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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEANDRO BAUTISTA PEREZ,

Defendant and Appellant.

H038106

(Santa Cruz County

Super. Ct. Nos. WF00793, F21640)

A jury found defendant Leandro Bautista Perez guilty of two counts of rape and found true allegations that he had personally used a knife during the rapes (3-, 4-, or 10-year sentence enhancement) and kidnapped the victim under specified circumstances (one-strike 25-year-to-life sentence for rape conviction). The trial court sentenced defendant to 35 years to life for count 1 and stayed an identical term for the count-2 conviction. It then awarded him presentence credits of 730 actual days and 109 conduct credits. And it imposed a restitution-fund fine of \$6,000. On appeal, defendant contends that the trial court erred by (1) admitting evidence of a sexual assault response team (SART) exam performed by a nontestifying nurse, (2) admitting evidence of the victim's pretrial identification from a surveillance film, (3) instructing the jury in the language of CALCRIM No. 372 (flight), and (4) refusing his request to instruct the jury with a lesser-included armed enhancement. We disagree and affirm the judgment.

## BACKGROUND

Tina Jaquez, Jaquez's boyfriend, and the victim were driving in the boyfriend's truck when they met a friend, Jaime Bracamonte, and Bracamonte's companion, defendant, who was a stranger. The two had a case of beer, and the group went to the boyfriend's home to drink the beer. At some point, defendant and the victim left to buy cigarettes for the group and a soda for the victim. On the way, defendant tossed a beer can from which he was drinking into the bushes. They walked to a 7-Eleven store but had no identification to buy cigarettes. They left without buying anything, but the victim prevailed upon an acquaintance to buy them cigarettes. While walking back, the victim purchased a can of soda from a machine in a parking lot. Defendant then put his arms around the victim. The victim refused this advance and pushed defendant away. Defendant then tripped the victim and sat on her. The victim screamed, and defendant covered her mouth. Defendant then dragged the victim by the hair behind garbage dumpsters and sat on her. The victim screamed, and defendant bashed her head onto the asphalt ground twice. Defendant pulled out a knife and held it against the victim's face. He pinned her down, pulled up her shirt, pulled down her pants, and pulled down his pants. He twice penetrated the victim briefly before "getting frustrated." He then pulled up his pants and sat crying on a railroad tie. After a few minutes he took off walking.

The victim returned to the boyfriend's home and related the rape. She, Jaquez, and the boyfriend then drove off in search of defendant. They encountered a Watsonville police sergeant who took the victim to the hospital. Nurse Ronnie Walker performed a videotaped SART exam on the victim, taking a vaginal swab and making a smear slide. The victim and her friends gave descriptions of defendant to the police. The police found a soda can with the victim's fingerprints at the crime scene. They also found a beer can with defendant's palm print in some bushes.

The next day, Officer Jess Ojeda obtained a surveillance video from the 7-Eleven and found a segment in which Bracamonte and defendant enter the store and Bracamonte

purchases a case of beer. In another segment from later the same night, the video depicts the victim and defendant entering and leaving the store. Officer Ojeda showed the second segment to the victim, and the victim identified defendant as the man who had raped her.

The above events took place in 2001. In 2009, a cold hit matched the DNA profile taken from the vaginal swab with defendant's DNA profile taken following a drunk-driving conviction. The police assembled a photo lineup that included defendant's photograph. The victim could not identify defendant among the photographs. Bracamonte identified two others who she said looked similar to her companion. But Jaquez identified defendant's photograph.

At the time of trial in 2012, Walker had died and the victim had become legally blind.

#### ADMISSION OF SART EXAM EVIDENCE

The trial court did not admit the SART exam itself into evidence. It admitted a video of the actual SART exam and two sets of digital still photographs from the exam. Over defendant's objection grounded on the constitutional right to confrontation, Diane Deese testified to the following.

Deese was a sexual assault nurse examiner and coordinator of the Santa Cruz County sexual assault nurse examiner program. She located and reviewed the records of the victim's SART exam prepared by Walker. The records show that the SART exam had samples labeled by Walker as having come from the victim. The records show that the SART exam was delivered by Walker to the law enforcement officer who had requested the exam in accordance with proper procedure. Deese reviewed the video and photographs of the exam. She described the depictions, including dye-enhanced injuries to the victim's genitals of which she opined were consistent with having been caused by penetration of the vagina by a penis. And she opined that the depictions showed that the evidence was collected according to proper protocol.

Defendant urges that “Deese did not have personal knowledge of the information contained in the report, photographs, video or sample labels. . . . Though the labels did not constitute express full, grammatically correct statements, they did constitute implicit hearsay by Walker that she took a vaginal swab, prepared a vaginal smear slide, properly processed, sealed and labeled them ‘vaginal,’ etc.; and that each came from [the victim] on March 13, 2001 during a SART exam she performed. Deese’s testimony is more explicit, because she described the actual writing in the rape kit and the contents of the video.” Defendant concludes that “Walker’s account of how she conducted her exam and her assertive conduct in labeling the swabs and slides she prepared was inadmissible testimonial hearsay, and [defendant] was tried in violation of his right to confrontation and cross-examination of the key witness behind his identification as [the victim’s] rapist.” Defendant’s analysis is erroneous. Deese’s testimony does not constitute the sort of testimonial evidence that would trigger his rights under the confrontation clause.

The California Supreme Court has held that appellate courts should generally apply the de novo or independent standard of review to claims that implicate a defendant’s constitutional right to confrontation. (*People v. Seijas* (2005) 36 Cal.4th 291, 304 [concluding that “independent review” applies because “the ruling we are reviewing affects the constitutional right of confrontation”].) Accordingly, we apply the de novo standard of review to defendant’s claim that the trial court violated his constitutional right to confrontation.

To what extent the Confrontation Clause permits witnesses to testify in criminal trials about the results of scientific testing that they did not personally conduct has been the subject of several recent decisions by the United States Supreme Court and the California Supreme Court. The courts have divided on the issue, producing a complicated array of majority, plurality, and dissenting opinions.

The relevant line of authority begins with *Crawford v. Washington* (2004) 541 U.S. 36, in which “the United States Supreme Court held that the introduction of

‘testimonial’ hearsay statements against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses, unless the witness is unavailable at trial and the defendant has had a prior opportunity for cross-examination.” (*People v. Vargas* (2009) 178 Cal.App.4th 647, 653.) “Under *Crawford*, the crucial determination about whether the admission of an out-of-court statement violates the confrontation clause is whether the out-of-court statement is testimonial or nontestimonial.” (*People v. Geier* (2007) 41 Cal.4th 555, 597 (*Geier*)). Though the court did not define or state what constitutes a testimonial statement for purposes of the confrontation clause, it observed:

“Various formulations of this core class of ‘testimonial’ statements exist: ‘*ex parte* in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ [citation]; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ [citation]; ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.’ ” (*Crawford, supra*, 541 U.S. at pp. 51-52.)

In *Geier, supra*, 41 Cal.4th 555, the California Supreme Court held that the Confrontation Clause did not prohibit a laboratory director from testifying about the results of DNA tests that were conducted by another analyst. “[T]he *Geier* court concluded a statement was testimonial only if three requirements were all met: (1) it was made to a law enforcement officer or by a law enforcement officer or agent; (2) it describes a past fact related to criminal activity; and (3) it will possibly be used at a later trial.” (*People v. Barba* (2013) 215 Cal.App.4th 712, 721 (*Barba*)).

Next, in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), the United States Supreme Court considered whether the admission of a sworn and

notarized affidavit known as a “certificate of analysis” was properly allowed in evidence in order to prove that a substance tested positive as cocaine. “The *Melendez–Diaz* court held that the affidavits fell within the core class of testimonial statements--such as depositions, prior testimony, declarations, and affidavits--whose admission violates the Confrontation Clause. [Citation.] Therefore, the analysts were witnesses and their affidavits were testimonial, meaning that the defendant had a right to ‘confront’ them at his trial unless the analysts were unavailable for trial and the defendant had a previous opportunity to cross-examine them.” (*Barba, supra*, 215 Cal.App.4th at pp. 722-723.)

In *Bullcoming v. New Mexico* (2011) \_\_ U.S. \_\_ [131 S.Ct. 2705] [2011 U.S. LEXIS 4790] (*Bullcoming*), the United States Supreme Court considered one of the issues left open in *Melendez-Diaz*: whether someone other than the person who conducted a laboratory analysis could testify about the results and report of the person who actually conducted the test. *Bullcoming* involved testing of blood for alcohol level. “The analyst recorded his results on a state-prepared form titled ‘Report of Blood Alcohol Analysis.’ [Citation.] The report included a ‘certificate of analyst,’ affirming that the sealed sample he tested was received at the laboratory intact, with the seal unbroken; the statements made by the analyst were correct; and that he had followed the procedures set out on the back side of the form. . . . [U]nder the heading ‘certificate of reviewer,’ a state lab examiner who reviewed the analysis certified that the person who tested the sample and prepared the report was qualified to do so and had followed the established procedures for conducting the test.” (*Barba, supra*, 215 Cal.App.4th at p. 723.) At trial, an analyst who was familiar with the laboratory’s procedures but had not participated in or observed the testing on Bullcoming’s sample testified about the testing results and report. (*Ibid.*)

Justice Ginsberg delivered a four-part plurality opinion holding that the analyst’s certificate was a testimonial statement. Part III of the *Bullcoming* decision, which commanded a majority of the court, explained why the analyst’s certificate was

testimonial. “Even though the analyst’s certificate was not signed under oath, as was the case in *Melendez-Diaz*, the two documents were similar in all material respects . . . . As in *Melendez-Diaz*, a police officer provided a sample to a lab for testing to assist in a police investigation. An analyst tested the sample and prepared a certificate concerning the results. Finally, the certificate was formalized in a signed document that was sufficient to qualify the analyst’s statements as testimonial despite the absence of notarization present in *Melendez-Diaz*.” (*Barba, supra*, 215 Cal.App.4th at p. 725.)

Justice Sotomayor authored a concurring opinion in which she noted that formality is not the only test to determine whether a document is testimonial. She pointed to four additional circumstances demonstrating that the analyst’s certificate was testimonial. First, the state did not suggest an alternate primary purpose for the report, such as contemporaneous medical reports. Second, the person testifying about the analyst’s certificate did not supervise the analyst or review the testing. Third, the testifying witness was not an expert who was asked for his or her independent opinion about underlying testimonial reports that were not themselves admitted into evidence. Fourth, the testing did not involve only machine generated results. (*Barba, supra*, 215 Cal.App.4th at pp. 725-726.)

Next, in *Williams v. Illinois* (2012) \_\_ U.S. \_\_ [132 S.Ct. 2221] [2012 U.S. LEXIS 4658] (*Williams*), the defendant was charged with rape. Vaginal swabs containing semen were sent to Cellmark laboratory. At trial, a police laboratory expert testified that Cellmark analysts derived a DNA profile of the man whose semen was on the swabs and sent the profile to the police laboratory. In the expert’s opinion, the Cellmark DNA profile matched the police laboratory’s DNA profile obtained from the defendant when he was arrested for an unrelated offense. The Cellmark report was not introduced into evidence and no Cellmark analyst testified.

The *Williams* court upheld the judgment of conviction. Justice Alito authored a plurality opinion holding that testimony about the DNA tests did not violate the

confrontation clause for two reasons: (1) testimony about the report was not admitted for its truth but only to explain the basis of the analyst's independent expert opinion that Williams' DNA profile matched the sperm donor's profile; and (2) the report was not testimonial because it was prepared for the primary purpose of finding a rapist who was still at large, not for targeting an accused individual. Justice Thomas' concurring opinion reasoned that the report was not testimonial, even though the analyst's testimony was premised on the truth of the Cellmark Labs report, because the report lacked the solemnity of an affidavit or deposition.

In 2012, the California Supreme Court issued a trio of companion cases interpreting the *Williams* decision: *People v. Lopez* (2012) 55 Cal.4th 569 (*Lopez*); *People v. Dungo* (2012) 55 Cal.4th 608 (*Dungo*); and *People v. Rutterschmidt* (2012) 55 Cal.4th 650 (*Rutterschmidt*).

In *Lopez*, a criminalist testified that he reviewed a lab report, created by a colleague whom he had trained, concluding that the defendant's blood alcohol level was 0.09. The criminalist testified that, based on his own separate abilities, he too concluded the defendant's blood alcohol level was 0.09. The lab report was admitted into evidence. Justice Kennard authored the lead opinion, in which four justices concurred. The court reasoned, "[W]e need not consider the primary purpose of nontestifying analyst Peña's laboratory report on the concentration of alcohol in defendant's blood because, . . . the critical portions of that report were not made with the requisite degree of formality or solemnity to be considered testimonial." (*Lopez, supra*, 55 Cal.4th at p. 582.)

"[T]he portions of the lab report that contained nothing other than the machine-generated results of the test performed were not sufficiently formal or solemn to be testimonial under the Confrontation Clause because they lacked any attestations or assertions of validity, and because there was no way to cross-examine the machine that generated those results. [Citation.] The same was true as to portions of the report that functioned like a chain of custody report by showing that it was the defendant's sample

being tested. Those notations . . . were . . . nothing more than an informal record of data for internal purposes.” (*Barba, supra*, 215 Cal.App.4th at p. 729.)

In *Dungo*, a forensic pathologist gave expert witness testimony that the victim had been strangled. His opinion was based on facts contained in an autopsy report, which had been prepared by another pathologist. The report itself was not placed in evidence. As in *Lopez*, Justice Kennard authored the lead opinion, in which four justices concurred, holding that the autopsy report was not testimonial. She reasoned that “the expert testified as to only the physical observations recorded in the autopsy report, not as to the conclusions reached by the pathologist who conducted the autopsy and prepared the report. Such observations lack the formality required under the Confrontation Clause.” (*Barba, supra*, 215 Cal.App.4th at p. 730.) Also, autopsy reports serve several purposes and do not have the primary purpose of targeting an accused individual. Justice Chin authored a concurring opinion, joined by three justices, in which he explained that the primary purpose of the autopsy report was to describe the condition of the victim’s body.

Finally, in *Rutterschmidt*, a lab director gave expert witness testimony that, based on lab tests conducted by others, the victims had been drugged. The court unanimously concluded that any possible Confrontation Clause error was harmless beyond a reasonable doubt due to overwhelming evidence that the defendants had murdered the victims.

Several districts of the California Court of Appeal have published decisions applying the line of authority developed by the United States Supreme Court and the California Supreme Court. These decisions include *People v. Holmes* (2012) 212 Cal.App.4th 431 (*Holmes*), *People v. Steppe* (2013) 213 Cal.App.4th 1116 (*Steppe*) and *Barba, supra*, 215 Cal.App.4th 712.

In *Holmes, supra*, 212 Cal.App.4th 431, the appellate court decided that the Confrontation Clause did not bar testimony by “[t]hree supervising criminalists from these labs [who] offered opinions at trial, over defense objection, based on DNA tests that

they did not personally perform. They referred to notes, DNA profiles, tables of results, typed summary sheets, and laboratory reports that were prepared by nontestifying analysts. None of these documents was executed under oath. None was admitted into evidence. Each was marked for identification and most were displayed during the testimony. Each of the experts reached his or her own conclusions based, at least in part, upon the data and profiles generated by other analysts.” (*Id.* at p. 434.) The *Holmes* court concluded that these documents were not testimonial, reasoning: “The forensic data and reports in this case lack ‘formality.’ They are unsworn, uncertified records of objective fact. Unsworn statements that ‘merely record objective facts’ are not sufficiently formal to be testimonial.” (*Id.* at p. 438.)

In *Steppe, supra*, 213 Cal.App.4th 1116, the appellate court upheld admission of a laboratory technical reviewer’s independent opinion that the defendant’s DNA profile matched DNA that was retrieved from certain evidence. The *Steppe* court reasoned that, under *Williams* and *Lopez*, the DNA report was not formal enough to be testimonial. Also, the raw data and DNA report are materials that are reasonably relied on by experts and the jury knew that the nontestifying analyst and the reviewer reached the same conclusion. (*Id.* at pp. 1125-1127.)

Most recently, in *Barba, supra*, 215 Cal.App.4th 712, the trial court admitted into evidence four DNA reports and the testimony of an expert based on the reports. The testifying expert did not produce any of the reports. The Court of Appeal determined that the evidence did not implicate the Confrontation Clause for two reasons. First, the reports lacked the requisite formality. Second, the primary purpose of the report was not to accuse a targeted individual. (*Id.* at p. 742.)

It is difficult to make sense from the case law in this area. (*Barba, supra*, 215 Cal.App.4th at p. 740.) Yet, recent appellate decisions have distilled and applied a principle that is agreed upon by a majority of the justices of the Supreme Courts of the United States and California: a document containing the results of scientific testing is

considered testimonial for purposes of the Confrontation Clause *only* if it possesses the attributes of formality and solemnity. (*Holmes, supra*, 212 Cal.App.4th at p. 436; *Steppe, supra*, 213 Cal.App.4th at p. 1125; *Barba, supra*, 215 Cal.App.4th p. 742.) The *Holmes* court explained, “The California Supreme Court has extracted two critical components from the ‘widely divergent’ views of the United States Supreme Court justices. [Citations.] To be ‘testimonial,’ (1) the statement must be ‘made with some degree of formality or solemnity,’ and (2) its ‘primary purpose’ must ‘pertain[] in some fashion to a criminal prosecution.’ [Citations.] . . . [¶] . . . [¶] It is now settled in California that a statement is not testimonial unless both criteria are met.” (*Holmes, supra*, at pp. 437-438.)

Defendant argues that the data generated by the SART exam “are all statement[s] for the purpose of prosecuting the perpetrator of the sexual assault.” But that addresses only one of the testimonial criterion and does not address the formality criteria.

In summary, documents containing the results of scientific testing that have been deemed sufficiently formal and solemn to be testimonial include a chemical analyst’s affidavit and a blood alcohol report that included a signed analyst’s certificate. (*Melendez–Diaz, supra*, 557 U.S. 305; *Bullcoming, supra*, \_\_ U.S. \_\_ [131 S.Ct. 2705].) In contrast, the California Supreme Court concluded that an autopsy report and a laboratory report analyzing blood alcohol concentration data were not testimonial due to lack of formality. (*Dungo, supra*, 55 Cal.4th at p. 621; *Lopez, supra*, 55 Cal.4th at p. 582.) Several California appellate courts reached this same conclusion with respect to unsigned and uncertified DNA test reports. (*Holmes, supra*, 212 Cal.App.4th at p. 438; *Steppe, supra*, 215 Cal.App.4th at pp. 1126-1127; *Barba, supra*, 215 Cal.App.4th at p. 742.)

In this case, the SART exam that Deese referred to during her testimony does not contain any certification, attestation, or oath. Though it was recorded on a “923 form,” it simply was not an affidavit or other formalized testimonial material. Rather, it was an

unsworn, uncertified record of objective fact.<sup>1</sup> It is analogous to the unsworn and uncertified materials that were deemed insufficiently formal to be testimonial in *Williams, Lopez, Dungo, Holmes, Steppe* and *Barba*. Following and applying these decisions, we hold that the SART exam is not testimonial. Consequently, Deese’s testimony about the exam performed by Walker did not infringe defendant’s Sixth Amendment confrontation right.<sup>2</sup>

Finally we observe that the SART exam that Deese referred to in her testimony was not admitted into evidence. And Deese did not testify to what some other analyst concluded. All of her conclusions were based on her own analysis.

#### ADMISSION OF PRETRIAL IDENTIFICATION

During in limine proceedings, defendant objected on testimonial-hearsay grounds to Officer Ojeda’s proffered testimony that the victim identified defendant on the 7-Eleven surveillance video. He urged that “Officer Ojeda cannot channel [the victim] to tell us about the live identification.” “[W]e won’t be able to ask her about the people that Officer Ojeda is pointing out in the video. We won’t be able to ask her is this the person that . . . you picked out of that video?” The People replied that the identification was admissible hearsay under Evidence Code section 1238 (prior identification of persons under certain circumstances) and there was no confrontation issue because the victim was

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<sup>1</sup> Sexual assault examinations are performed pursuant to a statutorily mandated protocol. (*People v. Vargas, supra*, 178 Cal.App.4th at p. 654.) Part of the procedure is the completion of a mandatory form for the purpose of recording medical and physical evidence data disclosed by a sexual-assault victim, observation data, and test data. (Pen. Code, § 13823.5, subd. (c).)

<sup>2</sup> In a concurring opinion, Justice Breyer in *Williams* noted “the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another.” (*Williams, supra*, \_\_\_ U.S. at p. \_\_\_ [132 S.Ct. at p. 2246].) In *Melendez–Diaz*, the Supreme Court held that not “everyone who laid hands on the evidence must be called” as a witness in order to satisfy the right to confrontation. (*Melendez–Diaz, supra*, 557 U.S. at p. 311, fn. 1.)

available to testify. The trial court agreed with the People and reasoned that the victim “may not be able to repeat her identification here in open court but she can testify about it based upon her memory.” “And you’re free to cross-examine her about whether or not Officer Ojeda or another member of law enforcement provided her with any cues or prompts or what her vision capabilities were or were not at that time. So she’s free to be fully cross-examined.”

At trial, the victim testified that, on the day after the rape, she watched the 7-Eleven video at the police station with Officer Ojeda and recognized herself and the man who raped her. She affirmed that she was sure that the man in the video had been the rapist because the rapist and the man in the video had the same distinctive haircut. Defendant did not cross-examine the victim about the 7-Eleven video. Later Officer Ojeda testified that the victim had watched the 7-Eleven video on the day after the rape and identified defendant as the person who raped her.

Defendant contends Officer Ojeda’s “testimony was not admissible under [Evidence Code] section 1238, because [the victim] could not and would not testify what [*sic*] she made the identification and that it was a true reflection of [her] opinion at that time.” We disagree.

Evidence Code section 1238 establishes an exception to the hearsay rule for a statement that identifies a party or other person as a participant in a crime or other occurrence, “if the statement would have been admissible if made by [the witness] while testifying . . . .” The statute requires that the statement have been made when the crime was fresh in the witness’s memory, and that “the evidence of the statement is offered after the witness testifies that he [or she] made the identification and that it was a true reflection of his [or her] opinion at that time.” (Evid. Code, § 1238, subd. (c).)

Our review of the record confirms that the true-reflection requirement was met. The victim testified that she “told [Officer Ojeda] that it was the man who raped me--the other person I recognized on the video tape.” And the victim answered “yes” to the

question, “At the time . . . that you picked this individual off of the video were you sure it was the man who had raped you?” She then described the distinctive haircut. (See *People v. Redd* (2010) 48 Cal.4th 691, 729.)

Defendant complains that the victim could not view the video and testify that the person Officer Ojeda pointed out was the person she identified. But this point does not implicate a foundational requirement for Evidence Code section 1238. Defendant was free to argue to the jury that Officer Ojeda’s testimony was flawed because the victim could not corroborate it. Since the evidence suggests that the only people in the video were the victim and defendant, defendant no doubt elected against so assailing Officer Ojeda’s testimony.

Defendant also contends that the admission of Officer Ojeda’s testimony about the victim’s out-of-court identification violated his right to confrontation. There is no merit to the point. “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” (*Crawford, supra*, 541 U.S. at p. 60, fn. 9.)

Defendant insists that the victim was not available for effective cross-examination due to her disability. However, he does not point us to any case which finds a violation of a defendant’s Confrontation Clause rights when the limitations on the effectiveness of cross-examination resulted from the witness’s own physical impairments.

All authority known to us supports the contrary proposition, i.e., that the confrontation clause is not generally implicated where the declarant is produced at trial for examination. “The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.” (*Crawford, supra*, 541 U.S. at p. 60, fn. 9.)

Though the Supreme Court has not addressed a case with facts identical to those in this case, in *United States v. Owens* (1988) 484 U.S. 554 (*Owens*), the court clearly held that the Confrontation Clause guarantees only the opportunity for cross examination, and

that the Clause is not violated by the admission of hearsay evidence when the witness's memory fails at trial. The facts in *Owens* resemble those before us. A prison guard, who had suffered head injuries in an assault, initially identified the defendant as his assailant, but at trial lacked any memory of seeing his assailant during the assault, or of circumstances bearing on the reliability of his pretrial identification. The court reiterated its previous statements in *Delaware v. Fensterer* (1985) 474 U.S. 15, 22, that “ ‘the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose . . . infirmities [in a witness's testimony and memory] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.’ ” (*Owens, supra*, at p. 558.)

Also instructive is *Vasquez v. Kirkland* (9th Cir. 2009) 572 F.3d 1029, 1036-1037, which concerned a deaf witness who was difficult to examine or cross-examine. Surveying the case law, *Vasquez* considered cases where (1) the declarant testified and was subjected to cross-examination or was cross-examined when the prior statement was made, (2) the trial court imposed procedural barriers to effective cross-examination, (3) procedures were invoked to protect child witnesses, and (4) a defendant's own statements were used against him. Although observing that the fact situation was closest to *Owens*, *Vasquez* held that there was no factually analogous Supreme Court decision finding a Confrontation Clause violation based on a witness's own physical impairments. (*Id.* at p. 1038.)

We observe that the victim's physical impairments in this case were less severe than in *Owens* and *Vasquez*. She remembered the incident and her pretrial identification and was able to communicate such to the jury; and she was able to remember and communicate her description of defendant. As the trial court remarked, defendant was free to cross-examine the victim about her recollections or any cues or prompts that may have influenced her pretrial identification.

The jury had the opportunity to observe the victim's demeanor, thus permitting the jury to draw its own conclusions regarding her credibility as a witness. As the Supreme Court has recognized in the more-aggravated memory-loss context, the "weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." (*Owens, supra*, 484 U.S. at p. 560.)

All of the elements of the confrontation right identified by the Supreme Court have been satisfied in this case: the victim was physically present in court and confronted the accused face-to-face; the victim was competent to testify and testified under oath; defendant retained the full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant were able to view the victim's demeanor and body language as she testified. (See *Maryland v. Craig* (1990) 497 U.S. 836, 851.)

In sum, we find no basis in *Crawford*--where the witness did not testify at all--to exclude a prior identification of the defendant by a witness who testifies at trial but has sustained an organically caused loss of perception preventing her from repeating the identification or corroborating another witness's detail about the prior identification.

#### CALCRIM NO. 372

Over defendant's objection, the trial court instructed the jury in the language of CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Defendant asserts that the trial court should not have given a flight instruction because it was argumentative and unsupported by sufficient evidence. We disagree.

Defendant contends that the flight instruction is argumentative because it invites a jury to make an inference favorable to the prosecution. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135.)<sup>3</sup> However, appellate courts have found the standard flight instruction to be an unbiased statement of law that does not unduly favor the prosecution. (See, e.g., *People v. Paysinger* (2009) 174 Cal.App.4th 26, 31.) As the instruction did not presuppose the occurrence of the alleged crime, a reasonable jury would not misunderstand the instruction in a manner that might undermine the presumption of innocence. (*Ibid.*) The instruction did not require the jury to view defendant's behavior as "flight." Instead, it left the appropriate characterization of defendant's conduct to the jury's determination, and outlined the permissible inferences that could be drawn *if* it concluded that defendant had fled the scene. The instruction does not direct that a particular inference be drawn and cannot be deemed argumentative. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 180-181 [reaching the same conclusion about CALJIC No. 2.52, another flight instruction].)

We also reject defendant's substantial-evidence point.

"Penal Code section 1127c requires that whenever evidence of flight is relied on to show guilt, the court must instruct the jury that while flight is not sufficient to establish guilt, it is a fact which, if proved, the jury may consider." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1243 (*Pensinger*)). Instruction on flight is appropriate if there is substantial evidence the defendant departed the crime scene under circumstances suggesting the movement was motivated by a consciousness of guilt. (*People v. Howard* (2008) 42 Cal.4th 1000, 1020; *People v. Smithey* (1999) 20 Cal.4th 936, 982; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) The law does not require the physical act of running,

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<sup>3</sup> A jury instruction is argumentative if it is " " "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." ' " (*People v. Lewis* (2001) 26 Cal.4th 334, 380, quoting *People v. Hines* (1997) 15 Cal.4th 997, 1067-1068.)

only a purpose to avoid being detained. (*People v. Abilez* (2007) 41 Cal.4th 472, 522-523.) “To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

Defendant argues that the victim testified only that he walked away from the scene. “He did not run, he did not hide, and there was no evidence he left the jurisdiction.” (*Pensingier, supra*, 52 Cal.3d at p. 1244 [evidence indicating that an accused left the scene and went home “is not evidence of flight that necessarily supports an inference of consciousness of guilt”].) He concludes: “In the absence of some fact showing [his] urgency in leaving the parking lot--indicating a desire to avoid detection--this record provides no evidence of flight from which an inference could be drawn that [he] was ‘aware of his guilt,’ or in fact guilty.”

Although defendant’s departure from the scene following the rape could be viewed as defendant suggests, it could also be viewed as an intent to evade arrest given that one ordinarily would not leave a consensual-sex partner at a garbage dumpster after the fact. The weight to be assigned to this fact was clearly in the purview of the trier of fact.

#### LESSER-INCLUDED ENHANCEMENT

For each violation of specified sexual offenses, a person shall receive a “3-, 4-, or 10-year enhancement if the person uses a firearm or a deadly weapon” (Pen. Code, § 12022.3, subd. (a)) or a “one-, two-, or five-year enhancement if the person is armed with a firearm or a deadly weapon.” (*Id.*, subd. (b).) Defendant was charged with the use enhancement. We agree that the armed enhancement is a lesser enhancement included within the use enhancement of Penal Code section 12022.3. (Cf. *People v. Allen* (1985) 165 Cal.App.3d 616, 627.)

The trial court instructed the jury regarding the use enhancement in the language of CALCRIM No. 3145, in part, as follows: “Someone personally uses a deadly or dangerous weapon if he does any of the following: Displays the weapon in a menacing manner.” It refused defendant’s request to instruct the jury regarding the armed enhancement. CALCRIM No. 3130 encompasses such an instruction, stating, in part: “A person is *armed* with a deadly weapon when that person: [¶] 1. Carries a deadly weapon [or has a deadly weapon available] for use in either offense or defense in connection with the crime[s] charged; [¶] AND [¶] 2. Knows that he or she is carrying the deadly weapon [or has it available].”

Defendant asserts that the trial court erred by refusing his request to instruct on the armed enhancement. He argues that such an instruction was warranted based on evidence that “the evidence of weapon use was limited to [the victim’s] testimony that [he] held a knife during the rape. [She] did not describe a specific threatening gesture with the knife. Nor was there evidence that [he] verbally threatened to use it.” Defendant’s analysis is erroneous.

A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, “ ‘ ‘ ‘those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.’ ” ’ ” (*People v. Valdez* (2004) 32 Cal.4th 73, 115.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser-included offense are present. (*Ibid.*; *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In *People v. Majors* (1998) 18 Cal.4th 385, however, the Supreme Court rejected the contention that a trial court has a sua sponte duty to instruct on “ ‘lesser included enhancements.’ ” (*Id.*, at p. 410.) The court stated, “One of the primary reasons for requiring instructions on lesser included offenses is ‘to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice

between [guilt] and innocence” ’--that is, to eliminate ‘ “the risk that the jury will convict . . . simply to avoid setting the defendant free.” ’ [Citation.] This risk is wholly absent with respect to enhancements, which a jury does not even consider unless it has already convicted defendant of the underlying substantive offenses. [Citation.] Under these circumstances, we hold that a trial court’s sua sponte obligation to instruct on lesser included offenses does not encompass an obligation to instruct on ‘lesser included enhancements.’ ” (*Id.* at pp. 410-411.)

In so deciding, the Supreme Court did not state whether instruction on a lesser-included enhancement would be proper, in an appropriate case, if requested by the defendant. But, assuming that a lesser-included-armed enhancement is analogous to a lesser-included offense in this context, a trial court is not required to grant a request to instruct on the lesser-included-armed enhancement unless there is substantial evidence that the defendant committed the lesser enhancement but not the greater. (*People v. Cole* (2004) 33 Cal.4th 1158, 1218 [“trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, ‘ “that is, evidence that a reasonable jury could find persuasive” ’ [citation], which, if accepted, ‘ “would absolve [the] defendant from guilt of the greater offense” [citation] *but not the lesser.*’ ”].) Stated another way, the trial court need not grant a request to instruct on a lesser-included enhancement when there is no evidence that the enhancement is less than charged. (*People v. Breverman, supra*, 19 Cal.4th at pp. 154, 162.)

Here, there is no evidence from which a reasonable jury could conclude that the enhancement was less than charged.<sup>4</sup>

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<sup>4</sup> When a trial court refuses a proposed instruction for lack of evidence, we review the record de novo to determine whether the record contains substantial evidence to warrant the instruction. (*People v. Cruz* (2008) 44 Cal.4th 636, 664.)

In *People v. Turner* (1983) 145 Cal.App.3d 658, the defendant forced the victim into her car at gunpoint. He placed the gun between the seats and told her she would not be harmed if she cooperated. He ordered her to drive to a secluded place and to undress. While she did so, he transferred the gun to a spot on the car floor where it was out of her way, but accessible to him. He then sexually assaulted her three times. She described the gun as “ ‘the most frightening thing to me because I just feared the gun more than anything.’ ” (*Id.* at p. 685.) The jury found that the defendant had used a gun during each sexual offense, per Penal Code section 12022.3, subdivision (a). On appeal, the defendant argued that the trial court erred by failing to instruct sua sponte on the lesser-included armed enhancement, per Penal Code section 12022.3, subdivision (b). The appellate court concluded that there was no error because there was “no possibility Turner was simply armed with a gun but did not personally use it in the commission of all the offenses of which he was convicted. [¶] The gun Turner used was an essential part of the crimes he committed. . . . Where the victim is sufficiently frightened by the use of a weapon such that it becomes unnecessary to continually display the weapon during the course of later crimes against that victim within a brief span of time, a use finding under section 12022.5 is proper. [Citation.] It would indeed be paradoxical to hold otherwise and reward with reduced punishment the criminal who effectively uses a firearm. . . .” (*People v. Turner, supra*, at pp. 684-685.)<sup>5</sup>

The victim in this case testified that defendant “pull[ed] a [two and one-half- to three-inch] knife out of his front pant pocket and put[] it to [her] face.” She indicated how defendant held it “to [her] cheek,” “Right on [her] face.” She described that she “was scared” and “Screaming and crying telling him to leave [her] alone, to stop.” Even

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<sup>5</sup> *Turner* was disapproved by the California Supreme Court in *People v. Majors, supra*, 18 Cal.4th at page 410 through 411, to the extent that *Turner* held that a trial court has a sua sponte duty to instruct on a lesser-included enhancement if the evidence warrants the instruction.

under defendant's characterization of this evidence (no specific threatening gesture or verbal threat to use knife), defendant displayed a knife menacingly to his victim, frightened her, and held it against her, either during the sex offenses or in such temporal and consequential connection with those offenses as to constitute use in their commission. This evidence does not permit the possibility that defendant was simply armed with a knife but did not personally use it. The trial court therefore properly refused defendant's request to instruct on the armed enhancement.

MODIFICATIONS

The parties agree that the trial court miscalculated defendant's presentence credits in awarding 730 actual days instead of 757 and 15 percent conduct credits of 109 days instead of 113. We will therefore modify the judgment. The parties also agree that the abstract of judgment incorrectly denotes that defendant was a "Three-Strike" offender rather than a "One-Strike" offender and assessed a restitution-fund fine of \$8,400 rather than \$6,000. We will therefore correct the abstract.

DISPOSITION

The judgment is modified to award defendant 757 actual days of presentence credit and 113 days of conduct credit. As so modified, the judgment is affirmed. The abstract of judgment is corrected to reflect that defendant is a "One-Strike" offender and was assessed a restitution-fund fine of \$6,000.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.