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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)**

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
SHANE ALAN WILSON,  
  
Defendant and Appellant.

C067640  
  
(Super. Ct. No. 09F01582)

Convicted of 18 sexual offenses against two victims—encompassing kidnapping, shackling and fetishes—and sentenced to 16 consecutive “One Strike” law terms of 25 years to life, defendant Shane Alan Wilson appeals. (Pen. Code, § 667.61.) He contends (1) the prosecutor engaged in misconduct through insinuating questions; (2) the trial court erred in misinstructing on consciousness of guilt, and in excluding impeachment evidence involving one of the victim’s appearances on *The Jerry Springer Show*; (3) defense counsel performed ineffectively concerning the admission of pornographic photos; and (4) his sentence is unconstitutionally cruel and unusual.

Other than granting defendant an additional day of presentence custody credit, we shall affirm the judgment.

### **FACTUAL BACKGROUND**

The two victims were Y.P. and M.H.

#### ***Y.P.***

Y.P. testified as follows.

In September and October 2008, Y.P., who was homeless and addicted to alcohol and crack cocaine, supported herself through prostitution and shoplifting.

Around 1:30 a.m. on October 1, 2008, in Sacramento, Y.P. entered the blue, four-door car of a prospective "john," who was tall. She had been up for 24 hours, was not wearing her prescription glasses for her nearsightedness, and had been smoking crack cocaine for a few days. After agreeing on an act of oral sex, the two drove to a dark area behind some Power Inn Road businesses, and parked. But as soon as Y.P. retrieved a condom from her purse, the man attacked her, shackling and duct-taping her hands and feet, placing a cloth bag over her head, and putting her in the car trunk. Y.P. begged for her life; the man said he would not kill her if she cooperated.

Before closing the trunk, the man asked Y.P. if she wanted anything to drink or smoke; she requested gin and a pack of Newport, which the man apparently obtained at a gas station store.

After driving for an hour or more, the two arrived at a rural residence, and entered the house through a sliding door from the garage. Y.P. still had the hood on her head. She sat on a bar stool at a kitchen counter that was black, grayish-silver and sparkly, and ate macaroni the man provided; she saw a black-and-white cat on the floor.

After this, and after some gin and cigarettes (the man assisted, given the hood on her head), the man said "it was time to play"; and no, said the man, refusal was not an option. The two proceeded to a stand-up shower with a frosted-glass door. The man removed Y.P.'s cloth hood, and then jammed his penis "all the way down" her throat, wanting Y.P. to vomit; she could only gag. After the oral copulation, the man urinated on Y.P. and in her mouth, and spat on her. This was followed by vaginal intercourse, during which the man ejaculated. Y.P. noticed that the bathroom sink handles were bronze colored.

The man then told Y.P. to put the bag back over her head, and they went to bed; the man handcuffed one of Y.P.'s hands to a bedpost.

The following day encompassed shackling and two more episodes of the same unwanted sex acts, including the urination and the spitting. Y.P. was afraid for her life the entire time. The man then had Y.P. clean up and he douched her.

The ordeal finally ended when the man replaced the hood covering Y.P.'s head with a black beanie covering her eyes, and

drove her back to Sacramento with her seat reclined. Y.P. asked if she could keep the beanie, but the man refused.

***M.H.***

M.H. testified as follows.

On February 8, 2009, M.H. was working as a prostitute in Sacramento when a man approached her, driving a lighter-colored pickup truck with a bed-wide tool box in the back. The man told M.H. his name was "Shane."

After agreeing on a sexual act, the man drove M.H. to a dark area behind a warehouse building on Power Inn Road. Almost immediately after parking, the man attacked M.H., handcuffed and bound her extensively with duct tape, and then put her into the tool box, locking it. On they drove, for an hour or two; the farther they ventured, the colder and mistier it got—"really tall trees" began to appear as they went "up higher and higher."

Eventually they arrived at a house, and later entered a stand-up shower with cloudy glass doors. The man removed the duct tape from M.H.'s eyes; he was wearing a black ski mask. The man forced M.H. to orally copulate him, inserting his penis so far that M.H. gagged and vomited, which aroused the man all the more. The man urinated in M.H.'s hair, had intercourse with her, and then douched her.

From the bathroom, the man took M.H. to a bedroom, where he handcuffed her to a bedpost. More sexual acts ensued forcibly, including anal intercourse and gag-inducing oral sex. M.H. did not fight, figuring that cooperation was the key to survival.

M.H. tried to "befriend" the man; they exchanged phone numbers and took pictures together. At some point, the man took off his ski mask. At another point, M.H. was able to glimpse some bar stools at the house.

M.H. was forced to spend the night. The next morning, after another round of forced sex, the man douched her, and then drove her back to Sacramento while she sat on the passenger floor. M.H. saw a business card in the truck's visor, with the name "Shane Wilson." As soon as the man drove off, M.H. called the police.

### ***Lineup Evidence***

In March of 2009, Y.P. picked two of five participants in a live lineup as the perpetrator (defendant was one of the two); she leaned toward defendant but was not sure.

In a photographic lineup, M.H. identified defendant as her attacker.

### ***Forensic Evidence and Circumstantial Facts***

The car the man apparently used in Y.P.'s abduction—a blue, four-door 1995 Nissan Sentra—was tied to defendant. Searches of it yielded duct tape and a black ski mask under the driver's seat, as well as two hairs stuck to a piece of duct tape in the trunk that matched Y.P.'s DNA profile.

Hairs stuck to a piece of duct tape found in defendant's shower, as well as found in the tool box on defendant's pickup truck, matched M.H.'s DNA profile (although the tool box yielded only a partial profile of M.H., while excluding defendant).

The shackles inflicted cuts to M.H.'s wrists, which were medically documented.

The travel time from Sacramento to defendant's residence in Pollock Pines was between one-and-a-quarter and one-and-a-half hours.

A search of defendant's residence disclosed: a master bedroom bed with four posts; a shower with frosted glass, containing a piece of silver duct tape and a used douche; an opened box of disposable douche; rolls of silver and black duct tape; shackles; gin bottles and bar stools in the kitchen area; and computer pornography depicting sexual acts similar to those involving Y.P. and M.H.; but the master bathroom sink faucets appeared to be chrome-colored, the kitchen countertops apparently were white, and the door from defendant's garage to his house was wood. Moreover, Y.P. described her attacker as tall, but defendant is five feet eight inches in stature.

Defendant's ex-wife testified that she never knew defendant to drink gin; that he did not cook except for TV dinners and macaroni and cheese; and that in October 2008, he had a black-and-white cat.

### ***Defense***

Defendant testified, claiming that Y.P. had misidentified him, and that her hair on the duct tape in the trunk perhaps had been left during one of his frequent encounters with prostitutes. Defendant also noted that Y.P. had told the police

he had gray hair, and that she did not say anything about his male-patterned baldness; the hair he had was dark on the sides.

Defendant claimed the acts with M.H. were consensual, pursuant to agreement. He also noted that M.H. at one point had held his truck's tool box lid open so he could remove some parts.

## **DISCUSSION**

### **I. Alleged Prosecutorial Misconduct**

During cross-examination following defendant's testimony that he had urinated on M.H., defendant answered "no" to the prosecutor's three questions that essentially asked whether defendant, during sexual encounters with his ex-wife, frequently urinated on her against her will.

Defendant claims this questioning constituted misconduct, citing the venerable principle that a prosecutor "may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred [in the question], together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.'" (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

However, another long-standing principle allows a prosecutor to ask questions which clearly suggest "the existence of facts . . . harmful to defendant" so long as the prosecutor has a "good faith belief" "that the questions would be answered in the affirmative, or with a belief on [the prosecutor's] part

that the facts could be proved, and a purpose to prove them, if their existence should be denied." (*People v. Perez* (1962) 58 Cal.2d 229, 241, overruled on another ground in *People v. Green* (1980) 27 Cal.3d 1, 27-34; *People v. Mooc* (2001) 26 Cal.4th 1216, 1233-1234.)

It is this second principle that governs here.

Defendant himself testified that he has tried "golden shower[s]" (urinating on another) numerous times, that he finds it exciting, that he and his ex-wife had done it for years, that he fantasizes about it, and that he seeks out golden shower pornography on the internet.

Furthermore, defense counsel conceded earlier in the trial (outside the jury's presence): "I anticipate that [defendant] will acknowledge since it was elicited during questioning by Detective Newby [(the investigating detective)] that [defendant] does have a fetish regarding golden showers."

The prosecutor did not engage in misconduct regarding the challenged golden shower questioning involving defendant's ex-wife. The prosecutor reasonably sought to present golden shower evidence as "one of the modes of identification of the perpetrator in [this] case." Given the evidence of defendant's extensive interest in and experience with golden shower activity, including with his ex-wife—much of this evidence from defendant himself—and given the prosecutor's reasonable belief that such activity is not fancied by most women, the prosecutor had a "good faith belief" "that the facts [in the questions]

could be proved . . . if their existence should be denied.”  
(*People v. Perez, supra*, 58 Cal.2d at p. 241; see *People v. Cleveland* (2004) 32 Cal.4th 704, 743 [the privilege allowed by Evidence Code section 980 relating to marital communications does not extend to physical facts observed by one’s spouse during the marriage].)

## **II. Instructions on Consciousness of Guilt**

Defendant contends the trial court erred prejudicially in instructing with CALCRIM Nos. 358 and 362 on a defendant’s pretrial statements evidencing consciousness of guilt, and he notes, in support, the prosecutor’s incorrect argument to the jury that CALCRIM No. 362 applied to defendant’s trial testimony. We agree the trial court erred, but find the error harmless.

The trial court instructed with CALCRIM No. 358 as follows:

“You have heard evidence that the defendant made oral statements before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt unless the statement was written or otherwise recorded.”

And the trial court instructed with CALCRIM No. 362 as follows:

"If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The best the People can do in citing purported statements to support these instructions are statements defendant made to Y.P. and to M.H. *during* the incidents themselves, including statements of what he intended to do with them and threats he made to them. These are not the kinds of statements envisioned by the wording and context of CALCRIM Nos. 358 and 362; nor the kind of statement in *People v. Beagle* (1972) 6 Cal.3d 441 (*Beagle*), upon which the People rely, in which the defendant there, prior to the offense, had specified his criminal intent to a third party in conversation, and for which the court said a CALCRIM No. 358-like cautionary instruction should have been given. (*Beagle, supra*, 6 Cal.3d at p. 455.)

While we believe the trial court erred in instructing with CALCRIM Nos. 358 and 362, we find the error harmless.

The two instructions, especially CALCRIM No. 362, were phrased in a conditional way ("if" defendant made such a statement) and cautioned the jury about the limited worth of such a statement, particularly if it was not documented (as

would be the case here). These instructions conveyed common sense concepts, rather than technical legal points that could have lead jurors astray. This is also why the prosecutor's legally incorrect argument to the jury, regarding CALCRIM No. 362's applicability to defendant's trial testimony, packed little punch ("[I]f the Defendant [during his trial testimony] made a false or misleading statement relating to the crime charged, knowing that it's false and intending to mislead, that shows that he's aware of his guilt. It's common sense . . . .").

Admittedly, this case largely involved a credibility contest between defendant and the two alleged victims. But we do not believe it is reasonably probable that defendant would have fared better in the absence of these two instructions. (*Beagle, supra*, 6 Cal.3d at p. 455, applying *People v. Watson* (1956) 46 Cal.2d 818, 836 [setting forth this standard of prejudice for state law error, such as these instructions].)

Defendant conceded the acts with M.H., but claimed they were part of their consensual prostitution agreement. Belying this claim were the medically documented injuries to M.H.'s shackled wrists, an eyelash hair from M.H. found on a piece of duct tape in defendant's shower (defendant denied duct-taping M.H.'s face or eyes), and the evidence of M.H.'s DNA profile in the truck-bed tool box. Y.P. and M.H. relayed quite similar tales of defendant's behavior. Y.P.'s account was corroborated by the car defendant had used, by her DNA profile found in that

car's trunk, and by several circumstantial facts (douche items, frosted-glass shower door, gin bottles, bar stools, macaroni meal, black-and-white cat, pornography depicting described fetish behavior, car travel time, residential location, black ski mask, duct tape, shackles). And while Y.P. did not "zero" in on defendant at the live lineup, she leaned that way.

In short, though this case was largely a credibility contest, there was a lot more evidence here than mere "he said, she said"; and for the most part, that evidence was contrary to what "he said."

### **III. Impeachment Evidence Concerning M.H.**

Defendant contends the trial court abused its discretion by excluding impeachment evidence involving M.H.'s paid appearance on the tabloid television hour, *The Jerry Springer Show*. We disagree. (See *People v. Thompson* (2010) 49 Cal.4th 79, 128 [setting forth the review standard of abuse of discretion regarding evidentiary rulings].)

More than a year after the M.H. incident, M.H. and her boyfriend appeared on an episode of *The Jerry Springer Show*, an episode with the pithy title, *Lesbians, Weddings and a Tranny*. M.H. admits that she lied to the *Springer* audience about her relationship with her boyfriend during that episode, an episode that featured the usual histrionics, infidelities, physical altercations and reconciliations.

Defendant sought to introduce these fabrications, reasoning that if M.H. publicly lied to a television audience, she could just as easily publicly lie to another audience—a jury.

The trial court excluded this proffered impeachment evidence under Evidence Code section 352. The court reasoned that this evidence, in line with the section 352 weighing process, was “substantially more prejudicial than . . . probative” given that the show’s participants were not sworn under penalty of perjury, and that the show was clearly for entertainment purposes; in fact, said the court after viewing the episode at issue, the show was “so over the top” it “border[ed] on the ridiculous.”

Defendant points, however, to M.H.’s pretrial statements to investigators and to the prosecutor, as well as to her sworn preliminary hearing testimony, in which she falsely denied that she engaged in prostitution. That is the point, though. The trial court properly allowed into evidence these lies—given their impeachment relevance; and properly excluded the *Springer* show statements, aptly concluding that “if [Evidence Code section] 352 was created for any reason, it was certainly created for this.”

#### **IV. Defense Counsel’s Alleged Ineffectiveness**

Defendant contends his counsel ineffectively represented him by failing “to litigate on the record an Evidence Code section 352 challenge to the admission of inflammatory, unduly

prejudicial pornographic images displayed to jurors during trial." We disagree.

To establish ineffective assistance of counsel, a defendant must show (1) his counsel performed below a level of reasonable competence, and (2) but for this performance, there is a reasonable probability defendant would have obtained a better result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.)

At trial, the People presented a representative sample of 10 photographs from the "hundreds and hundreds" of pornographic images found on defendant's computer. The photographs featured sexual activity involving duct tape or handcuffs, vomiting or gagging, urination (golden shower), and forced sex acts.

These photographs aligned with the unusual kinds of sexual acts that the two alleged victims claimed defendant had forced them to do. As a result, the People are correct that the photos corroborated the alleged victims' testimony, and were probative of defendant's intent and motive (rather than simply showing, as defendant argues, that he was a bad character who possessed this kind of pornography). (See *People v. Scheid* (1997) 16 Cal.4th 1, 18-19 [photograph of shackled victims in robbery-murder corroborated testimony of plan to incapacitate robbery victims]; *People v. Clark* (1992) 3 Cal.4th 41, 129 [in prostitute murder case, many pornographic works were seized from defendant's apartment; only a few pages were admitted at trial, including one depicting a decapitated head orally copulating a severed

penis, which "was probative of [the] defendant's interest in that matter"].)

Arguably, defense counsel did not perform below a level of reasonable competence, in light of these relevant evidentiary purposes and the small number of photos actually presented; some portion of this extensive set of distinct images was likely to come in—perhaps defense counsel "off the record" considerably whittled down the display. In any event, the representative sample of photos that was presented to the jury was certainly no worse a depiction than the lurid testimony of the two alleged victims; consequently, defendant was not prejudiced by the photos.

Defendant also argues that regardless of the effect of this evidentiary error on its own, the error, together with the other evidentiary and instructional errors discussed previously, cumulatively denied him his constitutional due process right to a fundamentally fair trial.

We again disagree. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) The only evidentiary-related errors we have found so far concern the trial court's instructions with CALCRIM Nos. 358 and 362, and defense counsel's supposed failure to keep out the few pornographic images, but we have found those errors harmless. Consequently,

defendant's trial was not rendered fundamentally unfair and did not invoke a constitutional violation.

### **V. The Sentence**

Defendant contends that his sentence of 400 years to life—comprising 16 consecutive One Strike law terms of 25 years to life—is a disproportionate sentence that is unconstitutionally cruel and/or unusual under the federal and state Constitutions. (See Pen. Code, § 667.61, subd. (a).) We disagree.

The federal Constitution prohibits a sentence that is “grossly disproportionate” to the severity of the crime. (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1087.) The California Constitution prohibits a sentence “if ‘it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.’” (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230-1231, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.)

Defendant was convicted of 18 forcible sex acts. The acts included aggravated kidnapping, shackling, duct-taping, and multiple victims, as well as brutal, degrading and dehumanizing conduct that extended over days. The trial court was on the mark in commenting at sentencing that defendant “chose victims that [he] thought [he] could dominate and control, and . . . used [his] . . . home as [his] personal sexual torture club.”

Defendant principally argues that the seriousness of the offenses “could be amply punished with a much shorter sentence” without “the gross overkill of a term requiring [defendant] to

serve a de facto term of life without parole." He acknowledges, as he must, that this court has rejected similar arguments. (*People v. Retanan, supra*, 154 Cal.App.4th at pp. 1222, 1230-1231 [135 years to life for 16 sexual offenses against four victims]; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1130, 1134-1137 [375 years to life plus 53 years for 19 sexual offenses against three victims]; see also *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382-1383 [115 years plus 444 years to life].) We again do so. It is defendant's conduct, rather than his de facto sentence of life without parole, that "shocks the conscience and offends fundamental notions of human dignity."

Lastly, defendant contends, the People agree, and we concur, that defendant is entitled to one additional day of presentence custody credit.

#### **DISPOSITION**

The trial court is directed to prepare an amended abstract of judgment to reflect 729 days of actual presentence custody credit, and consequently, 838 total days of actual credit plus conduct credit, and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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BUTZ, J.

We concur:

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RAYE, P. J.

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HULL, J.