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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. PAUL VINCENT SCARZO, Defendant and Appellant.	B267005 (Los Angeles County Super. Ct. No. BA406511)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed with directions.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Carl N. Henry, and William Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Paul Vincent Scarzo (defendant) appeals his conviction of multiple sexual crimes. He contends that the trial court improperly terminated his pro. per. status and appointed counsel to represent him; that a juror engaged in misconduct during deliberations, and the trial court erred in denying his motion for new trial based upon the alleged misconduct; that the trial court erred in imposing consecutive sentences as to counts 1 and 2; and that the abstract of judgment and minutes of the sentencing contain clerical errors. Respondent agrees with defendant's last assignment of error, and asks that both the minutes and abstract be corrected. While we agree that the clerical errors should be corrected, we find no merit to defendant's remaining contentions and affirm the judgment.

BACKGROUND

Defendant was charged with the following crimes committed against Kathleen G.[1] on January 4, 2013: count 1, forcible rape in violation of Penal Code section 261, subdivision (a)(2)[2]; counts 2, 3, and 4, forcible oral copulation in violation of section 288a, subdivision (c)(2)(A); and counts 5, 6, and 7, sexual penetration by foreign object in violation of section 289, subdivision (a)(1)(a). The information further alleged that defendant had suffered a prior violent or serious felony conviction within the meaning of sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d) (the "Three Strikes" law). As to all counts, the same prior conviction was alleged pursuant to section 667, subdivision (a)(1), and as a prior prison

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1 We refer to the victim by her first name to protect her privacy.

2 All further statutory references are to the Penal Code unless otherwise indicated.

term under section 667.5, subdivision (b). The information also specially alleged pursuant to section 667.61 (the "One Strike" law), that defendant committed the crimes during the commission of first degree burglary with the intent to commit an offense specified in subdivision (c) of that section.

A jury found defendant guilty as charged and found true the burglary allegation. Defendant waived his right to a jury trial as to the prior conviction, and the trial court found the allegation to be true. On August 26, 2015, the trial court sentenced defendant to a total prison term of 165 years to life. As to each of counts 1, 2, 3, and 4, the court imposed 25 years to life, doubled as a second strike, plus five years pursuant to section 667, subdivision (a)(1), with count 2 to run consecutively to count 1, and counts 3 and 4 to run concurrently. The trial court imposed identical terms as to each of counts 5, 6, and 7, with count 5 to run consecutively to the base term, and counts 6 and 7 to run concurrently. Defendant was awarded 949 actual days of presentence custody credit, and ordered to pay mandatory fines and fees, as well victim restitution in the sum of $6,455. Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The relationship

Kathleen met defendant in March 2012 on an internet dating site for people over 50. They began dating the first week of April and thereafter commenced a sexual relationship. When defendant suggested submissive-dominant role playing during sex, Kathleen agreed. One or two times defendant bound her hands with Velcro handcuffs, and used a little whip that did not cause pain. After that the role playing became painful when defendant attached the Velcro handcuffs to the top of the bed and ran his fingernails down Kathleen's chest, leaving marks and bruising. Shocked, Kathleen pulled away, broke the handcuffs,

and told defendant that was not acceptable. Defendant agreed not to do it again, and thereafter they used no restraints, just the little whip. Defendant did get rougher than Kathleen wanted, and he again scratched her back at times, leaving marks. Kathleen continued to tell him that it was unacceptable, and he would agree not do it again.

Kathleen described one night in May 2012, after she had declined sex, and woke up to find defendant taking her pills. He said something about committing suicide, so she immediately tried to take the pills away, and then followed him to the bathroom, where she slipped on water he had spilled. In the fall she hit her head, damaging the wall. The next thing she knew, defendant was on top of her, with his hands over her nose and mouth, preventing her from breathing. He said, "Now, bitch, you're going to sit here and watch me die." She was in shock, afraid, could not breathe or fight, and thought defendant was going to kill her. She managed to push him off, and ran to her roommate, Vaughn Smith's (Smith) bedroom, who also testified about the incident. Smith remembered the door bursting open and Kathleen coming in wearing just her underwear, with her arm bleeding. She screamed, "Help me. Help me. He's trying to kill himself." Smith and Kathleen ran to her bedroom, which was in disarray due to pills on the floor near the bathroom and a dent in the wall. Kathleen was frazzled, and kept repeating, "He's going to kill himself. He tried to kill himself." Smith called the police, looked out the window and saw defendant's car driving away. Though the police did not come to the residence, Kathleen filed a police report the next day.

Days later when defendant came to retrieve his computer, Kathleen told him she could not "do this" anymore. However, a few days or a week later, she again started seeing defendant and dropped her complaint. Sometime after that Kathleen tried to

break off the relationship, but defendant told her that it was not an option for her to break up with him, and she needed to stay with him until he got tired of her. Nevertheless, she told him again, several times, that she wanted to end the relationship. When she did see defendant, Kathleen tried to do so only in public places as she no longer wanted to have sex with defendant.

Once defendant came to Kathleen's house and told her she had to have sex with him. She did not want to, but did not fight him. He again clawed her back, leaving scratch marks. Later, she told Smith, "I think Paul raped me." Kathleen testified that another time, while they argued in the car outside a Burbank restaurant, defendant choked her with his hands around her neck. When a passerby began to take down the license plate number, defendant stopped and told her to drive. Defendant verbally threatened her many times, saying such things as, "You know I've been in jail. I know people. I could have you killed and no one would ever know it was me." Defendant often threatened to hurt the "boys" (her roommates) or burn the house down with them inside. Defendant admitted having popped three or four tires on Smith's car.

In September 2012, defendant and Kathleen were in a public place when he pushed Kathleen and became physically aggressive with her, grabbing her wrists to keep her from leaving. When a security guard investigated, Kathleen was able to run to her car and leave. After that Kathleen obtained a temporary restraining order, but did not serve it on defendant. Though their sexual relationship ended after she obtained the order, Kathleen continued to communicate with defendant, usually through texts, because it gave her information about his location and his state of mind, which made her feel safer.

A transcript of texts sent between October 8 through 19 were admitted into evidence, and Kathleen explained the

circumstances of each. In one, defendant said he was going to kill himself. In another, he said, "I just fucked your daughter." After Kathleen texted defendant that she was getting a restraining order, he replied, "No sense wasting money. Was this choice worth further damage with your daughter?" Defendant would also copy Kathleen's texts and send them back to her. Finally she texted, "Stop texting me now. I am done. If you want your computer, let me know. Otherwise, leave me alone." She changed her locks.

During the evening of January 3, 2013, while Kathleen was at a club with her friend Stephanie, Kathleen received texts from defendant, including the following: "You got here pretty quick. Love the sweater. Guess I'll go by my rules then. Shall I walk in?" She replied, "Please go home," and "Please. Don't do this. I need you to stop now." Defendant texted: "Oops. Stevey just saw me. I practiced restraint. I didn't fuck him up tonight." Kathleen explained that Steve was one of the boys who lived in her house. As Kathleen sat with her friend in the club, she saw defendant looking at her through the front window. She went outside and told him to leave. He responded that he did not have to leave, but she did not see him again that night.

The burglary and sexual assaults

The next day, Kathleen received a text from defendant at 3:30 p.m. and another two hours later. She did not hear the alert and did not respond to either text. She did reply to a third text, "This isn't going to work. Not tonight," and "The housekeeper is still here. She is very slow." After two more exchanges, defendant texted: "I'm in the backyard." Kathleen testified that her "heart stopped," and she replied, "I am not letting you in the house." Defendant replied: "Cold out here. Coming in." Kathleen made sure the back door was locked, but the dog door in the kitchen was not. She heard him tap on the kitchen window,

and then found him inside the kitchen. Terrified, Kathleen told him to go. Defendant seemed agitated, told her to shut up, and said something to the effect that they were playing by his rules now. She tried to ignore him and continue cooking, but he slapped her on the head. When she opened a drawer to get a lid, he kicked the drawer closed on her finger. When she said it hurt, he grabbed the finger and twisted.

Defendant told Kathleen to go the living room, where he kissed her, put his hands down her pants, inserted his fingers into her vagina, and then took them out and forced them into her mouth. He repeated this action a few times, despite Kathleen telling him to stop. He said he wanted her to taste herself. Finally Kathleen told him he had to stop because the housekeeper was still there. Defendant replied, "Get her the fuck out of here." Kathleen planned to take the housekeeper to the train station and then go for help. As Kathleen and the housekeeper went to Kathleen's car, defendant followed them and got into the back seat. After dropping off the housekeeper, Kathleen suggested they go get something to eat. Defendant replied, "[W]e're going back to your house, because I'm going to fuck you." Kathleen drove home and defendant followed her into the house, saying, "We're going upstairs. I'm going to fuck you." Because she was terrified, she went upstairs, and complied when he told her to take off her clothes. He then said, "Suck me, bitch," pulled her by the hair, and pushed her face down into his lap. She gave him oral sex while he held her hair, and afterward, he pulled her up, put his hands into her vagina and then into her mouth about three times. If she tried to move her arms, he slapped her on the head. He then had her orally copulate him again about three times, by forcing her head into his lap. After he got a small erection, defendant jumped on top of Kathleen and was able to insert his penis into her vagina, where he stayed

about a minute while holding her down with his hands on her arms so she could not move. At some point, as she tried to push him off her, defendant flipped Kathleen over and punched her with a closed fist on her back a couple times. After the rape, defendant said something like, "I'm going to make you suck me, because I know you don't like it." He pulled her hair and pushed her down again, forcing her to orally copulate him. After he ejaculated, Kathleen went into the bathroom, got dressed, and in order to get him out of the house, suggested they go out to eat at Palermo's pizzeria. Defendant resisted, preferring to order in. He wanted to meet with the boys to tell them the new rules, that defendant could come into the house and stay there whenever he wanted, and if they did not like it, they could move. Kathleen was eventually able to convince defendant to go out.

Defendant's flight and arrest

Kathleen texted Shane, Smith's co-worker at a nearby club, for help from Palermo's bathroom. She sent a second text later, with a copy to Smith. When Smith received her text he called the police, and headed toward the restaurant with Shane. Smith flagged down a nearby police officer and then saw defendant and Kathleen emerge from the restaurant. Afraid that defendant would see Smith and flee, Kathleen suggested they walk back through the restaurant to the car. Smith yelled at the police officer, "I think they're going to try to go out the back door." Kathleen formed a plan to start driving home, stop in the middle of the street and jump out of the car. Once in the street, she put the car in park, jumped out, screaming for help, just as she saw a police car make a U-turn behind her and activate its lights.

Defendant also got out of the car and ran up Vermont Avenue, followed by Smith and Los Angeles Police Officer Nathan Hooper's patrol car. More police cars and a helicopter soon arrived on the scene. Defendant tuned on Franklin Avenue,

circled back, running through a parking lot, jumping over a fence. When Officer Hooper could no longer follow in the car, he chased defendant on foot, and spotted him in some bushes across Vermont Avenue. When defendant came out, Officer Hooper identified himself as LAPD and ordered defendant to stop. Defendant kept running, passing at least two more buildings until he finally stopped. Defendant refused the officer's command to get on the ground, so Officer Hooper grabbed him, threw him to the ground, and handcuffed one hand. Defendant would not give up his other hand, which was under his body. After backup arrived defendant was completely handcuffed.

Investigation

That night Officer Clifford Parchman found Kathleen, upset, crying, nearly unable to speak. It took approximately 10 minutes for her to calm down. Officer Parchman took her home, interviewed her, and collected evidence from the bedroom, such as bed sheets, clothing, and erectile dysfunction pills.

Kathleen was then taken to the UCLA rape treatment center for a sexual assault examination. Forensic nurse Abigail Rea testified that she examined Kathleen and video recorded the bruises on her back and finger. Rea found no vaginal injuries, but observed that such injuries occur in only a small percentage of women over the age of 18. The video was played for the jury.

Defense evidence

Defendant testified that he did not force Kathleen to have sex with him on January 4, 2013, or to orally copulate him, and did not threaten her in any way. He claimed to have fled because he was on parole, and was scared to return to jail. He explained that he entered Kathleen's house to avoid the cold, although she made it clear she did not want him there, having texted, "I am not letting you into the house." He said that the back door was unlocked, and once he was inside, they had a discussion. Initially

defendant testified that Kathleen did not tell him to leave, but later testified that she said so, but only in texts. Defendant denied hitting Kathleen on the head and slamming her finger in the cabinet. He claimed she fabricated the entire story to get him into trouble. Defendant testified that Kathleen did not say no to his face that night, either about his coming into the house or to any of the sex acts.

Pretrial proceedings relevant to self-representation

In August 2013, as the matter was called for preliminary hearing, defendant's appointed counsel informed the court that defendant wanted to make a *Marsden* motion.[3] The motion was heard in camera and denied. The preliminary hearing was held and defendant was held to answer. The information was filed and arraignment was scheduled for September 5 in another department of the Superior Court. After defendant refused to come to court, arraignment was continued to September 10, at which time defendant again refused to come to court and the arraignment was continued to September 25, 2013. The judge expressed reluctance to issue an extraction order for a defendant with mental health problems.

On September 25, after defense counsel stated her appearance, defendant said, "No. I do not want this woman representing me." "I am exercising my *Faretta* rights [to waive counsel] at this time."[4] The trial court gave defendant both a written advisement and waiver form to read and initial, and also

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[3] See *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). A defendant's claim that appointed counsel is providing inadequate representation and a request to substitute new counsel is commonly called a *Marsden* motion. (*People v. Smith* (2003) 30 Cal.4th 581, 604.)

[4] See *Faretta v. California* (1975) 422 U.S. 806, 835 (*Faretta*).

orally detailed the disadvantages of self-representation. Defendant replied that he did not want this lawyer, or any other "at this time." He explained that whether he would want another attorney later depended upon how much research he was able to do before making a "comprehensive decision." Defendant agreed to a continuance of the *Faretta* hearing so he could speak with counsel about discovery obtained so far, but refused to enter a plea, saying he intended to demur to the information. The arraignment was continued to October 8, 2013.

On October 8, the court granted defendant's request to represent himself. When asked how he pled, defendant replied, "I demur," and asked to present his written demurrer to the court. The court refused to accept the demurrer, as defendant had only a single copy of it, and reminded him of the previous warnings about self-representation and his obligation to comply with the rules the same as an attorney. Defendant repeatedly interrupted, asking the judge for her name, arguing with the court, and asking for backup counsel or new counsel. Given the choice between self-representation and representation by counsel, defendant chose the former, entered a plea of not guilty, and requested a continuance.

At the November 7, 2013 pretrial conference, the matter was transferred to a trial department for November 15, 2013. On that date, the parties (including standby counsel for defendant) appeared before Judge William Sterling. Defendant wanted to present a few "sua sponte" issues to the court. After discussion of the appointment of a defense investigator, defendant wished to file a countercharge against the alleged victim. As the court attempted to explain that this was not possible in a criminal case, defendant interrupted the court several times. Judge Sterling commented that defendant did not appear to know what he was doing. Defendant cited title I of the Code of Civil Procedure, to

argue that because there was only one form of action, everything was civil.[5] Defendant also asked to see the Japanese consul, claiming not to be an American citizen.[6] After the court said that the request would be granted and someone from the consulate would appear under the Vienna Convention, defendant suggested that the Vienna Convention did not confer jurisdiction on the trial court. Defendant complained that the sheriff had not provided him with glasses despite three court orders, in violation of his due process right to face his accusers. Defendant also requested a "1099A" and a full accounting of the trust funds and surety bonds in his "cestui que vie" trust. Judge Sterling expressed concern about defendant's competence to represent himself, but ordered the prosecutor to turn over discovery to defendant.

At the next hearing, on December 19, 2013, defendant complained that former defense counsel had not issued subpoenas, and he requested discovery of any psychiatric evaluations of the alleged victim, as well as the civil file relating to the restraining order she obtained. The court informed defendant that he was required to have any subpoenas issued, and the prosecutor was not obligated to investigate or turn over the other items. Defendant then asked the judge to state his name for the record and to read the charges. When the court reminded defendant that he had previously been arraigned and made aware of the charges, and that he would not be

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[5] Defendant apparently meant Code of Civil Procedure section 307, which reads: "There is in this state but one form of civil actions for the enforcement or protection of private rights and the redress or prevention of private wrongs."

[6] At trial, defendant testified that he was born in Los Angeles 57 years ago.

rearraigned, defendant replied, "Let the record reflect you've refused to --." The judge ordered the clerk to give defendant a copy of the information, offered to appoint counsel, and said, "So far, you're not showing a real understanding of what you're supposed to do as . . . a pro per." Defendant then asked for a "*Cruz* waiver"[7] which the court construed as a request to be released on his own recognizance, which was denied. Defendant demanded to see the prosecutor's "performed bond," and that request was also denied. Then, in a series of truncated phrases, defendant said: "Let the record show -- record reflect no"; "Uhm, denying my discovery, denying --"; "constitutional rights --."

On February 3, 2014, Judge Sterling adjourned all criminal proceedings pursuant to section 1368, certified defendant to Department 95 for a determination of defendant's competence, and appointed standby counsel to represent defendant. At the next hearing on May 1, the doctors' reports were not ready, and defendant refused to come to court. On June 5, when again defendant refused to come to court, the court considered the opinions of two experts who found defendant incompetent to stand trial, and defendant was committed to Patton State Hospital (Patton).

In February 2015, Patton clinical staff issued a report expressing the opinion that defendant did not appear to be psychotic, paranoid, or delusional, was able to understand the proceedings and cooperate with counsel, and was thus competent to stand trial pursuant to section 1372. However, it was staff's opinion that defendant suffered from narcissistic personality disorder, involving such traits as arrogance, sarcasm, and agitated behavior. While such traits could interfere with his

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7 See *People v. Cruz* (1988) 44 Cal.3d 1247, 1251 1254, footnote 5.

relationship with his attorney, and any disagreement could cause him to seek to remove the attorney, any such noncooperation with counsel would be volitional, not rooted in psychosis.

On February 20, 2015, criminal proceedings were reinstated based upon certification of defendant's mental competence. During a hearing that date, when defense counsel attempted to have an off-the-record discussion with defendant, defendant said to him, "I don't know you. You don't know the case. We haven't discussed anything. And . . . I'm not going to have you as my counsel." When the court asked whether he was seeking to resume self-representation, defendant replied that he was making a special appearance because he could not confer jurisdiction on the court, and he claimed to have filed a removal application in federal court. Judge Sterling informed defendant that until he received a federal court order, defendant remained under the jurisdiction of the superior court.

Over the court's interspersed warnings to "hang on" and "stop," defendant replied: "I've done research on you, William Sterling. And you've been taking bribes"; "I have the readouts of all your bribes"; "You should have stopped in 2010, but you continued to take them, so you are a criminal"; "Just because you thought you had immunity doesn't mean you can still break the law." Defendant said that he wanted this statement on the record so the jurors would hear it. When the judge repeated that the court had jurisdiction, defendant replied, "I don't recognize you." The court stated that defendant clearly suffered from mental illness, and although the hospital staff found that he was not psychotic, defendant apparently had a significant behavioral disorder. Defendant interjected, "Yeah, keep it up." Judge Sterling went on to rule: "Given that his prior pleadings and behavior and his behavior now, it appears to me that he cannot follow the rules of the court, comply with the court orders, and,

therefore --." Defendant interrupted, "I've had my say." Judge Sterling continued: "I'm finding that he may not represent himself." Defendant then said, "Keep trying." The court appointed standby counsel as counsel of record, and among other comments, defendant demanded sanctions for the two-year delay in bringing the case to trial.

At the May 22 pretrial hearing, as defense counsel was speaking to the court, defendant interrupted, saying "Shut up." Counsel told defendant to be quiet, and the court began to admonish defendant, but defendant interrupted the court with, "I am not a corporation." Defendant added, "I'm a flesh and blood man with constitutional rights." The following colloquy ensued:

> "The Court: But you don't understand the law. And all of the things that you've said --
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> [The defendant]: Respect -- I understand the law, yes, I do.
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> The Court: -- are ridiculous. Now, [counsel] go ahead. I'll have you removed from the courtroom if you don't stop. You won't even get to hear what's going on.
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> The defendant: Oh, that's a shame."

Defense counsel then attempted to continue speaking to the court, but defendant again interrupted him. The court warned defendant to stop, or he would be removed and would not get to hear what counsel was saying. The following ensued:

> "The defendant: You have 1099 O.I.D. on the charges [deputy District Attorney]?
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> The Court: Mr. Scarzo --
>
> The defendant: Do you have a 1099?
>
> The Court: Mr. Scarzo!

The defendant: Don't raise your voice.

The Court: Remove him from the courtroom.

The defendant: You have a personality disorder. You know that? Probably taking bribes.

The Court: Goodbye.

The defendant: How many bribes have you taken?"

Defendant was removed from the courtroom, and the court noted for the record: "[Defendant] throughout this [proceeding] has been extraordinarily difficult. . . . He has interrupted with the most absurd comments, has refused to recognize the jurisdiction of this court, has continued to act out, and shows no indication that he'll stop doing it."

On June 19, the matter was transferred for trial to Department 133, before Judge Craig J. Mitchell. Before the jury was brought in, defendant complained to the court that defense counsel was not prepared, had done no research, and had not spoken to him. The court called an in camera *Marsden* hearing in which defendant claimed that he had a list of tasks for counsel, witnesses to contact, and experts to retain, but his attorney had never seen him. Defendant also claimed that when he did come, his attorney did not take notes, discuss the case, or give him enough time to do more than "get warmed up on some technical things that I wanted to demur and a few other defects." And defense counsel failed to give him the text messages obtained in discovery. Counsel responded that he had visited defendant, but defendant gave him no names of witness to contact, did not show him his list, and did not speak to him about case preparation. Instead defendant discussed his belief that the court had no jurisdiction, cited irrelevant federal statutes, and stated his belief

that state judges were stealing money or had been paid money to which they were not entitled.

Defendant asked whether he would be allowed to interview the jurors. When told he would not, defendant stated that other defendants were permitted to do so, that he had the right to defend himself, and that he never gave up that right. The court noted that defendant interrupted the court repeatedly with these statements. The court directed defense counsel to discuss the text messages with defendant, and denied the *Marsden* motion. Defendant said, "Your Honor, I didn't ask for a *Marsden* hearing," and asked, "Did you trick me into a *Marsden* hearing?" The court then gave defendant extensive instructions on how he would be expected to behave in court.

On June 22, during voir dire, as the court was addressing the jury, defendant interrupted by saying, "I'm sorry. Your Honor, I'm going to have to stop all the proceedings. Let the record reflect that I'm declaring a conflict and --." The court began to admonish him, but defendant interrupted with, "I have an absolute constitutional right to speak out in my own defense." The prospective jurors were asked to leave the courtroom, and as they were leaving, defendant complained about defense counsel. After the jurors left, the court admonished, defendant, and defendant renewed his request to represent himself. The court declined to reinstate defendant's pro. per. status, and voir dire continued. Defendant caused no further disruptions for the remainder of the trial.

DISCUSSION

I. Self-representation

Defendant contends that the trial court improperly terminated his pro. per. status on February 20, 2014, in violation of his Sixth Amendment right to self-representation.

The Sixth Amendment to the United States Constitution grants criminal defendants the right to counsel, as well as the right to waive counsel if the waiver is knowing and intelligent. (*Faretta, supra*, 422 U.S. at p. 807.) The right to self-representation is not absolute, however. (*Indiana v. Edwards* (2008) 554 U.S. 164, 171 (*Edwards*).) A "trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. [Citation.] . . . The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." (*Faretta, supra*, at p. 834, fn. 46; see also *Edwards*, *supra*, at p. 171.)

We reject defendant's lengthy attempt to conflate the legal principles governing an initial *Faretta* waiver, with those relating to the termination of previously granted self-representation for trial. The initial waiver "requires that the defendant have 'the mental capacity to understand the nature and object of the proceedings against him or her,' and that the defendant waives the right knowingly and voluntarily. [Citation.]" (*People v. Mickel* (2016) 2 Cal.5th 181, 211, quoting *People v. Koontz* (2002) 27 Cal.4th 1041, 1069-1070.) On the other hand, termination of self-representation is appropriate "[w]henever 'deliberate dilatory or obstructive behavior' threatens to subvert 'the core concept of a trial' [citation] or to compromise the court's ability to conduct a fair trial. [Citation.]" (*People v. Carson* (2005) 35 Cal.4th 1, 10 (*Carson*).) The court may also terminate pro. per. status when the defendant's impaired mental health renders him incompetent to represent himself, even if he is legally competent to stand trial. (*People v. Johnson* (2012) 53 Cal.4th 519, 523-525; see *Edwards*, *supra*, at p. 174.)

Contrary to defendant's claim that we review the trial court's ruling de novo, its determination is subject to its

considerable discretion, which is accorded deference by the reviewing court, and will not be disturbed absent a strong showing of clear abuse. (*People v. Becerra* (2016) 63 Cal.4th 511, 518-519.) Whenever "a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

We also reject defendant's suggestion that the California Supreme Court's decision in *Carson* required the trial court to make an express finding that his behavior rose "to the level of deliberately 'serious and obstructionist misconduct' that actually threaten[ed] the trial proceedings. In *Carson*, the court stated: "In a case of in-court misconduct, the record documenting the basis for terminating a defendant's *Faretta* rights is generally complete and explicit, without the need for further explanatory proceedings." (*Carson*, *supra*, 35 Cal.4th at p. 11.) Further, the court did "not hold that an intent to disrupt is a necessary condition," although it was one factor to consider. (*Id.* at pp. 10-11.) Other factors to consider include: "'the nature of the misconduct and its impact on the trial proceedings,'. . .'the availability and suitability of alternative sanctions,' . . . [and] 'whether the defendant has been warned that particular misconduct will result in termination of in propria persona status."[8] (*People v. Becerra*, *supra*, 63 Cal.4th at p. 518, quoting

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[8] In October 2013, defendant signed a standard form entitled "Advisement and Waiver of Right to Counsel (*Faretta* Waiver)," and he initialed each advisement and warning on the form, including the following: "I understand that I must not abuse the dignity of the Court. I understand that the Judge may terminate

Carson, at p. 10.) "Each case must be evaluated in its own context, on its own facts." (*Carson, supra*, at p. 10.) "In most cases, no one consideration will be dispositive; rather, the totality of the circumstances should inform the court's exercise of its discretion." (*Id*. at p. 12.)

Defendant contends that the trial court simply lost patience with defendant's challenges to the court's jurisdiction, and based its determination solely upon "a finding of mental illness, not obstreperousness." We disagree. Defendant has oversimplified and understated the court's ruling. The court stated that defendant clearly suffered from mental illness, and although the hospital found that he was not psychotic, defendant apparently had a significant behavioral disorder. Between interruptions by defendant, the court explained, "Given that his prior pleadings and behavior and his behavior now, it appears to me that he cannot follow the rules of the court, comply with the court orders, and, therefore . . . I'm finding that he may not represent himself." After another interruption by defendant, the court added: "You cannot or will not abide by the rules of this court. It's clear from the documentation from Patton State Hospital that there was significant mental illness."

Defendant has also understated his behavior that led to the termination of his pro. per. status, characterizing it simply as consisting of "vigorous" and "unorthodox" arguments which he had the right to express, with no indication that he presented

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my right to self-representation in the event that I engage in serious misconduct or obstruct the conduct and progress of the trial. I understand that if my pro per status is terminated, I may have to be represented by a lawyer, appointed by the Judge, who will then take over the case at whatever stage the case may be in."

them in a manner which delayed or obstructed the court proceeding. As defendant points out, he was found not to be psychotic or delusional at Patton, where the staff also concluded that any noncooperation with counsel would be volitional, not rooted in psychosis. As amply demonstrated in our summary of the pretrial proceedings, the trial court could reasonably have concluded that defendant's disruptive behavior toward the court was also volitional, and thus a deliberate attempt to delay or obstruct the proceedings. Defendant repeatedly refused to recognize the court's jurisdiction, refused to come to court on at least five occasions, made sarcastic comments to the judge, continued to argue points the court had found nonmeritorious, interrupted the court despite admonishments to stop, and accused the judge of taking bribes. Such circumstances provide a reasonable basis for any trial court to conclude "that defendant could not or would not conform his conduct to the rules of procedure and courtroom protocol, and that his self-representation would be unacceptably disruptive." (*People v. Welch* (1999) 20 Cal.4th 701, 735.) Further, we agree with respondent that defendant's outburst in the presence of the prospective jurors confirmed the trial court made a reasonable determination that he could not abide by the rules of the court. The ruling was not arbitrary or capricious, and defendant has failed to demonstrate an abuse of discretion.

II. Alleged juror misconduct

Defendant contends that Juror No. 6 committed misconduct during deliberations, and the trial court erred in denying his motion for new trial based upon the alleged misconduct.

"We review independently the trial court's denial of a new trial motion based on alleged juror misconduct. [Citation.] However, we will '"accept the trial court's credibility determinations and findings on questions of historical fact if

supported by substantial evidence.'" [Citation.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 396.)

After the verdict the attorneys spoke to jurors in the hallway outside the courtroom. Defendant contends that Juror No. 6 admitted to having shared a particular college experience with other jurors during deliberations, and that this amounted to having "filled in gaps in the evidence with anecdotal but fully irrelevant evidence." "A juror . . . should not discuss an opinion *explicitly* based on specialized information obtained from outside sources." (*In re Malone* (1996) 12 Cal.4th 935, 963, italics added.) Here the trial court found that this did not happen. In fact, Juror No. 6 did not share a particular college experience with other jurors, but only with counsel in the hallway.

After the hallway discussion counsel reported concern to the trial court that Juror No. 6 had recounted a college experience relating to his understanding of what constituted rape. The court then questioned Jurors No. 5 and 6. Juror No. 6 told the court that in deliberations, one of the jurors expressed the opinion that although the initial penetration with fingers was nonconsensual, the victim had to fight back after that. In response Juror No. 6 explained his understanding of consent. In the hallway, Juror No. 6 explained to counsel that his understanding of consent had come from experiences in college. To the court he said: "[E]very year my college from 2000 to 2004 had a party called Safer Sex Night, which the entire theme of the party was consent. There was, like, demonstrations of people getting it on in a consensual way and the way that that works and all of that. That was just general background for how I had knowledge about consent." Juror No. 6 added: What I told counsel in the hall was I explained where my experience came from about consent, but I actually did not mention all of that to

the jury . . . . And what we talked about inside was much -- I didn't relay that story."

Juror No. 5 confirmed that Juror No. 6 had not spoken about his specific college experience, but just about college and other experiences in general, and told the court that he and other jurors also referred to past experiences in order to discuss the meaning of consent. He explained that "we all were trying to explain the same things that all of you had said to us about what is consent, and how you behave, whether you fight back or you just lay there, it's still could be rape, and that was the point I think of that discussion." Juror No. 5 added, "It's no secret that there's lots of college -- you know, on campus that rape is a huge issue."

Thus, defendant is mistaken in the factual basis for his claim that Juror No. 6 shared his college "Safer Sex Night" anecdote with other jurors during deliberations. Rather, Juror No. 6 and other jurors merely relied in part on college and other experiences to evaluate the evidence of consent. "'Jurors cannot be expected to shed their backgrounds and experiences at the door of the deliberation room.'. . . 'Jurors' views of the evidence . . . are necessarily informed by their life experiences, including their education and professional work. . . .'" (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 76, quoting *People v. Fauber* (1992) 2 Cal.4th 792, 839, and *In re Malone*, *supra*, 12 Cal.4th at p. 963.)

The trial court concluded that there had been no misconduct. We agree. Regardless, the jurors' discussion of the meaning of consent based upon their life experiences did not harm defendant under any standard of review. Defendant contends that prejudice resulted because a juror "found the lack of evidence problematic." That was not the subject of the discussion; instead it was the definition of consent, and the opinion of a single juror that a woman was required to fight back

to show lack of consent. Both Juror No. 5 and Juror No. 6 believed that the jury's verdict was in accord with the court's instructions on consent. Indeed, this is demonstrated by the record, as the court defined consent as follows: "To consent, a woman must act freely and voluntarily and know the nature of the act. It is not required that she physically resist or fight back in order to communicate her lack of consent. Evidence that the defendant and the woman dated is not enough by itself to constitute consent." Thus, the jurors' discussion merely helped the jurors to understand the court's instructions.

The court also instructed the jury with CALCRIM No. 1000, that to find rape, it must find that "the defendant accomplished the intercourse by force, violence, duress, menace, or fear of immediate and unlawful bodily injury to the woman or to someone else." The court explained force as "enough physical force to overcome the woman's will," and duress as "a direct or implied threat of force, violence, danger, or retribution that would cause a reasonable person to do something that she would not do otherwise." The court explained that "[i]ntercourse is accomplished by fear if the woman is actually and reasonably afraid." The evidence of defendant's use of duress, force, menace, the absence of consent, and Kathleen's reasonable fear of immediate bodily injury, was overwhelming. Kathleen had endured months of defendant's physical and emotional abuse, including threats against her, her roommates, and her daughter. Then, on the night of January 4, 2013, defendant entered her locked home through the dog door despite her explicit refusal to allow him in the house, told her to shut up, slapped her on the head, kicked a drawer closed on her finger, and then grabbed her finger and twisted it. Defendant told her they were playing by his rules, and ordered her into the living room, where he repeatedly inserted his fingers into her vagina, and then forced

them into her mouth, despite her telling him to stop. When she told him that the housekeeper was there defendant demanded, "Get her the fuck out of here," followed them out, and got into the back seat of the car without invitation. After Kathleen dropped off the housekeeper, defendant announced, "[W]e're going back to your house, because I'm going to fuck you." Once back at the house, he announced, "We're going upstairs. I'm going to fuck you," and then told her to remove her clothes. She complied because she was terrified. Defendant pulled her by the hair, forced her head into his lap, ordered her to orally copulate him three times, and forced his hands into her vagina and then into her mouth, also about three times. Defendant then jumped on top of her, held her down so she could not move, inserted his penis into her vagina, and slapped her on the head when she attempted to move. It hurt when he hit her, and she was afraid he would hit her again, so she held still. Afterward, defendant pulled Kathleen's hair, pushed her down again, and forced her to orally copulate him. Not only did she not consent, he stated that he did this because he knew she did not like it. At some point during all this, when she tried to push him off her, he flipped her over and punched her on her back with a closed fist.

Based upon such instructions and evidence, we conclude that "'there is no substantial likelihood that any juror was improperly influenced to the defendant's detriment' [citations]." (*People v. Gamache*, *supra*, 48 Cal.4th at p. 397.) Thus, the trial court did not err in denying defendant's motion for new trial, and defendant was not harmed by the court's rulings.

III. Consecutive sentences

Defendant contends that the trial court erred in running the sentence for count 2 (forcible oral copulation) consecutively to the sentence on count 1 (rape), arguing that the two sex acts were not committed on separate occasions. Counts 1, 2, 3, and 4 were

the crimes committed in the bedroom after the housekeeper was gone. The trial court found that counts 1 and 2 were committed on separate occasions, while counts 3 and 4 were not separate from count 2.

As defendant's crimes were enumerated in the One Strike law, and they were committed against the same victim during the commission of first degree burglary, the trial court was required to impose consecutive sentences for each crime that was committed on "separate occasions as defined in subdivision (d) of Section 667.6." (§ 667.61, subds. (a), (c)(1), (5) & (7), (d)(4), (i).) In relevant part, section 667.6, subdivision (d), provides: "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a *reasonable opportunity to reflect* upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions." (Italics added.)

"Separate occasions" need only be established by a preponderance of the evidence. (*People v. Groves* (2003) 107 Cal.App.4th 1227, 1231-1232.) Accordingly, we may reverse the trial court's finding that the offenses were committed on separate occasions, "only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. [Citations.]" (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) "Under the broad standard established by Penal Code section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in

physical location." (*People v. Jones* (2001) 25 Cal.4th 98, 104 (*Jones*),[9] citing *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071, and *People v. Plaza* (1995) 41 Cal.App.4th 377, 385.)

Defendant argues that the lack of an interval between the forced oral copulation and the intercourse shows that the oral copulation was done for the purpose of gaining an erection, and was thus part of the same continuous assault. Defendant's argument and speculation might have merit with regard to the acts of forced oral copulation which occurred *before* intercourse, but he has apparently forgotten the forced oral copulation which was committed *after* the rape. After committing the rape, defendant demonstrated that he had the opportunity to reflect upon his actions, by expressing his *actual reflection* upon what he intended do next and why he intended to do it. He said, "I'm going to make you suck me, because I know you don't like it." He then pulled her hair and pushed her down again, forcing her to orally copulate him again.

Defendant urges a more restrictive approach, as suggested in cases that have required more than a mere change of position between different sex acts to find a reasonable opportunity for reflection. (See *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316 [change of position insufficient by itself, particularly where the

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[9] In *Jones*, the California Supreme Court declined to construe the term "single occasion" in the former section 667.61, subdivision (g), as having the same broad meaning as "separate occasions" in section 667.6, subdivision (d); and instead inferred a more restrictive standard based upon close temporal and spatial proximity of the acts. (*Jones, supra*, 25 Cal.4th at pp. 100-105; see *People v. Jackson* (2016) 1 Cal.5th 269, 354-355.) The Legislature thereafter amended section 667.61 by eliminating "single occasion" in favor of "separate occasions" as defined in section 667.6, subdivision (d). (Stats. 2006, ch. 337, § 33; § 667.61, subd. (i).)

change is accomplished within a matter of seconds]; *People v. Corona* (1988) 206 Cal.App.3d 13, 18 [no cessation of sexually assaultive behavior between the acts].) Defendant goes even further, however, and contends that there must be some kind of interruption caused by an outside event, or a "meaningful cessation" of the assaultive behavior by the defendant such that would demonstrate an opportunity to reflect. Defendant does not cite authority requiring a *meaningful* cessation or a particular kind or length of interruption or distraction, and we have found no published opinion using the term "meaningful cessation."[10] "The legislative history [of section 667.6, subdivision (d)] reveals the aim to provide 'a broader, less stringent standard to prove that multiple sex crimes occurred against the same victim on separate occasions.' (Cal. Youth and Adult Correctional Agency, Enrolled Bill Rep. on Assem. Bill No. 2295 (1985-1986 Reg. Sess.) Sept. 1986, p. 2.)" (*People v. Jones*, *supra*, 25 Cal.4th at p. 104, fn. 2.) Thus, a finding that defendant committed sex crimes on separate occasions does not require an "obvious break" in the perpetrator's behavior. (*Id.* at p. 104.)

Indeed, the activity or occurrence that interrupts the assault and affords the perpetrator an opportunity to reflect can be any event, even a trivial one, such as "nothing more than car lights going by that cause the perpetrator to pause and reflect before proceeding, as in [*People v.*] *King* [(2010) 183 Cal.App.4th

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10 Such an argument makes relevant the line of cases that held that sex offenses were not "separate occasions" unless they were episodically disjoined or detached by time or proximity. (See *Jones*, *supra*, 25 Cal.4th at pp. 112-113, dis. opn. of Chin, J., discussing the abrogation of the California Supreme Court's holding in *People v. Craft* (1986) 41 Cal.3d 554.) The Legislature responded to that line of cases by adding the present definition in section 667.6, subdivision (d).

1281], or . . . pausing to listen to the victim's answering machine or punching the wall, as in *Plaza*[, *supra*, 41 Cal.App.4th 377]." (*People v. Solis* (2012) 206 Cal.App.4th 1210, 1220.) We find no authority for defendant's suggestion that an occurrence that affords an *opportunity* for reflection cannot be defendant's *actual* reflection, which was established here by direct evidence of defendant's thought processes. After raping the victim, defendant stated his intention to commit another sexual assault, stated his reason for doing so, and then he forced his victim into a different position by pulling her up by the hair and pushing her face downward. We conclude that any reasonable trier of fact could have found that defendant had a reasonable opportunity for reflection after completing one offense before committing the next. We thus have no basis to reverse the trial court's ruling. (See *People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092.)

IV. Abstract of judgment

Defendant asks that the abstract of judgment be corrected to conform with the trial court's oral pronouncement of sentence. Respondent agrees, and contends that both the abstract and the minutes should be corrected.

The trial court orally imposed a 50-year sentence on each count, along with a five-year enhancement pursuant to section 667, subdivision (a)(1), as alleged in the information. Both the abstract of judgment (in item No. 3) and the clerk's minutes erroneously state that the five-year enhancements were imposed under section 667.5, subdivision (a). In addition, only six enhancements are listed. On the attachment page of the abstract, the sentence as to count 7 is listed in item No. 1 as "55 L" for a total of 55 years and no enhancement, instead of 50 years to life and a five-year enhancement (which should be noted in item No. 3 of the abstract). The reviewing court may correct clerical error in the trial court record. (See *People v. Mitchell*

(2001) 26 Cal.4th 181, 185-188.) We thus order the superior court to correct the abstract of judgment and its minutes.

DISPOSITION

The judgment is affirmed. The superior court is directed to correct its minutes and prepare an amended abstract of judgment reflecting on page 1, that the five-year enhancements were imposed under Penal Code section 667, subdivision (a). The amended abstract should also reflect on the attachment page that defendant was sentenced to a term of 50 years to life (item No. 1), plus an enhancement of five years pursuant to section 667, subdivision (a) (item No. 3). The court is directed to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.