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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JIMMY LLOYD ALEXANDER, Defendant and Appellant.	H045599 (Monterey County Super. Ct. No. 17CR001822)

A jury convicted defendant Jimmy Lloyd Alexander of numerous offenses after he kidnapped and sexually assaulted a victim multiple times over the course of a night. He was sentenced to a total term of 175 years to life in prison, which included multiple terms of 25 years to life under the "One Strike" law, Penal Code section 667.61.[1]

On appeal, Alexander argues that (1) the trial court erroneously admitted irrelevant expert evidence about the behavior of trauma victims, (2) the trial court failed to sua sponte provide a limiting instruction on the proper use of expert testimony, (3) there is insufficient evidence that he compelled the victim's movement through force or fear, (4) the trial court gave the jury a legally incorrect definition of the asportation element of kidnapping, (5) there is insufficient evidence that moving the victim substantially increased her risk of harm, (6) he is entitled to a hearing on his ability to pay fines and

[1] Unspecified statutory references are to the Penal Code.

fees, and (7) his 175-year-to-life sentence constitutes cruel and unusual punishment. We find no merit in Alexander's contentions and affirm the judgment.[2]

BACKGROUND

1. *The Amended Information*

On October 30, 2017, the Monterey County District Attorney's Office filed a first amended information charging Alexander with kidnapping to commit oral copulation, rape, and sodomy (§ 209, subd. (b)(1); count 1), two counts of forcible rape (§ 261, subd. (a)(2); counts 2 & 3), two counts of forcible sodomy (§ 286, subd. (c)(2)(A); counts 4 & 5), four counts of forcible oral copulation (former § 288a, subd. (c)(2)(A); counts 6, 7, 8, & 9) and second degree robbery (§ 211; count 10). The information alleged that as to counts 2 through 9, Alexander kidnapped the victim with substantial movement that increased her risk of harm (§ 667.61, subds. (a), (d)(2)) and used a deadly weapon (§ 667.61, subd. (e)(3)). As to counts 2 through 9, the information further alleged that Alexander kidnapped the victim for sexual purposes (§ 667.8, subd. (a)), used a deadly weapon during the commission of the offenses (§ 12022.3, subd. (a)), and was armed with a deadly weapon (§ 12022.3, subd. (b)). As to count 10, the information alleged that Alexander personally used a deadly weapon during the commission of the offense (§ 12022, subd. (b)(1)). Finally, the information alleged that Alexander had a prior serious or violent juvenile adjudication (§ 1170.12, subd. (c)(1)).

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[2] Alexander has filed in propria persona a petition for writ of habeas corpus (case No. H046803), which we ordered considered with his appeal. We have disposed of the habeas corpus petition by separate order filed this day. (See Cal. Rules of Court, rule 8.387(b)(2)(B).)

2. *The Trial*

a. **Victim's Testimony**

When victim was six years old, her brother's 14-year-old friend forced her to have oral sex with him. At the time, victim did not fight back and did not understand what was going on. Victim later told her parents about what happened. Victim heard that investigators went to her brother's friend's house, but her brother's friend was still permitted to come over to victim's house after the investigation concluded, making her feel unimportant. As a result of this incident, victim often felt insecure and was afraid of being alone with men. She occasionally still thought about what happened to her as a child, and memories of the event made her feel anxious.

Victim, who was 43 years old at the time of Alexander's trial, lived in Salinas with her female fiancée (fiancée) and her mother (mother). Victim suffered from attention deficit disorder and took Adderall to control her symptoms. At the time the offenses were committed, victim was taking other medication, including Butalbital, Wellbutrin, Fluoxetine (a generic for Prozac), Xanax, and prescription cough syrup. Between February 2016 and October 2016, victim used methamphetamine with her fiancée several times a week. She stopped using methamphetamine because she believed the drugs were not a "good thing" for her to do and the habit was expensive.

On Saturday, April 14, 2017, victim argued with her brother (brother) at his house. Victim had taken a Xanax, and brother confronted her about what she was "on." Victim admitted that she had used methamphetamine the year before. The fight with brother continued to the next day, Saturday, April 15. Brother came over to mother's house and told victim that he was going to change mother's locks.

Later that afternoon, victim left mother's house to go to her storage unit to retrieve packing boxes. Victim stopped to buy a meth pipe because she wanted to see if she could purchase methamphetamine from someone at the storage unit. She was angry at brother

and mother for not being supportive of her sobriety. Victim arrived at the storage unit at approximately 5:00 p.m. and saw that it was closed.

Victim stayed in her car and called over the first person that she saw on the street. Victim asked the man if he could get her some methamphetamine. The man asked victim how much money she had, and victim gave him $20. The man walked away with victim's money and came back with Alexander. The man handed victim a piece of plastic that was almost empty. Victim became angry and asked where the rest of the drugs were.

Alexander disappeared from victim's view for a few minutes, and when she saw him again, he was coming around to the front of her car and was getting inside to sit in the front passenger seat. Victim saw that Alexander had a 6-inch long hunting knife on his right side. Alexander did not directly threaten victim with the knife, and she thought she might have "accidentally" seen it. Victim felt scared. Alexander told her to drive and instructed her to go to a 99 Cent store. He told victim to pull her car behind the back of the store.

Victim had her cell phone with her, and she made a call to fiancée. Victim spoke with fiancée for approximately two and a half minutes but did not ask for help because she "froze up." She remembered that she told fiancée that the storage facility was closed, but she did not mention that there was someone else in the car with her or that she was driving to an unknown destination. Victim's cell phone ran out of power shortly after she called fiancée. After she stopped the car, Alexander pulled out some methamphetamine and told victim to smoke it. Victim did not want to smoke methamphetamine, but she was scared and did as she was told. Victim and Alexander remained in the car, with victim in the driver's seat and Alexander in the passenger's seat.

Alexander told victim to "[l]ook," and when victim looked in Alexander's direction, she saw that his pants were down and his penis was exposed. Victim asked

Alexander what he was doing, and Alexander responded, "Come on." Victim told Alexander that she was not interested, she was gay, and she was not a "crack whore." Alexander told victim to " '[s]uck [his] dick' " and put victim's hand on his penis. Victim pulled her hand back, and Alexander again told her to "suck his dick." Victim was scared, so she leaned toward Alexander. Alexander pulled her neck and face down, and victim placed her mouth on his penis for approximately 10 to 15 minutes. Victim repeatedly told Alexander that she was gay. A passerby walked by the car and Alexander told victim that they should leave.

Victim felt scared when she was forced to orally copulate Alexander. She described that she "felt like I did when I was a kid [being molested] again having to do that." She thought about fighting back and running away, but she was afraid.

Victim and Alexander then drove to a pharmacy parking lot. They stayed in the parking lot for approximately 10 minutes. No sexual acts occurred at the parking lot. Alexander told victim that he wanted to find someplace secluded.

Next, victim and Alexander drove near a gas station that was located in an industrial area. There were some businesses that were closed off by a gate. Victim recalled that Alexander noticed that one of the gates was closing, and he told her to quickly drive through it to a tractor/trailer area. Alexander then directed victim to park the car. At first, victim and Alexander remained seated in the car. Alexander then got out of the car and stood outside the passenger door. He started spitting on victim's face and forced her to have oral sex with him. Victim and Alexander remained in the area for 10 or 15 minutes. Another passerby walked near the area, and Alexander decided that they should leave because he wanted to find another secluded place.

Victim and Alexander went to the nearby gas station. Alexander told victim to go inside and buy him a beer. Victim told Alexander that she did not have any money, and Alexander would need to give her some if he wanted her to buy him a beer. Victim went

inside the store. There were other people inside the store, but she did not ask for help. Victim was "trying to make sense of everything that was going on and [was] thinking about what [she] could do to safely get out of the situation." Victim had the "mindset that [she had] when [she] was a kid and . . . was afraid of how [Alexander] might harm [her] somehow." Victim purchased some water, thinking that she could moisturize her mouth and stop Alexander from spitting in her face. The gas station cashier told victim that her car's headlight was out. At the time, victim felt trapped and terrified. She went outside to turn on the headlights to take a look.

Afterwards, victim and Alexander drove back to the tractor/trailer area. Alexander told victim to put her seat back and to bend over. Victim felt Alexander rub something that smelled like hand sanitizer on her buttocks. Victim asked Alexander what he was doing and told him that "he wasn't sticking anything up [her] butt." Alexander replied, " 'We're going to do things my way.' " Alexander then sodomized victim. Alexander also had victim perform oral sex on him an additional three or four times while they were in the area.

Alexander then directed victim to drive to a hotel. Alexander smoked more methamphetamine while parked in the parking lot, and he also told victim to smoke some more. Alexander told victim to clear out the back seat of her car and to place her belongings in the trunk. While victim was outside moving the items to the trunk, Alexander came from behind and raped her, putting his penis inside of her vagina. Alexander pushed victim to the ground, and victim landed on her knee. Alexander then told victim to get back into the back seat of the car, and she complied. Alexander attempted to have vaginal sex with victim, but he did not have a full erection. He then told her to roll onto her knees, and he penetrated her anally using some lotion that victim had in the car. Alexander pushed and grabbed victim's head, and she hit her head on the

car door several times. Later, victim and Alexander were sitting in the front of the car, and Alexander forced victim to orally copulate him again.

Afterwards, Alexander "stopped" and said he wanted to get a room. Victim told Alexander that she needed him to leave, and people would be looking for her soon. She also told him that her brother was an attorney who knew police officers. Victim thought that this information might scare Alexander. Victim did not remember if Alexander responded to her statements. They left the hotel and drove back to the gas station that they had left earlier.

At the gas station, victim told Alexander that he needed to leave. At some point, Alexander stepped outside the car. Victim did not drive away because she was afraid, and she felt that she needed Alexander to voluntarily leave. Alexander returned to the car, and victim went inside the gas station. Victim went back to the car to get her insulin because she planned on calling 911 and returned to the gas station. Victim asked the cashier for a phone and told him that she was in an emergency situation because there was someone inside her car. Victim, however, "froze up" and made no calls. She held the phone to her ear for a second and decided that calling the police might not be the "best thing." Victim did not know how long it would take for the police to arrive, and she did not know how suspicious Alexander would become. She was not sure if she would be safe if she made the phone call.

Victim walked back to the car, and Alexander had her drive to a Dollar Store. Victim kept telling Alexander that she needed to let him off somewhere because people would be looking for her. Alexander told her that he was not finished with her yet, and he wanted to "find a girl on the street . . . to bring in." Victim interpreted Alexander's comments to mean that he had not ejaculated yet.

Alexander then had victim drive to a grocery store. Victim drove through the parking lot and pulled in front of a house. Victim lied and told Alexander that she lived

at the house. Victim told Alexander that he needed to get out of the car because she needed to speak with her fiancée. Victim also told Alexander that he could not be inside the car while she was inside the house. Alexander finally agreed to get out of the car. He took victim's phone as " 'security or collateral' " to ensure that victim would return. After Alexander got out of the car, victim drove, made a U-turn, and left the area. Victim believed it was safe to leave Alexander at that location because it was more secluded. Victim thought that if she had left Alexander at the gas station, he could have convinced someone to give him a ride to follow her.

Victim drove home and told fiancée that she had been raped. By that time, it was approximately 1:00 or 1:30 a.m. on Sunday morning. Fiancée suggested that victim go to the hospital. Fiancée also wanted to go to the location where victim dropped Alexander off to see if fiancée could find him because she was "very angry." Victim took fiancée back to where she had dropped Alexander off. They did not see him and proceeded to go to the hospital. Victim and fiancée arrived at the hospital at around 2:00 or 3:00 a.m. She spoke with a police officer and underwent a physical rape examination.

Later, victim used fiancée's phone to "ping" her cell phone. Brother also got involved. Victim was able to locate Alexander, and she took a picture of him outside of a library. She then went to a police station and told officers that she had been raped by Alexander, showing officers the photograph that she had taken.

The entire time that Alexander forced victim to engage in sex acts, victim felt horrified and could not understand what was happening. She did not fight back because she was afraid of what Alexander would do; she did not know if he would harm her physically, hit her, or stab her. Victim did not know what Alexander was capable of. At some point during the night, Alexander burned her finger with a cigarette. Victim suffered from other injuries, including bruises.

When victim first told fiancée, mother, and the police about what had happened with Alexander, she did not disclose that she had intended to purchase drugs from Alexander. She felt ashamed and thought that people might blame her for what happened. Later, victim did not initially tell the district attorney or his investigator that she and Alexander went to the gas station because she was afraid of how the surveillance videos in that area would be interpreted. Victim knew that she did not fight with Alexander and thought the videos would make her look complacent.

b. **Fiancée's Testimony**

Fiancée and victim had been together for three years. Fiancée introduced victim to methamphetamine, but both fiancée and victim stopped using drugs sometime in October 2016. Fiancée knew someone who sold methamphetamine, and she never purchased drugs on the streets.

On Saturday, April 15, victim got into a fight with brother and mother. Victim was in an irate mood when she left mother's house, and she told fiancée that she was going to get boxes out of their storage unit. About an hour after victim left, victim called fiancée and spoke to her over the phone. Victim told fiancée that the storage unit was closed. Victim did not indicate that she was in trouble. Fiancée did not think there was something wrong, but she thought that "there was something in [victim's] voice."

The next time fiancée spoke with victim was at 1:30 a.m. on Sunday morning. Fiancée had been trying to reach victim that night, but her calls to victim's phone went straight to victim's voicemail. Victim opened the door and had a "look of terror in her eyes." Victim's clothes were dirty, and fiancée knew there was something wrong. Victim told fiancée that someone had gotten into her car with a knife, made her drive to different places, including a 99 Cent Store and a hotel, and made her "perform oral sex with him." Victim also told fiancée that the man "tried to sodomize her and rape her." Fiancée told victim that they should go to a hospital, and victim initially said she wanted

to take a shower first. Victim woke up mother, who had been sleeping, told her what happened, and went to the hospital with fiancée.

c. **Mother's Testimony**

When victim was six years old, mother recalled that victim came home crying one day. After victim calmed down, she told mother that brother's friend had " 'put his penis in [her] mouth.' " The family went through court proceedings and made arrangements for victim to have counseling.

Mother recalled the argument that she had with victim shortly before the crimes occurred. During the argument, victim told mother that she had used methamphetamine in the past. Brother told mother that she should not let victim or fiancée live with her anymore. At some point in the afternoon, mother noticed that victim had left. Fiancée told mother that victim had left to get boxes from her storage unit.

The next time mother saw victim was at around 1:30 a.m. the next morning. Mother had been sleeping, and victim woke her up. Victim, who was crying and hysterical, told mother, " 'I've been raped and sodomized and I've been held in my own car for the last eight hours at knife point.' " Mother told victim that she needed to go to the hospital.

d. **Brother's Testimony**

Brother testified that victim went out to get boxes after their argument that Saturday afternoon. He tried reaching her on the phone afterwards, but she did not respond. The next morning, brother heard from mother about what had happened to victim. Brother helped victim locate her phone. He called victim's phone number, and a man answered. Brother and the man had a five or six minute conversation. The man identified himself by his first name, Jimmy. Brother also met with police officers at the library after victim located the man who had assaulted her, who she later identified as Alexander.

e. **The Police Investigation**

On April 17, 2017, Officer Masahiro Yoneda responded to a 911 call at a library that was made by victim. Upon Officer Yoneda's arrival, brother showed Officer Yoneda a picture of Alexander, and Officer Yoneda arrested and detained Alexander. Alexander had a gray iPhone in his possession. Officer Yoneda conducted an "infield show-up" with victim at the police station and asked victim to identify Alexander. After Officer Yoneda admonished victim about infield show-ups, victim identified Alexander as the man who had raped her.

A sexual assault forensic nurse conducted an examination of victim after she arrived at the hospital at around 12:45 p.m. There was some delay in beginning victim's examination because she needed to have a CAT scan of her head. The nurse observed that victim had several large bruises on her body and a cigarette burn. Victim also complained of head pain. The nurse conducted a vaginal exam and noted that victim's perihymenal area was raw and red. Victim also had friction injuries that appeared to have been inflicted within the past 12 to 24 hours, which was consistent with her report of sexual assault. The nurse collected labial and anal swabs from victim and also took swabs from Alexander, who she also examined.

A criminalist with the Department of Justice analyzed victim's and Alexander's blood and urine. Alexander's urine tested positive for methamphetamine and amphetamine, and his blood tested positive for methamphetamine. Victim's urine tested positive for methamphetamine and amphetamine, metabolites of the anti-depressant or smoking-cessation drug Wellbutrin, a synthetic opioid-type drug found in over-the-counter drug syrups, Prozac, an antihistamine and sedative that is found in cough syrup, hydrocodone and a metabolite of hydrocodone, an anti-anxiety and sedative-type drug called Butalbital, and Tylenol. Victim's blood tested positive for methamphetamine and norfluoxetine.

A different criminalist with the Department of Justice analyzed the anal swab taken from victim and found a low-level male DNA that was consistent with Alexander's DNA. The criminalist also examined Alexander's swabs and found DNA that was consistent with victim's DNA. A forensic analyst at the California Department of Justice analyzed the labial and anal swab taken from victim and compared them to swabs taken from Alexander. The swabs were consistent with Alexander's DNA. There was some ambiguity with the anal swab, and there was an indication that there may have been more than one male donor. The ambiguity could have been the result of contamination, but the forensic analyst was unsure of how that may have occurred.

District Attorney's Office Investigator Jorge Gutierrez obtained surveillance video footage near the 99 Cent store and the gas station, which were played for the jury. District Attorney's Investigator Peter Austen retrieved victim's cell phone records for April 15, 2017. The records reflected that victim's cell phone connected with the network near her storage unit and the 99 Cent Store. It was subsequently disconnected from the network and was not reconnected until the next day at approximately 1:00 p.m. near the library.

f. **Dr. Mindy Mechanic's Testimony**

Dr. Mindy Mechanic, a psychology professor, had spent the last 25 years specializing on the psychological consequences of trauma and victimization. Dr. Mechanic had never met victim. She clarified that her role was to help educate the jury because lay people often do not have accurate knowledge about how victims tend to respond to sexual assault.

Dr. Mechanic first testified about the effect that trauma generally has on the brain. In situations where an individual perceives danger, the prefrontal cortex, the part of the brain responsible for complex thought, decision-making, impulse control, planning, and logical and rational decisions, goes offline. In its place, the "primitive and reptilian" part

of an individual's brain goes online. As a result, during traumatic events, an individual typically displays responses like "fight, flight and freeze." It is only after the traumatic event has passed that an individual can look back and think about what he or she could have done differently. A person who has prior traumatic experiences is more likely to "freeze" in traumatic situations and not fight. When the "reptilian" part of the brain takes over, an individual can remember what they saw, heard, and experienced, but the "verbal chronological narrative" does not function well during trauma. Trauma victims will often recount what happened in a disorganized way, and they may not recount the events in a linear fashion.

Dr. Mechanic explained that victims may behave in ways that "defy ordinary logic and expectations." There is a term called "counterintuitive victim behavior" that describes ways that victims respond to traumatic events in a way that is not intuitive or obvious to most people.

When victims disclose what happened to them, they may recount things differently and may provide different details with each retelling. Disclosures are usually not perfectly consistent over time, and victims do not always tell the entire story of what happened. The victim may feel that they were somehow complicit in the assault, that they did something wrong, or that they can get in trouble for what they did. Sexual assault is a "humiliating, degrading, and shameful experience" that can affect a victim's disclosure. Victims can sometimes hold back details about an assault that they feel particularly embarrassed or ashamed of, such as engaging in anal sex. Dr. Mechanic had never met a sexual assault victim who did not blame him or herself for being sexually traumatized.

Victims do not behave in a "single universal pattern." Generally, it is expected that after an assault, a victim should seem "really, really distressed and emotional and hysterical." Some victims may display those behaviors, but other victims may react

differently and will "shut down" and be "numb." Other victims may behave as if everything is "business as usual" in an attempt to restore control over his or her world. Victims do not tend to flee from their assailant. Sometimes victims are in a state of shock. Victims may also comply without consenting to the assault.

Childhood sexual assault can cause developmental arrest, depression, post-traumatic stress disorder, suicidality, substance abuse, trust issues, and difficulty with intimate relationships. It can also cause personality disorders. Dr. Mechanic opined that "girls have a risk of becoming victims of sexual assault or domestic violence when they're teenagers or adults." Dr. Mechanic elaborated that "[i]t's about twice as likely if you have been a previous victim of childhood sexual trauma that in adulthood you'll be twice as likely then as someone who didn't have that experience to be sexually victimized again as an adult."

Dr. Mechanic explained that one theory behind this pattern is that those who have been victimized as children may end up having "faulty risk recognition detection systems" and are not able to detect that they are in danger of sexual assault. Also, victims who already suffer from depression or post-traumatic stress disorder may make riskier decisions and have symptoms that "interfere such that [the victim] end[s] up being victimized again." Victims that have not been successfully treated for their trauma may end up self-medicating and using substances that increases a person's risk of being sexually assaulted. Research also suggests that criminals are good at reading body language and detecting submissiveness in their chosen victims.

Those who have experienced childhood sexual trauma are less likely to fight back if they are victimized again as adults and are more likely to disassociate and be unaware of their surroundings. They may also revert back to their prior assault and perceive that they are going through their original trauma. They may even see the face of their original perpetrator.

A childhood sexual assault victim whose perpetrator did not suffer any consequences for his or her actions may develop long-term feelings of mistrust and danger. These feelings may lead childhood sexual assault victims to seek out people who victimize them because "it's what they know" and there have been no clear indications that the assault was wrong or will not be tolerated. Sometimes victims may even seek out similar types of assault experiences.

3. *The Verdict and Sentencing*

On November 7, 2017, the jury found Alexander guilty of all counts. The jury did not find any of the deadly weapons allegations true, but found true the other alleged enhancements.[3] After a court trial, the trial court found that Alexander had a prior serious or violent juvenile adjudication. The trial court later struck the prior serious or violent juvenile adjudication in the interest of justice pursuant to section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 529-530.

On March 2, 2018, the trial court sentenced Alexander to a total term of 175 years to life in prison, composed of a sentence of life in prison for kidnapping to commit oral copulation, rape, and sodomy (§ 209, subd. (b)(1); count 1) that was stayed under section 654; seven consecutive terms of 25-year-to-life sentences under section 667.61 for his convictions of two counts of forcible rape (§ 261, subd. (a)(2); counts 2 & 3), a count of forcible sodomy (§ 286, subd. (c)(2)(A); count 4), and four counts of forcible oral copulation (former § 288a, subd. (c)(2)(A); counts 6, 7, 8, & 9); a concurrent 25-year-to-life sentence under section 667.61 for his conviction for forcible sodomy (§ 286, subd. (c)(2)(A); count 5); and a concurrent three-year sentence for his conviction

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[3] The clerk's minutes of the proceeding where the verdicts were read incorrectly reflects that the deadly weapons allegations were found true. The clerk's minutes contradict signed verdict forms and the reporter's transcript of the verdicts that were read in open court. The abstract of judgment, however, accurately reflects the verdict.

of second degree robbery (§ 211; count 10). The trial court further imposed eight 9-year sentences for the allegations as to counts 2 through 9 that Alexander kidnapped victim for sexual purposes (§ 667.8, subd. (a)) that were stayed under section 654. The trial court also imposed various fines and fees.

DISCUSSION

1. *Admission of Dr. Mindy Mechanic's Testimony*

On appeal, Alexander argues that the trial court erroneously admitted Dr. Mindy Mechanic's expert testimony because it was irrelevant, improper, and prejudicial opinion testimony about trauma victim behavior. He further argues that the judgment must be reversed because the trial court erroneously denied his motion for a new trial based on the admission of Dr. Mechanic's testimony.

a. **Background**

Before trial, the prosecutor filed a trial brief that explained that victim was a childhood sexual assault survivor. The prosecutor asserted that victim's childhood experience impacted her ability to react as one might typically expect a sexual assault victim to react. Thus, the trial brief proposed, "Dr. Mindy Mechanic is an expert on the effects of trauma, counter intuitive victim behaviors and will dispel some of the common myths about sexual assault."

Thereafter, the prosecutor filed a motion in limine seeking to admit Dr. Mechanic's testimony. In his motion, the prosecutor argued that research shows that victims of sexual assault "behave in ways that many people would not expect and therefore people do not believe them." Therefore, the prosecutor sought to introduce expert testimony from Dr. Mechanic, who was an "expert on such behaviors and beliefs as well as how trauma can impact a victim." The prosecutor explained that Dr. Mechanic had not met victim and would "talk about general concepts."

In his trial brief, defense counsel objected to the admission of Dr. Mechanic's testimony on the ground that it would be more prejudicial than probative under Evidence Code section 352. In response, the prosecutor requested that Dr. Mechanic be permitted to testify as an "expert on the effects of psychological trauma in the formation of memory, its impact on victim's behavior both during and after the event and the myths surrounding how victims behave or should behave in sexual assault situations."

During a hearing on the motions in limine, the trial court addressed the admission of Dr. Mechanic's testimony. The trial court asked the prosecutor if it was fair to describe Dr. Mechanic's testimony as related to "rape trauma syndrome," and the prosecutor said he would not characterize Dr. Mechanic's testimony that way. The prosecutor argued that Mechanic was an expert on "trauma as it affects victims, as it affects people," and there were common misunderstandings about how people react to sexual assault and how memories are formed during traumatic events, which Dr. Mechanic could address in her testimony. The prosecutor characterized Dr. Mechanic as an expert on "counterintuitive victim behavior" and how trauma is processed by victims.

Defense counsel argued that Dr. Mechanic would be "testifying in a very general sense." Thus, he was concerned that Dr. Mechanic's testimony "may very well be vouching" for victim's testimony. Defense counsel was also concerned that Dr. Mechanic's testimony would introduce evidence of victim's childhood sexual assault, which he believed would be relevant only to Dr. Mechanic's testimony. The prosecutor, however, argued that he intended to introduce evidence of victim's childhood sexual assault because studies have shown that victims of childhood sexual assault are more likely to be victimized again, and childhood sexual assault can impact a victim's ability to deal with stressful situations.

After considering the parties' arguments, the trial court granted the prosecutor's motion in limine to introduce Dr. Mechanic's expert testimony "with respect to

counterintuitive behavior." The trial court clarified that "there will be no specific testimony relating to the credibility of [victim]," and Dr. Mechanic would testify "about broad outlines of sex crimes, victims of sex crimes, and how they may act in counterintuitive ways."

After Dr. Mechanic testified, the prosecutor urged the jury during closing argument to "give what Dr. Mechanic said some real thought and consideration into how you might be assuming certain things about [victim's] behavior and what that means for whether the events are true or not." Specifically, the prosecutor pointed out that the surveillance videos showed victim "walking in and out freely" and not driving away when she had the opportunity to do so during the course of the night. The prosecutor explained that Dr. Mechanic's testimony "kind of does a reset on how you evaluate the evidence," "[b]ecause if a common victim reaction is to not fight, if a common victim reaction is to not flee, if it is common for a childhood sexual assault victim to disassociate and comply, then it would not be fair to evaluate [victim] with your belief that she should have done things differently." The prosecutor, however, reiterated that he was "not saying Dr. Mechanic says it happened. She absolutely didn't. She's not part of this case."

Defense counsel argued that Dr. Mechanic testified that trauma victims may not be able to recount the chronology of an assault with accuracy. Defense counsel, however, argued that Dr. Mechanic's testimony was used by the prosecution to "put a band[-]aid on the incredible story that [victim] tells in court, that somehow you can say, 'Well, she's been a victim before so her accounting may not be so accurate. Her flight or fright reaction—fight or flight reaction may be dialed back a bit. And that's why in those videos that she's not attempting to escape or to alert anybody to her distress.' "

In his rebuttal argument, the prosecutor argued that "[victim] has unique characteristics of a childhood sexual assault victim who got triggered and who became

submissive and docile and agreed to do certain things," noting that "a psychologist [(Dr. Mechanic)]" testified about this subject, and her testimony was uncontradicted. He closed his argument to the jury by urging them to "[t]hink long and hard about what Dr. Mechanic said before you go judging that victim."

b. **General Principles and Standard of Review**

Evidence Code section 801 limits expert opinion testimony to that which is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*Id.*, subd. (a).) " 'When expert opinion is offered, much must be left to the trial court's discretion.' [Citation.] The trial court has broad discretion in deciding whether to admit or exclude expert testimony [citation], and its decision as to whether expert testimony meets the standard for admissibility is subject to review for abuse of discretion." (*People v. McDowell* (2012) 54 Cal.4th 395, 446.)

c. **Admissibility of Dr. Mechanic's Testimony**[4]

Alexander argues that the trial court erroneously admitted Dr. Mechanic's expert testimony, characterizing it as irrelevant. He insists that Dr. Mechanic's testimony summarized the general behavior of trauma victims and was not a subject that was sufficiently beyond the common experience of jurors under Evidence Code section 801.

As previously described, Dr. Mechanic first testified about the general impact of trauma on victims, including the effect that trauma has on the brain and the emergence of the reptilian part of the brain when an individual is confronted by traumatic events. She then testified about the counterintuitive behaviors of both sexual assault victims and childhood sexual assault victims.

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[4] In the event that we find any of Alexander's arguments pertaining to the admissibility of Dr. Mechanic's testimony forfeited by his counsel's failure to make specific objections at trial, Alexander alternatively argues that his counsel rendered ineffective assistance. Since we address the merits of Alexander's claim, we do not reach his claim of ineffective assistance of counsel.

The latter part of Dr. Mechanic's testimony is akin to evidence of rape trauma syndrome or child sexual abuse accommodation syndrome (CSAAS), which have routinely been found admissible. In *People v. Bledsoe* (1984) 36 Cal.3d 236 (*Bledsoe*), the California Supreme Court considered the admissibility of expert testimony on rape trauma syndrome. (*Id.* at p. 245.) *Bledsoe* concluded that expert testimony that a victim suffers from rape trauma syndrome is inadmissible to prove that the victim was raped. (*Id.* at p. 251.) *Bledsoe*, however, noted that expert testimony on rape trauma syndrome "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." (*Id.* at pp. 247-248.)

Following *Bledsoe*, the California Supreme Court held in *People v. McAlpin* (1991) 53 Cal.3d 1289 (*McAlpin*) that expert testimony on CSAAS was inadmissible to prove that the complaining witness had in fact been sexually abused, but was admissible "to rehabilitate such witness's credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation." (*Id.* at p. 1300.)

Dr. Mechanic's testimony about how victims of sexual assault and childhood sexual assault may display counterintuitive behaviors was relevant to dispel misconceptions about sexual assault victims and child sexual assault victims.[5] (See *Bledsoe*, *supra*, 36 Cal.3d at p. 248; *McAlpin*, *supra*, 53 Cal.3d at p. 1300.)

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[5] In his reply brief, Alexander argues that the prosecutor sought to solely admit Dr. Mechanic's testimony to establish behavior *generally* manifested by trauma victims. We disagree. Before trial, the prosecutor broadly described that Dr. Mechanic was an expert on "trauma as it affects victims, as it affects people." However, the prosecutor thereafter clarified that he wanted Dr. Mechanic to address common misunderstandings about how people react to *sexual assault*. At least in part, Dr. Mechanic's testimony was introduced to address misconceptions about a discrete class of victims.

For example, Dr. Mechanic testified that sexual assault is a degrading experience that can affect a victim's disclosure of the crime, leading to sexual assault victims holding back details about the assault. Dr. Mechanic explained that she had never met a sexual assault victim who did not blame him or herself for their experience of being sexually traumatized. Likewise, victims of childhood sexual assault can suffer a variety of psychological aftereffects, some of which may result in a tendency to not fight back, disassociate, and be unaware of their surroundings.

Alexander argues that the prosecutor did not identify misconceptions held by the general public that were relevant to his case. We disagree. Dr. Mechanic's testimony was relevant to dispel misconceptions about why victim did not fight back against Alexander or flee or call for help when she had the opportunity to do so.[6] During closing argument, the prosecutor urged the jury to consider Dr. Mechanic's testimony in relation to victim's behavior during the assault to combat their assumptions of how sexual assault victims generally behave when assaulted. Under these circumstances, the trial court did not abuse its discretion in admitting Dr. Mechanic's testimony on these subjects.[7]

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[6] Alexander argues that there is no evidence that victim froze when she was assaulted. He opines that victim told Alexander that she did not want to engage in sex acts, and she later told the gas station cashier that she needed help. We disagree with Alexander's characterization of the evidence. Victim testified that she told Alexander she did not want to engage in sex acts, but she did not fight back against him or try to flee when Alexander left the car for various purposes. Moreover, she told the gas station cashier that she needed help, but she found herself unable to call for assistance after the cashier handed her a phone.

[7] In his reply brief, Alexander claims that cases like *Bledsoe* and *McAlpin* have only sanctioned expert testimony on *post-offense* counterintuitive behavior, not counterintuitive behavior that occurred *during* the offense. Alexander, however, does not cite to any authority that expressly holds that expert testimony discussing the counterintuitive behavior of victims of sexual assault or childhood sexual abuse *during* an offense is inadmissible.

Next, Alexander insists that the trial court erroneously admitted Dr. Mechanic's testimony on how childhood sexual assault victims are more likely to be victimized as adults. Alexander questions the relevance of Dr. Mechanic's testimony and argues that the prosecution knew that victim would testify that her poor judgment was the result of her methamphetamine use, her decision to take a Xanax earlier that night, and the anger that she felt toward her family after their argument.

Alexander relies on *People v. Wilson* (2019) 33 Cal.App.5th 559. In *Wilson*, the prosecution expert testified about the prevalence of false allegations of child sexual abuse, asserting that false allegations occur infrequently or rarely, and stating that there was a study that showed that about 4 percent of allegations were later determined to be false. (*Id.* at p. 568.) On appeal, the First Appellate District concluded that this testimony was inadmissible because it essentially told the jury that "there was at least a 94 percent chance that any given child who claimed to have been sexually abused was telling the truth." (*Id.* at p. 570.) The practical result of the expert testimony was "to suggest to the jury that there was an overwhelming likelihood [that the victims'] testimony was truthful," and "[i]n so doing, this testimony invaded the province of the jury." (*Ibid.*)

Dr. Mechanic's testimony is distinguishable from the testimony found inadmissible in *Wilson*. Mechanic did *not* testify that there was an overwhelming likelihood that victim's testimony was truthful. Rather, her testimony explained how some of the traumatic aftereffects of childhood sexual assault may make a childhood sexual assault victim vulnerable to future assaults. Mechanic explained that victims of childhood sexual assault may suffer from depression or PTSD, which may cause them to make riskier decisions, and childhood sexual assault victims may have "faulty risk recognition detection systems" rendering them less likely to be able to detect that they are in danger.

Alexander insists that Dr. Mechanic essentially testified that "it was likely that [victim] was actually raped and assaulted as she claimed by virtue of being an adult victim of childhood sexual assault." Alexander mischaracterizes Dr. Mechanic's testimony. As we have discussed, the prosecutor did not introduce Dr. Mechanic's testimony to *prove* that victim was sexually assaulted but to explain some of victim's counterintuitive behaviors, which may have been impacted by her childhood experiences. Dr. Mechanic testified that depression and PTSD, which can develop after childhood sexual assault, contributes to risk-taking behaviors and a decreased sense of danger. In this case, victim testified that she sought out methamphetamine from strangers, got into an argument with a man she initially gave money to, and generally engaged in behaviors that placed her at risk. Yet when she was with Alexander, she did not fight back and froze when given the opportunity to call for help or flee. Dr. Mechanic's testimony gave the jurors, who most likely have no experience with childhood sexual assault, information they needed to evaluate victim's behavior and credibility.[8] (See *McAlpin*, *supra*, 53 Cal.3d at pp. 1301-1302 [expert testimony that it is not unusual for parent to refrain from reporting a known molestation admissible to rehabilitate the testimony of the parent witness].)

Next, Alexander claims that Dr. Mechanic's testimony about how sexual assault victims may give partial or confused disclosures of the alleged offense is not relevant

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[8] Alexander insists that there is no evidence he knew about victim's childhood sexual assault or her alleged vulnerability, which arose from her prior experience. Thus, he claims that evidence about *why* victim appeared to consent to the sex acts was irrelevant because it did not tend to prove or disprove the reasonableness of his belief that victim acted voluntarily throughout their encounter. Alexander's argument largely ignores that Dr. Mechanic's testimony about victim's childhood sexual assault was relevant to dispel misconceptions by the jury about how sexual assault victims should act in certain situations. The evidence was not solely relevant to addressing *Alexander's* belief about victim's consent or lack of consent.

because victim *only* withheld information about how she purchased and used methamphetamine during the offense. Alexander insists that there is nothing counterintuitive about victim withholding information about her own misconduct and drug use.

We disagree with Alexander's characterization of the evidence. Victim withheld information about her methamphetamine purchase, but she *also* initially withheld information about some of the places that she went to with Alexander that night. She testified that she did not tell the district attorney or the investigator about going to the gas station because she was afraid of how the surveillance videos would be interpreted, and she knew that she might look complacent on the videos. As a result, Dr. Mechanic's testimony about disclosures and sexual assault victims' tendencies to blame themselves for being assaulted was relevant to disabuse the jury of any misconceptions of how such victims should behave and how their disclosures may change over time.

We reach a different conclusion on the admissibility of the portions of Dr. Mechanic's testimony that more generally described the reaction of victims to trauma. For example, Dr. Mechanic's testimony that when a person perceives danger, the rational part of the person's brain shuts down and the primitive and reptilian part of the brain goes online, is not "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) And similarly, her testimony that during traumatic events, individuals typically display responses like "fight, flight, and freeze" also did not concern a subject beyond a lay person's common experience.

In *People v. Wells* (2004) 118 Cal.App.4th 179, the defendant sought to introduce expert testimony from a rape trauma/CSAAS expert, who stated that she intended to testify that the victim's demeanor was inconsistent with having suffered trauma. (*Id.* at p. 187.) The trial court excluded the expert's testimony about the " 'usual' emotional

reactions of trauma victims." (*Ibid.*) On appeal, the First Appellate District agreed with the trial court's evidentiary ruling. In part, the appellate court noted that unlike evidence of rape trauma syndrome or CSAAS, the defendant's proposed expert testimony was "not relevant to correct any common myth or misconception about the behavior of children who have been molested. If anything, [the expert's] proposed expert testimony would likely reinforce a commonly held belief that traumatized victims will become emotionally disturbed or tearful when describing a traumatic event." (*Id.* at p. 189.) Thus, "[the] proposed testimony was little more than expert opinion as to [the victim's] credibility," and "[j]urors are generally considered to be equipped to judge witness credibility without the need for expert testimony." (*Ibid.*)

Like the proposed expert testimony in *Wells*, Dr. Mechanic's generalized testimony about victims and their behaviors when confronted with traumatic events did not, like her testimony about sexual assault and child sexual assault victims, disabuse common misconceptions that the jurors may have and was not a subject beyond the jurors' common experience.

Alexander also argues that the trial court erroneously admitted Dr. Mechanic's testimony that "people blame sexual assault victims [for] their assault because [it] helps them maintain a sense of control over their own safety." Alexander insists that this testimony had no place at his trial because it improperly suggested that if a juror concluded that victim voluntarily participated in sex acts with Alexander, he or she was being misled by "his or her self-interest in a false sense of safety."

Alexander's argument is targeted toward a specific portion of Dr. Mechanic's testimony at trial. After testifying that she had never met a victim who did not blame him or herself for being sexually traumatized, Dr. Mechanic explained that self-blame allows victims to restore a sense of control and reduce a sense of vulnerability. She then explained that the same principles "hold[] true for blaming other people."

Mechanic testified: "If somebody else is sexually assaulted or robbed at the ATM. Let's say they went at night and were robbed at the ATM we say, 'I would never go to an ATM at night,' so then I could protect myself from ever being robbed. So all of these things are distortions, but they're self-serving distortions because as human beings we need to feel like we're in control and we need to reduce our feelings of vulnerability. So self-blame or other-blame helps reinstate those feelings of being powerful instead of powerless."

We agree with Alexander that this testimony is irrelevant. Only relevant evidence is admissible at trial (Evid. Code, § 350), and relevant evidence is evidence that has a tendency "to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) The testimony was not offered to explain victim's behavior, nor was it relevant to victim's credibility, which was the primary issue at trial.

d. **Prejudice**

Although we agree with Alexander that the trial court erroneously admitted Dr. Mechanic's testimony about the general behaviors of trauma victims and about "other-blame," we find that he has failed to demonstrate prejudice because it is not reasonably probable that a result more favorable to Alexander would have been reached had the testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *People v. Prieto* (2003) 30 Cal.4th 226, 247 (*Prieto*) [applying *Watson* standard to erroneous admission of expert testimony].)

First, Dr. Mechanic's testimony about the general behavior of trauma victims, such as the existence of the fight or flight response or the emergence of the reptilian or primitive side of a person's brain in response to a traumatic event, was relatively brief. Her comments about how others may blame victims to reduce their own feelings of vulnerability were also brief. Moreover, the evidence was not particularly prejudicial.

Mechanic specifically testified that she had never met victim. And during his closing argument, the prosecutor reiterated to the jury that he was "not saying Dr. Mechanic says it happened. She absolutely didn't. She's not part of this case." The prosecutor did not improperly urge the jury to use Mechanic's testimony as substantive evidence of Alexander's guilt.

On the other hand, the evidence of Alexander's guilt was relatively strong. Physical evidence, including DNA, tied him to victim. Surveillance videos corroborated victim's general chronology of the assault, and victim told fiancée and mother about what happened to her. Under these circumstances, it is not reasonably probable that absent Mechanic's testimony about general trauma victim behavior or her testimony about how jurors might blame others to reduce their own feelings of vulnerability, Alexander would have received a more favorable result at trial.

e. **Due Process and Fair Trial**

Alexander argues that admission of Dr. Mechanic's testimony deprived him of his rights to due process and a fair trial. He claims that the evidentiary errors made by the trial court violated the federal Constitution, requiring us to apply the harmless-beyond-a-reasonable-doubt standard articulated in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).

We disagree. "[T]he admission of evidence, even if erroneous under state law, results in a due process violation only if it makes the trial *fundamentally unfair*. [Citations.] Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error." (*People v. Partida* (2005) 37 Cal.4th 428, 439; *Watson, supra*, 46 Cal.2d at p. 836.) Erroneous admission of evidence results in an unfair trial " '[o]nly if there are no permissible inferences the jury may draw from the evidence,' " and " '[e]ven then, the

evidence must "be of such quality as necessarily prevents a fair trial." ' " (*People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*).)

Here, we have found that the trial court erroneously admitted Dr. Mechanic's testimony about the general behavior of trauma victims and of how others may blame victims to reduce their own feelings of vulnerability. Although this evidence was not the proper subject of expert opinion testimony and was not otherwise relevant to the issues in Alexander's trial, it is not evidence that is of such a quality that it prevented Alexander from receiving a fair trial. (See *Albarran*, *supra*, 149 Cal.App.4th at p. 229.) The evidence was not particularly prejudicial, Dr. Mechanic's testimony on these subjects was relatively brief, and there was strong evidence of Alexander's guilt. Under these circumstances, we evaluate the evidentiary error under the *Watson*, not the *Chapman* standard of review. And as we have previously determined, under *Watson*, any error was harmless.

f. **Motion for a New Trial**

Alexander argues that the trial court erroneously denied his motion for a new trial because it wrongly admitted Dr. Mechanic's expert testimony.

"When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial" (§ 1181) in certain situations, such as "[w]hen the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury" (*id.* at subd. 5).

The "trial court may grant a motion for new trial only if the defendant demonstrates reversible error." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1159, overruled on another point by *People v. Rundle* (2008) 43 Cal.4th 76, 151.)
The erroneous admission of expert testimony is prejudicial if it is reasonably probable

that the defendant would have received a more favorable result absent the admission of the evidence. (*Watson*, *supra*, 46 Cal.2d at p. 836; *Prieto*, *supra*, 30 Cal.4th at p. 247.) Moreover, the determination of a motion for a new trial rests within the trial court's discretion and its ruling will not be disturbed on appeal unless there was an abuse of discretion. (*People v. Fuiava* (2012) 53 Cal.4th 622, 730.)[9]

We have either determined that Dr. Mechanic's testimony was properly admitted, or, in the limited instances where we have concluded that her testimony was either not the proper subject of expert opinion testimony or irrelevant, her testimony was not prejudicial under the *Watson* standard. As a result, Alexander has failed to demonstrate reversible error, and the trial court did not abuse its discretion in denying his motion for a new trial.

2. *Limiting Instruction on Proper Use of Dr. Mechanic's Expert Testimony*

Alexander argues that the trial court erred when it failed to sua sponte instruct the jury on the limited use of Dr. Mechanic's expert testimony.

a. **General Principles**

"When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Evid. Code,

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[9] Alexander argues that we must independently review the trial court's denial of his motion for a new trial, citing *People v. Ault* (2004) 33 Cal.4th 1250, 1255 and the plurality opinion of Chief Justice George in *People v. Nesler* (1997) 16 Cal.4th 561, 582. *Ault* noted that the plurality in *Nesler* concluded that "when a *criminal defendant* appeals the *denial* of his or her motion for a new trial on grounds of juror misconduct, the appellate court must independently review, as a mixed question of law and fact, the trial court's conclusion that no prejudice arose from the misconduct." (*Ault*, *supra*, p. 1255.) *Ault* is inapplicable to Alexander's case because he does not argue that the trial court erroneously denied his motion for a new trial based on grounds of juror misconduct. He argues that the trial court erroneously denied his motion for a new trial on the grounds that it improperly admitted expert opinion testimony.

§ 355, italics added.) Generally, "although a court should give a limiting instruction on request, it has no sua sponte duty to give one." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1051.) Failure to request a limiting instruction forfeits the issue on appeal. (*People v. Sánchez* (2016) 63 Cal.4th 411, 460.)

Alexander analogizes Dr. Mechanic's testimony to expert testimony on CSAAS. Presently, there is a split of authority on whether a trial court is required to sua sponte give a limiting instruction when expert testimony on CSAAS is introduced at trial.

In *People v. Housley* (1992) 6 Cal.App.4th 947 (*Housley*), the appellate court concluded "that because of the potential for misuse of CSAAS evidence, and the potential for great prejudice to the defendant in the event such evidence is misused, it is appropriate to impose upon the courts a duty to render a sua sponte instruction limiting the use of such evidence. Accordingly, in all cases in which an expert is called to testify regarding CSAAS we hold the jury must sua sponte be instructed that (1) such evidence is admissible solely for the purpose of showing the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested; and (2) the expert's testimony is not intended and should not be used to determine whether the victim's molestation claim is true." (*Id.* at pp. 958-959.) More recently, the appellate court in *People v. Mateo* (2016) 243 Cal.App.4th 1063 (*Mateo*) disagreed with *Housley*'s holding and concluded that the trial court was not required to sua sponte give a limiting instruction in cases involving CSAAS expert testimony. (*Id.* at p. 1074.)

b. **Prejudice**

Assuming that Alexander did not forfeit his appellate arguments by failing to request a limiting instruction below, and assuming that the trial court erred in failing to instruct the jury, we find his contentions lack merit because any error was harmless under *Watson, supra*, 46 Cal.2d at page 836. (*Housley, supra*, 6 Cal.App.4th at p. 959

[applying *Watson* standard to failure to instruct jury on limited use of CSAAS evidence]; *Mateo*, *supra*, 243 Cal.App.4th at p. 1074 [same].)[10]

As we previously discussed, Dr. Mechanic specifically testified that she had never met victim. Her testimony was couched in general terms and described behavior common to childhood sexual assault victims and sexual assault victims as a class. And during the prosecutor's closing argument, the prosecutor reiterated to the jury that he was "not saying Dr. Mechanic says it happened. She absolutely didn't. She's not part of this case." The prosecutor did not urge the jury to use Mechanic's testimony as substantive evidence of Alexander's guilt. And, as we have already stated, the evidence of Alexander's guilt was relatively strong. Victim's testimony was corroborated by the surveillance videos. Her testimony was also largely consistent with her statements to fiancée and mother.

Alexander argues that *United States v. Reyes-Vera* (2014) 770 F.3d 1232 (*Vera*) is analogous to his case. In *Vera*, the Ninth Circuit observed that a law enforcement officer testifying as an expert can also testify as a lay witness if he or she was involved in the underlying criminal investigation. (*Id.* at p. 1242.) However, if a single officer offers both lay and expert testimony, "the jury must be informed of the fact and significance of [his or her] dual roles." (*Id.* at p. 1243.)

Acknowledging that *Vera* is distinguishable in some respects, Alexander insists that the prejudice arising from the instructional error in his case is fundamentally the same as in *Vera* because it does not permit us to have "confidence in the jury's ability to

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[10] Alternatively, Alexander argues that if we find his appellate arguments forfeited, defense counsel rendered ineffective assistance by failing to object below. We find no merit in Alexander's claim of ineffective assistance of counsel because he cannot show that there is a reasonable probability that in the absence of counsel's omissions, he would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 689.)

meaningfully evaluate [the expert's] testimony." (*Vera*, *supra*, 770 F.3d at p. 1243.) We disagree with Alexander's reliance on *Vera*. Here, the jury was instructed with CALCRIM No. 332, the standard instruction on the use of expert witness testimony. And Dr. Mechanic made it clear during her testimony that she was testifying as an *expert* and not as a lay witness. She did not testify about specific facts of victim's case. Unlike the expert in *Vera*, Dr. Mechanic did not have a dual role at trial.

Next, Alexander claims that failing to give a limiting instruction deprived him of his due process rights because it relieved the prosecution of the burden of proving beyond a reasonable doubt each essential element of the charged offenses. He argues that the prosecutor relied on Dr. Mechanic's testimony to rebut an inference that victim consented, and lack of consent is essential to the charged offenses. Thus, he argues that prejudice should be examined under the more stringent harmless-beyond-a-reasonable-doubt standard described in *Chapman*, *supra*, 386 U.S. at page 24.

We reject Alexander's assessment that Dr. Mechanic's testimony improperly relieved the prosecution of its burden of proof. Dr. Mechanic's testimony was largely aimed at dispelling some of the common misconceptions that jurors may have about the way that sexual assault and child sexual assault victims behave during traumatic events. The prosecution was still required to prove lack of consent. As a result, the introduction of Dr. Mechanic's testimony did not deprive Alexander of due process in the absence of a limiting instruction.

3. *Insufficient Evidence of Force or Fear*

Alexander argues that his conviction for kidnapping and the kidnapping special allegations should be stricken because there is insufficient evidence that he compelled victim's movement through force or fear. He insists that the jury found that he was not armed with a knife during any of the events described by victim. Thus, he claims that

there is no substantial evidence to support the kidnapping conviction or kidnapping special allegations.

a. **General Principles and Standard of Review**

Under section 207, subdivision (a), "[e]very person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping." Alexander was convicted of kidnapping to commit oral copulation, rape, and sodomy under section 209, subdivision (b)(1). The jury also found true the special allegation that he kidnapped the victim and moving the victim substantially increased the victim's risk of harm. (§ 667.61, subd. (d)(2).)

"As can be seen by this language, in order to constitute section 207[, subdivision] (a) kidnapping, the victim's movement must be accomplished by force or any other means of instilling fear." (*People v. Majors* (2004) 33 Cal.4th 321, 326 (*Majors*).) "[T]he force used against the victim 'need not be physical. The movement is forcible where it is accomplished through the giving of orders which the victim feels compelled to obey because he or she fears harm or injury from the accused and such apprehension is not unreasonable under the circumstances.' " (*Id.* at pp. 326-327.)

When determining whether there is substantial evidence of force or fear, "we do not resolve evidentiary conflicts, but ' "view the evidence in the light most favorable to" ' the People, ' "and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*Majors*, *supra*, 33 Cal.4th at p. 331.)

b. **Substantial Evidence of Force or Fear**

Alexander observes that the jury did not find true the allegations that he was "armed" with a knife during any of the charged offenses. Thus, he insists that substantial evidence does not support a rational inference that he used force or fear, requiring that we strike his kidnapping conviction and kidnapping special allegations.

First, the fact that the jury did not find true the allegations that Alexander was *armed* with a knife did *not* mean that the jury found that Alexander was not in *possession* of a knife. With respect to sentence enhancements under section 12022, "armed" with a firearm means that the defendant "has the specified weapon available for use, either offensively or defensively." (*People v. Bland* (1995) 10 Cal.4th 991, 997.) At trial, victim testified that Alexander did not directly threaten her with the knife, and she thought she might have "accidentally" seen it. The jury may have concluded that although Alexander possessed a knife or had a knife on his person, he did not have it available for his use.

Moreover, even in the absence of evidence that Alexander had a knife in his possession, victim's testimony provided substantial evidence that her movement was still accomplished by force or fear. Victim testified that Alexander, a stranger, opened her car door and sat in the front passenger seat. She also testified that he instructed her to drive. Victim reiterated that she was scared of Alexander multiple times during her testimony. When Alexander first asked victim to orally copulate him, Alexander told victim to " '[s]uck [his] dick' " and placed her hand on his penis. Victim testified that Alexander directed her to drive to various places, and, when she initially refused his attempt to sodomize her, he told her that they were going to do things his way. Victim testified that she did not know Alexander, and was afraid he would harm her because she did not know what he was capable of. Given victim's testimony, there was substantial evidence that her movement was accomplished by force because she reasonably feared she would be harmed by Alexander unless she complied with his demands. (*Majors*, *supra*, 33 Cal.4th at pp. 326-327.)

Alexander argues that there is no evidence that he knew victim, and as a result, he had no way of knowing about her childhood trauma, which may have made her more susceptible to acting under coercion. He insists that it is not enough to prove that victim

was *subjectively* afraid of him; there must also be proof that her fear was the result of his actions. We find no merit in Alexander's argument. As described, Alexander engaged in numerous acts that reasonably instilled fear in victim. He got into her car, directed her to drive to deserted places, and forced her to engage in sex acts with him despite her refusal. Based on the evidence, the jury could reasonably infer that victim's fear directly arose from Alexander's acts.

Under these circumstances, we find substantial evidence supports Alexander's kidnapping conviction and special allegations.

4. *Instruction on the Asportation Element of Kidnapping*

Alexander next argues that he is entitled to a new trial on the kidnapping charge and kidnapping special allegations because the trial court gave a legally incorrect definition of the asportation element.

a. **Background**

Before trial, both the prosecutor and defense counsel requested the trial court instruct the jury with CALCRIM No. 1203. CALCRIM No. 1203 defines kidnapping for rape or other sex offenses (§ 209, subd. (b)) and describes that the defendant is guilty of the crime if: "1. The defendant intended to commit rape, oral copulation, or sodomy; [¶] 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] 3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a rape, oral copulation, or sodomy; [¶] 5. When that movement began, the defendant already intended to commit rape, oral copulation or sodomy; [¶] AND [¶] 6. The other person did not consent to the movement; [¶] AND [¶] 7. The defendant did not actually and reasonably believe that the other person consented to the movement. [¶] . . . [¶] *In order to consent, a person must act freely and voluntarily and know the*

nature of the act. [¶] . . . [¶] The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if she (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient mental capacity to choose to go with the defendant." (Italics added.)

The trial court also instructed the jury with CALCRIM No. 1215, the instruction on simple kidnapping (§ 207, subd. (a)). CALCRIM No. 1215 defined the elements of simple kidnapping as: "1. The defendant took, held, or detained another person by using force or by instilling reasonable fear; [¶] 2. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] AND [¶] 3. The other person did not consent to the movement; [¶] AND [¶] 4. The defendant did not actually and reasonably believe that the other person consented to the movement. [¶] *The term consent has been previously defined.*" (Italics added.) The given jury instructions contained no other definition of consent, aside from the descriptions of consent found in CALCRIM No. 1203.

Finally, the trial court instructed the jury with CALCRIM Nos. 3175 (aggravated kidnapping, § 667.61, subd. (d)(2)), 3179 (kidnapping and personal use of a deadly weapon, § 667.61, subd. (e)(1) & (e)(3)), and 3250 (kidnapping for sexual purposes § 667.8, subd. (a)), the multiple sentencing factors that Alexander was charged with that relied on an element of kidnapping. CALCRIM No. 3175 informed the jury that it must find that the defendant used "force or fear" to move victim, and "[victim] did not consent to the movement." CALCRIM Nos. 3179 and 3250 referred the jury back to CALCRIM No. 1215's definition of kidnapping.

b. **Forfeiture**

Alexander did not object when the trial court instructed the jury with CALCRIM No. 1203. As a result, the Attorney General argues that he forfeited his appellate claims.

We disagree. Generally, "the forfeiture rule 'does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law.' " (*People v. Gomez* (2018) 6 Cal.5th 243, 312.) Since Alexander argues that CALCRIM No. 1203 is an incorrect statement of law, we address the merits of his claims.

c. **General Principles and Standard of Review**

"We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088 (*Ramos*).)

d. **Application to Alexander's Case**

Alexander argues that reading the instructions as a whole, a reasonable juror could have concluded that under the definition of "consent" described in CALCRIM No. 1203, Alexander was guilty of kidnapping if he used fraud or deceit to trick victim into driving to any of the locations involved in the case.

"It is true that ' "asportation by fraud alone does not constitute general kidnapping in California." ' " (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 476.) In *People v. Davis* (1995) 10 Cal.4th 463 (*Davis*), the California Supreme Court considered CALJIC No. 9.56, which instructed the jury as follows: " 'When one consents to accompany another there is no kidnapping so long as such condition of consent exists. To consent to an act or transaction a person must[:] [O]ne, act freely and voluntarily and not under the

influence of threats, force or duress; two, *have knowledge of the true nature of the act or transaction involved*; and, three, possess sufficient mental capacity to make an intelligent choice whether or not to do something proposed by another person.' " (*Id.* at pp. 516-517.)

The *Davis* defendant argued that this instruction was an incorrect statement of law because the jury might have been misled to conclude that "consent in kidnapping may be vitiated by fraud, deceit, or dissimulation for the purpose of the asportation." (*Davis*, *supra*, 10 Cal.4th at p. 517.) The California Supreme Court rejected this argument, noting that although CALJIC No. 9.56 was not well-worded, it correctly stated the law. (*Davis*, *supra*, at p. 517.) The *Davis* court observed: "The phrase 'act or transaction,' which appears twice in the instruction, refers to the earlier phrase 'to accompany another.' Thus, 'knowledge of the true nature of the act or transaction involved' refers to the act or transaction of accompanying another, i.e., physical asportation." (*Ibid.*) Furthermore, additional instructions informed the jury that the " 'knowledge of the true nature of the act or transaction' referred to the victim's knowledge that she was being physically moved." (*Ibid.*)

We find *Davis* instructive. As worded, CALCRIM No. 1203 instructed the jury that to find a defendant guilty of aggravated kidnaping, the victim must not "consent to the *movement*," and "[i]n order to consent, a person must act freely and voluntarily and know the nature of the *act*." (Italics added.) Thus, the "act" referred back to the "movement" of the victim—in other words, the physical asportation. Moreover, like in *Davis*, the latter part of CALCRIM No. 1203 provided additional clarity by describing that a victim consented if he or she "freely and voluntarily agreed to go with or be moved by the defendant," "was *aware* of the movement," and had the sufficient mental capacity to choose to go with the defendant. (Italics added.) Read as a whole, CALCRIM No. 1203 does not improperly suggest that fraud or deceit vitiates consent.

Alexander insists that the jury's kidnapping verdict and findings do not provide an indication of the basis for their conclusion that victim was moved against her will. He argues that the jury's findings reflect a conclusion that he was not armed with a knife during the commission of the offense. Thus, he insists that we cannot ascertain if the jurors based their decision on a legally sufficient theory of asportation by force or fear.

We are not persuaded by this argument. Notwithstanding CALCRIM No. 1203's definition of consent, Alexander fails to acknowledge that, as we have described, CALCRIM Nos. 1203, 1215, 3175, 3179, and 3250 *all* required the jury to find that the defendant *used force or fear* to move the victim in order to find the aggravated kidnapping charge of the kidnapping allegations to be true. We must consider the jury instructions as a whole and assume that jurors are capable of correlating all given jury instructions. (*Ramos, supra*, 163 Cal.App.4th at p. 1088.) Given that movement using force or fear is a *compulsory* element in the given instructions, the instructions are simply not susceptible to the interpretation that Alexander advances.

For these reasons, we find no merit in Alexander's claim that his kidnapping conviction and kidnapping allegations must be reversed because the trial court gave a legally incorrect definition of asportation.[11]

5. *Sufficiency of the Evidence that Victim's Movement Substantially Increased Risk of Harm*

Alexander was sentenced to a term of 25 years to life for each sex offense after the jury found that he committed the offense during a kidnapping and "the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ." (§ 667.61, subd. (d)(2).)

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[11] Since we find no instructional error, we do not address Alexander's claim that the record does not reflect whether the jury relied on a legally valid theory of kidnapping. Nor do we address his argument that the jury instruction lowered the prosecution's burden of proof.

He argues that he is entitled to resentencing because there is insufficient evidence that victim's movement substantially increased her risk of harm.

a. **General Principles and Standard of Review**

To convict a defendant of simple kidnapping (§ 207, subd. (a)), the prosecutor must prove that "(1) the defendant took, held, or detained another person by using force or by instilling reasonable fear; (2) using that force or fear, the defendant moved the other person, or made the other person move a substantial distance; and (3) the other person did not consent to the movement." (*People v. Burney* (2009) 47 Cal.4th 203, 232.)

To prove an *aggravated* kidnapping enhancement (§ 667.61, subd. (d)(2)), the prosecutor must prove that the defendant "kidnapped the victim of the present offense and the movement of the victim *substantially increased* the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense . . . ." (*Ibid.*, italics added.) Thus, "[t]he plain wording of this enhancement requires two elements: (1) a simple kidnapping (§ 207, subd. (a)); and (2) a substantial increase in the risk of harm to the victim." (*People v. Diaz* (2000) 78 Cal.App.4th 243, 246, fn. omitted.) The movement of the victim must be "more than incidental to the underlying sex offense." (*Ibid.*)

"Whether a forced movement of a rape victim (or intended rape victim) was merely incidental to the rape, and whether the movement substantially increased the risk of harm to the victim, is difficult to capture in a simple verbal formulation that would apply to all cases. . . . [¶] The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement." (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1151-1152 (*Dominguez*).) There are "various circumstances the jury should consider, such as whether the movement decreases the likelihood of detection, increases the danger inherent in a victim's foreseeable attempts to escape, or enhances the attacker's opportunity to commit additional crimes." (*Id.* at p. 1152.)

When reviewing a claim of sufficiency of the evidence, we must determine " ' "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' " (*People v. Banks* (2015) 61 Cal.4th 788, 804 (*Banks*).)

b. **Application to Alexander's Case**

Alexander argues that there is insufficient evidence that victim's movement substantially increased her risk of harm. He acknowledges that although some movements brought victim to a more secluded area, other movements brought victim into public places and into contact with those who could aid her.

Viewing the evidence in the light most favorable to the judgment, a rational trier of fact could have found that Alexander's movements substantially increased victim's risk of harm. (See *Banks*, *supra*, 61 Cal.4th at p. 804.) In some instances, Alexander made victim drive to public places—such as the gas station, where she was able to speak with a cashier. But Alexander *also* made victim drive to secluded areas, such as the industrial tractor/trailer area close to the gas station. At these more secluded locations, there were individuals that walked past victim's parked car. However, whenever someone walked by victim's car, Alexander made victim drive to a different location.

Moving victim to a more secluded location decreased the likelihood of the crimes being detected and increased the danger to victim. (*Dominguez*, *supra*, 39 Cal.4th at p. 1152; *People v. Hoard* (2002) 103 Cal.App.4th 599, 607 ["a rape victim is certainly more at risk when concealed from public view and therefore more vulnerable to attack"].) It also decreased the likelihood that victim could escape, and ultimately increased Alexander's ability to further perpetrate sexual assaults against victim without intervention by third parties. (*Dominguez*, *supra*, at p. 1152.)

As a result, we find substantial evidence supports the jury's conclusion that Alexander's movement of victim substantially increased her risk of harm.

6. *Ability to Pay Fines and Fees*

Following the jury's verdict, the trial court ordered Alexander to pay various fines and fees, including a $1,310 sex offender fine (§ 290.3) plus penalty assessments, a maximum $10,000 restitution fine (§ 1202.4, subd. (b)), a $41 local crime prevention fine (§ 1202.5) plus penalty assessments, a $400 court operations assessment fee (§ 1465.8, subd. (a)(1)), and a $300 criminal conviction assessment (Gov. Code, § 70373). Relying on *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Alexander argues that the trial court erroneously imposed the fines and fees without first determining his ability to pay.

a. ***People v. Dueñas***

In *Dueñas*, the trial court imposed over the defendant's objections a $30 court facilities assessment (Gov. Code, § 70373), a $40 court operations assessment (§ 1465.8), and a $150 restitution fine (§ 1202.4, subd. (b)(1)). (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1162-1163.) The defendant was an unemployed homeless probationer with cerebral palsy who spent her benefits and food stamps on her two children. (*Id.* at pp. 1160-1161.) The defendant had received juvenile citations as a teenager, which led to fines, which led to her driver's license getting suspended after she was unable to repay her debts. (*Id.* at p. 1161.) She was then convicted several times of driving with a suspended license, and she spent time in jail because she could not afford to pay the fines associated with her convictions. (*Ibid.*)

On appeal, the Second Appellate District concluded that imposing the criminal conviction and court operations assessment without determining the defendant's ability to pay was fundamentally unfair and violated due process. (*Dueñas*, *supra*, 30 Cal.App.5th at pp. 1168-1169.) With respect to the restitution fine under section 1202.4, subdivision (b), the *Dueñas* court held that the trial court must stay the execution of the

fine until the trial court determines that the defendant could pay. (*Dueñas*, *supra*, at p. 1172.)

b. **Forfeiture and Ability to Pay**

Alexander was sentenced before *Dueñas* was decided. Therefore, he argues that his failure to object to the fines and fees below does not forfeit his appellate claims. As we explain, we disagree. With respect to some of the imposed fines and fees, Alexander had the right, even before *Dueñas*, to object on the basis of his ability to pay. Therefore, some of his appellate claims are not preserved.

First, Alexander challenges the $10,000 restitution fine imposed under section 1202.4. Section 1202.4, subdivision (b)(1) requires that the trial court impose a restitution fine of not less than $300 and not more than $10,000. Under section 1202.4, subdivision (d), if the trial court imposes a fine above the minimum fine of $300, it should consider "any relevant factors, including, but not limited to, the defendant's inability to pay . . . ." Thus, "even before *Dueñas* a defendant had every incentive to object to imposition of a maximum restitution fine based on inability to pay because governing law as reflected in the statute [citation] expressly permitted such a challenge." (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033 (*Gutierrez*).) Here, the trial court imposed the maximum restitution fine of $10,000. Alexander had the right, even before *Dueñas* was decided, to request that the court consider his ability to pay.

Next, Alexander challenges the $41 local crime prevention fine (§ 1202.5) plus penalty assessments. Section 1202.5, subdivision (a) states in pertinent part: "If the court determines that the defendant has the ability to pay all or part of the fine, the court shall set the amount to be reimbursed and order the defendant to pay that sum to the county in the manner in which the court believes reasonable and compatible with the defendant's financial ability." Like the restitution fine under section 1202.4, subdivision (b), Alexander had a statutory basis to object to the fine imposed under

section 1202.5 based on his ability to pay, and his failure to do so forfeits his claim on appeal.

Furthermore, even if we assume without deciding that Alexander did not forfeit his challenge to the sex offender fine plus penalty assessments, the court security fee, and the criminal conviction assessment, *Dueñas* is distinguishable and any error is harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24; *People v. Johnson* (2019) 35 Cal.App.5th 134, 140; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035.)

By failing to challenge the imposition of $10,041 in fines and fees (the sum of the restitution fine and the local crime prevention fine), we find that the trial court could reasonably infer that Alexander had the ability to pay the additional $2,010 in fines and fees—the sum of the sex offender fine plus penalty assessments, the court security fee, and the criminal conviction assessment. (See *Gutierrez*, *supra*, 35 Cal.App.5th at p. 1023.)

Moreover, unlike the *Dueñas* defendant, who was placed on probation and subjected to a recurring cycle of debt, Alexander was sentenced to 175 years to life in prison. It is illogical to conclude that he will not have the ability to pay the challenged amount of fines and fees over the course of his sentence. Alexander was 41 years old at the time of sentencing and will be incarcerated for the rest of his life, where he will have the opportunity to earn prison wages.

Alexander argues that there is no guarantee that he can obtain a paid assignment while incarcerated. However, every able-bodied prisoner is required by statute to perform labor. (§ 2700.) Although a paid position is "a privilege" that is conditioned on "available funding, job performance, seniority and conduct" (Cal. Code Regs., tit. 15, § 3040, subd. (k)), in general, wages in prison range from $12 to $56 per month (Cal. Code Regs., tit. 15, § 3041.2, subd. (a)(1)). During his incarceration, Alexander will have the opportunity to earn prison wages over a substantial period of time, and courts

have generally accepted that a defendant's ability to pay includes the *prospect* of earning prison wages. (*People v. Jones*, *supra*, 36 Cal.App.5th at p. 1035 ["Wages in California prisons currently range from $12 to $56 a month."]; *People v. Santos* (2019) 38 Cal.App.5th 923, 934 [a defendant's present ability to pay includes prison wages].)

As a result, we find any argument that Alexander is unable to pay the challenged fines and fees is foreclosed.[12]

7. *Cruel and Unusual Punishment*

Alexander was sentenced to seven 25-year-to-life terms under section 667.61, the One Strike law. (*People v. Anderson* (2009) 47 Cal.4th 92, 99.) The One Strike law mandates indeterminate sentences of 15 or 25 years to life for specified sex offenses that are committed under certain aggravating circumstances. "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*." ' " (*People v. Alvarado* (2001) 87 Cal.App.4th 178, 186.) On appeal, Alexander argues that his sentence is cruel and unusual under the Eighth Amendment.

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[12] Alternatively, Alexander argues that his counsel rendered ineffective assistance by failing to object to the challenged fines and fees. We disagree. "On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation." (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Alexander acknowledges in his reply brief that the only information in the record about his financial ability to pay fines and fees was the probation officer's report, which stated, "Although minimal, the defendant will have some financial opportunities while serving a sentence at the California Department of Corrections and Rehabilitation." Otherwise, the record sheds no light on why defense counsel chose not to object to the imposed fines and fees. In light of this silent record, Alexander's ineffective assistance of counsel claim fails.

a. **Overview and General Legal Principles**

"Whereas the federal Constitution prohibits cruel 'and' unusual punishment, California affords greater protection to criminal defendants by prohibiting cruel 'or' unusual punishment." (*People v. Haller* (2009) 174 Cal.App.4th 1080, 1092.) "A punishment violates the Eighth Amendment if it involves the 'unnecessary and wanton infliction of pain' or if it is 'grossly out of proportion to the severity of the crime.' " (*People v. Retanan* (2007) 154 Cal.App.4th 1219, 1230 (*Retanan*).)

Thus, "a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon* (1983) 34 Cal.3d 441, 478.)

b. **Forfeiture**

Alexander argues for the first time on appeal that his sentence constitutes cruel and unusual punishment. He has forfeited his arguments by failing to raise them below. "A defendant's failure to contemporaneously object that his sentence constitutes cruel and unusual punishment forfeits the claim on appellate review." (*People v. Speight* (2014) 227 Cal.App.4th 1229, 1247; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.)

c. **Alexander's Sentence Does Not Constitute Cruel and Unusual Punishment**

Even if we assume that Alexander has not forfeited his claim, we would find it is without merit.[13] Citing *Coker v. Georgia* (1977) 433 U.S. 584 (*Coker*) and Justice Mosk's concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585 (*Deloza*),

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[13] Alexander argues that defense counsel rendered ineffective assistance by failing to object to his sentence below. His claim of ineffective assistance of counsel fails. As we find no merit in his Eighth Amendment claims, his counsel was not ineffective for failing to raise a meritless objection. (*People v. Lucero* (2000) 23 Cal.4th 692, 732.)

Alexander argues that a sentence that no human can conceivably complete serves no legitimate penal purpose.

In *Coker*, the Supreme Court observed that "the Eighth Amendment bars not only those punishments that are 'barbaric' but also those that are 'excessive' in relation to the crime committed . . . a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." (*Coker*, *supra*, 433 U.S. at p. 592.) Thereafter, the Supreme Court determined that a sentence of death for the crime of rape was grossly disproportionate and excessive and forbidden by the Eighth Amendment. (*Ibid.*)

Alexander relies on the first definition of an excessive punishment described in *Coker*, arguing that his sentence serves no legitimate purpose. In support, he relies on Justice Mosk's concurrence in *Deloza*. In *Deloza*, Justice Mosk opined, "A sentence of 111 years in prison is impossible for a human being to serve, and therefore violates both the cruel and unusual punishments clause of the Eighth Amendment to the United States Constitution and the cruel or unusual punishments clause of article I, section 17 of the California Constitution." (*Deloza*, *supra*, 18 Cal.4th at pp. 600-601.) However, " 'no opinion has value as a precedent on points as to which there is no agreement of a majority of the court.' " (*People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383 (*Byrd*).) No other justice joined in Justice Mosk's concurrence in *Deloza*, rendering it of no precedential value. (*Ibid.*)

Furthermore, the practical effect of Alexander's sentence is that he has received a sentence of life without possibility of parole. (*Byrd*, *supra*, 89 Cal.App.4th at p. 1383.) And "imposition of a sentence of life without possibility of parole in an appropriate case does not constitute cruel or unusual punishment under either our state Constitution

[citation] or the federal Constitution." (*Ibid.*) Alexander cites to no cases that have found that a sentence is irrational and constitutes cruel and unusual punishment if it exceeds the human lifetime and lengthy prison sentences have been routinely found constitutional. (*Byrd, supra*, 89 Cal.App.4th 1373 [sentence of 115 years plus 444 years to life constitutional]; *Retanan, supra*, 154 Cal.App.4th 1219 [sentence of 135 years to life constitutional].) Alexander's reliance on cases like *Graham v. Florida* (2010) 560 U.S. 48 and *People v. Caballero* (2012) 55 Cal.4th 262, which discuss the Eighth Amendment in relation to juvenile offenders sentenced to life in prison without the possibility of parole and life sentences, is misplaced. Alexander was an adult when he committed his offenses, and neither *Graham* nor *Caballero* have any bearing on the Eighth Amendment argument raised here.

Additionally, far lengthier sentences have been found to serve valid penological purposes. In *Byrd*, the defendant was sentenced to a determinate term of 115 years plus an indeterminate term of 444 years to life for multiple convictions, including 12 counts of robbery. (*Byrd, supra*, 89 Cal.App.4th at pp. 1375-1376.) The *Byrd* court noted that the sentence imposed served valid purposes, "it unmistakably reflect[ed] society's condemnation of [the] defendant's conduct and it provide[d] a strong psychological deterrent to those who would consider engaging in that sort of conduct in the future." (*Id.* at p. 1383.)

Under these circumstances, Alexander's claim of cruel and unusual punishment is without merit.[14]

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[14] In his respondent's brief, the Attorney General argues that Alexander's sentence is not grossly disproportionate to his crimes. (*In re Lynch, supra*, 8 Cal.3d at p. 424.) Alexander, however, does not argue that his sentence was grossly disproportionate to his crime. His Eighth Amendment claim challenges the sentence as irrational and arbitrary.

8. *Cumulative Prejudice*

Finally, Alexander argues that the evidentiary and instructional errors that he alleges cumulatively require reversal of his convictions. To the extent that there were evidentiary or instructional errors, we have found they were not prejudicial. And even if we cumulate the errors, we still find no prejudicial error depriving him of a fair trial.

DISPOSITION

The judgment is affirmed.

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.

People v. Alexander
H045599

ORIGINAL

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

RE: THE PEOPLE,
Plaintiff and Respondent,
v.
JIMMY LLOYD ALEXANDER,
Defendant and Appellant.
H045599
Monterey County Super. Ct. No. 17CR001822

*** * REMITTITUR * ***

I, Baltazar Vazquez, Assistant Clerk of the Court of Appeal of the State of California, for the Sixth Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion or decision entered in the above-entitled cause on May 6, 2020, and that this decision has now become final.

Costs are not awarded in this proceeding.

Witness my hand and the seal of the Court affixed at my office on July 9, 2020.

COURT OF APPEAL ★ SIXTH APPELLATE DISTRICT ★ STATE OF CALIFORNIA

BALTAZAR VAZQUEZ
Assistant Clerk/Executive Officer

By: S. Zamaripa
Deputy Clerk

(APPENDIX-(A)) SIXTH APPELLATE DISTRICT. DECISION

APPENDIX-(A)
DECISION OF
STATE OF APPEALS.

8. *Cumulative Prejudice*

Finally, Alexander argues that the evidentiary and instructional errors that he alleges cumulatively require reversal of his convictions. To the extent that there were evidentiary or instructional errors, we have found they were not prejudicial. And even if we cumulate the errors, we still find no prejudicial error depriving him of a fair trial.

DISPOSITION

The judgment is affirmed.

APPENDIX-(A)

Premo, Acting P.J.

WE CONCUR:

Elia, J.

Mihara, J.

People v. Alexander
H045599

APPENDIX-(C)
DECISION OF STATE SUPREME COURT DENYING REVIEW.

SUPREME COURT
FILED

JUL 8 2020

Jorge Navarrete Clerk

Deputy

Court of Appeal, Sixth Appellate District - No. H045599

S262591

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JIMMY LLOYD ALEXANDER, Defendant and Appellant.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX (C)

Additional material from this filing is available in the Clerk's Office.