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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL EDWARD STEVENS,

Defendant and Appellant.

A130778

(Contra Costa County
Super. Ct. No. 5-090689-1)

A jury convicted defendant Michael Edward Stevens of multiple offenses arising from the sexual assaults of four prostitutes. Defendant contends the trial court committed prejudicial error in denying his motion to sever charges involving two of the victims, and in ruling on a series of evidentiary, instructional, and sentencing issues. We find no prejudicial error, and affirm the judgment.

I. BACKGROUND

A. Charges

Defendant was charged by amended information filed on May 10, 2010, with 22 counts of sexual and other offenses against four victims. He was charged with three counts of forcible oral copulation (Pen. Code,¹ § 288a, subd. (c)(2); counts 1, 14, and 22), three counts of forcible sodomy (§ 286, subd. (c)(2); counts 2, 17, and 21), and four counts of forcible rape (§ 261, subd. (a)(2); counts 3, 5, 15, and 19) against Jane Does I,

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

III, and IV.² As to these victims, he was further charged with false imprisonment by violence (§§ 236, 237, subd. (a); count 4) against Jane Doe I, two counts of forcible sexual penetration (§ 289, subd. (a)(1); counts 16 and 20) against Jane Does III and IV, and kidnapping for sexual purposes (§ 209, subd. (b)(1); count 13) and second degree robbery (§§ 211, 212.5, subd. (c); count 18) against Jane Doe III. The charges pertaining to Jane Doe II³ were forcible oral copulation in concert (§ 288a, subd. (d); count 6), two counts of forcible sodomy in concert (§ 286, subd. (d); counts 7 and 10), two counts of forcible rape in concert (§ 264.1; counts 8 and 11), forcible sexual penetration (§ 289, subd. (a)(1); count 9), and second degree robbery (§§ 211, 212.5, subd. (c); count 12).

The information further alleged in counts 6 to 18 defendant personally used a firearm (§ 12022.53, subd. (b)), in counts 14 to 17 defendant kidnapped the victim (§ 667.61), and in counts 6 to 12 and 14 to 17 defendant used a deadly weapon (§ 12022, subd. (b)(1)). The information also alleged defendant committed the offenses against multiple victims (§ 667.61) and had served a prior prison term (§ 667.5, subd. (b)).

B. *Prosecution Case*

1. *Jane Doe I*

At 9:00 a.m. on February 2, 2007, Doe I was working as a prostitute on 23rd Street in Richmond. Defendant approached her on the street and asked if she was working. She said yes, and voluntarily got into his car, which he drove to an apartment in Richmond.

Doe I asked for money when they first got to the apartment and defendant gave her \$40. When she reached for the money, he identified himself as a police officer and began searching her, and told her she would be arrested. He started talking into his cell phone as if it was a walkie-talkie. Defendant asked her if she had any money and went into her purse and took money.

Defendant then told Doe I he wanted her to perform oral sex on him. His demeanor changed and he began acting angry, which frightened her. He led her to a back

² Hereafter sometimes referred to as Doe I, Doe III, and Doe IV.

³ Hereafter sometimes referred to as Doe II.

bedroom, saying, “Bitch, get back there.” He loudly and angrily told her he would kill her and put her body in the trunk. Defendant ordered her to take off her clothes. He pushed her to the ground and forced her to perform oral sex. She complied out of fear. He was slapping her on her face and head, and he pulled her wig off her head. Defendant then raped her vaginally and anally. As he was raping her, defendant repeatedly struck her on her buttocks with a belt. She was crying and yelling for him to stop during the rapes.

When he was finished, defendant told Doe I not to move and he went to the bathroom. She dressed and went to the front door, but could not open the multiple locks on the door. A photograph of the apartment door showing the multiple locks was put in evidence. Defendant confronted her at the door and angrily told her she could either have sex with him one more time or he was going to kill her. He pushed her back into the bedroom, ordered her to remove her clothes, and again had vaginal sex with her.

Defendant ordered her to take a shower, which she did hastily. He drove her back to the Civic Center Motel where she was staying, driving in a “crazy” fashion, speeding, and running stop signs. At the motel, Doe I saw defendant had her room key. She walked away quickly and distanced herself from defendant. She started calling for help, but when no one responded, she walked to the Richmond Police Department, about one block away.

Elizabeth LaGorce, a sexual assault response team (SART) nurse, examined Doe I on February 2, 2007. Doe I told her she thought defendant had used Vaseline, and that she had showered after the attack. She complained of soreness and a burning pain on urination. She stated she had been hit by a belt and the nurse observed swelling, redness, tenderness, and a large bruise on Doe I’s right thigh. Using a dye that reveals injuries not visible to the naked eye, LaGorce detected an injury to Doe I’s posterior fourchette, at the base of the vaginal area, and a small tear at the top of the anus. Over defendant’s objection, LaGorce testified she had determined as part of her duties as a SART nurse that the exam results were consistent with Doe I’s stated history of being sexually

assaulted. On cross-examination, LaGorce conceded the results were also consistent with consensual sex.

2. Jane Doe II

Doe II was on 23rd Street in Richmond at about 5:30 a.m. on December 31, 2008 looking for powder cocaine. She saw defendant parking his car, and she walked toward it. She was hoping he might know where to get cocaine. The two talked, and he came across to her as being nice and intelligent and harmless. He told her he was a police officer but was not working at the time. He invited her to get into his car and she did. Doe II told defendant she wanted to tell a friend who had come there with her that she was leaving, but he drove off without letting her speak to her friend. He was driving in a crazy manner at a fast speed “like the road was his.” She warned him he would get a ticket, but he told her not to worry because he was a police officer. He showed her a badge and a handgun.

Defendant took Doe II to a dark, deserted area near a warehouse. After parking the car, defendant pulled down his pants and told Doe II to perform oral sex on him. She said no, and observed the trunk of the vehicle open. A Black male adult, approximately 21 years old, walked to the passenger side of the car where she was seated. He pulled out a black handgun and pointed it at Doe II. He cocked the weapon, making a loud sound. Defendant told Doe II she better get busy sucking him because she was making the second man mad. She complied because she thought she was going to be shot. She had her knees on the passenger seat as she performed oral sex on defendant. The second man opened the passenger door and pulled off Doe II’s boots. He penetrated her anus with his penis and inserted and removed his penis a number of times until he ejaculated into her anus. The two men switched sides, with defendant inserting his penis into her anus an unknown number of times and ejaculating, while she performed oral sex on the second man who was now seated in the driver’s seat. The men continued to switch sides and positions, and both men also penetrated and ejaculated into her vagina.

At some point, defendant took her into the backseat and choked her with both hands while penetrating her vagina and anus. Defendant also put his fingers in her vagina

and his mouth on her breasts. He pulled off Doe II's necklace, which she never got back. The second man also took some of Doe II's jewelry, and went through her purse. After the sexual assault, defendant took Doe II's driver's license from her purse, pulled up the collar of his coat like he was a police officer talking into a radio microphone, and read off some of her information. Defendant and the other man jumped in the car, drove off with her purse and cell phone, and left her standing on the street. Someone coming to work at a warehouse gave her a ride to her friend's house. She reported the events to the police later that day.

SART nurse, Katherine Stidwell, examined Jane Doe II on the night of December 31, 2008. She narrated the sexual assault to Stidwell consistent with what she told police and testified to at trial. She complained of anal and genital pain. Stidwell found petechiae—small, ruptured blood vessels—at the back of Doe II's palate, indicating the application of force in the mouth. She found injury to the posterior fourchette between the hymen and the anus, and around the hymen. She also found swelling of the anus. She determined the physical examination was consistent with the oral history given to her by Doe II.

3. *Jane Doe III*

Doe III testified American Sign Language was her first language and she later learned to speak and read English. She can read lips in certain circumstances and uses hearing aids to help her hear. She testified through a certified deaf interpreter.

Doe III was sitting at a bus stop on Telegraph Avenue in Oakland waiting for a bus at about 4:00 a.m. on January 29, 2009. Someone came up behind her, grabbed her, choked her by the neck, and forced her into a tan four-by-four vehicle. The assailant, who she identified as defendant, put her in the front passenger seat, and drove onto the freeway. She told him she wanted to get out, but he ignored her and opened his pants, pulled out his penis, and forced her to give him oral sex while the car was moving. She tried to stop but he kept pulling her hair and pushing her head down.

Defendant got off the freeway in Richmond and drove to a dark area with no one around. He ordered her to take her clothes off, and she said she did not want to and

resisted. Defendant started to grab and tear at her clothes, until he tore them off and threw them into the backseat. Defendant took out a condom, put it on, and forced Doe III's mouth back onto his penis. He put his fingers in her mouth, vagina, and anus, and then forced his penis into her vagina and her anus. He grabbed her "really hard" on the arm, slapped her twice, choked her, and told her not to move. He showed her a gun and threatened to shoot her.

After ejaculating, defendant looked through her pockets, and took her hearing aid, necklace, and make-up. He threw the condom out of the car, and then got out, went to the passenger side, and ordered Doe III out of the car. He gave Doe III her clothes and drove away.

Doe III walked to a nearby gas station, told a man she saw there that she had been raped, and asked him to call the police. A police officer had her taken to the hospital in an ambulance. A paramedic dispatched to the gas station testified Doe III was upset, crying, and visibly disturbed when he arrived. She told him she had been raped and had pain in her rectal area. Doe III's statement to the police several hours after the incident was largely consistent with her trial testimony about what had happened.

On cross-examination, Doe III admitted convictions for prostitution in the San Pablo Boulevard area of Oakland in 2004, 2007, 2008, and 2009.⁴ She also admitted she had taken methadone and heroin the day before the alleged rape, although she had denied using drugs to the SART nurse.

Anamaree Rea conducted the SART examination on Doe III on January 29, 2009. She described the events to Rea consistently with her statement to the police. The nurse found evidence of injuries she testified were consistent with Doe III's history of assault. Rea admitted on cross-examination that Doe III's injuries were not uncommon in consensual sex.

⁴ The prosecutor conceded in closing argument Doe III's story that she was waiting for a bus to go to a job at Safeway was untrue.

4. Jocelyn B. Incident

City of Richmond 911 dispatcher, Monica Henn, testified she received a transferred phone call from the California Highway Patrol at 2:06 a.m. on February 1, 2009. The caller identified herself as “Jocelyn [B.]” Henn dispatched officers to Castro Street at Mills East in Richmond. A CD of the call was played for the jurors.

In the call, Jocelyn stated a man had met her on San Pablo Avenue at 30th Street in Oakland, and he had taken her to Castro Street in Richmond. Jocelyn also stated the man told her he wanted to proposition her, and when she told him, “[Y]ou have to proposition me another way,” he responded, “Bitch you gonna do what I say do [*sic*]!” She reported he was trying to “hump” her, but she was able to jump out of the car. He was driving a new, silver BMW. Jocelyn told the operator, “He has my hair in his car.” Jocelyn did not know the area and was trying unsuccessfully to find street signs for several minutes until she reported she was at Chevron Way and Mills Street East.

5. Jane Doe IV

Doe IV was walking on San Pablo Avenue at 27th Street coming home from her sister’s house at about 3:20 a.m. on February 1, 2009 (about one and a half hours after Jocelyn’s 911 call). She thought walking on San Pablo, which was busy and well-lighted, would be safer than taking backstreets. She had been at a club with her sister and two other women where she had consumed alcohol, marijuana, and Ecstasy. She felt the effects of the drugs but was not “falling down intoxicated.”

As she was walking, she noticed defendant in a “nice silver BMW.” He had driven past her two times and then stopped. She thought he was attractive and walked over to his car and conversed with him. He was nicely dressed and seemed well-mannered and nice. Doe IV got into defendant’s car. Defendant said his name was “Adari,” told her he was in culinary school, and spoke about cooking. Doe IV felt comfortable and she agreed to have sex with defendant.

Defendant drove “real fast” toward the freeway. She was nervous about not being able to jump out of the car and she was not comfortable about leaving Oakland with him. She asked him where he was going, and he told her he was going to “his area.” He got

off the freeway in Richmond, where they stopped at a gas station. Defendant asked Doe IV to buy condoms, which she did. She was expecting they would have sex at his place in Richmond.

When she got back in the car, defendant's demeanor changed, and he "got real mean" and told her, "I'm a[n] evil person." He took her to a secluded area where there were no houses and all the businesses were closed. He became very aggressive, cursing at her, and ordering her to take her clothes off. He said, "Shut the fuck up, Bitch, you're in my area now." Doe IV felt very angry and scared.

After Doe IV took off her clothes, defendant made her climb over the front seats into the backseat of the vehicle. Doe IV became even more scared when she saw a piece of fake hair on the backseat floorboard. It was a type of hair piece that could not easily be removed just by pulling on it. Special materials were required and a person would not choose to remove a hair piece like that inside a car.

Defendant got out of the car, then got into the backseat and forced Doe IV to have oral sex with him. He forced her head down hard. The weight of his forearm and penis was choking her and causing pain in her neck. She was gagging and crying. Defendant told her to get on her back and he pinned her so she could not move, with her knees up to her shoulders. He put his fingers and his penis into her vagina. He did what he wanted to do without asking her. She did not like what he was doing, and was in pain and crying. He put his penis into her anus. She was telling him to please stop, but he would not. At some point he told her he had a gun under the seat. She was scared and began praying.

Doe IV realized protesting and pleading with defendant was not working so she decided to act like she was enjoying it, and said to defendant, "Oh please, fuck me harder." He immediately reacted, jumping up and pulling her out of the car. He "got real belligerent and mad." At that point, Doe IV was wearing only boots; her clothes, purse, iPod, and money that had fallen out of her boots were in the car. When she asked defendant if she could retrieve them, he refused. After defendant pulled her out of the car, he got on his cell phone and started talking like he was a police officer "calling something in." She begged him not to kill her, and he laughed, got back in his car, and

drove off, leaving her naked except for her boots. She found a gas station, and got someone to call the police while she waited in a “porta-potty.” A witness present at the gas station Doe IV ran to testified she was crying, very upset, asking for help, and saying she had been raped. A paramedic called to the scene gave a similar description of Doe IV’s emotional state. Police later found Doe IV’s clothes in the street. Her iPod was found in the silver BMW SUV defendant was driving when he was arrested on February 3, 2009.

Doe IV’s statements about the assault to a police officer who spoke to her immediately after the incident, and to Anamaree Rea, the SART nurse who examined her later that morning, were consistent with her trial testimony. Rea testified the results of her examination of Doe IV’s injuries were consistent with Doe IV’s stated history. Rea admitted she had seen similar injuries in individuals after consensual sex.

On cross-examination, Doe IV admitted she had been convicted of prostitution on San Pablo Avenue in 2006, of theft in 2007, and of possession of drugs in 2008, and had also been arrested for prostitution in 2008 and theft in 1995. She also admitted testifying at the preliminary hearing she may have consented, at least initially, to oral and vaginal sex with defendant, but not to anal sex, which she had never engaged in before the incident.

6. Other Prosecution Evidence

DNA evidence conclusively tied defendant to each of the four victims. A photograph taken from defendant’s cell phone dated February 2, 2007, showed him engaging in oral copulation with Doe I. Defendant’s former girlfriend testified she let him drive her silver BMW SUV in early 2009. Telephone records established defendant had texted her on the afternoon of December 31, 2008 from Doe II’s cell phone number.

B. Defense Case

Defendant testified, admitting all of the sex acts alleged by all four victims, but claiming all were consensual. Doe I approached him on the street. He invited her to his apartment for sex, gave her \$40, and took a photograph of her performing oral sex on him. He also had consensual vaginal and anal sex with her. They engaged in vaginal sex

a second time after he showered, again consensually. He was joking when he pretended to be a police officer. Doe I wanted him to pay her more money and she became angry when he said he would not give her more money until a later time. When he found out the next day the police were looking for him, he voluntarily surrendered and spoke to them about the incident.

Defendant was with his two nephews, age 13, on December 31, 2008. They asked him if he could help find them a prostitute. The two boys were seated in the car with defendant that night when Doe II approached their car. Defendant assumed she was a prostitute, and told her he and the boys wanted to have sex with her. She got in the car and asked if there was somewhere he could take her. He joked about being a cop. They drove to a secluded spot in Richmond because he did not want himself or his underage nephews to be seen having sex with a prostitute. He offered to pay her \$150 to have sex with him and both of his nephews. He had oral and vaginal sex with her, and each of his nephews had sex with her. He paid her only \$70, refused to drive her back to where he had met her in Richmond, and refused her request to help her find powder cocaine. She was angry with him when they dropped her off in North Richmond.

Doe III approached defendant's car when he had pulled over to make a cell phone call. Using hand signals, she asked him if he wanted oral sex. They agreed to have sex for money. Defendant told her to get into the car and drove her to the same area of Richmond where he had driven Doe II. He gave Doe III \$30, and they proceeded to have oral, vaginal, and anal sex. Doe III did nothing to indicate she objected to the sex. When they were done, she got of the car with her pants and underwear off, and just stood there. Defendant was saying, "let's go," and he retrieved her pants, handed them to her, and told her to get in the car. He warned her he was going to leave and eventually drove off when she made no move to get into the car.

Doe IV also approached defendant's car when he pulled over in Oakland to make a phone call, and struck up a conversation with him. He told her to get in the car because he did not want police to pass by and think there was something going on. The conversation turned sexual and he asked her if she was willing to come with him to

Richmond. She was agreeable and he assumed they were going to have sex. On their way to Richmond, they got off the freeway and he gave her a \$100 bill and a \$20 bill to buy condoms, telling her the \$100 bill was for her. They headed to the same spot he had taken Does II and III. They got in the backseat and had oral, vaginal, and anal sex. After he ejaculated, Doe IV's mood changed and she started crying and clenching her jaw. He had seen similar symptoms with people who had taken Ecstasy. She started asking why they were there, and then stood outside the car and would not get back in. She urinated on herself. When she refused to respond to him, defendant left, and he saw Doe IV was just standing there with her clothes off.

Defendant testified he did not know anything about the woman on the 911 tape played for the jury. He did not hit any of the victims, or pull a gun on, rape or sodomize anyone.

C. Verdicts, Sentencing, and Appeal

The jury found defendant guilty as charged on 14 of the 22 counts. It found him guilty of all counts charged as to Jane Doe I. As to Jane Doe II, it found him guilty as to all crimes charged except forcible sexual penetration (count 9) and as to that count found him guilty of the lesser included offense of battery. As to Jane Doe III, the jury found him guilty of forcible sodomy and second degree robbery (counts 17 and 18), and of the lesser included offenses of false imprisonment by violence on count 13 (kidnapping for sexual purposes) and battery on count 15 (forcible rape). It found him not guilty of forcible oral copulation (count 14) and forcible sexual penetration (count 16). As to Jane Doe IV, the jury found him guilty of forcible sodomy (count 21) but not guilty of forcible sexual penetration (count 20). The jury deadlocked and the court declared a mistrial on the forcible rape and forcible oral copulation charges (counts 19 and 22).

The jury found true the multiple victim enhancement allegations under section 667.61, but the other enhancement allegations were found not true with the exception of the prior prison term enhancement on which defendant waived a jury trial.

The trial court sentenced defendant to consecutive 15-year-to-life terms on counts 1, 2, 3, 5, 6, 7, 8, 10, 11, 17, and 21. The court imposed a consecutive one-year term for

the enhancement under section 667.5, subdivision (b). The total unstayed prison term was 166 years to life in state prison. This timely appeal followed.

II. DISCUSSION

Defendant contends the trial court prejudicially erred and in some instances violated his federal or state constitutional rights by (1) denying his motion to sever the counts involving Does III and IV; (2) admitting evidence of and allowing the jury to consider his propensity to commit sex offenses; (3) admitting evidence of the uncharged act involving Jocelyn B. to prove a common scheme or plan, intent, and the absence of consent; (4) admitting the testimony of two of the SART nurses that their examinations of Does II and IV were consistent with these victims' allegations of nonconsensual sex; (5) giving conflicting pinpoint instructions on the use of the complaining witnesses' prostitution convictions in evaluating their credibility; (6) failing to instruct that engaging in an act of prostitution was a lesser related offense to the charged sex offenses; and (7) imposing a sentence grossly disproportionate to the offenses for which defendant was convicted.

A. Severance Motion

Defendant moved in the trial court to sever each of the four alleged sexual assault incidents on the ground a joint trial would result in unfair prejudice. He argued in part the incident involving Jane Doe III was more inflammatory than the other charges, and evidence of the charges involving Jane Doe IV was weaker than the evidence supporting the charges arising from the other three incidents. The trial court denied the motion, emphasizing the cross-admissibility of the evidence pertaining to the four incidents, and the judicial economy achieved and positive impact on the witnesses and victims of holding a single trial with one jury covering all incidents as opposed to holding separate trials with substantially overlapping testimony and evidence.

There is no dispute all of the alleged incidents and charges meet the statutory requirements for joinder. (See §§ 954, 954.1 [different offenses of the same class of crimes may be tried together]; *People v. Maury* (2003) 30 Cal.4th 342, 395 [assaultive crimes against the person, such as murder and rape, are “ ‘offenses of the same class of

crimes’ ” for purposes of § 954].) Defendant is therefore required to make “a clear showing of potential prejudice” from joinder in order to establish error in denying his motion to sever. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Defendant bears a heavy burden: “[B]ecause consolidation or joinder of charged offenses ordinarily promotes efficiency, that is the course of action preferred by the law. [Citations.] . . . [¶] A trial court’s denial of a motion for severance of charged offenses amounts to a prejudicial abuse of discretion if . . . ‘ [it] ‘ “falls outside the bounds of reason. ” ’ ” [Citation.] . . . ‘The factors to be considered are these: (1) the cross-admissibility of the evidence in separate trials; (2) whether some of the charges are likely to unusually inflame the jury against the defendant; [and] (3) whether a weak case has been joined with a strong case or another weak case so that the total evidence may alter the outcome of some or all of the charges’ [Citations.] ‘The state’s interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence.’ ” (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220–1221 (*Alcala*)).⁵

On appeal, defendant maintains the counts involving Doe III were (1) weak in comparison to those pertaining to Does I and II, and (2) much more inflammatory because Doe III’s deafness made her a “significantly more vulnerable victim.” As evidence for the weakness of the Doe III counts, defendant cites the jury verdicts finding him not guilty of kidnapping for sexual purposes, forcible oral copulation, forcible rape, or forcible sexual penetration as to Doe III.⁶ Regarding Doe IV, defendant relies on the asserted weakness of the case against him as shown by her admission she consented to orally copulate him, her testimony she told him to “fuck me harder” during anal sex, and the fact he was found guilty on only one of the four counts pertaining to Doe IV (forcible sodomy).

⁵ *Alcala* lists a fourth factor that is pertinent only in capital cases.

⁶ They jury did, however, find him guilty of false imprisonment by violence, battery, forcible sodomy, and second degree robbery as to Doe III.

We are not persuaded. The distinctions defendant tries to draw among the victims are unsupported by the record. As an initial matter, in deciding whether the trial court abused its discretion in declining to sever properly joined charges, we “ ‘consider the record before the trial court when it made its ruling.’ ” (*People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*), quoting *Alcala, supra*, 43 Cal.4th at p. 1220.) The eventual jury verdicts were not part of that record. Even if the verdicts could properly be considered, they do not support defendant’s position. The jury did not exonerate him as to any victim. It found he had committed at least one felony sexual offense involving the use of force against each victim. Each such offense was sufficiently serious to qualify for imposition of an indeterminate life term under section 667.61. Although it is undoubtedly true the credibility of each victim was bolstered by the strikingly similar accounts given by the other victims, that fact does not establish one victim’s claim of forcible sex was any weaker than the others. The fact the jury did not reach unanimous verdicts of guilt on all counts as to all victims, if anything, tends to undermine defendant’s argument he was prejudiced by joining weaker with stronger claims. It shows the jury evaluated each count separately based on the specific evidence for and against it, and did not let its guilty verdicts on counts 1 through 12, or the fact Doe III was deaf, control its evaluation of counts 13 through 22.

Nor is defendant’s purported distinction between Doe III and the other victims in terms of the inflammatory nature of the evidence any more persuasive. In all of the attacks, defendant made his victims vulnerable by isolating and physically overpowering them. The attacks each evidenced extraordinary brutality and cruelty. While Doe III was deaf, Doe II was repeatedly assaulted by two men and had a gun pointed at her head, and Doe IV thought defendant was going to kill her and was left on the street without any of her clothes. On this record, it is impossible to say Doe III’s deafness set her victimization apart from the others.

The prosecution argued in opposition to defendant’s severance motion that the joinder of the four incidents in a single trial was justified by their cross-admissibility to

(1) show his propensity to commit sexual offenses (Evid. Code, § 1108);⁷ and (2) prove a common plan and intent, and rebut the defense of consent (Evid. Code, § 1101, subd. (b)).⁸ Cross-admissibility is a highly significant consideration in ruling on a motion for severance: “If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court’s refusal to sever properly joined charges.” (*Soper, supra*, 45 Cal.4th at pp. 774–775.)

While defendant contests the cross-admissibility of evidence of the other charged incidents under Evidence Code section 1108 on constitutional grounds, he acknowledges we are bound by *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), which approved the application of that section in cases like this one. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.) He makes no argument any of the charged incidents were inadmissible under Evidence Code section 1101, subdivision (b). He nonetheless argues evidence concerning his conduct toward Does I and II was not cross-admissible in his prosecution for assaulting Does III and IV because the probative value of such evidence was outweighed by its asserted prejudicial effect of joining the latter, comparatively weak and/or inflammatory cases with the stronger, less inflammatory evidence pertaining to Does I and II. We find no merit in this argument.

For the reasons we have discussed, trying counts 1 through 12 together with counts 13 through 22 did not unfairly prejudice defendant in defending against the former counts. The evidence as to Does III and IV was not comparatively weak nor were the

⁷ Evidence Code section 1108 provides in substance that in a criminal prosecution for a sexual offense, evidence of the defendant’s commission of other sexual offenses is admissible to prove the defendant’s propensity to commit such offenses, unless the probative value of the evidence is found to be substantially outweighed by the probability it will have an undue prejudicial effect or that it is otherwise inadmissible under Evidence Code section 352.

⁸ Evidence Code section 1101, subdivision (b) allows the admission of evidence that a defendant committed another offense “when relevant to prove . . . intent [or] . . . plan” and, in a prosecution for an unlawful sexual act, whether the defendant “did not reasonably and in good faith believe that the victim consented.”

Doe III facts uniquely inflammatory. On the other hand, evidence concerning the 2007 and 2008 offenses, had considerable probative value as to the two 2009 offenses, and vice versa—a vital part of the balancing test defendant entirely omits from his analysis. The victims described strikingly similar conduct. All of the victims were prostitutes. He picked them up on the street and drove them to a distant location in Richmond, where help was unavailable. At some point in the interaction, he would become angry and abusive. He would engage in forceful sex involving choking or other rough treatment. He always proceeded from oral to vaginal to anal sex. He stole money or property from each of them. With Does I, II, and IV, he started out being nice and polite to lure the women into his car. In all three of these incidents, he also pretended to be a police officer,⁹ and drove his car in a crazy fashion. He abandoned Does II, III, and IV at the scene of the rapes. Does II, III, and IV all reported defendant showed them a gun or threatened to use a gun. The accumulation of these four very consistent accounts of rape by women with whom defendant claims to have had only consensual sex self-evidently enhances the credibility of the victims and casts doubt on the defense of consent. Four such accounts are more probative as to the relative credibility of the victim and the defendant than two or even three such accounts would be.

Based on the cross-admissibility of the four incidents, the substantial convenience for the court and the witnesses, the judicial economies achieved by trying the cases together, and the lack of undue prejudice to the defendant, the trial court did not abuse its discretion in denying defendant's motion for severance.

B. Propensity Evidence

Defendant contends admission of evidence of the four charged sexual offenses and the Jocelyn B. 911 recording under Evidence Code section 1108 to show he had a propensity to commit sexual offenses violated his federal constitutional rights to due

⁹ He left out the police officer act with Doe III, probably because her deafness would have made it difficult to pull off.

process and equal protection. He maintains the Jocelyn B. recording was also inadmissible because it did not constitute evidence of any sexual offense.

As noted earlier, Evidence Code section 1108 generally authorizes admission of evidence of a defendant's commission of other sexual offense to prove the defendant's propensity to commit such offenses. Section 1108 was upheld against a due process challenge in *Falsetta, supra*, 21 Cal.4th at pages 912–922. *Falsetta* also cited with approval the discussion in *People v. Fitch* (1997) 55 Cal.App.4th 172, 184 rejecting an equal protection challenge to Evidence Code section 1108. (*Falsetta*, at p. 918.) We follow *Falsetta* and *Fitch* and reject defendant's constitutional challenges to Evidence Code section 1108. (See also *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [rejecting equal protection challenge to § 1108 “[f]or the reasons best expressed in *Fitch*, which were endorsed in *Falsetta*”].)

In any event, because evidence of the charged sexual offenses was also admitted under Evidence Code section 1101, subdivision (b)—which defendant does not challenge—its admission under section 1108, even if erroneous, would be harmless under the standards of *People v. Watson* (1956) 46 Cal.2d 818 or *Chapman v. California* (1967) 386 U.S. 18.

Defendant also maintains the admission of Jocelyn B.'s 911 call under Evidence Code section 1108 was error because the recording does not show the commission of any sexual offense but, at most, only battery. We disagree. The tape shows an attempted sexual assault of Jocelyn B. under Penal Code section 220.¹⁰ She states on the tape that the perpetrator, shown inferentially by other evidence to be defendant, had tried to proposition her and, when she refused, had said, “Bitch, you gonna do what I say do [*sic*],” and tried to “hump” her, before she was forced to jump out of the car in an unfamiliar neighborhood in order to escape him. She also told the operator, “He has my hair in his car.” This provides substantial evidence of an attempted sexual assault

¹⁰ Penal Code section 220 makes it a crime to “assault[] another with intent to commit mayhem, rape, sodomy, [or] oral copulation”

especially in view of the light thrown on defendant's intentions by the evidence he had sexually assaulted three other women in quite similar circumstances when the victims had been unable to escape from him. (See *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1418 [necessary specific intent may be inferred from the circumstances of the offense].)

Even assuming for the sake of analysis admission of the 911 tape under Evidence Code section 1108 was error, the error would be harmless in any event because, as discussed *post*, the evidence was also properly admitted under section 1101.

C. Admission of the 911 Tape under Evidence Code Section 1101

The trial court admitted the 911 tape under Evidence Code section 1101, subdivision (b), based on its probative value as evidence of a common plan or scheme and of defendant's intent, which it found to outweigh any potential prejudicial effect. The court pointed out that the Jocelyn B. incident occurred two hours before the incident described by Doe IV and the two incidents began in virtually the same neighborhood in Oakland and ended in the same poorly lit, lightly traveled warehouse district in another city some miles away. The two incidents start out as consensual encounters and ended, according to the prosecution evidence, as nonconsensual. In both, the perpetrator is driving a silver BMW vehicle. Jocelyn tells the operator her hair was left in the car, and Doe IV sees a woman's hairpiece in defendant's car. The trial court found the Jocelyn B. incident, as evidenced in the tape, to be "corroborative and . . . very probative evidence . . . the jury is entitled to hear [as the fact-finders] and make of it what they will."

Defendant insists the Jocelyn B. incident was not particularly probative because he was never identified or charged as the perpetrator, and there was nothing particularly unusual or distinctive about a prostitute getting into a car in the vicinity where the Jocelyn B. and Doe IV incidents began. He notes Jocelyn B. was driven to a location three miles away from where he drove Doe IV—two locations assertedly not so close together as to justify the inference he was involved in the Jocelyn B. incident. Defendant ignores the many circumstances linking both incidents to him: the proximity in time between them during early morning hours when there is relatively little traffic, the fact both victims mentioned a silver BMW which defendant was admittedly driving at the

time, the conjunction of Jocelyn B.'s statement she left her hair in the silver BMW and Doe IV's observation of a hairpiece in the backseat of defendant's silver BMW less than two hours later, and the fact both events started in Oakland and ended in deserted areas of the city in which defendant happened to reside at the time. These common threads were more than sufficient to establish the probative value of the 911 tape under Evidence Code section 1101, subdivision (b).

Defendant nonetheless contends the evidence should have been excluded under Evidence Code section 352 because its potential to create undue prejudice outweighed its probative value. He asserts the Jocelyn B. incident "bore no substantial similarities to the charged crimes," because there was no allegation he pretended to be a police officer, told her he had a gun, or forced her to perform oral, vaginal, or anal sex. According to defendant, admission of the evidence also created a substantial danger of confusing the jury by injecting extraneous issues such as whether the uncharged incident was a sexual offense at all and whether he was involved in it.

The trial court did not abuse its discretion under Evidence Code sections 1101 or 352. It is self-evident why defendant did not engage in all of the conduct and crimes in the Jocelyn B. incident he exhibited in the other incidents: the crime was interrupted by Jocelyn's escape. That does little to diminish its probative value in showing his common modus operandi and criminal plan and intent in all of the incidents. On the prejudice side, there was little danger of confusing the jury. The jury had no need to decide whether he completed a sexual offense in the Jocelyn B. incident. That was an issue, if at all, only for the court and only in determining whether the evidence was admissible under section 1108. His involvement or non-involvement in the Jocelyn B. incident was left to the jury, but there was little risk of confusing jurors with that question given the minimal amount of trial time taken up by playing the 911 tape. Defendant was free to argue the Jocelyn B. incident had nothing to do with him. He offers no concrete evidence he was prejudiced by having to do so.

The trial court did not abuse its discretion in admitting the 911 tape under Evidence Code section 1101, subdivision (b).

D. Testimony of SART Nurses

Defendant challenges his convictions on the counts arising from the Doe II and Doe IV incidents on the grounds the court erred in allowing SART nurses Stidwell and Rea to “impermissibly corroborate[] the otherwise unreliable testimony of the complaining witnesses in the guise of expert opinion testimony.” He maintains the nurses’ testimony that their examinations of the patients were “consistent” with the patients’ histories was beyond the scope of their expertise, and amounted to improper opinion testimony that defendant sexually assaulted the patients.

Stidwell was questioned at length about her training and experience. She had been a registered nurse for 43 years and a SART nurse for 10 years. She described the training required to become a SART nurse, which included four days of classes, conducting 10 pelvic examinations, and extensive oversight by more experienced examiners. She was certified by the International Forensic Nurses Association to conduct examinations in adult and adolescent cases. As part of her ongoing training as a SART nurse, Stidwell took many hours of additional course work and attended professional conferences and trainings. She took courses on sexual assault examination evidence collection techniques and documentation, attended 35 hours of forensic examiner training, and completed more than 100 hours of other training and review courses relating to her work.

Anamaree Rea, the SART nurse who examined Doe IV, had been a licensed vocational nurse at the Contra Costa Regional Medical Center for over 26 years, and had conducted over 1,000 SART exams. She had completed the two-week sexual assault forensic examination and collection course sponsored and approved by the California Department of Justice, as well as more than 100 hours of other course work and training pertaining to her SART work. She had been qualified on seven prior occasions as an expert witness in forensic examination of female genitalia and sexual assault examination.

As an initial matter, defendant did not preserve his current objection to the testimony of Stillwell and Rea. Before trial, defendant’s trial counsel merely stated she wanted to see some foundation laid if the nurse was going to testify her examination of

the patient was consistent or inconsistent with the history reported by the patient. She made no objection when Stillwell and Rea were asked about that subject after establishing their qualifications, training, and experience as SART nurses. Defendant has accordingly forfeited his objections to this testimony. (Evid. Code, § 353, subd. (a); *People v. Gutierrez* (2008) 28 Cal.4th 1083, 1139–1140.)

Defendant’s objection fails on its merits in any event. Our review of trial court determinations with respect to expert opinion evidence is deferential: “Where expert opinion evidence is offered, much is left to the discretion of the trial court. [Citation.] The trial court is given wide latitude in determining the qualifications of an expert. That determination will not be disturbed on appeal except for a manifest abuse of discretion, i.e., where ‘ “ ‘the evidence shows that a witness *clearly lacks* qualification as an expert’ ” ’ [Citation.] An individual is qualified to testify as an expert ‘if he [or she] has special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates.’ ” (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1295 (*Mendibles*), disapproved on other grounds in *People v. Soto* (2011) 51 Cal. 4th 229, 248, fn. 12.)

Stillwell and Rea testified they were licensed nurses with extensive training and experience in performing SART examinations. There was no dispute both SART nurses were qualified as expert witnesses in the area of sexual assault examinations. The statute establishing a training center for SART and other forensic examinations provides that the medical personnel qualified to perform SART examinations include nurses, and that “[t]o ‘perform a medical evidentiary examination’ means to evaluate, collect, preserve, and document evidence, *interpret findings*, and document examination results.” (§ 13823.93, subd. (a)(2), italics added.) “[T]he diagnosis of sexual abuse or rape from the observation of certain marks or scarring is nothing new.” (*Mendibles, supra*, 199 Cal.App.3d at p. 1295.) In *People v. Rance* (1980) 106 Cal.App.3d 245, 254, the Court of Appeal held an emergency room nurse with sufficient experience examining wounds could render the opinion in a sexual assault case that the victim “had physical violence put upon her by someone else.” Therefore, even assuming defendant had not

forfeited the issue, the trial court did not abuse its discretion by allowing the testimony to which he now objects.

Defendant also complains the nurses should not have been allowed to recite the histories given to them by the complaining witnesses. He cites *People v. Dean* (2009) 174 Cal.App.4th 186, in which the Court of Appeal observed that if an expert is allowed to testify as to the details of inadmissible hearsay reports he or she relied on in forming an opinion, the jury might improperly consider such testimony as independent proof of the facts described in the reports. (*Id.* at pp. 196–197.) But the trial court has wide discretion over the questioning of experts, including the discretion to weigh the probative value of testimony recounting hearsay statements upon which they relied against the risk the jury might improperly consider it as independent proof of the facts recited therein. (*Id.* at p. 199, quoting language to that effect from *People v. Gardeley* (1996) 14 Cal.4th 605, 619.) Here, the statements of Doe II and Doe IV to their SART nurses were probative as prior consistent statements, just as were their initial statements to police. Moreover, defendant interposed no objection to the nurses’ testimony about these statements. The trial court therefore did not abuse its discretion in allowing it.

Any assumed error would be harmless in any event. The nurses acknowledged they were not present at the scene of the events described and did not know whether the patients were telling them the truth or not. Nurse Rea admitted Doe IV’s injuries were minimal and were also consistent with consensual sex. Defendant called his own qualified expert on SART examinations who testified the examinations were as consistent with consensual sex as with assault. That conclusion was not disputed by the prosecution experts. Thus, the evidence of which defendant complains was not particularly damaging.

Even more to the point, the other evidence of defendant’s guilt was overwhelming without regard to the SART nurses’ testimony. As defendant himself emphasizes, the only contested issue at trial was consent. But Doe II’s and Doe IV’s claimed consents were disproved by many circumstances, including the following: (1) the extreme improbability that four prostitutes in a two-year period, after having consensual sex with

defendant, would voluntarily go to the police to report him for sexually attacking them; (2) the equally extreme improbability that four consensual sex partners of defendant would independently fabricate strikingly similar descriptions of the assaults they suffered, including substantially overlapping details of the defendant's conduct and predilections, such as his pretense of being a police officer, the spots where he would take them, the particular sex acts he forced upon them, and the order in which they occurred; (3) the Jocelyn B. 911 tape, which corroborated Doe II's and Doe IV's accounts by graphically evidencing the frantic emotional state of a third victim caught up in defendant's web, and reinforced Doe IV's chilling testimony about her fear at seeing a torn-off hairpiece in defendant's car; (4) defendant's possession of property stolen from Does II and IV; and (5) in the case of Doe IV, the testimony of independent witnesses who observed her emotional state in the immediate aftermath of her encounter with defendant. In the face of all of the other evidence demonstrating his guilt, there is no reasonable likelihood exclusion of the challenged SART testimony would have affected the jury's verdict that defendant sexually assaulted Doe II and Doe IV.

E. Conflicting Pinpoint Instructions

The trial court instructed the jury with a defense pinpoint instruction that allowed them to consider the victims' history of prostitution in evaluating their credibility: "In determining whether or not . . . Jane Does I, II, III or IV is a truthful witness, you may consider each witness's history of prostitution arrests and/or prostitution convictions." The prosecution objected to that instruction when the defense proposed it, and then requested a similar instruction: "Evidence of a complaining witness's arrest or convictions for prostitution has been admitted. *You may, but are not required to, consider this evidence as it relates to the witness's credibility.*" (Italics added.) The trial court ultimately gave both instructions back-to-back. Defendant contends his instruction was a correct statement of the law and pinpointed the basis for his attack on the credibility of the main prosecution witnesses, whereas the prosecution instruction was an incorrect and inconsistent statement of the law which should not have been given to the jury.

Defendant points to cases holding the use of inconsistent instructions may constitute reversible error if it is impossible to tell which of the conflicting rules the jury followed. (See, e.g., *People v. Dail* (1943) 22 Cal.2d 642, 653, and cases cited therein [jury instructed both that the credibility of accomplice testimony is to be judged by the same standard as that of other witnesses, and that it should be viewed with distrust, with no attempt to explain the inconsistency].) We find these cases inapposite. Here, we do not have irreconcilable instructions pulling the jury in opposite directions. We have two instructions saying essentially the same thing with a slightly different choice of words. Defendant’s instruction tells jurors they “may” consider the complaining witnesses’ past prostitution in evaluating their credibility. The use of the word “may” would convey to a reasonable juror that he or she *can* consider that history on the question of credibility, not that the juror is *required* to do so. Such a juror would construe the prosecution’s instruction to mean exactly the same thing: we may but are not required to consider the witness’s prostitution history in evaluating her credibility. Substantively, the instructions in issue are redundant, not contradictory.¹¹

Defendant points to a second conflict assertedly created by the prosecution pinpoint instruction. The jury was instructed with CALCRIM No. 220 stating in relevant part: “In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially *compare and consider all the evidence that was received throughout the entire trial.*” (Italics added.) He argues the prosecution’s instruction told the jury that, unlike every other type of evidence, it was *not* required to consider the prostitution evidence as it relates to the credibility of the complaining witnesses. But any arguable conflict on this point was created by the defense’s pinpoint instruction which told jurors they “may” consider the prostitution evidence on the question of witness credibility, not that they were required to do so. Any conflict or error in the instructions this created

¹¹ Defendant’s trial counsel tacitly acknowledged the point by stating she understood the two instructions were “repetitive,” but insisting she did not want her proposed instruction to be “subsumed” by the prosecution’s instruction and wanted hers to be read to the jury “by itself.”

would have been invited by the defense, which insisted on a pinpoint instruction that, by its own terms, did not *require* jurors to consider the victims' prostitution history in determining their truthfulness.

In our view, however, there was no conflict. Other instructions told jurors they could, but were not required, to consider evidence *for certain purposes*. Thus, the instruction on the use of evidence under Evidence Code section 1101 told jurors that if they found the defendant committed the uncharged offenses, "you may, but are not required to, consider that evidence for the limited purpose of deciding" intent, common plan, or consent. The robbery instruction told the jury it "may consider how, where and when the defendant possessed the property, along with any other relevant circumstances tending to prove his guilt of second degree robbery." Such instructions do not conflict with CALCRIM No. 220. Although the jury is instructed to "consider" all of the evidence, that does not mean the jury may or must use ("consider") any particular piece of evidence in making a specific determination of credibility or fact. That is a matter to be filled in by other instructions addressing how the jury is to approach deciding the particular issues of credibility and fact necessary for it to reach a verdict. We do not find it reasonably likely the jury would have been confused by these distinct senses in which the CALCRIM No. 220 and other instructions used the word "consider."

We find no error in the use of the prosecution's pinpoint instruction on the prostitution history evidence.

F. *Failing to Instruct on Lesser Related Offense*

The trial court declined to give defendant's proffered instruction on the lesser related offense of engaging in prostitution on all of the sexual offense counts. Defendant acknowledges the decision of the California Supreme Court in *People v. Birks* (1998) 19 Cal.4th 108 (*Birks*), holding lesser related offense instructions may only be given if both parties stipulate to it, which was not the case here. He further acknowledges we are bound by *Birks* under *Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d 450.

Defendant nonetheless contends the trial court's refusal to give the instruction deprived him of his right to present a defense and to an instruction on the defense theory

of the case, in violation of his federal constitutional right to due process. He claims *Birks* is at odds with these federal constitutional rights. We are not persuaded. Defendant cites no federal case holding or suggesting *Birks* is out of step with federal constitutional principles. In fact, *Birks* itself relied in part on United States Supreme Court authority in holding lesser related offense instructions are not required. (*Birks, supra*, 19 Cal.4th at pp. 120, 123–124, 130; see *Hopkins v. Reeves* (1998) 524 U.S. 88, 96–99 [federal Constitution does not require instructions on lesser related offenses, and such a requirement is not only unprecedented but unworkable as a practical matter].) Moreover, defendant was in no way prevented from offering his defense of consent, and the jury was fully instructed on that defense.

The trial court did not err by refusing to give an instruction on the lesser related offense of prostitution over the prosecution's objection.¹²

G. Cruel and Unusual Punishment

Defendant urges the imposition of 11 consecutive terms of 15 years to life in state prison violates the state and federal constitutional prohibitions against cruel and unusual punishment. He asserts his sentence is the functional equivalent of a sentence of life without the possibility of parole for the commission of non-homicide offenses, and cites cases holding the imposition of such a sentence *on a juvenile* in a non-homicide case violates these constitutional proscriptions against excessive punishment. (See, e.g., *Graham v. Florida* (2010) 560 U.S. ____ [130 S.Ct. 2011]; *People v. Mendez* (2010) 188 Cal.App.4th 47, 64–65.)

Defendant fails to explain how these cases are relevant to his situation. He was not a juvenile when he committed these crimes. He was a mature adult with a criminal record, including seven felony convictions and a prior prison term. Moreover, he did not commit a single non-homicide offense but multiple violent offenses against multiple

¹² Defendant's final contention with regard to the guilty verdicts is that even if no single error is sufficiently prejudicial to require reversal, the cumulative prejudice resulting from all of the errors shown does require reversal. This contention is without merit. There was no error to cumulate. (*People v. Phillips* (2000) 22 Cal.4th 226, 244.)

victims. The evidence adduced at trial shows defendant is a serial rapist who, over a two-year period, preyed upon prostitutes who he thought would not report his crimes. He impersonated a police officer to intimidate and coerce his victims. His crimes were aggravated and callous. He kidnapped or imprisoned his victims, physically assaulted them, and subjected them to sustained sexual victimization. Defendant's sentence was not constitutionally disproportionate in light of the nature of the offenses or the offender, and defendant fails to make any showing whatsoever with regard to its disproportionality to the punishment for similar crimes in California or for the same offenses in other jurisdictions. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 199.) Defendant's argument his sentence is constitutionally infirm is entirely unsupported.

III. DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.