Court, rules 4.421 and 4.425. In this case, only a single section 667.61 subdivision (a) 25-year-to-life sentence was imposed. The 25-year-to-life minimum term was then tripled pursuant to sections 667, subdivision (a)(2)(A)(i) and 1170.12, subdivision (a)(2)(A)(i). The section 667.61 subdivision (a) sentence was imposed as to the rape count. The lewd conduct sentence, only 25 years to life, was imposed pursuant to section 667, subdivision (a)(2)(A)(i) and 1170.12, subdivision (a)(2)(A)(i). The trial court found that: the forcible rape and forcible lewd acts were committed on separate occasions; that between the commission of one sex crime and another, defendant had a reasonable opportunity to reflect upon his or her actions; and nevertheless defendant resumed sexually assaultive behavior. In addition, the trial court found the victim was particularly vulnerable. In *People v. Coelho* (2001) 89 Cal.App.4th 861, 886, our colleagues in the Court of Appeal for the Sixth Appellate District held: “Former rule 425 (now rule 4.425) sets forth the criteria affecting the decision to impose consecutive rather than concurrent terms, and these criteria included whether or not ‘(1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.’ The rule

also incorporates as criteria “[a]ny circumstances in aggravation of mitigation” with certain exceptions not applicable here. (Former rule 425(a) & (b); see former rules 421 & 423 [now rules 4.421 & 4.423] [listing circumstances in aggravation and mitigation].)” The trial court’s finding that the victim was particularly vulnerable constitutes a rule 4.421 factor in aggravation. Based on the victim’s testimony, the trial court concluded defendant “had time to think about the additional crime before committing it,” thereby satisfying the factor that the crimes were predominantly independent of each other, involved separate acts of violence and were committed at different times of rule 4.425.

Finally, we also disagree with defendant’s assumption that the trial court “felt it had no discretion to impose concurrent sentences” If the record established that the trial court believed consecutive sentences were mandatory rather than discretionary under any statutory scheme, a remand would be appropriate. (See, e.g., *People v. Deloza* (1998) 18 Cal.4th 585, 590-591; cf. *People v. Banks* (1997) 59 Cal.App.4th 20, 23.) However, the trial court understood its discretion and exercised it within the scope of allowable authority.

2. Enhancements pursuant to section 667, subdivision (a)

Defendant argues and respondent concedes that the trial court improperly sentenced him to three five-year enhancements pursuant to section 667, subdivision (a)(1) for three prior serious felonies that were not brought and tried separately. We agree. Case No. A041114 involved three separate felonies brought and tried together. (§ 667, subd. (a)(1); see also *People v. Wiley* (1995) 9 Cal.4th 580, 584-585; *In re Harris* (1989) 49 Cal.3d 131, 136.) Therefore, the 15-year sentence enhancement for those prior offenses is reversed. Defendant may only receive a single section 667, subdivision (a) 5-year enhancement. The abstract of judgment must be corrected to reflect only a single five-year enhancement pursuant to section 667, subdivision (a)(1).

F. The lewd conduct section 12022.3 enhancement

As noted previously, defendant was convicted of committing a forcible lewd act upon a child within the meaning of section 288, subdivision (b)(1). Also, as to that count, the jury found that defendant used a deadly weapon within the meaning of section 12022.3, subdivision (a). Because the rape and lewd conduct counts have resulted in indeterminate terms, there must be full term sentencing on enhancements. (*People v. Felix* (2000) 22 Cal.4th 651, 656 [“[T]he court should impose the full term for enhancements attached to indeterminate terms”] see *People v. Bracamonte* (2003) 106 Cal.App.4th 704, 710-711.) But when sentencing defendant, the trial court made no reference to the section 12022.3, subdivision (a) deadly weapon use finding.

The trial court had a duty to impose sentence in accord with the law. (§ 12; *People v. Bradley* (1998) 64 Cal.App.4th 386, 390-391; *People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1588-1589; *People v. Floyd P.* (1988) 198 Cal.App.3d 608, 612; *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 537, overruled on another point in *People v. Norrell* (1996) 13 Cal.4th 1, 7, fn. 3; *People v. Santana* (1986) 182 Cal.App.3d 185, 191-192.) The failure to impose or strike an enhancement is a legally unauthorized sentence subject to correction for the first time on appeal. (*People v. Irvin* (1991) 230 Cal.App.3d 180, 190; see *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1311.) The trial court did have the legal authority to strike the section 12022.3, subdivision (a) deadly weapon finding pursuant to section 1385, subdivision (a). (*People v. Thomas* (1992) 4 Cal.4th 206, 209-210 [“the power to dismiss an ‘action’ under section 1385 includes the power to dismiss or strike an enhancement”]; *People v. Morales* (2003) 106 Cal.App.4th 445, 456-457; *People v. Bradley, supra*, 64 Cal.App.4th at p. 400, fn. 5; *People v. Santana, supra*, 182 Cal.App.3d at pp. 190-191, fn. 6; *People v. Sutton* (1985) 163 Cal.App.3d 438, 445-446, disapproved on another point in *People v. Equarte* (1986) 42 Cal.3d 456, 465, fn. 12.) However, the trial court neither imposed nor exercised its section 1385, subdivision (a) discretion. The trial court never orally stated that it was exercising its section 1385, subdivision (a) discretion. Nor do the clerk’s minutes reflect

the trial court ever exercised its section 1385, subdivision (a) discretion or contain the mandatory statement of reasons for such an order. (See *People v. Williams* (1998) 17 Cal.4th 148, 159; *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 531.) Accordingly, the cause is remanded with directions that the trial court impose or strike the remaining section 12022.3, subdivision (a) enhancement. (*People v. Jordan* (1986) 42 Cal.3d 308, 319, fn. 7; *People v. Bradley, supra*, 64 Cal.App.4th at p. 400, fn. 5.)

G. Correction of Abstract of Judgment

Following our request for further briefing, the parties agree that the abstract of judgment must be corrected to reflect: a \$2,000 fine rather than a \$200 fine was imposed by the trial court pursuant to section 1202.4, subdivision (b) ; the trier of fact convicted defendant of kidnapping to commit rape pursuant to Penal Code section 209, subdivision (b)(1) rather than kidnapping to commit robbery and defendant's 25-year-to-life sentence imposed for kidnapping is stayed pursuant to Penal Code section 654, subdivision (a). California Rules of Court, rule 12(c)(1) provides in pertinent part, "[O]n its own motion, the reviewing court may order correction . . . of any part of the record." (See also *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188.) As a general rule, the record will be harmonized when it is in conflict. (*People v. Smith* (1983) 33 Cal.3d 596, 599; *In re Evans* (1945) 70 Cal.App.2d 213, 216.) The Court of Appeal has held, "[A] discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*People v. Williams* (1980) 103 Cal.App.3d 507, 517, quoting the Los Angeles Superior Court Criminal Trial Judge's Bench Book at page 452; see also § 1207; *In re Daoud* (1976) 16 Cal.3d 879, 882, fn. 1 [trial court could properly correct a clerical error in a minute order *nunc pro tunc* to conform to the oral order of that date if there was a discrepancy between the two].)

IV. DISPOSITION

Two of the 3 five-year sentence enhancements imposed pursuant to Penal Code section 667, subdivision (a)(1) are reversed. The cause is remanded to allow the trial court to exercise its sentencing discretion as to the Penal Code section 12022.3, subdivision (a) deadly weapon use enhancement discussed in the body of this opinion. The clerk of the superior court is directed to prepare and deliver to the Department of Corrections an amended abstract of judgment, which reflects: the imposition of only 1 Penal Code section 667, subdivision (a)(1) 5-year enhancement; the \$2,000 fine imposed pursuant to Penal Code sections 1202.4, subdivision (b); the correct offense is kidnapping to commit rape; and the 25-year-to-life sentence imposed and stayed pursuant to Penal Code section 654, subdivision (a) as to the aggravated kidnapping count. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

GRIGNON, J.

ARMSTRONG, J.