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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER DAVID ALLEN,

Defendant and Appellant.

E059292

(Super.Ct.Nos. SWF10001610
& RIF10002868)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Senior Assistant Attorney
General, and Eric A. Swenson, Kristine A. Gutierrez, and Lynne G. McGinnis, Deputy
Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Christopher David Allen was charged by information with five felony counts: two counts of forcible rape (counts 1 and 3, Pen. Code,¹ § 261, subd. (a)(2)), two counts of forcible penetration by a foreign object (counts 2 and 4, § 289, subd. (a)), and unlawful sexual intercourse with a person under the age of 18 and more than three years younger than defendant (count 5, § 261.5, subd. (c)). Counts 1 through 4 included allegations that defendant had committed a sexual offense against more than one victim (former § 667.61, subd. (e)(5), now § 667.61, subd. (e)(4)). Counts 1 and 2 related to a July 9, 2009, attack on one female victim (victim 1); counts 3 through 5 related to a July 13, 2010, attack on a second female victim (victim 2).²

After a jury trial, with respect to count 1, the jury found defendant guilty of the lesser included offense of attempted rape. With respect to counts 2 through 5, the jury found defendant guilty as charged, and it found each of the multiple victim allegations true.

At sentencing, the trial court dismissed the multiple victim allegation as to count 1. The court then imposed a determinate sentence of four years with respect to count 1, consecutive indeterminate terms of 15 years to life with respect to counts 2 through 4, and a stayed three-year sentence with respect to count 5, for an aggregate sentence of four years, plus 45 years to life.

¹ Further undesignated statutory references are to the Penal Code.

² In the trial transcript, following the practice of the information, victim 1 is referred to as “Jane Doe 2,” while victim 2 is “Jane Doe 1.” Defendant continues to use the “Jane Doe” appellations, or abbreviations thereof, in his briefing on appeal, while the responsive brief of the attorney general refers to the victims by their initials.

On appeal, defendant contends that the trial court erred by (1) denying his motion to sever counts 1 and 2 from counts 3 through 5; (2) permitting the two victims to testify with a victim support advocate, without holding a hearing to determine whether the witnesses needed support; (3) failing to instruct the jury on rape by intoxication and sexual penetration of an intoxicated person; (4) failing to instruct with respect to honest but unreasonable belief in consent; and (5) refusing to allow defendant and his counsel to be present while a portion of the trial testimony of one of the victims was read back to the jury. We affirm the judgment in all respects.

I. FACTUAL AND PROCEDURAL BACKGROUND³

Victim 1 testified that defendant attacked her on July 9, 2009. At the time, she was 36 years old, working primarily as a waitress, and cleaning houses as a second job. She had met defendant while waitressing, about two months earlier; defendant was a customer. In the course of conversation, he offered her a house cleaning job at a house in Riverside owned by a “friend . . . in real estate.”

Victim 1 stated that defendant made sexual advances towards her on July 9, 2009, at the end of the day, as she was finishing up the house cleaning job. After she resisted his advances, he attacked her, blocking her from leaving and eventually succeeding in grabbing her, throwing her to the ground and removing her clothing. She resisted both verbally and physically, managing among other things to kick him in the groin. He

³ A relatively brief summary of the events at issue suffices for present purposes. We do not attempt an exhaustive description of the testimony of the witnesses at trial, or the details of the attacks on the victims.

continued kissing her neck, abdomen, and breasts, and bit her on the breasts. He tried to put his penis in her vagina, but could not maintain an erection.⁴ He then put his fingers inside her vagina.

Later that evening, at the hospital, the nurse treating victim 1 observed various abrasions and bruises on her arms, legs, fingers, wrists, and torso, and her left forearm was beginning to swell—injuries consistent with a physical struggle and being restrained by physical force. Victim 1 had no visible injuries to her external genitalia, and declined to undergo a more intrusive internal examination. She had suffered, in the nurse’s words, “quite an extensive anal perineal injury.” DNA gathered by swabs of victim 1’s right breast, ears, neck, and external genitalia were later discovered to be a match to defendant.

Defendant testified that he and victim 1 had mutually kissed on one occasion, and had sex on another, in the weeks prior to July 9, 2009. He said that on July 9, there was some mutual kissing and other touching, initiated by victim 1, but not more than that. Afterward, however, defendant says that he told victim 1 that he did not want to continue their relationship, and conceded that he “probably” did not do so “nicely.” He also described victim 1 then accidentally learning that defendant was already in a relationship with another woman, by overhearing a discussion between defendant and the owner of the property she had been hired to clean. In defendant’s account, victim 1 became

⁴ Victim 1 testified at several points that defendant succeeded in inserting his penis into her vagina before losing his erection and using his fingers to penetrate her instead. At other times, however, she at least arguably suggests that defendant lost his erection when he was kicked in the groin, and that he never was able to penetrate her with his penis, despite trying to do so.

“extremely upset,” to the point of lying in the living room area “moaning” and “in a fetal position.” Shortly thereafter, she stood up, got in her car and left.

Victim 2 testified that defendant attacked her on July 13, 2010. She had recently turned 17 years old. She had met defendant a few weeks prior, before her birthday.⁵ While victim 2 was walking home from a fast-food restaurant to her father’s house, a distance of several miles, defendant drove by in a truck, and stopped to offer a ride. She accepted the offer. They did not proceed straight to victim 2’s father’s home, however, instead stopping at defendant’s house; he said he needed to stop there to drop off some laundry, and would be there only a short time. In fact, they conversed for about two hours. As they left, defendant tried to kiss her, but she pushed him away, telling him that she had a boyfriend. He then drove her to her father’s house.

Victim 2 further testified that, after their initial meeting, she and defendant began communicating via text message. She told him that her birthday was coming up, and she wanted to get a tattoo. She asked if he knew anyone who did tattoos, and if defendant could take her to get one. Defendant responded that he did know someone, who worked from home, and would give her the tattoo for free as a favor to him.

Eventually, according to victim 2, she and defendant agreed on July 13, 2010, as the date for her to get the tattoo. They met that morning, about a half mile from her father’s house. Defendant suggested that alcohol would ease the pain of being tattooed, so they stopped at a grocery store, and defendant bought the alcohol that victim 2 chose, a

⁵ Defendant was 40 years old in July 2010, but victim 2 testified he told her that he was 27, while she told him she was 16.

six-pack of hard lemonade. Over several hours, defendant gave victim 2 a series of excuses as to why his friend was not ready to give her the tattoo, and in the meantime, victim 2 consumed about four bottles of the hard lemonade. Eventually, defendant indicated that it was time to go meet the friend, at the friend's house.⁶ Instead of going there, however, the defendant drove them to an area nearby where there were no houses. After talking for a while, and engaging in some consensual kissing, victim 2 testified that defendant forced her to perform oral sex on him. In the course of doing so, victim 2 vomited on defendant. After cleaning himself up, defendant partially removed victim 2's clothing, despite her efforts to stop him from doing so, then bit her and kissed her on the breasts, and penetrated her vagina with his fingers, and then his penis. Victim 2 said no repeatedly, and "kept telling [defendant] that [she] didn't want him to do that." Defendant stopped after ejaculating onto a blanket.

That evening, at the hospital, a nurse treating victim 2 observed no visible injuries from the incident, noting only redness and tenderness on the outer portion of her hymen.⁷ DNA gathered on swabs of victim 2's breasts was later discovered to be a match to defendant.

In an interview with police on July 14, 2010, defendant denied that he ever tried to kiss victim 2, or ever had any sexual contact with her, stating ". . . if she says that I tried

⁶ In fact, the house was that of Fuad Camanero, who was a friend of defendant's, but who was not a tattoo artist.

⁷ Victim 2 told the nurse that a wound on her left forearm was not from her encounter with defendant.

to kiss her, it never happened. If she said I tried to do something else to her, it never happened.” At trial, defendant admitted that this statement to police (among others) was a lie, but insisted that his sexual contact with victim 2, including her oral copulation of him, his digital penetration of her, and sexual intercourse, was consensual.

Defendant was initially charged by means of two separate informations, filed on the same date, each relating to offenses against a single victim. The charges were consolidated on the People’s motion. The trial court later denied a defense motion to sever.

On May 30, 2013, after trial and deliberations, the jury returned its verdict, described above. Defendant was sentenced on July 19, 2013.⁸

II. DISCUSSION

A. The Trial Court Did Not Err by Denying Defendant’s Motion to Sever.

Defendant contends that the charges involving victim 1 were not properly joined with the charges involving victim 2, and that even if the statutory requirements for joinder were met, the denial of his motion to sever was an abuse of discretion. We disagree with both contentions, for the reasons discussed below.

First, joinder was proper. There is a strong preference for joinder of separate offenses and consolidation of trials against the same defendant. (§ 954.) All that is required for joinder is that the offenses either be “offenses of the same class of crimes” or “different offenses connected together in their commission.” (*Ibid.*) Crimes are of the

⁸ Additional facts will be discussed below as necessary to address defendant’s claims of error.

same class if they share common general characteristics or attributes, and courts interpret the term “same class” broadly. (See *People v. Thomas* (1990) 219 Cal.App.3d 134, 140 (*Thomas*) [attempted murder and felon in possession of firearm counts properly joined with robbery counts, committed on different dates and against different victims, because offenses pertained to same class of crimes, “assaultive crimes against the person.”].) Offenses are “connected together in their commission” if “there exists ‘a common element of substantial importance in their commission,’ even though the offenses charged do not relate to the same transaction and were committed at different times and places against different victims.” (*People v. Poon* (1981) 125 Cal.App.3d 55, 68 (*Poon*).)

The crimes charged in this case were offenses of the “‘same class of crimes,’” namely, “assaultive crimes against the person” or, more specifically, sexual assault. (See *Thomas, supra*, 219 Cal.App.3d at p. 140.) The offenses also shared numerous common elements of substantial importance, the most significant being sexual motivation, and nonconsensual acts of digital sexual penetration and sexual intercourse. (See *Poon, supra*, 125 Cal.App.3d at pp. 68-69.) Defendant’s arguments to the contrary, attempting to distinguish between the two charged assaults on their details, are unpersuasive; similarity in every detail between the events underlying the charged offenses is unnecessary for joinder to be proper under the applicable standards.

Second, defendant fails to show that the trial court’s refusal to sever the charges was an abuse of discretion. “A defendant, to establish error in a trial court’s ruling declining to sever properly joined charges, must make a “‘clear showing of prejudice to establish that the trial court *abused its discretion*’”” (*People v. Soper* (2009) 45

Cal.4th 759, 774.) “[T]he first step in assessing whether a combined trial was prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled.” (*People v. Balderas* (1985) 41 Cal.3d 144, 171-172.) Nevertheless, “even the complete absence of cross-admissibility does not, by itself, demonstrate prejudice” (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221 (*Alcala*)). Other factors to be considered include “whether some of the charges are unusually likely to inflame the jury against the defendant; whether the prosecution has joined a weak case with a strong case (or another weak case), so that a ‘spillover’ effect from the aggregate evidence on the combined charges might alter the outcome as to one; and whether any of the joined charges carries the death penalty.” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244 (*Musselwhite*)).

Evidence Code section 1101 limits the introduction of character evidence to prove conduct, but those limitations are subject to a number of exceptions, including those codified in Evidence Code section 1108. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1108 permits the jury in sex offense cases to consider evidence of charged or uncharged sexual offenses for any relevant purpose, “subject only to the prejudicial effect versus probative value weighing process required by Evidence Code section 352.” (*People v. Loy* (2011) 52 Cal.4th 46, 63; see Evid. Code, § 1108, subd. (a).) Analysis of cross-admissibility in the context of a motion to sever properly joined offenses, however, does not turn on the assessment of prejudice under Evidence Code section 352. (*Alcala, supra*, 43 Cal.4th at p. 1222, fn. 11.) Rather, “a party seeking severance must make a

stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial.’” (*Ibid.*)

All of the charges against defendant are “sexual offenses” within the meaning of Evidence Code section 1108. (Evid. Code, § 1108, subd. (d)(1)(A).) Though defendant identifies some differences between the two incidents at issue—the age of the victims, the amount of physical force used to subdue the victim, and so on—we cannot say that the offenses involving victim 1 were entirely dissimilar to those involving victim 2. Among other things, defendant was charged with committing nonconsensual acts of sexual penetration and sexual intercourse with respect to both victims. As such, the evidence of the offenses against each victim generally would be cross-admissible at a hypothetical separate trial of the other, at least for purposes of severance analysis. (*Alcala, supra*, 43 Cal.4th at p. 1226, fn. 17.)

Furthermore, the charges with respect to each victim are similar in nature and similarly egregious. Though victim 2 was 17 at the time of the charged offenses, while victim 1 was an adult, we are not persuaded by defendant’s assertion that the jury’s passions were likely to be unduly inflamed by victim 2’s age. (Cf. *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 132-133 [finding abuse of discretion in failure to sever charges of rape, sodomy, and murder of an adult from two counts of rape and one count of oral copulation with respect to a 13-year-old victim, and one count of committing a lewd act on an 11 year old victim].) The jury’s verdict—finding defendant guilty only of the lesser included charge of attempted rape with respect to count 1, but guilty as charged with respect to all offenses involving victim 2—also tends to indicate that the jury

considered each count separately, as it was instructed to do, rather than acting out of any unduly inflamed passion.

We are also not persuaded that a weak case was joined with a strong case, so as to cause a spillover effect that altered the jury's verdict. We are hard pressed to identify which of the two cases, viewed in the abstract and without the benefit of hindsight regarding the eventual verdict, was reasonably viewed as stronger. (See *Soper, supra*, 45 Cal.4th at p. 780 [review of severance analysis is based on the information before the trial court at the time it ruled on the severance motion].) For example, on the one hand, as defendant notes, victim 1's testimony and statements to police were at least arguably inconsistent or ambiguous at certain points, whereas victim 2 "gave entirely consistent stories about what occurred, and [defendant] hardly disagreed with her," except with respect to the issue of consent. On the other hand, victim 1's injuries—including scrapes, abrasions, and bruising over much of her body, and "quite an extensive anal perineal injury"—were unlikely to have been the result of consensual sexual contact. In contrast, victim 2 suffered no physical injuries patently inconsistent with consensual sexual contact. Thus, at the time the court ruled on defendant's severance motion, the evidence supporting one set of charges could not definitively be characterized as stronger than the other set, so this factor does not support defendant's claim of prejudice.

Finally, none of the charges with respect to either victim carries the death penalty. (*Musselwhite, supra*, 17 Cal.4th at p. 1244.) This factor too, therefore, does not support defendant's claim of prejudice.

We conclude that defendant's charges involving victim 1 were properly joined with the charges involving victim 2, and defendant has failed to demonstrate that any of the relevant factors weigh in favor of a finding of prejudice, thereby falling far short of the clear showing of prejudice required to establish an abuse of discretion. As such, defendant has shown no error by the trial court with respect to the denial of his motion to sever.

B. Defendant's Constitutional Rights Were Not Violated by Lack of Evidentiary Hearing Regarding Support Person Procedure.

As permitted under the Penal Code, both victims testified at trial accompanied by a support person. (§ 868.5.) The prosecution had asked the court to permit the presence of a support person for each witness in its trial brief. At a pretrial hearing, defense counsel asked to be informed in advance who the support person would be; when told that it would be a victim-witness advocate from the district attorney's office, defense counsel indicated that no further information was needed. At trial, as each victim took the stand, the trial court noted for the record, in the jury's presence, that the victim was accompanied by a "victim witness advocate from the district attorney's office." At trial, defense counsel raised no objection regarding the support person for either victim.⁹

⁹ Because defendant did not object in the trial court, he at least arguably has forfeited any claim of error. (*People v. Stevens* (2009) 47 Cal.4th 625, 641.) Nevertheless, we address the matter on its merits to forestall any claim of ineffective assistance of counsel. (See *People v. Thurman* (2007) 157 Cal.App.4th 36, 43, fn. 5 [Fourth Dist., Div. Two].)

On appeal, defendant does not contend that the trial court failed to follow the procedure provided section 868.5. He contends only that the statute—more precisely, the lack of any requirement for an evidentiary hearing to determine whether the victim witness needs support, and to explore available alternatives to having the support person at the witness stand with the victim—is unconstitutional, at least under the circumstances of this case. We find no violation of defendant’s constitutional rights.

As defendant acknowledges, California appellate courts, including this one, have rejected defendant’s argument that the use of support persons is inherently prejudicial and therefore requires a case-specific showing of necessity in all cases to be constitutional, even though such a showing is not required by section 868.5. (*People v. Johns* (1997) 56 Cal.App.4th 550, 553-556 [Fourth Dist., Div. Two].) We decline to revisit that issue.

Defendant further argues that the specific circumstances of this case required a showing of necessity for the use of the support person to be constitutional, regardless of the statutory requirements. (See *People v. Patten* (1992) 9 Cal.App.4th 1718, 1727 [conducting analysis of whether specific circumstances of the case required showing of necessity, even absent statutory requirement for such a showing].) We disagree. As noted, the jury heard that the support person for each witness was from the district attorney’s office. It is therefore unlikely the jury would view the support person as having reached a “neutral assessment that the witness is telling the truth,” thereby risking an improper influence, as defendant asserts, rather than as someone naturally sympathetic to the prosecution’s view. (See *Patten, supra*, at p. 1731 [because jury was already well aware of support person’s sympathy for witness, possible influence on the jury was

“minimal”].) Additionally, although a support person accompanied each victim in this case to the stand, there is nothing in the record showing that the support person did anything other than sit quietly nearby while the victim testified. “[T]here is nothing about a person sitting quietly to the side of a witness which is particularly distracting or likely to arouse intense feeling among jurors for a witness or against a defendant.” (*Ibid.* [quoting *Stanger v. State* (Ind.Ct.App. 1989) 545 N.E.2d 1105, 1114.]) Finally, defendant’s suggestion to the contrary notwithstanding, the circumstance that the victims were both adults at the time of trial does not create a constitutionally unacceptable risk that the jury would render its verdict on an improper basis. (See *Patton, supra*, at p. 1733 [involving adult victim-witness, finding defendant presented no facts demonstrating that the court should have required a showing of necessity before allowing support person].)

In short, we find no constitutional infirmity in the procedures relating to support persons utilized by the trial court, either on the face of the statutory procedure, or as applied to the circumstances of the present case, and we reject defendant’s arguments to the contrary.

C. The Trial Court Did Not Err by Refusing to Instruct on Rape by Intoxication and Sexual Penetration of an Intoxicated Person.

At trial, defense counsel asked the trial court to instruct the jury on the elements of rape by intoxication (§ 261, subd. (a)(3)) and sexual penetration of an intoxicated person (§ 289, subd. (e)) based on the evidence that victim 2 consumed alcohol in substantial quantities the morning of July 13, 2010. The prosecution objected, and the trial court

declined to give the requested instructions. Defendant contends that the failure to instruct on these offenses violated his constitutional rights. We find no error.

The trial court is obligated to give instructions on lesser included offenses when warranted by substantial evidence. (*People v. Jennings* (2010) 50 Cal.4th 616, 667 (*Jennings*)). “Under California law, a lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser.” (*Id.* at pp. 667-668.) However, “[a] defendant has no right to instructions on lesser related offenses, even if he or she requests the instruction and it would have been supported by substantial evidence, because California law does not permit a court to instruct concerning an uncharged lesser related crime unless agreed to by both parties.” (*Id.* at p. 668.)

Rape by intoxication and sexual penetration of an intoxicated person are not lesser included offenses of any of the offenses with which defendant was charged, but instead lesser related offenses, and defendant has not attempted to argue otherwise. The prosecution objected to instructing the jury on those lesser related offenses. Under California law, therefore, the court not only made no error by declining defendant’s request for those instructions, but would have erred if it had done otherwise. (*Jennings, supra*, 50 Cal.4th at pp. 667-668.)

Defendant argues that, regardless of state law, his federal constitutional right to have the jury instructed on the defense theory of the case required the court to give the requested instructions on rape by intoxication and sexual penetration of an intoxicated

person. The California Supreme Court, however, has rejected this argument, holding that “refusing to grant a defendant’s unilateral request for instructions on a lesser related offense does not violate any ‘constitutional due process right to present the “theory of the defense case . . .”.’” (*People v. Taylor* (2010) 48 Cal.4th 574, 622.)

Further, defendant’s reliance on the Ninth Circuit’s decision in *Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, is misplaced, because that case involved failure to instruct on a lesser included, not a lesser related, offense. (*Id.* at p. 737-738.) Neither does *People v. Schmeck* (2005) 37 Cal.4th 240, require a different conclusion than the one we reach above. Nothing in the record supports the notion that defendant was deprived of his opportunity to present the theory of his defense, namely, that the sexual contact between him and victim 2 was consensual. (See *id.* at p. 292 [finding defendant was not deprived of adequate opportunity to present his defense by lack of instruction on lesser related offense].) If the evidence at trial turned out to be such that, as defendant characterizes it in his briefing on appeal, “no jury could have found that [victim 2] could have actually formed consent” due to her intoxication, that tends to demonstrate only that the consent element of the charged offenses involving victim 2 was satisfied, not that the trial was fundamentally unfair.¹⁰

¹⁰ Appellate counsel for defendant overstates the evidence on the issue of victim 2’s intoxication. Certainly there was substantial evidence to support the notion that victim 2 may have been too intoxicated to consent, but we see nothing in the evidence that compels that conclusion. The evidence also could support other possible conclusions—for example, that victim 2 was not too intoxicated to consent, but simply *did not* consent.

Defendant fails to demonstrate any violation of his rights under either California or federal law with respect to the denial of his request that the jury be instructed on lesser related offenses.

D. Defendant Was Not Entitled to Any Instruction Regarding Honest But Unreasonable Belief in Consent.

Defendant contends that, as to counts 3 and 4, the trial court had a sua sponte duty to instruct the jury that if defendant had an honest but unreasonable belief that victim 2 consented, he should be convicted only of an (unspecified) lesser included offense. Defendant's argument is without merit.

Under California law, a defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. (*People v. Mayberry* (1975) 15 Cal.3d 143, 155.) But an honest but *unreasonable* belief is no defense: "[R]egardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable" (*People v. Williams* (1992) 4 Cal.4th 354, 361.) Defendant's notion that an honest but unreasonable belief that the victim consented warrants a finding of lesser culpability is incompatible with these principles.

Defendant's theory that an honest but unreasonable belief in consent should be treated as a partial defense, warranting conviction on a lesser included offense, is based on analogy to authority regarding imperfect self-defense as a partial defense to murder. The analogy, however, is fatally flawed. An honest but unreasonable belief in the necessity of self-defense, together with a fear of imminent harm, negates the malice

element of the offense of murder. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The offenses of rape and sexual penetration lack any such malice element. (See §§ 261, subd. (a)(2), 289, subd. (a)(1).) Unsurprisingly, therefore, no California court has published an opinion extending the reasoning of authority regarding imperfect self-defense to situations where the offense at issue is rape or sexual penetration, rather than murder, as defendant would have us do. We will not be the first.

In sum, the trial court had no duty to instruct the jury that an honest but unreasonable belief that victim 2 consented warranted conviction of a lesser offense. That proposition is not well-established by authority, as would be required for us to find a sua sponte duty to instruct. (See *People v. Michaels* (2002) 28 Cal.4th 486, 530) More to the point, however, such an instruction would not be a correct statement of the law. (See *People v. Prock* (2014) 225 Cal.App.4th 812, 821 [trial court had no obligation to give proposed instruction that was not a correct statement of the law].) Defendant's claim of error is rejected.

E. The Trial Court Did Not Err by Refusing to Allow Defendant or His Counsel to Be Present During Readbacks of Trial Testimony.

During deliberations, the jury twice requested and was provided readbacks of trial testimony. First, the jury sent the court a note requesting "transcripts" for victim 1's testimony. In lieu of written transcripts, the trial court sent the court reporter into the jury room to read the entirety of victim 1's testimony back to the jury. After approximately 40 minutes of readback, at 12:00 p.m., the jury sent a second note, stating that the court reporter "does not need to provide us with any further testimony at this time on [victim

1].” Later that day, the jury sent another note, requesting readback of a specific portion of victim 1’s testimony, described—apparently with reference to the previous readback—as beginning “from 15 minutes prior to lunch” and continuing “to the end of the D.A.’s questioning.”

Defendant had waived being personally present or having his counsel present during the first readback, based on the circumstance that the entirety of victim 1’s testimony was to be read back. When the jury cut short the readback, defense counsel stated that his “only concern” was that “all of the jurors actually agreed” to stop the readback, and that “an overbearing juror” might have cut the readback off at a point where others wished it to continue. With respect to the second readback, counsel requested that defendant be allowed to be present during the readback. The trial court denied that request.

On appeal, defendant contends that the readback of testimony to the jury out of his and his attorney’s presence, over his express objection (except with respect to any readback of the entirety of a witness’s testimony, as opposed to a portion thereof) violated his constitutional rights. We disagree.

Although a criminal defendant has the constitutional right to be present, and to have counsel available to assist him, at all critical stages of trial (e.g., *Rushen v. Spain* (1983) 464 U.S. 114, 117), the United States Supreme Court has never declared readback of testimony to be a critical stage. Our own Supreme Court has held that it is *not* a critical stage. (*People v. Cox* (2003) 30 Cal.4th 916, 963, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Defendant’s constitutional rights

were not violated by the denial of his request to be present during the readback of testimony to the jury.¹¹

In arguing otherwise, defendant’s briefing on appeal suggests *People v. Knighten* (1980) 105 Cal.App.3d 128, 132 (*Knighten*) stands for the principle that rereading testimony to the jury implicates the defendant’s constitutional right to counsel at all critical stages of trial. That is not an accurate characterization of the case. In *Knighten*, a judge entered the jury room during deliberations, outside of the presence of defendant or defense counsel, “ostensibly to clarify a request from the jury for rereading of certain testimony.” (*Knighten, supra*, at p. 132.) The Court of Appeal concluded that it “is obviously critically important that a defendant and his attorney be permitted to participate in decisions as to what testimony is to be reread to the jury” (*Ibid.*) Nowhere does the *Knighten* court say, or suggest, that the readback of testimony itself, as distinguished from determining what is to be reread, is a critical stage of the trial. Defendant’s characterization of several other cases that, unlike this one, involved direct communications between judge and jurors outside of the presence of counsel, is similarly misleading. (See *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1413 [ex parte

¹¹ Although defendant has not raised the issue in this appeal, he arguably did have a statutory right to be present during the readback of testimony. (§ 977, subd. (b)(1), (2).) Nevertheless, “[i]n general, “the defendant’s absence from various court proceedings, ‘even without waiver, may be declared nonprejudicial in situations where his presence does not bear a “reasonably substantial relation to the fullness of his opportunity to defend against the charge.” [Citations.]”” (*People v. Ayala* (2000) 23 Cal.4th 225, 288, fn. 8 (*Ayala*) [quoting *People v. Dennis* (1998) 17 Cal.4th 468, 538].) In *Ayala*, the California Supreme Court applied this principle to the rereading of testimony to a jury, finding the defendant’s absence nonprejudicial, so “[n]o waiver was required” (*Ayala, supra*, at p. 288, fn. 8.) The same analysis applies here.

communications with jury during deliberations regarding jury instructions]; *People v. Garcia* (1984) 160 Cal.App.3d 82, 88 [ex parte communications with two jurors during trial regarding defendant’s behavior at trial].)

Furthermore, defendant’s only theory as to how he might have been prejudiced by the readback of testimony to the jury outside of his and his attorney’s presence is that the wrong portions of testimony might have been read back to the jurors, or that the court reporter might have engaged in improper communications with the jury. “Contrary to defendant’s suggestion, we will not presume that testimony was misread or that misconduct occurred” (*People v. Pride* (1992) 3 Cal.4th 195, 251; accord *Ayala, supra*, 23 Cal.4th at p. 289 [presumption that official duty has been regularly performed applies to court reporters].) Thus, to the extent there was any error with respect to the readback of testimony, it was harmless, on any standard of review. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

III. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.