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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,
Plaintiff and Respondent,
v.
TARQUIN C. THOMAS,
Defendant and Appellant.

A131157
(San Mateo County
Super. Ct. Nos. SC064461,
SC067103A)

This is an appeal from the conviction by a jury of defendant Tarquin C. Thomas for dozens of crimes relating to his sexual abuse and exploitation of three minor boys. On appeal, defendant challenges the trial court's denial of his motion to suppress evidence in the form of digital images depicting his sexual abuse of one of the minors discovered on a computer flash drive. Defendant also challenges the trial court's charge to the jury with respect to his insanity defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2010, an amended consolidated information was filed alleging that defendant committed: (1) a lewd and lascivious act with a minor under the age of 14 (Pen. Code,¹ § 288, subd. (a)) (44 counts); (2) a lewd and lascivious act with a minor between the ages of 14 and 15 (§ 288, subd. (c)(1)) (three counts); (3) false imprisonment

¹ Further references to code sections are to the Penal Code, unless otherwise specified.

(§ 236) (one count); (4) sending harmful material to a minor for the purpose of seducing him (§ 288.2, subd. (a)) (one count); (5) employment of a minor in the sale or distribution of pornography (§ 311.2, subd. (b)) (one count); (6) misdemeanor possession of child pornography (§ 311.11, subd. (a)) (one count); (7) misdemeanor sexual exploitation of a minor (§311.3, subd. (a)) (one count); (8) attempted kidnapping (§ 664/207, subd. (a)) (one count); and (9) misdemeanor use of an electronic tracking device (§ 637.7, subd. (a)) (one count).

With respect to the section 288, subdivision (a) counts, the information alleged all were serious felonies (§ 1192.7, subd. (c)(6)); 40 counts involved substantial sexual conduct (§ 1203.066, subd. (a)(8)); and 39 counts were alleged to be offenses committed against more than one victim within the meaning of section 667.61, subdivision (c) and section 1203.066, subdivision (a)(7).

With respect to the false imprisonment count, it was alleged the offense was committed with multiple victims within the meaning of section 667.61, subdivision (c) and section 1203.066, subdivision (a)(7).

Finally, with respect to the section 288, subdivision (c)(1) counts, the information alleged the offenses were charged within ten years of their commission (§ 801.1) and within one year of their disclosure (§ 803, subd. (g)(1)).

Defendant entered a plea of not guilty and not guilty by reason of insanity to all counts.

I. Pre-Trial Motion to Suppress.

Asserting numerous grounds, defendant moved to suppress evidence derived from a computer flash drive turned in to police by the mother of one of defendant's victims. On January 25, 2010, the trial court began an evidentiary hearing on the motion, at which defendant, the victim's mother, and several law enforcement officials testified. Following this extensive hearing, the trial court denied the motion, thereby permitting numerous still and video images of defendant engaged in acts of child sexual abuse against the victims –including images recovered by computer forensic experts from deleted files on the flash drive – to be admitted at trial. This evidentiary ruling, which is

the basis of one of defendant's challenges on appeal, is described in much more detail below.

II. Trial with respect to Defendant's Guilt.

The guilt phase of a trial by jury began on August 24, 2010, at which the following evidence was offered.

A. Crimes against Dylan.

In August 2005, defendant, a non-married British national born in 1966, adopted Dylan, born in 1996, through the Oregon State Social Services Department. Dylan was initially placed with defendant for a six-month probationary period.

On November 9, 2006, Officer Jimmy Chan of the San Mateo Police Department assisted two social workers in conducting a welfare check at defendant's residence on Oceanview Drive. This welfare check was in response to a report that defendant had used physical force on his adopted son, Dylan. Defendant admitted spanking Dylan, and Dylan was thereafter returned to the Oregon State Social Services Department where he was placed in a secret home.

Oregon case worker Sylvia Mullenix asked defendant to return Dylan's personal belongings, which he did in person on December 20, 2006. Among the items returned by defendant were t-shirts identifying defendant as "an awesome dad," a laptop intended as a present for Dylan, a homemade picture frame and a jewelry box. When Mullenix examined the picture frame, she found inside a battery-equipped black box, which law enforcement later identified as a GPS tracking device. Officers also found a location tracking history for the device on defendant's computer. In addition, Mullenix found a note hidden in the picture stating that Dylan could find his mother in the Salt Lake City phone book when he turned 18. Inside the jewelry box, she found a locket with a note containing a map of San Francisco and a prepaid phone card.

There were also several notes from defendant to Dylan, including one containing an apology for spanking and hurting Dylan, and for "photography." Another note directed Dylan to contact an attorney and "tell him you want to be adopted by me, that

this is where you feel safe and loved and want to live. And if for some reason you don't want that, tell him you want to be adopted by Lori. If you do not do this, you will likely be in foster care for eight more years.”

In May 2007, Oregon law enforcement officials contacted the San Mateo Police Department requesting an investigation of appellant. Pursuant to this investigation, defendant was arrested and his house searched on May 24, 2007. The search yielded, among other items, sexually suggestive notes; a book entitled “Photographing Children” depicting nude children; a CD entitled “Child Stars” with photographs of young child actors (most of which were boys); DVDs entitled “Models Bootcamp,” “Posing Guys,” and “One Model Place;” a journal containing website names such as “Reelboys.net,” “Youthinfilms.com,” “Reelyouth.com,” and “boygem.com;” computer and camera equipment, and an apparent photography studio set up in the living room. Finally, the search yielded numerous photographs of boys (sometimes barely-clothed), including many photographs of the victims.

B. Crimes against Freddie.

Freddie, born in 1988, met defendant in 1996 through a Boys and Girls Club mentoring program in San Francisco. Freddie’s mother, Rene, placed him in the program while she addressed her own substance abuse problems. Defendant volunteered in the program through his employer, a large banking institution which he joined upon moving to California from Great Britain.

Eventually, defendant and Freddie became quite bonded, with defendant assuming a quasi-parental role with Freddie. Rene, who also bonded with defendant and benefitted from his financial and emotional support, endorsed defendant’s relationship with Freddie. Over the years, Freddie often stayed with defendant at his San Mateo residence and, from 1999 to 2002, he lived with defendant, maintaining his own bedroom there. Other boys, including Blake, also lived with defendant during some of this time. However, when Dylan moved in with defendant in 2005, Freddie went to Nevada to live with his biological father. In 2007, defendant purchased for Freddie, for his birthday, a home in Oregon and a truck.

After defendant's arrest in May 2007, law enforcement questioned Freddie regarding his relationship with defendant. Freddie initially denied any sexual abuse. However, later, after photographs of Freddie being sexually abused by defendant were discovered on the flash drive Rene gave to the San Mateo Police Department, Freddie acknowledged defendant molested and engaged in oral copulation with him.

C. Crimes against Blake.

Blake, born in 1991, met defendant through Freddie, whom he met at the park. Blake visited Freddie at defendant's house on "play dates," and eventually began spending the night there, sleeping in a bunk bed in Freddie's room. Blake moved to Kentucky to live with his father when he was 11, returning to the Bay Area when he was 14. Upon his return, Blake's mother arranged with defendant for Blake to spend more time at defendant's house. On at least 50 occasions when Blake spent the night at defendant's house, defendant coaxed him to sleep in defendant's bed. During these occasions, defendant "cuddled" with Blake, placing his arm around Blake while Blake faced the other direction. Often, during this "cuddling," defendant would ask Blake sexually explicit questions such as whether Blake had ever engaged in sex.

III. The Jury's Guilty Verdict, the Sanity Phase, and Sentencing.

On September 24 and 25, 2010, the jury found defendant guilty of 39 counts of a lewd and lascivious act with a minor under age 14, three counts of a lewd and lascivious act with a minor age 14 or 15, one count of misdemeanor possession of child pornography, and one count of misdemeanor use of an electronic tracking device. In addition, the trial court found true numerous of the enhancement allegations.

Following the jury's guilty verdict, a separate trial was held on defendant's insanity defense. Defendant, as well as several psychiatric experts, testified. Among other things, defendant admitted engaging in sexual acts with Dylan and Freddie, but claimed that Freddie was to blame and that Dylan was the instigator. Defendant denied knowing the sexual acts with the boys were legally or morally wrong, due in part to his

abnormal upbringing.² Defendant admitted instructing Freddie to destroy evidence in the case following his arrest, including a computer hard drive and a laundry detergent box where he had hidden a four-gigabyte flash drive. The trial court thereafter sentenced defendant to a total prison term of 60 years to life plus 48 years. This timely appeal followed.

DISCUSSION

Defendant raises two arguments on appeal. First, defendant challenges the trial court's denial of his motion to suppress certain photographic evidence retrieved from a four-gigabyte flash drive that he claims was the product of an illegal search. Second, defendant contends the trial court prejudicially erred when instructing the jury with respect to his insanity defense. We address each argument in turn.

I. Denial of Defendant's Motion to Suppress Evidence.

On November 26, 2008, defendant moved to suppress, among other things, photographic evidence seized during a police search of a four-gigabyte flash drive (flash drive) that was provided to the San Mateo Police Department by Rene in November 2007, several months after defendant's May 2007 arrest. Defendant argued, among other things, that the search was overbroad and not supported by the relevant showing of probable cause, contentions he again raises on appeal.³ The following facts are relevant to his challenge.

Rene found the flash drive hidden in a sealed plastic bag at the bottom of a box of laundry soap that she had taken from defendant's home at his request.⁴ Specifically,

² Among other abnormalities, defendant's father, a respected sculptor, would force him to wear lederhosen and to pose naked for his artwork, subjecting him to ridicule, and would regularly grope his mother in front of him. After divorcing his mother when defendant was a teenager, defendant's father married a 15-year old girl.

³ Defendant also filed related motions to traverse and to quash on December 18, 2008 and December 30, 2009.

⁴ Following his arrest and incarceration in May 2007, Rene had agreed to help defendant with his personal affairs, including performing various household tasks. When this agreement was made, Rene believed defendant was innocent of the charges.

defendant asked Rene, and she agreed, to go to his house and retrieve this box of laundry soap, take it to her own house, and then use it to do his laundry while he was incarcerated. After doing his laundry for several months, Rene reached the bottom of the soap box, where she found the flash drive. Upon opening the flash drive on her computer with an adapter she bought for just that purpose, Rene found pictures of defendant engaged in various acts of sexual misconduct with Dylan. Rene immediately turned the drive over to the San Mateo Police Department, advising officers that it contained evidence relevant to defendant's ongoing criminal case.

After receiving the flash drive from Rene on November 13, 2007, Detective Tanya Neu opened it with the assistance of Court Services Officer Melanie Wylie to confirm Rene's allegations. Initially, they found no photographic files on the flash drive, but after additional searching they found four file folders, including one entitled "movies" and three others containing digital photographs. They observed obscene images in both the photographs and videos, including images of defendant orally copulating Dylan and ejaculating into his mouth. Officer Wylie copied the contents of the flash drive onto two compact disks and gave the disks and drive to Detective Neu.

On November 14, 2007, Detective Neu filed a request for a warrant to search the flash drive setting forth her belief that it would reveal further images of defendant sexually abusing Dylan. Detective Neu based her affidavit of probable cause for the warrant on Rene's statements to police regarding her discovery of obscene photographs and videos of defendant with Dylan on the flash drive. Detective Neu stated her belief, based on her law enforcement training and experience, that a further search of the flash drive "would reveal more evidence of [defendant] engaging in sexual acts with [Dylan] and sexually exploiting [him]." In addition, Detective Neu "request[ed] using Computer Forensic Experts to assist . . . in the search of the disk." The warrant, authorizing a search of the "blue/black 4.0 GB Compactflash disk with the words- '4.0 GB Compactflash' in the lower left hand corner of the disk," was issued the same day.

On November 26, 2007, Detective Neu filed a Partial Return stating that the police search had revealed additional images of defendant sexually abusing Dylan. The Partial

Return further indicated Detective Neu and her colleagues were unable to access all files on the flash drive, so they had sent it to the FBI Regional Computer Forensics Laboratory for further analysis. Detective Neu then stated her intent to complete a second return after receiving the results of a complete computer forensic analysis of the flash drive.

The San Mateo Police Department thereafter gave the flash drive to Sergeant Alan Lee for further examination. Sergeant Lee made another copy of the contents of the flash drive, as well as a directory list identifying the drive files. He also used special tools to recover deleted files from unallocated space on the flash drive. These deleted files, which were dated 1999, 1996 and 2000, were reviewed by Detective Joyce, who found photographs of defendant engaged in various sexual acts with Freddie, including oral copulation, touching and ejaculation. The acts depicted in the photographs located on the deleted files are the basis of the charges against defendant in counts 19 through 40.

After a hearing on defendant's suppression motion that included testimony from defendant, Rene, Detective Neu, Sergeant Lee and others, the trial court issued a denial, reasoning as follows: (1) Rene's initial inspection of the flash drive was a private party search outside the scope of the Fourth Amendment; (2) Rene's search breached the privacy of the flash drive, thereby enabling police to legally search the entire drive ("anything on the disk") without obtaining a search warrant; and (3) as an alternative finding with respect to the police search of deleted files recovered from the flash drive's unallocated space, that defendant's deletion of those files amounted to his abandonment of them.

The standard of review of the trial court's ruling is not in dispute. "In ruling on a suppression motion, 'the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] . . . [¶] The court's resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is

however predominantly one of law, viz., the reasonableness of the challenged police conduct, is also subject to independent review. [Citations.] The reason is plain: “it is ‘the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.’ ” (*People v. Williams* (1988) 45 Cal.3d 1268, 1301 [248 Cal.Rptr. 834, 756 P.2d 221].)” (*People v. Wilkinson* (2008) 163 Cal.App.4th 1554, 1562.)

Here, defendant raises no factual issue for our review. Rather, the issue is whether the trial court selected and applied to the facts the correct rule of the law. To be specific, the parties agree Detective Neu’s initial search of the flash drive to confirm Rene’s allegations of sexual abuse against Dylan was a valid warrantless search within the scope of Rene’s private search.⁵ (*People v. Wilkinson, supra*, 163 Cal.App.4th at pp. 1572-1573 [the Fourth Amendment is not implicated where a government agent views computer files already viewed by an individual engaged in a private search]). They disagree, however, on whether the trial court correctly found the expanded government search of the flash drive, which revealed images of defendant sexually abusing Freddie, was valid. As the United States Supreme Court holds, where a law enforcement search occurs subsequent to a private search, “additional invasions of . . . privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search.” (*United States v. Jacobsen* (1984) 466 U.S. 109, 111, 115.)

The trial court relied upon *People v. Wilkinson, supra*, 163 Cal.App.4th 1554 in finding the expanded government search proper, reasoning that Rene’s private search of some files on the flash drive permitted law enforcement to thereafter search the entire flash drive, with or without a warrant. To determine whether the trial court was correct, we first look more closely at the authority for its ruling.

People v. Wilkinson involved the denial of a motion to suppress evidence that included several compact disks containing webcam images the defendant illicitly took of

⁵ Below, defendant argued Rene was acting in the capacity of government agent when she delivered the flash drive to the San Mateo Police Department. The trial court denied defendant’s argument, a decision he does not appeal.

his roommate engaged in sexual activity with her boyfriend. The boyfriend took the compact disks from the defendant's room without permission and gave them to law enforcement after looking at five to seven disks to confirm the defendant had in fact been video-recording the couple. (163 Cal.App.4th at pp. 1559-1560.) Following his arrest, the defendant argued, among other things, that the police performed an illegal search when viewing these compact disks without a warrant. The trial court rejected this argument, and the defendant appealed. (*Id.* at pp. 1561-1562.)

On appeal, the reviewing court “agree[d] with defendant’s argument (unchallenged by the People) that the compact discs constituted closed containers, the contents of which were not apparent on their face.” (*People v. Wilkinson, supra*, 163 Cal.App.4th at p. 1572.) The court then held that “to the extent [law enforcement] viewed images on the compact discs that [the boyfriend] had already viewed, his search was within the scope of the private search and did not implicate the Fourth Amendment.” (*Id.* at p. 1572.) However, the court noted there was no evidence in the record regarding which compact disks, or which files on those disks, the boyfriend viewed in his private search. As such, while noting that a federal case, *United States v. Runyon* (5th Cir. 2001) 275 F.3d 449, had held that police did not exceed the scope of a private search when examining more files on each compact disk than did the private searchers, the *People v. Wilkinson* court ultimately decided there was no need to address this finer point. (*People v. Wilkinson, supra*, 163 Cal.App.4th at p. 1572, fn. 6.)

Thus, after a careful reading, we disagree with the trial court that *People v. Wilkinson* completely resolves the matter at hand. While *People v. Wilkinson, supra*, 163 Cal.App.4th 1554, answers in the affirmative the question of whether law enforcement acted within the scope of Rene’s private search when viewing images on the flash drive depicting defendant sexually abusing Dylan, which Rene already viewed, the decision leaves unanswered the question of whether law enforcement acted within the scope of her private search when viewing images depicting defendant sexually abusing Freddie, which were recovered with the help of a computer forensic expert from deleted files in the flash drive’s unallocated space.

However, putting aside *People v. Wilkinson, supra*, 163 Cal.App.4th 1554, there is in fact no need to decide for purposes of this case whether, as the trial court found, the search of defendant's flash drive was a valid warrantless search within the scope of Rene's private search. Quite simply, a warrant to conduct the search in this case was in fact issued on November 14, 2007, by Judge Craig Parsons. As such, we may review the validity of this search under the following rule: "The scope of a warrant is determined by its language, reviewed under an objective standard without regard to the subjective intent of the issuing magistrate or the officers who secured or executed the warrant. (See *Whren v. United States* (1996) 517 U.S. 806, 813 [135 L.Ed.2d 89, 116 S.Ct. 1769]; *Scott v. United States* (1978) 436 U.S. 128, 137-138" (*People v. Balint* (2006) 138 Cal.App.4th 200, 207.)

The November 14, 2007 warrant specifically authorized seizure of the "blue/black 4.0 GB Compactflash disk with the words- '4.0 GB Compactflash' in the lower left hand corner of the disk" to search for "more evidence of [defendant] engaging in sexual acts with [Dylan] and sexually exploiting [him.]" The prosecution, like the trial court, reads this language as permitting search and seizure of the entire flash drive, which they deem a "single closed container" for purposes of the Fourth Amendment. Defendant, to the contrary, contends that, while the warrant may have authorized the search of the flash drive files that were viewable to police (and Rene) when the drive was first opened, the warrant did not authorize the search of the flash drive's unallocated space which contained the deleted files viewable to police only with the assistance of computer forensic experts. With respect to this portion of the flash drive, defendant insists, police were required to, but did not, request a separate warrant.

We reject defendant's request to partition the flash drive into separate "containers" – one container consisting of visible files and the other of deleted files – for purposes of deciding the proper scope of the November 14, 2007 warrant. Rather, we agree with the prosecution that, although law enforcement needed special tools and expertise to search the flash drive in its entirety, the drive, including its unallocated space, must be deemed a single container for purposes of the Fourth Amendment. As

our colleagues in federal court have explained under comparable circumstances, where the seizure of unlawful images is within the plain language of the warrant, “their recovery, after attempted destruction [by the defendant], is no different than decoding a coded message lawfully seized or pasting together scraps of a torn-up ransom note. [Citations.] The . . . warrant did not prescribe methods of recovery or tests to be performed, but warrants rarely do so. The warrant process is primarily concerned with identifying *what* may be searched or seized — not how — and *whether* there is sufficient cause for the invasion of privacy thus entailed.” (*United States v. Upham* (1st Dist. 1999) 168 F.3d 532, 537 [where the warrant authorized seizure of all computers and available disks, police legally used a computer utilities program to recover from the hard drive and disks 1,400 previously-deleted pornographic images]; see also *People v. Superior Court (Nasmeh)* (2007) 151 Cal.App.4th 85, 98, fn. 4 [“the police . . . were entitled to use technology to determine the evidentiary value of trace materials possibly coming from an item listed in the warrant and purportedly found in [defendant’s] car”].)

Applying these principles here, we note that, in seeking the warrant in this case, Detective Neu specifically “request[ed] using Computer Forensic Experts to assist . . . in the search of the disk.” Her request was wholly reasonable given the circumstances of defendant’s case, including the already-gathered evidence of his digital photography of Dylan’s sexual abuse and exploitation and his illicit attempt to monitor Dylan’s movements with a GPS tracking device. Moreover, the fact that law enforcement’s use of computer forensic expertise ultimately led to discovery of defendant’s sexual abuse of another victim (Freddie) merely reflects the strength of Detective Neu’s training and judgment; it does not render her search efforts invalid.⁶ The law does not require

⁶ Expert knowledge is not required to understand the basic fact that deleted computer files are often recoverable with the aid of special computer tools and knowhow. Moreover, as Detective Joyce explained in her affidavit in support of her request for an earlier search warrant in this case, police departments frequently rely on offsite computer facilities equipped with the requisite tools and expertise to recover hidden or deleted files during the course of criminal investigations. This is particularly true in child

investigators to turn a blind eye to evidence discovered in a search indicating the accused committed crimes beyond those initially suspected. (*United States v. Henson* (6th Cir. 1988) 848 F.2d 1374, 1383 [“A search does not become invalid merely because some items not covered by a warrant are seized”]; see also *Zurcher v. The Stanford Daily* (1978) 436 U.S. 547, 556 [“The critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that specific ‘things’ to be searched for and seized are located on the property to which entry is sought”].)

Thus, for the reasons stated above, we conclude that, based on a reasonable interpretation of the November 14, 2007 warrant, the officers and their computer expert colleagues were entitled to search the flash drive in its entirety, including any part of it, visible or invisible, where the officers could reasonably expect to find evidence of defendant’s sexual abuse of minors. The trial court’s denial of defendant’s motion to suppress must therefore be affirmed.⁷

II. Instructing the Jury on the Issue of Sanity (CALCRIM No. 3450).

Defendant’s primary defense was that he was not guilty of the charged crimes by reason of insanity. Dr. Arturo Silva testified on his behalf as an expert on the subjects of autism, legal sanity and pedophilia during the sanity phase of trial. Among other things, Dr. Silva testified that defendant suffered from Asperger’s syndrome, mood disorder, pedophilia, paraphilia, avoidant personality disorder and personality disorder not otherwise specified. According to Dr. Silva, defendant believed he was acting for the good of the child to bond with the child when engaging in his crimes. However, Dr. Silva had no opinion on whether defendant was legally sane.

pornography investigations given the all-too-common use of computers to transport the illicit sexual images.

⁷ Given our affirmance on this ground, we need not address the trial court’s alternative ground for denying defendant’s suppression motion – to wit, that the police search of the deleted files recovered from the flash drive’s unallocated space was authorized by defendant’s abandonment of them.

The prosecution's sanity experts, Dr. Alfred Fricke and Dr. George Wilkinson, testified in turn that defendant was in fact legally sane. They reasoned that, while defendant was undoubtedly a pedophile as evidenced by his sexual attraction to prepubescent boys, he had no medical condition that prevented him from understanding right and wrong.

Following the presentation of evidence, the trial court gave instructions to the jury that included a modified version of CALCRIM number 3450, the standard instruction on legal sanity. Specifically, the modification, given *sua sponte*, was the addition of the legal definition of "morally wrong," which the trial court believed would assist the jury in deciding whether to accept defendant's plea of not guilty by reason of insanity. The instruction, set forth in relevant part, reads as follows:

"You have found [defendant] guilty of Multiple crimes of lewd and lascivious act on a child under the age of 14, or age 14-15 in violation of Penal Code section 288(a), Unlawful use of a tracking device and possession of matter depicting or simulating a minor engaged in sexual conduct. Now you must decide whether he was legally insane when he committed the crimes.

"[Defendant] must prove that it is more likely than not that he was legally insane when he committed the crimes.

"[Defendant] was legally insane if:

"(1) When he committed the crimes, he had a mental disease or defect; AND [¶]

"(2) Because of that disease or defect he did not know or understand the nature and quality of his act or did not know or understand that his act was morally or legally wrong. [¶] . . . [¶] *"Conduct that is morally wrong is conduct that violates generally accepted standards of moral obligation. Legal wrongfulness and moral wrongfulness are often the equivalent but that is not always the case."* (Italics added.)

Defendant contends this instruction, as modified by the trial court, was erroneous and resulted in prejudice. In particular, defendant challenges the court's inclusion of language defining "morally wrong" because, he contends, the language "informed the jury that in virtually all cases moral wrong and legal wrong are the same thing." Thus,

defendant reasons, by “equating moral wrong with legal wrong, the trial court improperly increased his burden of proof at the sanity phase” in violation of his fundamental constitutional rights. The following well-established legal principles govern our review of his challenge.

“We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. (*People v. Posey* (2004) 32 Cal.4th 193, 218 [8 Cal.Rptr.3d 551, 82 P.3d 755].) Review of the adequacy of instructions is based on whether the trial court ‘fully and fairly instructed on the applicable law.’ [Citations.] ‘ “In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” [Citation.]’ [Citation.]’ ‘Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.’ [Citation.]” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Applying these principles to the jury instruction at hand, we conclude there are no grounds for reversal. Quite simply, the jury instruction, including the trial court’s language defining “morally wrong,” is not only an accurate statement of the law, it is a clear and straightforward statement of the law. With respect to accuracy, the language of the challenged instruction states that “[Defendant] was legally insane if: [¶] . . . [w]hen he committed the crimes, he had a mental disease or defect; AND [¶] . . . [b]ecause of that disease or defect he did not know or understand . . . that his act was morally or legally wrong.” Not only is California law in accord (see *People v. Coddington* (2000) 23 Cal.4th 529, 608 [approving an instruction stating, among other things, that “the defendant who is incapable of distinguishing what is morally right from what is morally wrong is insane, even though he may understand the act is unlawful”]), the challenged instruction advised the jury of just what defense counsel argued on his behalf: Defendant could be found not guilty by reason of insanity so long as he, as a result of a mental

disease or defect, believed his sexual misconduct was morally proper, even if he knew his misconduct was legally barred.⁸ Thus, the modified instruction was technically accurate.

Moreover, while defendant insists the “practical effect” of the modified version of CALCRIM 3450 was to instruct the jury that “that if appellant knew that his conduct was illegal, he was sane even if he did not know it was morally wrong,” the instruction in fact gave the complete opposite charge. To wit, as set forth above, the jury in this case was told that defendant was legally insane if he had a mental disease or defect and, because of the disease or defect, he was incapable of knowing or understanding “that his act was *morally or legally wrong*.” This use of the disjunctive term “or” in the instruction is not mere “legalese,” as defendant claims. Rather, this commonly-used term makes clear to the average layperson that defendant’s lack of awareness of *either* the moral wrongfulness *or* the legal wrongfulness of his conduct was, by itself, a sufficient basis for finding him legally insane. And, even assuming for the sake of argument the average layperson would not understand the trial court’s use of the disjunctive to broaden the circumstances under which defendant could be found legally insane, the court’s inclusion of the definition of “morally wrong” provided further clarity. This definition, also set forth above, states in no uncertain terms that legal and moral wrongfulness may be the same “but that is not always the case.” Thus, there was no ambiguity or legal error with respect to the court’s modification. (*People v. Coddington, supra*, 23 Cal.4th at p. 608 [“[M]oral obligation in the context of the insanity defense means generally accepted moral standards and not those standards peculiar to the accused’ ”].)

Accordingly, we conclude based on the record as a whole there is no reasonable likelihood the jury misapplied the modified version of CALCRIM 3450 given in this case. Contrary to defendant’s suggestion, juries are quite capable of “pay[ing] close attention to the meaning of individual words” in order to parse them in the intended manner, particularly the commonly used words “or” and “and.” And with respect to this

⁸ *People v. Coddington, supra*, 23 Cal.4th 529, was disapproved on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, at footnote 13.

particular jury, there is simply no basis to conclude it was confused or misinformed when parsing the language of the challenged instruction.

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Siggins, J.