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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DALLAS RANDOLPH WHITE,

Defendant and Appellant.

F067535

(Super. Ct. No. 1433662)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Linda A. McFadden, Judge.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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**INTRODUCTION**

On June 15, 2011, defendant Dallas Randolph White was arrested in connection with the sexual abuse of his son's minor stepdaughter Jane Doe. On June 19, 2012,

defendant was charged with one count of engaging in sexual intercourse or sodomy with a child 10 years of age or younger (count I; Pen. Code,<sup>1</sup> § 288.7, subd. (a)); one count of engaging in oral copulation or sexual penetration with a child 10 years of age or younger (count II; § 288.7, subd. (b)); one count of oral copulation with a child under 14 years of age (count III; § 288a, subd. (c)(1)); one count of sexual penetration with a person under 14 years of age (count IV; § 289, subd. (j)); and one count of committing a lewd or lascivious act upon a child under 14 years of age (count V; § 288, subd. (a)). The information also alleged defendant had a prior strike for robbery (§ 667, subds. (b)-(i)), an additional prior serious felony (§ 667, subd. (a)(1)), and had served two prior prison terms (§ 667.5, subd. (b)).

A jury found defendant guilty on all five counts, and he subsequently admitted to his prior strike, felonies, and prison terms. Defendant was sentenced to an aggregate term of 103 years to life.

On appeal, defendant argues (1) the trial court erred by admitting the victim's semen-stained underwear into evidence, (2) the trial court erred by permitting the sexual assault exam nurse to testify as an expert on vaginal trauma, (3) the trial court erred by permitting a support person during the victim's testimony when there had been no showing a support person was necessary, (4) defendant was prejudiced by the trial court's failure to issue cautionary instructions concerning defendant's out-of-court oral admissions, (5) the trial court erred by improperly instructing the jury on the applicable burden of proof, (6) the cumulative effect of the preceding errors was prejudicial to defendant, (7) his sentence constitutes cruel and unusual punishment, and (8) the abstracts of judgment must be corrected. Only defendant's final argument is persuasive, and we order the correction of defendant's indeterminate and determinate abstracts of judgment. Defendant's convictions and sentence are affirmed.

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<sup>1</sup>Unless otherwise specified, all statutory references are to the Penal Code.

## FACTS

At trial, Jane Doe's mother (Mother) testified she was married to defendant's son, but her oldest child, Jane Doe, had a different father. According to Mother, defendant lived in her home from June 2009 until June 2011. On June 11, 2011, Mother observed that Jane's vaginal area was red and irritated. Despite questioning, Jane did not reveal the cause of the redness or irritation. Mother became concerned after observing the vaginal irritation as Jane had been "acting funny" in the preceding weeks. Specifically, Mother noted Jane had recently begun sleeping in the hallway or alongside Mother's bed, and she also had been demonstrating inappropriate sexual vocabulary. Mother also recalled that earlier that day she had walked in on defendant and Jane together, and Jane fled the room, claiming to have defecated in her pants, while defendant's suspenders were loose and his pubic hair was exposed.

The next day, Jane informed Mother that defendant had touched her vagina. At that time, Mother removed her children from the home, contacted the police, and took Jane to the hospital to be evaluated. Upon returning home, Mother collected from the laundry pile a pair of underwear Jane had been wearing the previous day and placed them in a Ziploc bag. Mother later turned that bag over to the police on June 21, 2011, ten days after first contacting the police.

Mother testified she had not previously observed any cuts or abrasions on Jane's vagina, but when she came home on June 11, 2011, the same day she later noticed the redness and irritation on Jane's vagina, she found defendant and Jane together. She testified Jane fled the room, claiming to have defecated in her pants, and defendant's suspenders were loose and his pubic hair was exposed.

Jane testified defendant had sexually abused her on several occasions while she was in first grade. Specifically, defendant had touched her breasts, repeatedly penetrated her vagina with his fingers and penis, placed his mouth on her vagina, inserted his penis

into her rectum, and made Jane perform oral sex on him. Jane observed “clear stuff” coming out of defendant’s penis, and defendant told her not to tell anyone.

Joanna Franks, a registered nurse, conducted the forensic “Sexual Assault Response Team” (SART) exam on Jane and noted bruising in the area between Jane’s buttock and thigh, as well as redness and a possible healing bruise on Jane’s vaginal opening. Franks did not find evidence of bodily fluids or any injuries to Jane’s hymen or rectum. According to Franks, however, past penetrative sex would not always cause visible damage to those areas as they were capable of healing rapidly. Franks acknowledged she could not definitively conclude the injuries present on Jane’s exam were caused by sexual abuse rather than a fall or general irritation.

The underwear provided to the police by Mother tested positive for seminal fluid and spermatozoa, but there was insufficient DNA in the sample to determine the source of the semen.

## **DISCUSSION**

### **I. The Trial Court Did Not Err by Admitting Jane Doe’s Underwear into Evidence**

Prior to trial, defense counsel moved to exclude Jane Doe’s underwear and the forensic tests performed on them from evidence. Defendant claimed the evidence was more prejudicial than probative, as the source of the semen could not be determined, ten days passed before Mother turned the underwear over to police, and a recent study had shown semen could be transferred between articles of clothing in a washing machine. Following a hearing, the trial court denied defendant’s motion, finding the evidence was more probative than prejudicial, and defendant’s arguments for exclusion went to the weight of the evidence rather than its admissibility.

On appeal, defendant renews his objection to the admission into evidence of Jane’s underwear and related forensic tests, again asserting the evidence was more prejudicial than probative. We disagree. We review a trial court’s decision to admit

evidence for an abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) An abuse of discretion occurs when a court exercises its discretion in an “arbitrary, capricious, or patently absurd manner that result[s] in a miscarriage of justice.” (*Ibid.*)

Under Evidence Code section 352, a trial court has the discretion to exclude evidence “if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice.” While the admission of semen-stained underwear was certainly damaging to defendant’s case, “[i]n applying [Evidence Code] section 352, “prejudicial” is not synonymous with “damaging.” [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 638, quoting *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Instead, evidence is only unduly prejudicial if it “uniquely tends to evoke an emotional bias against defendant as an individual and ... has very little effect on the issues.” (*People v. Bolin* (1998) 18 Cal.4th 297, 320, quoting *People v. Yu*, *supra*, at p. 377.)

The forensic testing in this case had a profound effect on the issues, even in the absence of definitive proof that the semen came from defendant. Jane Doe testified defendant sexually assaulted her and ejaculated in her presence, and the presence of semen on Jane’s underwear tended to corroborate those claims. Such corroborating physical evidence has obvious probative value. (*People v. Clark* (2011) 52 Cal.4th 856, 923 [“Here, notwithstanding the expert’s inability to type the semen stain, the evidence tended to show defendant’s guilt of attempted rape”].)

Moreover, that probative quality was not outweighed by any prejudicial effect as contemplated by Evidence Code section 352. That section “uses the word in its etymological sense of “prejudging” a person or cause on the basis of extraneous factors. [Citation.] [Citation.]” (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) The physical evidence in this case did not run the risk of causing the jury to prejudge defendant on “extraneous” factors, as it directly related to actual crimes for which defendant stood accused.

Further, defendant's repeated assertion that the semen could have been transferred in the washing machine does nothing to decrease the probative value of the evidence in question. At trial, expert testimony established the underwear had not been laundered, and it tested positive for not only spermatozoa but also seminal fluid, which cannot be transferred by the laundering process.

Likewise, neither the delay in turning the underwear over to police nor the fact there was insufficient DNA evidence to conclusively determine the source of the semen on the underwear renders the evidence in question inadmissible. The trial court correctly noted those facts go to the weight of the evidence, not its admissibility. (*People v. Clark, supra*, 52 Cal.4th at p. 923 ["Defendant's argument goes to the weight, not the admissibility, of the semen stain evidence"].) In order to be admissible, evidence need only be relevant, not beyond reproach. As the evidence in question was obviously relevant to the primary question in this case, we find the trial court did not abuse its discretion by denying defendant's motion to exclude the evidence. (*Ibid.* [no abuse of discretion in admitting evidence of semen stain on defendant's boxer shorts in attempted rape prosecution even though source of stain could not be scientifically established].)

## **II. The Trial Court Did Not Err by Permitting Franks to Testify as an Expert**

Prior to trial, the People filed a motion naming SART nurse Franks as an expert witness. In response, defendant filed a motion to exclude any testimony by Franks relating "to any medical diagnosis, or conclusion on the condition of [Jane Doe]'s hymen" due to Franks' lack of forensic expertise. Following a hearing on the motion, the trial court ruled Franks could testify to what she saw and did during the SART exam, but declined to qualify her as an expert prior to voir dire.

At trial, the People called Franks as a witness and, during voir dire, she testified she had been a registered nurse since 2007, had been trained in the collection of forensic evidence in sexual assault cases, and had conducted ten to 20 SART examinations on children under the age of ten. She acknowledged, however, that she was not trained to

offer any diagnosis. Franks further testified that, as part of a three-day training course, she had received training on human genitalia and locating genital injuries. At the conclusion of voir dire, the trial court found Franks had knowledge of genital injuries exceeding that of the average person and qualified her to give opinion evidence regarding her findings from Jane Doe's SART exam.

On appeal, defendant argues he was prejudiced by improper admission of expert testimony regarding Jane's SART examination. We disagree. We review the admission of expert witness testimony under an abuse of discretion standard. (*People v. Kovacich* (2011) 201 Cal.App.4th 863, 902.)

Expert opinion testimony is admissible when it “[r]elate[s] to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Evid. Code, § 720, subd. (a).)

Defendant argues Franks was not qualified to testify she documented a “possible” healing bruise during Jane Doe's SART exam. As Franks' position as a SART nurse entails the documentation of injuries, and she did in fact document the area of possible bruising, defendant's argument is without merit. The case cited by defendant does not support his contention. Instead, it supports our conclusion there was no error in permitting Franks to testify about a subject in her specific area of training and duties as a SART examiner. (See *People v. Hogan* (1982) 31 Cal.3d 815, 852 [“the qualifications of an expert must be related to the particular subject upon which he is giving expert testimony”].) In light of Franks' education, training, and practical experience (noted above and below), the trial court did not abuse its discretion by finding Franks qualified to testify about possible injuries she documented during her examination.

Defendant also alleges Franks lacked sufficient expertise to offer opinion evidence concerning the absence of documented injuries to Jane Doe's hymen and rectum. Specifically, defendant objects to Franks' testimony that a finger or penis could be inserted into a vagina or rectum without leaving lasting damage, as an estrogenized hymen was capable of repairing itself and rectal tissue heals very rapidly. This contention must also be rejected.

Because of the specialized knowledge involved, the subject of genital trauma is certainly a subject "that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Further, Franks testified she had training and several years of experience as a registered nurse, as well as additional training as a forensic examiner and experience in conducting numerous sexual assault examinations on children under the age of ten. Franks also testified she had undergone specific training on recognizing genital injuries, including injuries to the hymen.

“[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (*People v. Cole* (1956) 47 Cal.2d 99, 103.)

Given Franks' demonstration of her education, training, and practical experience in the areas of human health, forensic examination, and sexual assault, it was not an abuse of discretion for the trial court to conclude she could reach conclusions on the subject of sexual assault injuries more intelligently than a person of ordinary education. Indeed, this fact was evidenced at trial where defense counsel repeatedly sought to appeal to the common-sense notion that sexual intercourse between an adult and a child leaves lasting and obvious trauma, and Franks' expert testimony contradicted that notion.

Further, while defendant's brief on appeal seeks to minimize the extent of Franks' training and experience, "[w]hen a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience go to the weight, not the admissibility, of the witness's testimony. [Citation.]" (*People v. Jones* (2013) 57 Cal.4th 899, 949-950.) Defendant thoroughly cross-examined Franks as to the depth of her knowledge and experience and was free to call his own expert witness if he so chose. Acceptance of Franks as an expert and permitting her testimony regarding injuries, bruises, and their ability to heal was within the court's broad discretion. We find no manifest abuse of that discretion. (*Ibid.*)

### **III. The Trial Court Did Not Err by Permitting Mother to Act as Jane Doe's Support Person**

Defendant contends the trial court erred by permitting Mother to serve as a support person during her daughter's testimony. This contention is summarily rejected under the rule of forfeiture because defendant failed to object to this procedure at trial. (*People v. Myles* (2012) 53 Cal.4th 1181, 1214; *People v. Stevens* (2009) 47 Cal.4th 625, 641.) In any event, we disagree that the trial court committed error or that trial counsel's failure to object caused defendant any prejudice.

Under section 868.5, some prosecution witnesses are entitled to the presence of two support persons, one who may accompany the witness to the witness stand. (§ 868.5, subd. (a).) If a person chosen to be a support person is also a prosecuting witness, the prosecution must show that "the person's attendance is both desired by the prosecuting witness for support and will be helpful to the prosecuting witness." (§ 868.5, subd. (b).) If that showing is made, the court must grant the request unless it is established "that the support person's attendance during the testimony of the prosecuting witness would pose a substantial risk of influencing or affecting the content of that testimony." (*Ibid.*) A

support person who is also acting as a witness must testify before and out of the presence of the witness who is to be supported. (§ 868.5, subd. (c).)

In the instant case, the People informed the trial court that Mother would be serving as a support person for Jane Doe and that Mother's testimony would be given first, as required by section 868.5, subdivision (c). The People made no special offer of proof showing the necessity of a support person, but defense counsel offered no objection and the trial court permitted Mother to sit behind Jane on the stand and serve as her support person.

Citing *People v. Adams* (1993) 19 Cal.App.4th 412, defendant argues an evidentiary hearing to establish the necessity of a support person is required before a trial court can approve the use of the support person. *Adams*, however, based its holding on a pair of cases dealing with child witnesses who were not required to face the defendants at trial. (*Id.* at pp. 442-444.) In the first, *Maryland v. Craig* (1990) 497 U.S. 836, child witnesses were permitted to testify via closed circuit television, while in the second, *Coy v. Iowa* (1988) 487 U.S. 1012, a pair of child witnesses were permitted to testify from behind a screen.

While *Craig* and *Coy* required an evidentiary hearing to protect the defendants' rights to confront their accusers face-to-face, *Adams* sought to extend those protections to a witness's use of a support person under section 868.5. That extension was criticized by the First Appellate District in *People v. Lord* (1994) 30 Cal.App.4th 1718, 1721-1722, where the court found the need for a full evidentiary hearing was "debatable," as the only showing required under section 868.5 was that the support person was desired and would be helpful. (See § 868.5, subd. (b).) The First District further held that "[i]n the case of a molested six-year-old victim, it is almost given that [a] support person's presence is desired and would be helpful, and the statutory showing will be perfunctory." (*People v. Lord, supra*, at p. 1722.)

Given the express language of section 868.5, we see no reason to adopt the expansive holding in *Adams* in favor of the more statutorily based holding in *Lord*. Section 868.5, subdivision (b) does not require an evidentiary hearing to establish the necessity of the support person; it only requires a showing the witness desires the support person and the support person would be helpful. While the People did not make any express showing to this effect at trial, we agree with the sentiment in *Lord* and find in cases of child sexual abuse, a showing that a support person's presence is desired and helpful is essentially "perfunctory" and can be sufficiently established by the request itself.

Even if we were to conclude the trial court erred by failing to make a specific finding that a support person for Jane Doe was desired and necessary, and that trial counsel was ineffective for failing to object, any such error would be harmless. Defendant has failed to make any showing that, had the trial court made a case-specific finding on the desirability and helpfulness of a support person, it would have denied Jane the use of a support person. "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show ... it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.) As defendant has not, and cannot, establish he was prejudiced in anyway by the trial court's failure to inquire into the desirability and helpfulness of a support person for an eight-year-old sexual abuse victim, we find any error harmless.

#### **IV. Defendant Was Not Prejudiced by the Trial Court's Failure to Instruct the Jury With CALCRIM Nos. 358 and 359**

Defendant argues the trial court erred by failing to instruct the jury that evidence of a defendant's oral admission should be viewed with caution, and a defendant cannot be convicted solely on the basis of an out-of-court statement. We agree, but find the errors harmless.

“It is well established that the trial court must instruct the jury on its own motion that evidence of a defendant’s unrecorded, out-of-court oral admissions should be viewed with caution. [Citations.]” (*People v. McKinnon* (2011) 52 Cal.4th 610, 679.) Jury instructions concerning such out-of-court admissions are found in CALCRIM No. 358, which reads as follows:

“You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]”

At trial, Jane Doe testified defendant told her “not to tell anyone” about the sexual abuse. This was obviously evidence of an unrecorded, out-of-court statement tending to show defendant’s guilt and, thus, required the trial court to instruct the jury with the language of CALCRIM No. 358. Nevertheless, the failure to issue such an instruction only requires reversal when “it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. [Citations.]” (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.)

As cautionary instructions are intended to help the jury to determine whether an oral admission was in fact made, “courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]” (*People v. Dickey* (2005) 35 Cal.4th 884, 905, quoting *People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.) “[Our Supreme Court] has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict, a defendant simply denies that he made the statements.” (*People v. McKinnon, supra*, 52 Cal.4th at p. 680.) Appropriately instructing a jury on assessing the credibility of

witnesses also renders the failure to issue a cautionary instruction on oral admissions harmless. (*Ibid.*)

In the instant case, there was no conflict as to defendant's exact words used, their meaning, or whether they were repeated accurately. Instead, the defense asserted Jane Doe was simply fabricating the allegations. Further, the trial court appropriately instructed the jury with CALCRIM Nos. 226 and 302 on assessing the credibility of witnesses. Therefore, the trial court's failure to instruct the jury with CALCRIM No. 358 was harmless.

A similar analysis applies to defendant's claim that the trial court erred by failing to instruct the jury with the language of CALCRIM No. 359, which states, in relevant part:

“The defendant may not be convicted of any crime based on (his/her) out-of-court statement[s] alone. You may rely on the defendant's out-of-court statements to convict (him/her) only if you first conclude that other evidence shows that the charged crime [or a lesser included offense] was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed.”

As this instruction is required whenever a defendant's extrajudicial statements form part of the prosecution's evidence, the trial court erred by failing to provide it to the jury in this case. (*People v. Howk* (1961) 56 Cal.2d 687, 706.) Failure to issue jury instructions to this effect is harmless, however, “if there appears no reasonable probability the jury would have reached a result more favorable to the defendant had the instruction been given.” (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1181.)

While the trial court failed to instruct the jury it could not convict defendant without evidence—other than defendant's out-of-court statements—of a crime having been committed, there was significant evidence from which the jury could conclude a crime took place. Both Mother and Franks testified to seeing bruising and redness on Jane Doe's genital area, Jane testified in detail about several acts of sexual abuse at the hands of defendant, and forensic testimony established Jane's underwear had tested

positive for semen. This evidence, and not Jane's testimony that defendant told her not to tell anyone about the abuse, formed the backbone of the People's case against defendant. As such, there is no reasonable probability that, had the jury been instructed with CALCRIM No. 359, defendant would have obtained a different result. No reversal is required.

#### **V. The Trial Court's Jury Instructions on Reasonable Doubt Were Not Erroneous**

Defendant argues on appeal that the trial court's instructions to the jury on the standard of proof were defective. We disagree. "In determining the correctness of jury instructions, we consider the instructions as a whole. [Citation.] An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words. [Citation.]" (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.)

Defendant alleges two errors in the trial court's instructions. First, he claims the trial court's use of jury instructions compelling the jury to find the facts of the case based solely on evidence presented at trial was erroneous, as it precluded the jury from finding facts based on a *lack* of evidence. In so arguing, defendant challenges the validity of language found in CALCRIM No. 220, which instructs jurors they "must impartially compare and consider all the evidence that was received throughout the entire trial." To the extent they rely on similar language, defendant also challenges the trial court's use of CALCRIM Nos. 200, 222, 223, and 3550.

An identical argument was addressed and rejected in *People v. Campos, supra*, 156 Cal.App.4th at page 1238 where the Second District Court of Appeal held:

"Reasonable doubt may arise from the lack of evidence at trial as well as from the evidence presented. [Citation.] The plain language of CALCRIM No. 220 does not instruct otherwise. The only reasonable understanding of the language, '[u]nless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty,' is that a lack of evidence could lead to reasonable doubt. Contrary to defendants' claim, CALCRIM No. 220 did not tell the jury that

reasonable doubt must arise from the evidence. The jury was likely ‘to understand by this instruction the almost self-evident principle that the determination of defendant’s culpability beyond a reasonable doubt ... must be based on a review of the evidence presented.’ [Citations.]”

While this holding refers only to CALCRIM No. 220, it applies with equal force to defendant’s objections to CALCRIM Nos. 200, 222, 223, and 3550. Indeed, despite defendant’s claims to the contrary, nothing in the trial court’s instructions to the jurors could be reasonably understood to prohibit them from using a lack of evidence to establish reasonable doubt. Accordingly, defendant’s argument is without merit.

Second, defendant argues the trial court conveyed an insufficient burden of proof when it instructed the jury, pursuant to CALCRIM No. 220, that “[p]roof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true.” According to defendant, “an abiding conviction” incorrectly states the People’s burden of proof, as it goes only to the jury’s duration of belief, not in its degree of certainty.

This argument, however, was explicitly rejected by the United States Supreme Court in *Victor v. Nebraska* (1994) 511 U.S. 1, 14-15, where the court held “[a]n instruction cast in terms of an abiding conviction as to guilt, without reference to moral certainty, correctly states the government’s burden of proof. [Citations.]” Similarly, the California Supreme Court upheld the validity of defining reasonable doubt in terms of “an abiding conviction” in *People v. Farley* (2009) 46 Cal.4th 1053, 1122.<sup>2</sup> As we follow the decisions of courts exercising superior jurisdiction, defendant’s argument must be rejected. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

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<sup>2</sup>*Victor v. Nebraska* and *People v. Farley* dealt with CALJIC No. 2.90, not CALCRIM No. 220. However, both CALJIC No. 2.90, and CALCRIM No. 220 define reasonable doubt in terms of “an abiding conviction” in the truth of the charge.

## **VI. Defendant Was Not Prejudiced by Cumulative Error**

Next, defendant argues that even if none of the errors alleged above merits reversal on its own, the cumulative effect of those errors requires reversal. We disagree. Under the cumulative error doctrine, reversal may be required when the cumulative effect of the errors made at trial amounted to a miscarriage of justice. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) While we have found the trial court erred by failing to give cautionary instructions pursuant to CALCRIM Nos. 358 and 359, neither of those errors, either alone or in concert, amounted to a miscarriage of justice. Therefore, in the absence of a miscarriage of justice, we must reject defendant's contention he was harmed by the cumulative effect of multiple judicial errors.

## **VII. Defendant's Sentence Was Not Cruel and Unusual**

Defendant contends his aggregate sentence of 103 years to life constitutes unconstitutional cruel and unusual punishment, as it is grossly disproportionate to the crimes committed. We disagree.

As a preliminary matter, we note defendant did not raise his claim of cruel and unusual punishment before the trial court and, thus, the issue is forfeited for appeal. (See *People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Even if the matter had been properly preserved, however, it must fail on the merits.

Cruel and unusual punishment is prohibited under both the federal and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) This prohibition forbids punishment that "is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

In order to determine if a sentence is disproportionate, we must (1) examine "the nature of the offense and the offender, with particular regard to the degree of danger which both present to society," (2) "compare the challenged penalty to 'punishment prescribed in the same jurisdiction for other more serious offenses,'" and (3) "compare

the challenged penalty to ‘punishment prescribed for the same offense in other jurisdictions.’” (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806, quoting *People v. Thompson* (1994) 24 Cal.App.4th 299, 304.) We review questions of constitutional law de novo. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1154.)

Under the first prong, the nature of the offenses in this case—five sex crimes against a child committed over a period of several months—is undeniably heinous. Moreover, while the offender in this case had no prior record of sex crimes against children, he admitted to a prior conviction for robbery, a serious felony. Given the number and severity of the offenses in this case, as well as defendant’s past criminal history, a severe sentence was certainly justifiable under California law. (See *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231.)

Similarly, defendant finds no respite under the second prong of this analysis. While defendant argues his sentence exceeds the punishment given for offenses such as kidnapping and voluntary manslaughter, he fails to acknowledge the extreme length of his sentence was not due to one individual conviction, but rather five separate and serious offenses, sentenced consecutively. The imposition of sentences in excess of 100 years for multiple sex crime convictions has been upheld by the appellate courts of this state, as given “the outrageous nature of this type of offense and ... the danger that these offenses pose to society we cannot say that the imposition of consecutive sentences for multiple sex offenses shocks the conscience.” (*People v. Bestmeyer* (1985) 166 Cal.App.3d 520, 531; see *People v. Retanan, supra*, 154 Cal.App.4th at p. 1231 [sentence of 135 years to life for multiple sex offenses against minors not cruel or unusual punishment].)

Further, defendant’s sentence was effectively doubled by his prior conviction for robbery, and “society is warranted in imposing increasingly severe penalties on those who repeatedly commit felonies.” (*People v. Martinez, supra*, 71 Cal.App.4th at p. 1512.) Indeed, while defendant compares his sentence to a sentence for voluntary

manslaughter, he fails to acknowledge a conviction for petty theft at the time he committed his offenses could carry a sentence of 25 years to life if preceded by a serious enough criminal history. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431-1433.) Accordingly, given the number of charges defendant was convicted of, as well as defendant's past criminal history, defendant's sentence was not disproportionate to this jurisdiction's penalties for more serious offenses.

Finally, under the third prong, while sex offenders in California are “subject to some of the longest sentences in the country,” defendant has made no effort to show his sentence was disproportionate to the sentences he would be subject to in other jurisdictions. In fact, defendant acknowledges several other jurisdictions authorize similar sentences. As defendant bears the burden of establishing his punishment is disproportionate to the punishment he would face in other jurisdictions, his concession resolves this prong in the People's favor. (*People v. Crooks, supra*, 55 Cal.App.4th at p. 808.)

In spite of this analysis, defendant further asserts his sentence is unconstitutional as it greatly exceeds his life expectancy. California courts, however, have “repeatedly upheld” sentences which exceed the life expectancy of a defendant. (*People v. Retanan, supra*, 154 Cal.App.4th at p. 1231.) Defendant's sole authority in support of his argument, Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585, 600-601, carries no weight as precedent as it is not supported by the agreement of a majority of the court. (*People v. Retanan, supra*, at p. 1231.) Given the foregoing, we find defendant's punishment is not cruel or unusual and affirm defendant's sentence.

#### **VIII. The References to a “No Contact” Order Under Section “1202.01” in the Determinate and Indeterminate Abstracts Require Correction**

Finally, defendant argues the determinate and indeterminate abstracts of judgment erroneously state a “no contact” order was entered by the court under section “1202.01.” We agree.

At sentencing, the trial court orally imposed an order of no visitation under section 1202.05, but the abstracts of judgment state an order of no contact was imposed under section 1202.01. This appears to be a clerical error as there is no section 1202.01 in the California Penal Code, and the trial court referenced the correct statute, section 1202.05, when entering the order. As clerical errors are subject to correction on appeal, we will order the abstract corrected to include an order of no visitation under section 1202.05, rather than an order of no contact under section 1202.01. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

### **DISPOSITION**

The trial court is ordered to correct defendant's indeterminate and determinate abstracts of judgment to replace all references to "no contact" and "Penal Code section 1202.01" with "no visitation" and "Penal Code section 1202.05." The trial court is further ordered to forward corrected copies of the abstracts to the Department of Corrections and Rehabilitation. In all other respects, defendant's judgment is affirmed.

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PEÑA, J.

WE CONCUR

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LEVY, Acting P.J.

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SMITH, J.