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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS CAPACETE, JR.,

Defendant and Appellant.

G048795

(Super. Ct. No. 12CF0202)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Thomas M. Goethals, Judge. Affirmed.

Rodger P. Curnow, under appointment by the Court of Appeal, for
Defendant and Appellant.

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

* * *

INTRODUCTION

A jury convicted Jose Luis Capacete, Jr. (Defendant), of the following six counts: *count 1*—sodomy by force (Pen. Code,¹ § 286, subd. (c)(2)); *count 2*—forcible oral copulation (§ 288a, subd. (c)(2)); *count 3*—forcible sexual penetration by a foreign object (§ 289, subd. (a)(1)); *count 4*—simple battery (§ 242) as a lesser included offense to the charged offense of forcible sexual penetration by a foreign object; *count 5*—sodomy by force (§ 286, subd. (c)(2)); and *count 6*—forcible rape (§ 261, subd. (a)(2)). In addition, the jury found to be true the following special circumstance allegations as to counts 1, 2, 3, 5, and 6: Defendant engaged in the tying and the binding of the victim in the commission of the offense (§ 667.61, subs. (a), (e)(5)); Defendant kidnapped the victim in the commission of the offense (§ 667.61, subs. (b), (e)(1)); and Defendant committed a charged offense against more than one victim (§ 667.61, subs. (a), (e)(4)). The trial court sentenced Defendant to an aggregate term of 75 years to life in prison.

Defendant contends (1) the trial court erred by denying his motion to exclude statements made during two police interviews; (2) his statements during the interviews were inadmissible because police detectives used an unlawful two-step interrogation procedure; (3) substantial evidence does not support the conviction on count 5; (4) the trial court erred by giving CALCRIM No. 362; and (5) his sentence of 75 years to life constitutes cruel and unusual punishment under the United States and California Constitutions. We reject each contention and therefore affirm.

FACTS

I.

Counts 1 Through 4, Victim Yesenia G.

In the early morning hours of December 24, 2011, Yesenia G., a prostitute, was soliciting business in a shopping center on McFadden Avenue and Harbor Boulevard

¹ Further code references are to the Penal Code unless indicated otherwise.

in Santa Ana. A van pulled up and the driver, later identified as Defendant, said to Yesenia G., “I been looking for you.” She got inside the van and they discussed prices as Defendant drove away. When Defendant decided Yesenia G. was too expensive, she asked him to drop her off at a nearby 7-Eleven store.

Before arriving at the 7-Eleven store, Defendant told Yesenia G. he needed to put gas in the van. Yet, he drove past a gas station without stopping and turned left onto another street. Defendant reached underneath his seat, removed a Taser, and asked Yesenia G. if she had ever been “tased.” He told her, “don’t do nothing stupid or I’m going to tase you.” He also said he had a knife, although he did not show it to her.

Defendant drove to a dark street and parked in an industrial area. He told Yesenia G., “if you don’t do anything stupid . . . , I won’t do anything,” and ordered her to remove her shoes and go to the back of the van. Fearing for her life, she complied. Defendant told Yesenia G. to lie on her stomach and place her hands behind her back. Once she complied, he tied her hands with a rope or a towel. He placed his fingers into Yesenia G.’s vagina and buttocks and had her orally copulate him. He then rubbed his penis against her vagina, removed the condom he was wearing, and sodomized her.

When he was finished, Defendant wiped himself off, wiped off Yesenia G.’s anal area, and threw the soiled wipes out of the van. He found cash inside of her bra, and took it. He told Yesenia G. not to contact the police because “the police was not going to believe no prostitute.”

Defendant dropped Yesenia G. off in a “dark spot” near an automobile dealership. He ordered her to get out of the van, get down on her knees, and not to look back. He threw her cell phone, shoes, and half the money he had taken, out of the van at her, and said, “I’m going to give you your money for cooperating with me, for being a good girl.”

After Defendant drove away, Yesenia G. approached a man sitting in his truck. She hysterically banged on the truck window, and, when this man asked what was

wrong, she said she had been raped and asked him to call 911. The man dialed 911, spoke with the dispatcher, and then handed the phone to Yesenia G. She did not reveal that she had been working as a prostitute for fear the dispatcher would not believe she had been raped. Instead, she told the dispatcher she had been at a party with some friends at a trailer park and, after leaving the party alone, walked to a 7-Eleven store to buy some cigarettes. A van pulled over and the driver, a Hispanic man wearing a black shirt and a beanie, grabbed her by the hair and forced her into the van. Yesenia G. told the dispatcher that the Hispanic man had a gun, a knife, and a Taser, and that he tied her hands with rope and said he would tase and kill her if she did something stupid. Eventually, the man told Yesenia G. to open the door to the van, told Yesenia G. to get on her knees and not to face him, and drove off southbound on Harbor Boulevard.

II.

Investigation and Police Interviews of Defendant

A. Yesenia G. Interview and Examination

A police officer arrived at the scene and spoke with Yesenia G., who directed the officer to a nearby parking lot, where he found soiled wipes in a parking stall. Margaret Vo, a police forensic specialist, arrived and noticed Yesenia G. had red lesions around both of her wrists.

Yesenia G. was transported to a hospital. A sexual assault examination revealed she had abrasions inside of her vagina and anus that were consistent with consensual or nonconsensual sex. DNA testing on swabs from Yesenia G.'s sexual assault examination showed that sperm swabbed from her internal rectal area was Defendant's, while sperm swabbed from her vaginal area was not.

While waiting for the police to arrive at the scene, Yesenia G. had discovered a receipt in the cash that Defendant had thrown out of the van. Santa Ana Police Detective Michael Judson, the lead investigator on the case, traced the receipt to a credit card purchase at a Unocal 76 service station in Garden Grove. Through

Unocal 76's fraud division, Judson learned that the credit card had been issued to Defendant. Judson obtained Defendant's date of birth and a photograph of him, which Judson used in a six-man photographic lineup. When Judson showed the photographic lineup to Yesenia G. in January 2012, she identified Defendant as the man who had attacked and raped her.

B. Search Warrants/Interview at Public Park

Judson learned Defendant had two possible home addresses (one in Baldwin Park, and the other in La Puente) and owned two vehicles, one of which was a van. Judson obtained search warrants for both residences and for the van, and to obtain a sample of Defendant's DNA.

On January 19, 2012, Santa Ana police detectives conducted a surveillance of the residence at the Baldwin Park address (the Baldwin Park residence). At around 12:45 a.m. on that day, Defendant was seen walking into and out of the Baldwin Park residence. On January 20, Santa Ana police detectives conducted a search of the Baldwin Park residence pursuant to a search warrant. Inside, the detectives found a gun, a Taser, and a plastic bag containing six cell phones. The serial numbers for each phone were jotted down. One cell phone was a T-Mobile BlackBerry, model 8100.

On January 20 at around 11:00 a.m., Judson, accompanied by five to eight other Santa Ana police detectives, went to the address in La Puente (the La Puente residence) and executed the search warrant. Judson and Detective Ricardo Perez, both dressed in civilian clothing, went to the front door of the house and knocked. Defendant walked through a gate and met Judson and Perez along the side of the house. Judson and Perez identified themselves and asked Defendant if he would speak with them. Defendant agreed but did not want to talk at the house. He suggested they talk at a public park located down the street.

Defendant got in his van and drove alone to the park, while Judson and Perez followed him in their unmarked police car. Defendant was not handcuffed during

the interview at the park. The interview was recorded, the jury heard the recording, and a transcript of it was received in evidence. Judson told Defendant his name had come up in an investigation, he was not under arrest, he was under no obligation to talk, and his cooperation was entirely voluntary. After some talk about his job and recent divorce, Defendant asked, “[w]hat are we here for?” In response, Judson asked Defendant if he paid for prostitutes. Defendant said he had and that he preferred Hispanic or white girls. When shown pictures of Yesenia G., Defendant said he did not recognize her, although he did remember picking up a prostitute on Friday, December 23, 2011, at about 12:00 midnight, after his work shift.

At this point, Defendant said he felt “wheezy.” Judson suggested they move to some bleachers and that Defendant “take some deep breaths and relax.” Defendant said he had not eaten breakfast and might be experiencing low blood sugar. Judson replied, “[w]ell, let me try and wrap this up” so that Defendant could be “on [his] way” and could get some food.

Judson asked Defendant if anything unusual happened with the prostitute on December 23. Defendant said he picked up the prostitute, who was upset because she had not made any money that night, and took her to a parking lot at the intersection of McFadden Avenue and Harbor Boulevard. Everything went smoothly, and he paid her the agreed-upon amount. Defendant claimed he had never tied up or used handcuffs on a sex partner, never had a bad experience with a prostitute, and did not keep a Taser in his van. When Judson said the prostitute had said she saw a Taser in Defendant’s van, Defendant replied, “I don’t remember pulling it out on her. I’m sure.” Defendant claimed he never tied up the prostitute and never threatened her with a Taser.

As the interview proceeded, Defendant described the circumstances under which he had approached Yesenia G. and the nature of their sexual acts, which included vaginal and anal intercourse. Judson then said, “we’ll wrap this up here. . . . [S]he obviously made a report. . . . [S]he made a report that you picked her up and she probably

[was] thinking it was just the regular customer and it went, it went bad that . . . you tied her up that . . . you had a Taser. . . . Not only had a Taser [but] that you had a gun as well.” Defendant claimed Yesenia G. did not see his gun and he “never pulled no gun on no one.” He claimed there was no Taser in his van and agreed to let the detectives search it.

At the end of the interview, Judson arrested Defendant and transported him to the Santa Ana Police Department. Defendant’s van was impounded, towed to the Santa Ana Police Department, and searched. Inside the van were found a 32-inch-long rope hidden under a pillow on the driver’s side, a plastic bag containing an unused condom, wipes, receipts, and a beanie. DNA swabs collected from the rope were tested and matched Yesenia G.’s DNA.

C. Postarrest Interview at Santa Ana Police Department

Judson interviewed Defendant again at the Santa Ana Police Department later in the day on January 20. The interview was recorded. The jury heard the recording, and a transcript of it was received in evidence.

Judson read Defendant his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). Defendant stated he understood each right as it was read to him. During this interview, Defendant admitted he tied up Yesenia G. on December 23 (although he did not remember her face). He had done so because he was frustrated and under a lot of stress from his recent divorce and inability to see his children as much as he would have liked; he felt “useless in [his] life” and would get “mad at the wrong people.” Defendant told Yesenia G. to lie face down on the backseat of the van and, if she cooperated with him, he would let her go without harm. He used a piece of rope in his van to tie her up without force, did not hurt her, and told her he had a Taser, which he did not display because he did not want to hurt anyone. He had anal sex with Yesenia G. His condom broke and they used wipes to clean up.

Judson showed Defendant the cell phones found at the Baldwin Park residence. Defendant acknowledged he took those phones from prostitutes whom he had hired. When Judson asked Defendant if Yesenia G. was the only girl he had ever tied up, Defendant answered, “[n]o” and he had tied up “[o]nly two or three . . . I don’t know.” In each case, he tied up the prostitute against her will and told her to cooperate. He claimed he never used a foreign object for sex, never used a Taser or knife, and never caused any injuries. Defendant said that when he dropped off Yesenia G., he told her, “just get out of the car, and face the other way. And I’m gonna drop off the shoes out the window . . . for you . . . and that’s what I did and I took off.” He admitted taking her money and throwing it at her with her shoes “all at once.”

III.

Count 5, Victim Dana B.

After interviewing Defendant, Judson believed there might be more victims who had not come forward. Judson had the cell phones found in the Baldwin Park residence analyzed and created a bulletin to be disseminated to other law enforcement agencies. The bulletin included general case information, a photograph of Defendant, a description of his van, and a license plate number for the van.

In 2011, Department of Homeland Security Special Agent Monica Abend was conducting a human trafficking investigation. As part of the investigation, Abend interviewed Dana B., who was a prostitute. Dana B. told Abend she had been raped by a man driving a van with license plate No. 5KSM311. Abend ran the license plate, but it did not match the vehicle description given by Dana B. In January 2012, Abend saw the law enforcement bulletin prepared by Judson and compared the vehicle description and license plate number in the bulletin with those provided by Dana B. Abend contacted Judson.

After hearing from Abend, Judson located Dana B. and interviewed her. From memory, Dana B. recited the license plate of the perpetrator’s van as

No. 5KSM311. The license plate number of Defendant's van is 5KSM113. Judson showed Dana B. a photographic lineup that included Defendant's photograph. Dana B. identified Defendant as the man who had raped her.

Dana B. was 20 years old when she testified at trial in May 2013. One night in July 2011, while she was working as a prostitute at Harbor Boulevard and First Street in Santa Ana, a man driving a blue Chrysler van stopped and asked, "how much." She quoted a price of \$100 for vaginal sex only. The man agreed and Dana B. got into the van's front passenger seat. The man drove to an alleyway and parked. Both the man and Dana B. climbed into the rear seat and she undressed from the waist down. The man put on a condom and asked for oral sex. Dana B. told him she did not do that. Dana B. then provided the service that had been agreed upon.

The man returned to the driver's seat and drove to a different location to avoid being seen by someone in another car. After attempting vaginal sex again, the man asked Dana B. if anyone had ever kidnapped her or done anything to her while she was working. She answered, "no." The man then sat on top of her, grabbed some rope from the floor of the van, used the rope to tie her hands behind her back, tied the rope around her body, and put a towel in her mouth. When Dana B. tried to fight him off, the man showed her a Taser, threatened to use it if she continued to resist, and threatened to kill her. Dana B. was scared and began to weep.

The man drove to a third location, parked, turned Dana B. onto her stomach, and engaged in anal intercourse with her. He again threatened to use the Taser on Dana B. and to kill her. She was "[s]cared for [her] life." The man became frustrated because he was unable to continue the sexual act. He returned to the driver's seat and drove to a location, unfamiliar to Dana B., where he stopped, untied her, let her out of the van, and drove away. He kept her cell phone. Dana B. started walking. The man drove back, handed her a piece of paper with the phone number of her pimp, and said, "here,

call him,” but did not give Dana B.’s cell phone back to her. Dana B. walked to a nearby donut shop and wrote down the van’s license plate number as she remembered it.

The cell phone that the man took from Dana B. was a BlackBerry given to her that night by her pimp. The phone number associated with the BlackBerry had an area code for Dallas, Texas, where the pimp had family ties.

Dana B. testified that Judson showed her a photographic lineup and that she identified one of the photographs in the lineup as that of the man who had tied her up in the van. She told Judson the license plate number of the van was 5KSM311.

IV.

Count 6, Victim Kristina W.

In the course of the investigation, Judson learned of a third victim, Kristina W. In September 2011, Kristina W. was working as a prostitute on Hazard Street in Santa Ana. A man, later identified by Kristina W. as Defendant, pulled up in a green van and asked her “how much.” After quoting a price, Kristina W. stepped into the van. Defendant drove the van in a direction toward which she did not want to go, and she decided there was “something weird” about Defendant. Kristina W. had Defendant stop and let her out of the van.

Two or three weeks later, Kristina W. was working at the same location on Hazard Street in Santa Ana when Defendant again drove up in a green van. They negotiated a price, Defendant parked the van, and they completed their business. When finished, Kristina W. left the van without any problems.

Sometime later, Kristina W. encountered Defendant again while she was working in the same location in Santa Ana. He pulled up in his green van, she quoted a price, and he agreed. Because the last transaction had gone smoothly, Kristina W. had no second thoughts about getting into the van. He drove first to an ATM, and then to a McDonald’s restaurant, where he parked between two trucks. Defendant and Kristina W. moved to the back of the van. When she asked for the money (it was her practice to be

paid “up front”), his demeanor suddenly changed. He grabbed Kristina W.’s neck with both hands and said, “I’m going to f’g kill you.” He pulled a Taser out from under a seat and threatened to use it on Kristina W. if she did not obey him. She feared for her life. Defendant told her to lie down on her stomach so that he could tie her hands behind her back. She begged him not to tie her up and at first would not comply with his demand. She tried to negotiate with him by offering to do whatever he asked, but he did not listen, and she lay down on her stomach. Defendant tied her hands behind her back with a rope, removed her shoes, and put a rag in her mouth. He then raped her.

After about 30 minutes, Defendant drove the van to a different location. Kristina W. remained face down, bound and gagged, in the van’s middle seats. Defendant parked the van and again raped Kristina W. He could not maintain an erection, however, and told her he was going to let her go. While driving to a third location, Defendant instructed Kristina W. what to do when he parked and let her out of the van. Defendant stopped the van, made her crouch facing the sliding door of the van, and ordered her not to look at him. When he opened the door, she hopped out and, as he had ordered, walked straight forward without turning around. He threw her shoes out of the van and kept her cell phone and \$60 he had taken from her.

The next time Kristina W. saw Defendant’s van, she sent herself a text message with the license plate number. It matched the license plate number of Defendant’s van.

DISCUSSION

I.

The Trial Court Did Not Err by Denying Defendant’s Motion to Exclude Evidence.

Judson interviewed Defendant in the park without warnings pursuant to *Miranda* (the first interview) and again interviewed Defendant, after he had been arrested, at the Santa Ana Police Department, with warnings pursuant to *Miranda* (the

second interview). Defendant argues his statements made during the first interview were inadmissible because he was in custody at the time and the statements were involuntary, and his statements made during the second interview were inadmissible because it was a direct continuation of the first interview. We conclude the trial court did not err by denying Defendant's motion to exclude evidence.

A. Background

1. Evidentiary Hearing

Before trial, Defendant moved to exclude evidence of the statements he made during the first interview and the second interview. The trial court paid a significant amount of time and attention to this motion, listened to much of the audio recordings of the interviews, and read the entirety of their transcripts. The court conducted an evidentiary hearing, at which Judson testified.

a. Judson Direct Examination

Judson testified he first made contact with Defendant at the La Puente residence. When Judson knocked on the front door of the residence, Defendant emerged from a gate at the side of the house. They spoke outside of the La Puente residence. Judson identified himself as a Santa Ana Police Department detective and said he had some questions in connection with a case he was investigating. Judson and his partner, Perez, were armed and carried their badges, and were dressed in a detective's uniform: shirt and tie or black polo shirt with a pair of slacks. It was agreed that Defendant would talk with Judson at a nearby park. From the beginning of the contact, Judson's conversation with Defendant was recorded, and the recording device was turned off only while Judson drove to the park.

Judson drove to the park with Perez in an unmarked detective car. They followed Defendant, who drove himself. Judson described the park as "a standard community park" with "a playground, a baseball diamond, a parking lot, open grassy

area.” Neither Judson nor Perez ever drew a weapon, and Defendant was not placed in handcuffs.

b. *Judson Cross-examination and Redirect Examination*

On cross-examination, Judson testified that Defendant had been under surveillance before Judson first made contact with him. As Defendant traveled from his home to his parents’ home (the La Puente residence), he was followed by five to eight officers who were in about four unmarked police cars. When Defendant became aware he was being followed, he dialed 911, not realizing he was being followed by police. At that point, the surveillance was halted.

While at the park, Judson told Defendant he was free to leave. Judson did not tell Defendant he was free to leave while at the La Puente residence. At the La Puente residence, Judson told Defendant his name had come up in an investigation and Judson had some questions for him. Defendant said he did not feel comfortable talking at his parents’ home and suggested going to a donut shop or the park. It took about a minute to drive to the park. Judson parked the police car next to Defendant’s vehicle, and Judson and Perez stood on a sidewalk in front of the vehicles and faced Defendant while speaking with him. At one point, Defendant said he was not feeling well and sat down on the curb. Judson and Perez stood next to him. Judson advised Defendant to take some deep breaths and, before resuming his questioning, asked if he was feeling better. Within a minute or two, Defendant appeared to be feeling better. About an hour elapsed from the time at which Judson first made contact with Defendant to the end of the questioning.

On redirect examination, Judson testified he initially made contact with Defendant at 11:20 a.m. Judson and Perez were dressed in civilian clothing.

2. *The Trial Court’s Ruling*

The trial court ruled that Defendant’s statements made during the first interview were admissible up to the point at which Defendant stated, “I’m getting worried

now man. You're worrying me." The court held that everything Defendant said in the first interview after he made that statement was inadmissible under the Sixth Amendment to the United States Constitution. The trial court ruled that Defendant's statements made during the second interview were admissible. The trial court made extensive factual findings on the record. In summary, those findings were:

1. The first interview was not a custodial interrogation. Defendant twice was told he not was under arrest and was told he was under no obligation to speak with Judson and Perez. The audio recording of the interview did not support a finding of coercion. Defendant had requested the interview take place at a park, rather than at the La Puente residence, and had driven himself to the park. He understood he was not under arrest.

2. Defendant invoked his Sixth Amendment right to counsel when he stated, "I'm getting worried now man. You're worrying me." At that point, Defendant asked, "[d]o I need a lawyer . . . ?" Defendant's statements made in the first interview were inadmissible from then on.

3. At the outset of the second interview, Judson and Perez "did exactly what they should have done" by reading Defendant his rights pursuant to *Miranda* and asking whether he understood those rights.

4. Defendant voluntarily, knowingly, and intelligently waived his rights and spoke with the police detectives. That waiver was not tainted by the first interview.

5. Defendant was never coerced into talking to Judson and Perez. The court stated, "I've listened to portions of this which I wanted to hear how it was being said, not just what was being said, and I don't find any coercive aspect to the officer's questioning. . . . [A]nd Mr. Capacete certainly doesn't sound like he's being coerced at any point that I listened to." The officers used a variety of interrogative techniques to encourage Defendant to talk, but they did not use unlawful techniques, and Defendant "accepted their encouragement and . . . did get a lot of things off his chest."

B. *Defendant Was Not in Custody During the First Interview.*

Defendant contends all of his statements made during the first interview were involuntary considering the totality of the circumstances. If the police take a suspect into custody and then ask the suspect questions without administering *Miranda* warnings, the suspect's responses cannot be introduced into evidence to establish guilt. (*Berkemer v. McCarty* (1984) 468 U.S. 420, 429.) Law enforcement officers are not required, however, to administer *Miranda* warnings to everyone whom they question. (*Oregon v. Mathiason* (1977) 429 U.S. 492, 495.) Rather, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" (*Ibid.*; see *People v. Ochoa* (1998) 19 Cal.4th 353, 401 ["Absent "custodial interrogation," *Miranda* simply does not come into play."].)

Case law has identified numerous circumstances to consider in making the determination whether the defendant was in custody for purposes of *Miranda*. (*People v. Pilster* (2006) 138 Cal.App.4th 1395, 1403-1404; *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1162.)² No one of those factors is dispositive, and the ultimate question is simply whether there was "a "formal arrest or restraint on freedom of

² In *People v. Aguilera, supra*, 51 Cal.App.4th at page 1162, the court listed the circumstances as including: "[W]hether contact with law enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation."

movement” of the degree associated with a formal arrest.’ [Citation.]” (*Thompson v. Keohane* (1995) 516 U.S. 99, 112; accord, *People v. Ochoa, supra*, 19 Cal.4th at p. 401; see *People v. Pilster, supra*, at p. 1403 [“Would a reasonable person interpret the restraints used by the police as tantamount to a formal arrest?”].) This is an objective test. (*Thompson v. Keohane, supra*, at p. 112.)

“Whether a defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] When reviewing a trial court’s determination that a defendant did not undergo custodial interrogation, an appellate court must ‘apply a deferential substantial evidence standard’ [citation] to the trial court’s factual findings regarding the circumstances surrounding the interrogation, and it must independently decide whether, given those circumstances, ‘a reasonable person in [the] defendant’s position would have felt free to end the questioning and leave’ [citation].” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400.)

After reading the transcript of the recording of the first interview, listening to relevant portions of the audio recording, and hearing Judson’s testimony, the trial court found Defendant was not in custody during the first interview. The evidence fully supported the trial court’s findings. The trial court found, among other things, Defendant twice was told he was not under arrest, was told he was under no obligation to speak to Judson and Perez, was granted his request to conduct the interview at a public park, and drove himself to the park. At the park, at the outset of the first interview, Judson told Defendant, “[u]nderstand you are not under arrest, right? . . . [W]e’re just here to talk to you, okay? Talk to you, find out what your involvement is and we appreciate your cooperation and you’re under no obligation [to] speak to us, . . . this is completely voluntary. It’s voluntary, right? Okay, you understand?” Defendant answered, “[r]ight.” The trial court, after listening to the audio recording, found that Judson and Perez were not coercive in their questioning. Judson and Perez were not aggressive or accusatory toward Defendant. They wore civilian clothing and, although they carried weapons,

never displayed them. Judson and Perez did not handcuff Defendant or otherwise restrain his movement, and, when Defendant did not feel well, told him to take some deep breaths and relax.

Given the totality of the circumstances of the first interview, as found by the trial court, we conclude Defendant was not subjected to a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest (*Thompson v. Keohane, supra*, 516 U.S. at p. 112) and a reasonable person in Defendant's position would have felt free to end the questioning and leave (*People v. Leonard, supra*, 40 Cal.4th at p. 1400).

C. The First Interview Did Not Taint the Second Interview.

Based on *Oregon v. Elstad* (1985) 470 U.S. 298, Defendant argues his statements made during the second interview should have been excluded, notwithstanding his *Miranda* waiver, because the second interview was a direct continuation of the first interview, which was tainted by lack of *Miranda* warnings. Because the first interview was not a custodial interrogation for purposes of *Miranda*, it did not, and could not, taint the second interview. At the outset of the second interview, Judson read Defendant his rights pursuant to *Miranda* and Defendant acknowledged he understood those rights before talking.

II.

The Police Detectives Did Not Engage in an Unlawful Two-step Interview Procedure.

A. Introduction

Defendant asserts, as a separate theory for excluding his statements made during both the first interview and the second interview, that Judson and Perez engaged in a two-step interview procedure made unlawful by *Missouri v. Seibert* (2004) 542 U.S. 600 (*Seibert*). Defendant's trial counsel did not present any argument based on *Seibert*. On appeal, his counsel argues trial counsel was not ineffective for not objecting on

Seibert grounds because “he did in any event move to exclude his statements on *Miranda* grounds.” To avert any possible ineffective assistance of counsel claim, we address the *Seibert* argument. (*People v. Crittenden* (1994) 9 Cal.4th 83, 146; see *People v. Williams* (1998) 17 Cal.4th 148, 161-162, fn. 6.) We find no merit to Defendant’s argument based on *Seibert*.

B. *The Seibert Opinion*

In *Seibert, supra*, 542 U.S. 600, the United States Supreme Court addressed a police protocol for a two-step interrogation of suspects. In the first step of such an interrogation, police officers deliberately provide no *Miranda* warning and conduct a custodial interrogation until a confession is produced. (*Id.* at p. 604.) In the second step, the police officers, knowing the confession would be inadmissible, provide *Miranda* warnings and conduct a second interrogation that leads the suspect to make the same confession that was produced by the first interrogation. (*Ibid.*) The question in *Seibert* was the admissibility of the second confession. (*Ibid.*)

The facts of *Seibert* are as follows. The defendant’s 12-year-old son, Jonathan, who suffered from cerebral palsy, died in his sleep. (*Seibert, supra*, 542 U.S. at p. 604.) The defendant was afraid of being charged with neglect because there were bedsores on Jonathan’s body. (*Ibid.*) The defendant, two of her teenage sons, and two of her sons’ friends decided to incinerate Jonathan’s body while burning down the family’s mobilehome. (*Ibid.*) Donald, a mentally ill teenager living with the family, was left in the home when the fire was set to avoid the appearance Jonathan had been left alone. (*Ibid.*)

Five days later, police officers awakened the defendant in the middle of the night at a hospital, where one of her sons was being treated for burns suffered while setting the fire. (*Seibert, supra*, 542 U.S. at p. 604.) The defendant was taken to the police station, left alone in an interview room for 15 to 20 minutes, and then questioned for 30 to 40 minutes by a police officer who squeezed her arm and repeatedly said,

“Donald was also to die in his sleep.” (*Id.* at pp. 604-605.) After the defendant admitted she knew Donald would die in the fire, the police officer gave her a 20-minute break before providing her *Miranda* warnings and resuming the interrogation. (*Id.* at p. 605.) During the second part of the interrogation, the police officer confronted the defendant with her prewarning statements and thereby was able to extract more confessions from her. (*Ibid.*) At a hearing on the defendant’s motion to suppress, the interrogating officer admitted, “he made a ‘conscious decision’ to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question ‘until I get the answer that she’s already provided once.” (*Id.* at pp. 605-606.) The officer acknowledged the defendant’s ultimate statement was “‘largely a repeat of information . . . obtained’ prior to the warning. . . .” (*Id.* at p. 606.)

A divided Supreme Court held the defendant’s postwarning statements were inadmissible. (*Seibert, supra*, 542 U.S. at p. 617 (plur. opn. of Souter, J.); *id.* at p. 622 (conc. opn. of Kennedy, J.)) The plurality opinion, authored by Justice Souter, focused on whether the midstream *Miranda* warning “could function ‘effectively’ as *Miranda* requires.” (*Id.* at pp. 611-612.) The plurality opinion concluded: “Because the question-first tactic effectively threatens to thwart *Miranda*’s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, [the defendant]’s postwarning statements are inadmissible.” (*Id.* at p. 617.)

Justice Kennedy authored a concurring opinion expressing the view that the plurality opinion’s approach was too broad and would apply to both intentional and unintentional two-stage interrogations. (*Seibert, supra*, 542 U.S. at pp. 621-622 (conc. opn. of Kennedy, J.)) Justice Kennedy concluded, “I would apply a narrower test applicable only in the infrequent case . . . in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.” (*Id.* at p. 622 (conc.

opn. of Kennedy, J.).) Justice Kennedy proposed this test: “If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made.” (*Ibid.*) Such curative measures “should be designed to ensure that a reasonable person in the suspect’s situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver.” (*Ibid.*) Two examples of curative measures were offered. First, “a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn.” (*Ibid.*) Second, and alternatively, “an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient.” (*Ibid.*)

The concurring opinion of Justice Kennedy is considered to represent the *Seibert* holding because he “‘concurred in the judgment[] on the narrowest grounds’ [citation].” (*People v. Camino* (2010) 188 Cal.App.4th 1359, 1370, quoting *Marks v. United States* (1977) 430 U.S. 188, 193.)

C. *Seibert* Is Inapplicable.

Seibert is inapplicable to this case. No evidence was presented to suggest Judson and Perez engaged in a deliberate two-step interrogation technique designed to circumvent *Miranda*. Indeed, the first step in the two-step interrogation technique condemned by *Seibert* is a custodial interrogation, and Defendant was not in custody during the first interview. As to both the first interview and the second interview, the trial court found that Judson and Perez did not engage in coercive methods.

Even if the first interview could be construed as a custodial interrogation, curative measures ensured Defendant would understand the import and effect of the *Miranda* warning and his *Miranda* waivers in the second interview. There was a substantial break in time and circumstances between the first interview and the second

interview. The first interview took place in a public park in La Puente, and the second interview took place several hours later at the police department in Santa Ana. At the end of the first interview, Defendant was placed under arrest, handcuffed, and transported to the Santa Ana Police Department. Such changes in time and circumstances would have allowed Defendant “to distinguish the two contexts and appreciate that the interrogation ha[d] taken a new turn.” (*Seibert, supra*, 542 U.S. at p. 622 (conc. opn. of Kennedy, J).)

III.

The Trial Court Did Not Err by Denying Defendant’s Motion for Judgment of Acquittal on Count 5 Because Substantial Evidence Supports That Conviction.

At the close of the prosecution’s case-in-chief, Defendant made a motion under section 1118.1 for a judgment of acquittal on count 5, which charged him with sodomy by force (§ 286, subd. (c)(2)) of Dana B. Defendant argued the evidence before the court was insufficient to sustain a conviction on count 5 because Dana B. never identified Defendant in court as the perpetrator. The trial court denied the motion because Dana B. had identified Defendant in a photographic lineup and “it’s [not] necessary as a matter of law that a defendant be identified in court.”

Defendant argues the trial court erred by denying his section 1118.1 motion. We disagree. Although Dana B. did not identify Defendant in court, he cites no authority supporting the proposition that an in-court identification is required as a matter of law. When Defendant made his section 1118.1 motion, there was substantial evidence that Defendant committed the offense charged in count 5.

In reviewing an order denying a motion under section 1118.1, we determine whether there is any substantial evidence of the existence of each element of the offense charged. (*People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on another ground in *People v. Johnson* (1989) 47 Cal.3d 1194, 1220-1221.) When, as here, the motion is

made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested "as it stood at that point." (*People v. Trevino, supra*, at p. 695.)

Dana B. testified the man who had forcibly sodomized her took her cell phone—a BlackBerry. The telephone number assigned to the BlackBerry had a Dallas, Texas, area code. In searching the Baldwin Park residence, detectives found a plastic bag containing six cell phones, one of which was a T-Mobile BlackBerry, model 8100. The telephone number associated with this cell phone had an area code for Dallas, Texas. At trial, Dana B. looked at a photograph of the cell phone recovered from the Baldwin Park residence (exhibit No. 43) and identified it as the phone taken from her. Dana B. testified the man who had forcibly sodomized her drove a blue Chrysler van. She wrote down the license plate number as 5KSM311. Defendant drove a green Chrysler Town & Country van with license plate No. 5KSM113.

In considering the evidence related to count 5, the jury could consider evidence relevant to the other charged counts. (Evid. Code, § 1101; *People v. Catlin* (2001) 26 Cal.4th 81, 153.) The jury was so instructed. The evidence relating to the crimes committed against Yesenia G. and Kristina W. established a distinct and unmistakable practice of hiring prostitutes in the same area of Santa Ana, threatening them with a Taser, tying their hands behind their backs with a rope, putting a towel or rag in their mouths, taking their cash, and (in the case of Kristina W.) keeping their cell phones. Defendant carried out this practice with Dana B.

The evidence described was sufficient in itself to prove Defendant was the man who had forcibly sodomized Dana B., as charged in count 5. In addition, Judson testified he had shown a photographic lineup to Dana B., and she had identified Defendant as the perpetrator. He did not pose an objection when that testimony was given or when making his section 1118.1 motion, perhaps because the statement met the requirements of a prior identification under Evidence Code section 1238. In any event, "[i]t is settled law that incompetent testimony, such as hearsay or conclusion, if

received without objection takes on the attributes of competent proof when considered upon the question of sufficiency of the evidence to support a finding.”” (*People v. Panah* (2005) 35 Cal.4th 395, 476.)

IV.

The Trial Court Did Not Err by Giving CALCRIM No. 362.

The trial court instructed the jury with CALCRIM No. 362 (consciousness of guilt: false statements) as follows: “If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing that the statement was false and 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.” Defendant argues the evidence did not support giving CALCRIM No. 362.

“A trial court properly gives consciousness of guilt instructions where there is some evidence in the record that, if believed by the jury, would sufficiently support the inference suggested in the instructions.” (*People v. Bowman* (2011) 202 Cal.App.4th 353, 366.) Giving the consciousness of guilt instruction is justified when there is evidence the defendant fabricated a story to explain his or her conduct (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1102) or to deflect suspicion from himself or herself (*People v. Rankin* (1992) 9 Cal.App.4th 430, 436).

Evidence at trial supported the trial court’s decision to give CALCRIM No. 362. During the first interview, when asked if anything unusual had happened during his encounter with Yesenia G., Defendant said, “I did my thing and then that’s it.” He said he negotiated money for sex, paid her, and dropped her off. She was upset because she had not made any money that night. Defendant told Judson and Perez he had never

tied up or used a restraining device on a sexual partner, and did not keep a Taser in his van. Those statements were inconsistent with statements made in the second interview and justified giving CALCRIM No. 362.

Defendant argues CALCRIM No. 362 violates due process by allowing the jury to make an irrational inference of guilt. The California Supreme Court has rejected the same or similar argument and upheld CALJIC No. 2.03,³ the consciousness of guilt predecessor instruction to CALCRIM No. 362. (*People v. Page* (2008) 44 Cal.4th 1, 49-52; *People v. Howard* (2008) 42 Cal.4th 1000; *People v. San Nicolas* (2004) 34 Cal.4th 614, 666.) Indeed, “[i]t is well established that pretrial false statements by a defendant may be admitted to support an inference of consciousness of guilt by the defendant” (*People v. Edwards, supra*, 8 Cal.App.4th at p. 1102, citing *People v. Showers* (1968) 68 Cal.2d 639, 643) and “[t]he inference of consciousness of guilt from willful falsehood . . . is one supported by common sense, which many jurors are likely to indulge even without an instruction” (*People v. Holloway* (2004) 33 Cal.4th 96, 142). In *People v. Crandell* (1988) 46 Cal.3d 833, 871, disapproved on another ground in *People v. Crayton* (2002) 28 Cal.4th 346, 364-365, the California Supreme Court explained that CALJIC No. 2.03 did not permit the jury to draw an impermissible inference: “A reasonable juror would understand ‘consciousness of guilt’ to mean ‘consciousness of some wrongdoing’ rather than ‘consciousness of having committed the specific offense charged.’ The instructions advise the jury to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and

³ CALJIC No. 2.03 states: “If you find that before this trial [a] [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which [he] [she] is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.”

common sense. The instructions do not address the defendant's mental state at the time of the offense and do not direct or compel the drawing of impermissible inferences in regard thereto."

Defendant argues CALCRIM No. 362, unlike CALJIC No. 2.03, allows the jury to draw an impermissible inference of guilt by adding the phrase "and you may consider it in determining (his/her) guilt." Defendant relies on *Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 820, which, in upholding the use of CALJIC No. 2.03, stated that "[s]o long as the instruction does not state that inconsistent statements constitute evidence of guilt, but merely states that the jury may consider them as indicating a consciousness of guilt, the instruction would not violate constitutional rights."

CALCRIM No. 362 advises the jury that if the defendant knowingly made false or misleading statements before trial, the jury may draw the inference, permissible under California Supreme Court authority, that the defendant was conscious of guilt or wrongdoing, and the jury may *consider* that inference in determining whether the defendant was guilty of the charged offense. CALCRIM No. 362 instructed the jury that "evidence that the defendant made such a statement cannot prove guilt by itself" and, therefore, did not permit the jury to draw an inference of guilt from the false or inconsistent statements themselves, or from the inference of consciousness of guilt alone.

V.

Defendant's Sentence of 75 Years to Life Does Not Constitute Cruel and Unusual Punishment Under the United States or California Constitution.

A. Introduction

Defendant was sentenced to three consecutive terms of 25 years to life in prison on counts 1, 5, and 6 for a total sentence of 75 years to life. Counts 1 and 5 were for forcible sodomy, the base punishment for which is three, six, or eight years in prison. (§ 286, subd. (c)(2)(A).) Count 6 was for forcible rape (§ 261, subd. (a)(2)), the base

punishment for which is also three, six, or eight years in prison (§ 264, subd. (a)). Under section 667.61, subdivisions (a) and (e)(4) and (5), the punishments for counts 1, 5, and 6 were enhanced to 25 years to life, based on the jury's findings that (1) Defendant had kidnapped the victim, (2) Defendant had been convicted of committing the offense against more than one victim, and (3) Defendant "engaged in the tying or binding of the victim" (§ 667.61, subd. (e)(5)) in the commission of the offense. Consecutive sentences were mandatory on counts 1, 5, and 6 because each count involved a different victim. (§ 667.6, subds. (d), (e)(1) & (4).)

Defendant contends his sentence of 75 years to life in prison constitutes cruel and unusual punishment prohibited under the United States Constitution and the California Constitution. Specifically, he argues section 667.61 is facially unconstitutional and unconstitutional as applied to him. In the trial court, Defendant did not argue a sentence of 75 years to life in prison constituted cruel and unusual punishment. Although the argument may be deemed forfeited, "[n]onetheless, we shall reach the merits under the relevant constitutional standards, in the interest of judicial economy to prevent the inevitable ineffectiveness-of-counsel claim." (*People v. Norman* (2003) 109 Cal.App.4th 221, 229-230.)

B. *California Constitution*

1. *The Law*

Article I, section 17 of the California Constitution prohibits infliction of "[c]ruel or unusual punishment." A prison sentence might violate this prohibition 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. Dillon* (1983) 34 Cal.3d 441, 478.) A defendant has a "considerable burden" to show a punishment is cruel or unusual under the California Constitution. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) "The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely the domain of the

Legislature. Perhaps foremost among these are the definition of crime and the determination of punishment.” (*Ibid.*) It is therefore only in the “rarest of cases” that a court may declare a punishment mandated by the Legislature to be “unconstitutionally excessive.” (*People v. Meneses* (2011) 193 Cal.App.4th 1087, 1093.)

We use a three-part test to determine whether a particular sentence is disproportionate to the offense for which it is imposed. First, we examine “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.” (*In re Lynch* (1972) 8 Cal.3d 410, 425.) Second, we compare the punishment imposed with punishments prescribed by California law for more serious offenses. (*Id.* at pp. 426-427.) Third, we compare the punishment imposed with punishments prescribed by other jurisdictions for the same offense. (*Id.* at pp. 427-429.) In applying the three-part test, we consider the “totality of the circumstances” surrounding the commission of the offense. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1389.) The importance of each part depends on the facts of the case. (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 88.)

2. *Facial Challenge*

First, Defendant argues section 667.61 is facially unconstitutional because it imposes required sentences without recognizing “significant gradations of culpability depending on the severity of the current offense” and without consideration of mitigating factors.

Section 667.61, sometimes referred to as the “One Strike” law (*People v. Anderson* (2009) 47 Cal.4th 92, 99), “mandates indeterminate sentences of 15 or 25 years to life for specified sex offenses that are committed under one or more ‘aggravating circumstances,’ [Citations.] The purpose of the One Strike law is ‘to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction,’ ‘where the nature or method of the sex offense “place[d] the victim in a

position of *elevated vulnerability*.” [Citation.]’ [Citation.]” (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 199 (*Alvarado*)). Specified sex offenses under section 667.61 include rape and sodomy. (§ 667.61, subd. (c)(1) & (6).) Circumstances enhancing a sentence to 25 years to life include “kidnapp[ing] the victim of the present offense” (§ 667.61, subd. (e)(1)), “committing an offense . . . against more than one victim” (§ 667.61, subd. (e)(4)), and “tying or binding of the victim . . . in the commission of the present offense (§ 667.61, subd. (e)(5)).

Section 667.61 does recognize gradation in culpability. Section 667.61, subdivision (a) mandates a sentence of 25 years to life if the defendant is convicted of an offense specified in subdivision (c) under at least one of the circumstances specified in subdivision (d) or under at least two of the circumstances specified in subdivision (e). Section 667.61, subdivision (b) mandates a sentence of 15 years to life if the defendant is convicted of an offense specified in subdivision (c) under at least one of the circumstances specified in subdivision (e). The jury in this case found two circumstances under section 667.61, subdivision (e): offense against more than one victim (§ 667.61, subd. (e)(4)) and tying or binding of the victim (§ 667.61, subd. (e)(5)).

Forcible rape and forcible sodomy, as well the other offenses identified in section 667.61, subdivision (c), are horrible crimes in themselves. Committing them against more than one victim, by kidnapping the victim, and by tying or binding the victim justifies the enhanced sentence. “Courts have uniformly rejected claims [that punishing crimes with a kidnapping more severely] is constitutionally disproportionate ‘given the long-standing, even ancient, horror of kidnapping [citation] and the substantial risk to human life that it presents[.]’ [Citations.]” (*People v. Estrada* (1997) 57 Cal.App.4th 1270, 1281.) Tying or binding the victim not only is degrading, but can lead to serious physical injuries or death. And, “persons convicted of sex crimes against multiple victims within the meaning of section 667.61 . . . ‘are among the most dangerous’ . . .” (*People v. Wutzke* (2002) 28 Cal.4th 923, 930-931.)

In *Alvarado*, *supra*, 87 Cal.App.4th at pages 199-201, the court held an indeterminate life sentence under section 667.61, subdivisions (b) and (e)(2) for committing rape during the course of a burglary did not constitute cruel or unusual punishment under the California Constitution. In *People v. Estrada*, *supra*, 57 Cal.App.4th at pages 1277, 1282, and *People v. Crooks* (1997) 55 Cal.App.4th 797, 803-809, the courts held enhanced sentences of 25 years to life in prison under section 667.61, subdivisions (a), (c), and (d) for committing forcible rape during the commission of a burglary with the intent to commit forcible rape did not constitute cruel or unusual punishment under the California Constitution. We agree with these opinions and disagree with Defendant's assertion they were wrongly decided.

Defendant argues *Alvarado*, *People v. Estrada*, and *People v. Crooks* are distinguishable because they involved rape in the commission of a burglary. It is arguable that kidnapping and tying or binding the rape victim are even more hideous and deserving of greater punishment than committing rape in the commission of a burglary. The Legislature has the responsibility for making such penological decisions. "The judicial inquiry commences with great deference to the Legislature. Fixing the penalty for crimes is the province of the Legislature, which is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches. [Citations.]" (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.)

Defendant's argument that his sentence under section 667.61 exceeds the punishments imposed for the same offenses in all but two other jurisdictions was addressed in *Alvarado*: "[T]hat some other jurisdictions allow for the same or even harsher punishment (Louisiana and Washington) indicates that in the abstract, the One Strike term imposed here is not irrational or obviously excessive punishment" (*Alvarado*, *supra*, 87 Cal.App.4th at p. 200.)

3. *As-applied Challenge*

Defendant argues section 667.61 is unconstitutional as applied to him because he committed no prior violent crimes and has only one misdemeanor conviction (for soliciting a prostitute), and the nature of his crimes do not warrant a sentence that “is more than the equivalent of committing three second degree murders.”

Defendant is a grown man with no reported mental disabilities or impairments. He committed the offenses for which he was convicted by kidnapping and tying and binding the victims before forcibly raping or sodomizing them. He also threatened the victims with a Taser and put a towel or rag in their mouths, which could have induced asphyxiation. He took the cash from all three victims and cell phones from Dana B. and Kristina W. The three crimes for which Defendant was convicted were committed in an unmistakable pattern, suggesting he might have committed other such offenses and would continue to commit the same offense, following the same pattern, in the future. Indeed, six cell phones were found during the search of the Baldwin Park residence, indicating that Defendant had more than three victims.

We conclude Defendant’s sentence is not so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity. (*People v. Dillon, supra*, 34 Cal.3d at p. 478.)

C *United States Constitution*

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” For noncapital cases, the Eighth Amendment contains a proportionality principle, but it is “‘narrow.’” (*Ewing v. California* (2003) 538 U.S. 11, 20.) The appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. That is, “[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.

[Citations.]” (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.), citing *Solem v. Helm* (1983) 463 U.S. 277, 288.) Successful grossly disproportionate challenges are ““exceedingly rare”” and appear only in an ““extreme”” case. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

The companion cases of *Ewing v. California* and *Lockyer v. Andrade* demonstrate the very narrowness of the Eighth Amendment’s disproportionality principle. Gary Ewing was sentenced to a term of 25 years to life under the California “Three Strikes” law for stealing three golf clubs priced at \$399 each, as petty theft with a prior conviction for theft. (*Ewing v. California, supra*, 538 U.S. at pp. 18, 20.) The United States Supreme Court applied the principles of gross disproportionality and deference to legislative policy choices to conclude that Ewing’s sentence of 25 years to life “is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” (*Id.* at pp. 30-31.) Leandro Andrade was sentenced under California’s Three Strikes law to two consecutive terms of 25 years to life on two counts of petty theft with prior theft-related convictions. (*Lockyer v. Andrade, supra*, 538 U.S. at p. 68.) On habeas corpus review, the United States Supreme Court rejected Andrade’s claim that his sentence violated the prohibition against cruel and unusual punishment, holding “it was not an unreasonable application of our clearly established law for the California Court of Appeal to affirm Andrade’s sentence of two consecutive terms of 25 years to life in prison.” (*Id.* at p. 77.)

If terms of 25 years to life and 50 years to life are not ““grossly disproportionate”” (*Harmelin v. Michigan, supra*, 501 U.S. at p. 1001 (conc. opn. of Kennedy, J.) to the crime of petty theft with prior theft convictions, then a sentence of 25 years to life is not grossly disproportionate to the crime of forcible sodomy or forcible rape while engaging in the tying or binding of the victim. Defendant’s sentence therefore does not violate the Eighth Amendment to the United States Constitution.

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.