Filed 3/14/18 P. v. Bunton CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DOUGLAS L. BUNTON, Defendant and Appellant.	B280879 (Los Angeles County Super. Ct. No. BA439636)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Affirmed as modified.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters,

Assistant Attorney General, Shawn McGahey Webb and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Douglas L. Bunton (Bunton) of the following felonies: forcible rape (Pen. Code, § 261, subd. (a)(2)[1]); forcible oral copulation (§ 288a, subd. (c)(2)(a)); and battery (§ 242). The trial court sentenced Bunton to an aggregate sentence of 100 years to life plus five years.

On appeal, Bunton advances four principal arguments.[2] First, he contends that the trial court erred by failing to declare a mistrial after the rape and oral copulation victim, Olivia T. (Olivia), became upset while testifying and addressed certain comments directly to Bunton. Second, Bunton argues that the trial court abused its discretion by admitting video footage of Olivia's out-of-court photo identification of Bunton as her attacker. Third, Bunton claims that the trial court abused its discretion when

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Bunton also argues that he is entitled to one additional day of presentence custody credit—instead of 514 days of credit, he is entitled to 515 days. The People agree that the correct amount of custody credit should be 515 days due to the fact 2016 was a leap year with 366 days, not 365 days. Accordingly, we direct the trial court to prepare an amended abstract of judgment reflecting that Bunton has 515 days of presentence custody credit.

it denied his *Romero* motion (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497) requesting that the court strike one of his prior "strike" convictions. Finally, Bunton argues that his sentence constitutes cruel and/or unusual punishment.

We are not persuaded by any of these arguments. Accordingly, we affirm the judgment.

BACKGROUND

I. The attack

On September 7, 2015—Labor Day—at approximately 5:00 p.m., Olivia was at her home barbecuing with two other people, her boyfriend and another friend. At approximately 5:22 p.m., shortly after the friend had left and Olivia's boyfriend had gone to the store for some seasoning, Olivia went inside to retrieve some meat for the barbecue. Bunton, Olivia's neighbor, who had been sitting on his porch smoking a cigarette laced with phencyclidine (PCP), followed Olivia into her house. According to Bunton, once he was inside Olivia's house, the PCP just "hit" him and he "went crazy."

In the living room, Bunton, who weighed approximately 185 pounds, attacked Olivia, who weighed about 100 pounds, from behind, "slamming" her down on a coffee table, telling her that she was going to give him "some pussy." Olivia immediately began to holler and call for help. Olivia struggled free of Bunton and ran for the front door, but he slammed and locked it before she could get out. Then she tried to jump from a window, but Bunton grabbed her, slammed her on the floor, and began forcibly removing some

of her clothing. Olivia got Bunton off of her long enough to run to the bedroom. Bunton followed her into the bedroom and slammed her down on the bed. Bunton then climbed on top of Olivia and put his erect penis inside her vagina, but only a "little bit" because she kept "pushing" and twisting" to get him off her. After Bunton ejaculated on Olivia's thigh, he pinned Olivia's shoulders with his knees and told her, "You're going to suck my dick." Olivia kept hollering and fighting, but Bunton was able to push his penis onto Olivia's cheeks, chin, the front of her mouth, and partially into her open mouth, enough that she could "taste" his penis.

Olivia pushed Bunton off of her and fled to the living room where she tried once more to escape through the window, but again Bunton pulled her back and slammed her down onto the floor. She tried to escape through the front door again, but Bunton knocked her once more to the floor and dragged her by the hair back into the bedroom where he sexually assaulted her for a second time. During this second episode in the bedroom, Olivia lost consciousness for a time and, as a result, was not sure if Bunton's penis penetrated her vagina. After he ejaculated once more on her thigh, he again pinned her shoulders down and tried to force his penis into her mouth.

A number of neighbors, including Bunton's wife, heard Olivia's cries for help and came to her aid. Bunton, however, shoved his wife away from Olivia's front door and knocked another neighbor, Santos E. (Santos) to the ground as he tried to help Olivia escape through the window. Bunton's

wife and another neighbor called 911. The police arrived, tasered Bunton, and took him into custody.

II. Investigation and trial

On September 8, 2015—the day following the attack—Olivia identified a photo of Bunton as that of her attacker; her photographic identification was videotaped.

On that same day, a detective with the Los Angeles police department interviewed Bunton. During that interview, Bunton admitted to the following: smoking PCP shortly before the attack; pushing Olivia down; pulling her clothes off; telling Olivia that she was going to give him " 'some . . . pussy' " and ordering her to " 'suck [his] dick' "; putting his penis in Olivia's vagina; trying to put his penis in Olivia's mouth and to putting his penis against her mouth; Olivia running away from him and him chasing her, and hearing Olivia "yelling and screaming at [him] to stop." Near the end of the interview, Bunton stated that, if he could, he would apologize to Olivia for "raping" her, that he "didn't mean it," that it was the PCP that made him act the way he did.

On January 4, 2016, the People filed a three-count information alleging Bunton forcibly raped and orally copulated Olivia and committed battery against Santos. As to the rape and oral copulation counts, the People alleged further that those crimes were committed during the commission of a first degree burglary and that Bunton had

two prior convictions for serious or violent felonies.[3] On December 12, 2016, after deliberating for approximately one and a half hours, the jury returned verdicts against Bunton on all counts.

On February 2, 2017, the trial court sentenced Bunton to a term of 25 years to life on each of the forcible rape and forcible oral copulation charges; each sentence was doubled to 50 years to life pursuant to the section 667.61, subdivision (a). In addition, the trial court added a five-year serious felony enhancement pursuant to section 667, subdivision (a). The trial court ordered that these sentences were to run consecutively. As for the battery conviction, the trial court imposed a concurrent term of six months. Bunton timely appealed.

DISCUSSION

I. Olivia's emotional outburst while on the stand

During the second day of her testimony, near the conclusion of the People's direct examination, the prosecutor asked Olivia about her relationship with Bunton before the assault. Midway through her answer, Olivia began addressing Bunton directly, "He was a very nice person, a friendly person, very nice. I would have never knew he would do something like that. . . . I never knew he would do something like that. *Why the hell you do that to me for?*

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[3] After the jury rendered its verdicts, the trial court granted the People's oral motion to strike one of Bunton's prior convictions.

Why did you do that to me? You hurt me. I can't sleep at night. I can't even walk in the store. I'm jumpy. I cry every, every, every, every night. *Why did you do that? You were my friend.* He was my friend." (Italics added.)

Although the trial court immediately called for a break in the proceedings so that Olivia could collect herself, and instructed the jury to go into the jury room, Olivia continued to address Bunton directly and discuss how the assault had affected her: "He was my friend. [¶] . . . [¶] He was my damn friend. It was him that hurt me. I didn't do nothing to him. *Why you touch me?* I can't even walk down the street. [¶] . . . [¶] I can't walk down the street. I can't even do nothing. I think people after me all the time. I can't sleep. *I see your face all the time.* I don't even have sex no more. I don't even like sex. I don't even have sex. [¶] . . . [¶] He got me shaky all the time."

Throughout the course of Olivia's outburst, the trial court repeatedly tried to calm and comfort Olivia. After a brief recess and outside the presence of the jury, the trial court, without placing any blame on Olivia for her outburst, counseled her that she needed to "listen carefully to the question and just answer the question." Olivia replied that she understood and she completed her direct examination and cross-examination without further outbursts. As discussed below, we disagree with Bunton's contention that the trial court should have declared a mistrial following Olivia's outburst.

A. STANDARD OF REVIEW

" 'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.' " (*People v. Collins* (2010) 49 Cal.4th 175, 198.) While "[a] witness's volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice" (*People v. Ledesma* (2006) 39 Cal.4th 641, 683), "a motion for mistrial should be granted only when ' "a party's chances of receiving a fair trial have been irreparably damaged." ' " (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) A sua sponte declaration of a mistrial should be an " 'extremely rare event.' " (*Carrillo v. Superior Court* (2006) 145 Cal.App.4th 1511, 1529.) We review a trial court's decision to grant or deny a mistrial under the deferential abuse of discretion standard. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

B. NO ABUSE OF DISCRETION

We hold that Bunton's chances of receiving a fair trial were not irreparably damaged by Olivia's emotional outburst.

First, we note that the trial court repeatedly instructed the jury at other points during the trial not to "let bias, sympathy, prejudice, or public opinion influence [their] decision." Our Supreme Court has "consistently stated in numerous contexts" that appellate courts "generally presume

that jurors are capable of following, and do follow, the trial court's instructions." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 447.) Such a presumption is eminently sensible. As one court has observed, "Juries often hear unsolicited and inadmissible comments and in order for trials to proceed without constant mistrial, it is axiomatic the prejudicial effect of these comments may be corrected by judicial admonishment; absent evidence to the contrary the error is deemed cured." (*People v. Martin* (1983) 150 Cal.App.3d 148, 162–163 [no mistrial for witness's emotional outburst].) Here, there is no evidence—such as posttrial juror declarations or affidavits—that any juror was unduly swayed by Olivia's lone outburst.

Second, courts seldom declared a mistrial when there has been an isolated emotional outburst by a witness. For example, in *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, our Supreme Court held that the trial court properly refused to grant a mistrial after the mother of a murder victim called a defendant either a "dirty black dog" or a "mad dog" as she left the witness stand; the trial court's refusal was proper because "the comment added nothing to what the jury knew." (*Id.* at p. 1029; *People v. Roy* (1971) 18 Cal.App.3d 537, 554 [no mistrial due to "single" emotional outburst by murder victim's wife while testifying].)

Here, by the time of Olivia's outburst, the jury had already heard from two neighbors who described hearing Olivia screaming and calling for help and seeing a naked Bunton pull her back inside the house when she tried to

escape. The jury had also heard Olivia describe in detail Bunton's assault upon her. Under these circumstances, Olivia's outburst would not have added anything to what the jury already knew—that is, at the time of her outburst, the jury already knew that Olivia had suffered emotional as well as physical trauma as the result of being a victim of a sustained and brutal sexual assault in her own home on a holiday by a neighbor whom she trusted.

Finally, there is no factual basis for a finding of incurable prejudice to Bunton from Olivia's outburst. The evidence that Bunton brutally raped Olivia was in the defense's own words "overwhelming." Olivia's account of the attack was confirmed in a number of important respects by testimony from her neighbors and the content of their contemporaneous 911 calls, by the testimony of the nurse practioner at the rape treatment center who performed a sexual assault examination of Olivia shortly after the assault and who videotaped her injuries, and, perhaps, most importantly, by Bunton's own videotaped admission to the police that he had raped her.

While Olivia's emotional outburst was not fleeting, it was addressed by the court and the conduct ceased. As such, Olivia's isolated and momentary loss of composure did not constitute one of the "extremely rare" cases in which the trial court was obligated to grant a mistrial on its own motion. (*Carrillo v. Superior Court*, *supra*, 145 Cal.App.4th at p. 1529.)

II. Admission of Olivia's out-of-court identification

Prior to opening statements, the People sought to admit at trial a short—less than a minute long—video recording of Olivia identifying Bunton from a photograph as her assailant. The trial court described the video as showing a male detective presenting a single photograph to Olivia, who "[i]mmediately points to it and then in a rather emotional fashion kind of grabs at the paper, pushes it back toward the detective and eventually starts crying."

The defense, pursuant to Evidence Code section 352, objected to the admission of the video on the ground that it had "minimal probative value" given that the defense was not disputing Olivia's identification of Bunton as her attacker. The People argued that, because the defense had not yet actually conceded identity, it still had to prove that fact to the jury, and, moreover, because Olivia's credibility would be placed at issue by the defense, the jury could draw inferences about her credibility from the "raw emotional response" that the video captured. The trial court deferred ruling on the issue until after Olivia gave her testimony so that it could assess the video's probative value and prejudicial effect, and cautioned the parties not to refer to the video during opening statements.

At the conclusion of the first day of testimony, before the People had completed their direct examination of Olivia, the trial court ruled that the video was admissible under Evidence Code section 352 because it was probative of her credibility and more probative than a description of her

identification by one of the officers who was present during the identification. In addition, the trial court ruled the video admissible under Evidence Code section 1238,[4] if a proper foundation was laid. The People, after first having Olivia testify about her identification of Bunton via a photograph and then having the attending detective testify about the identification, played the video for the jury.

On appeal, Bunton argues that the trial court erred because the video was "highly prejudicial, likely to have elicited a strong emotive response from the jurors, who likely reacted with undue sympathy toward Olivia." We disagree.

A. STANDARD OF REVIEW

Evidence Code section 352 provides as follows: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

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[4] Evidence Code section 1238 provides as follows: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement would have been admissible if made by him while testifying and: [¶] (a) The statement is an identification of a party or another as a person who participated in a crime or other occurrence; [¶] (b) The statement was made at a time when the crime or other occurrence was fresh in the witness' memory; and [¶] (c) The evidence of the statement is offered after the witness testifies that he made the identification and that it was a true reflection of his opinion at that time."

We review a trial court's rulings under section 352 for abuse of discretion and will not disturb the trial court's determination unless the court acted in an arbitrary, capricious, or patently absurd manner. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.) "[T]he decision on whether evidence . . . is relevant, not unduly prejudicial and thus admissible, rests within the discretion of the trial court. [Citation.] 'Where, as here, 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. [Citation.]" [Citations.]' It is appellant's burden on appeal to establish an abuse of discretion and prejudice." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224–225.)

B. NO ABUSE OF DISCRETION

Bunton makes three arguments for why the trial court's decision was an abuse of its discretion. Each of those arguments is without merit.

First, Bunton argues that the video was not relevant because "the defense did not contest identity." Although the defense did not "disput[e] identification" at trial, the defense also did not stipulate to identification, thereby leaving the People with the burden of proving "*every* element of the crime by evidence sufficient to satisfy the minds of the jurors beyond a reasonable doubt." (*People v. Martinez* (1922) 57 Cal.App. 771, 775–776, italics added; *People v. Valenti* (2016)

243 Cal.App.4th 1140, 1164.) In other words, " 'the prosecution's burden to prove every element of the crime is *not* relieved by a defendant's tactical decision not to contest an essential element of the offense.' " (*Estelle v. McGuire* (1991) 502 U.S. 62, 69; *People v. Merritt* (2017) 2 Cal.5th 819, 840–841, italics added.)

Second, Bunton asserts that the video was not relevant because the defense did not attack Olivia's "veracity, particularly with respect to her identification of Bunton." The defense, however, never advised the trial court that it would not challenge Olivia's credibility—either generally or with respect to her identification of Bunton—even when both the People and the trial court repeatedly mentioned that the video was relevant to and probative of Olivia's credibility. The defense's silence on whether it would challenge Olivia's credibility was not surprising given the emphasis that the defense placed on witness credibility during its opening argument, "These are, of course, very serious charges and Mr. Bunton and I ask that when every witness testifies, give that witness your utmost attention and notice if there are any inconsistencies to what any witness says."[5]

Third, Bunton maintains that the video was "highly prejudicial" because it "likely . . . elicited a strong emotive response from the jurors, who likely reacted with undue

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[5] The defense's opening statement was brief, taking up only 15 lines in the reporter's transcript. The above quoted passage constituted six lines or more than a third of the defense's opening statement.

sympathy toward Olivia." There are several problems with this argument. For Evidence Code section 352 purposes, unduly " 'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that ' "uniquely tends to invoke an emotional bias against the defendant" ' without regard to its relevance on material issues." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.) While the video was likely prejudicial or damaging to the defense, there is no evidence—no juror declarations or affidavits—that the video had any emotional impact on the jury, let alone created an emotional bias against Bunton unrelated to the video's relevance. Moreover, even assuming that the video did have an emotional effect on the jurors, any such impact would have been minor compared to Olivia's testimony about the assault. Over the course of two days, Olivia testified at length and in considerable detail about the assault. In contrast, the video lasted only 43 seconds.

In short, we hold that the trial court did not abuse its considerable discretion in admitting the video of Olivia's identification of Bunton.

Even if the trial court did err, any such error was harmless in that it was not reasonably probable that Bunton would have obtained a more favorable result absent the admission of the video. (See *People v. Beltran* (2013) 56 Cal.4th 935, 955.) The evidence of Bunton's guilt was so overwhelming that the defense was forced to take a position at the close of trial that was radically different from the one it took at the beginning. During opening statements, the

defense told that jury that after reviewing all the evidence it would find Bunton not guilty of all charges. By closing argument, however, the defense conceded that Bunton was guilty of battery against Santos and that he had raped Olivia, and only asked the jury to find reasonable doubt that Bunton had felonious intent when he entered Olivia's house and/or her bedroom and acquit him of the charge that the rape and forced oral copulation took place during a burglary.

Given the overwhelming nature of the evidence against Bunton, including his own confession, we hold that the admission of the video, even if erroneous, was harmless under any conceivable standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California* (1967) 386 U.S. 18, 24.)

III. The denial of Bunton's *Romero* motion

The information alleged that Bunton had two prior convictions for robbery, both in 1987. After Bunton was convicted, the trial court granted the People's motion to strike one of the robbery convictions. Bunton, after admitting to the remaining robbery conviction, subsequently filed a *Romero* motion to strike the single remaining robbery conviction. In opposing Bunton's motion, the People argued that Bunton was a recidivist offender, noting that in addition to the robbery conviction, he was also convicted in 1997 of inflicting corporal injury (§ 273.5, subd. (a)) on a spouse or cohabitant and in 2001 of violating a court order to prevent domestic violence and stalking (§ 646.9, subd. (b)). Given the "violent nature" of Bunton's current convictions and given

the nature of Bunton's prior offenses, the trial court could not "in good conscience" grant the *Romero* motion even though the denial of the motion would mean that Bunton's sentence would be "extremely lengthy."

On appeal, Bunton argues that, while his "current offenses are certainly serious and warrant severe punishment, the indeterminate life terms provided by section 667.61 were sufficient to serve that purpose." He argues further that while he has "not led a completely law-abiding adult life," he "does not fit into the category of a repeat felony offender who should be subject to the harsh recidivist sentencing scheme set forth in the Three Strikes Law." We disagree.

A. STANDARD OF REVIEW

Trial courts have discretion under section 1385 to dismiss Three Strikes allegations in the furtherance of justice. We review the trial court's decision under the abuse of discretion standard of review. (*Romero*, *supra*, 13 Cal.4th at p. 530; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 992–993.) An abuse of discretion occurs with respect to a *Romero* motion only when the trial court was not aware of its discretion to dismiss, where the court considered impermissible factors, or where the defendant clearly falls outside the spirit of the Three Strikes law. (*People v. Scott* (2009) 179 Cal.App.4th 920, 926.) In determining whether to dismiss a prior felony conviction, the trial court must "consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony

convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

It is the defendant's burden as the party attacking the sentencing decision to show that it was arbitrary or irrational, and, absent such showing, there is a presumption that the court " ' "acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." ' " (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.) Such a discretionary decision " ' "will not be reversed merely because reasonable people might disagree." ' " (*Id*. at p. 377.) In other words, "[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance." (*People v. Myers* (1999) 69 Cal.App.4th 305, 310 (*Myers*).) "Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack'

[citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*Carmony*, at p. 378.)

We presume the trial court considered all relevant factors in the absence of an affirmative record to the contrary. (*Myers*, *supra*, 69 Cal.App.4th at p. 310.)

B. NO ABUSE OF DISCRETION

Here, the trial court, after taking into account Bunton's pre-plea report and his probation officer's report, considered the relevant factors. First, it found the nature of Benton's current offenses—the rape and forced oral copulation of Olivia and the battery of one of her would-be rescuers—to constitute a "brutal, brutal" set of crimes. Second, the trial court considered Bunton's prior offenses—"although not as recidivist as some serious felons, [Bunton's criminal record] still includes ongoing criminal conduct and multiple crimes against women." In addition, the trial court also considered certain mitigating factors, such as the relative remoteness of the robbery conviction and evidence that Bunton was "under the influence of PCP" at the time of his assault on Olivia. After balancing and weighing all of these factors, the trial court found that Bunton did not fall "outside the spirit of the Three Strikes Law as indicated in *Williams* or even in the *Romero* case." Under these circumstances, we hold that there was no abuse of discretion.

IV. Bunton's sentence does not constitute cruel or unusual punishment

Bunton contends his sentence of 100 years to life plus five years constitutes cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution and cruel or unusual punishment in violation of the California Constitution. We disagree.

A. BUNTON FORFEITED HIS ARGUMENTS

As a preliminary matter, we note that Bunton failed to raise these arguments below. As a result, those arguments are waived on appeal. (See, e.g., *People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1045; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583.) However, we consider the merits of his cruel and/or unusual argument under the relevant constitutional standards in order to address Bunton's ancillary argument that the failure to object was the result of alleged ineffective assistance rendered to him by his trial counsel. (See *Norman*, at pp. 229–230.)

B. BUNTON'S CONSTITUTIONAL CLAIMS FAIL

The Eighth Amendment to the United States Constitution prohibits "cruel *and* unusual" punishment. (U.S. Const., 8th Amend., italics added.) It prohibits " 'only extreme sentences that are "grossly disproportionate" to the crime.' " (*Ewing v. California* (2003) 538 U.S. 11, 23 (lead opn. of O'Connor, J.) (*Ewing*).) The California Constitution proscribes "[c]ruel *or* unusual punishment." (Cal. Const.,

art. I, § 17, italics added.) This prohibition may be violated if a punishment is " 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136.)

Although there is a considerable overlap in the federal and state approaches to determining whether a punishment is cruel and/or unusual, we consider each separately because the distinction in wording is "purposeful and substantive rather than merely semantic." (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085.)

1. *Standard of review*

"Whether a punishment is cruel and/or unusual is a question of law subject to our independent review, but underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Palafox* (2014) 231 Cal.App.4th 68, 82.)

2. *Bunton's federal constitution claim*

The United States Supreme Court considered the constitutionality of substantial indeterminate prison terms under California's Three Strikes statutes in two companion cases. In the first case, *Ewing*, *supra*, 538 U.S. 11, the court directly confronted the issue of "whether the Eighth Amendment prohibits the State of California from sentencing a repeat felon to a prison term of 25 years to life under the State's 'Three Strikes and You're Out' law." (*Id.* at

p. 14.) The indeterminate term was imposed after a grand theft of three golf clubs together worth in total almost $1,200. (*Id.* at pp. 18–20.) A plurality (O'Connor, J., Rehnquist, C.J., Kennedy, J.) reasoned that "[t]he Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' " (*Id.* at p. 20.) "In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism." (*Id.* at p. 29.) "[T]he State's public-safety interest in incapacitating and deterring recidivist felons" is a "legitimate penological goal." (*Ibid.*) The indeterminate life sentence "is not *grossly disproportionate* and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments."[6] (*Id.* at pp. 30–31, italics added.)

In the second case, *Lockyer v. Andrade* (2003) 538 U.S. 63 (*Andrade*), which involved federal habeas corpus review, the court concluded that it was not a clear violation of the federal prohibition of cruel and unusual punishment to impose two consecutive terms of 25 years to life under California's Three Strikes statutes for Andrade's two crimes of petty theft with a prior. The thefts involved the taking of

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[6] Two concurring justices (Scalia, J., Thomas, J.) disavowed the existence of a proportionality principle, but still concluded that the sentence did not violate the Eighth Amendment. (*Ewing*, *supra*, 538 U.S. at pp. 31–32.)

videotapes worth $84.70 from one store and $68.84 from another store. (*Id.* at pp. 66–68.) A majority (O'Connor, J., Rehnquist, C.J., Scalia, J., Kennedy, J., and Thomas, J.) determined that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case" (*id.* at p. 77), that it is "applicable only in the 'exceedingly rare' and 'extreme' case" (*id.* at p. 73), and that Andrade's case was not such a case.

Here, unlike the property crimes at issue in *Ewing*, *supra*, 538 U.S. 11 and *Andrade*, *supra*, 538 U.S. 63, Bunton's instant conviction involved a brutal sexual assault. Moreover, Bunton had a history of committing crimes that either involved the threat or use of violence (robbery and corporal abuse of a spouse/cohabitant) or raised the specter of violence (stalking). In light of *Ewing* and *Andrade*, we hold that Bunton's sentence was not grossly disproportionate to his crime.

Bunton argues his prison sentence is cruel and unusual under the federal constitution because it "serves no legitimate penal purpose." He bases his argument on the United States Supreme Court's decision in *Coker v. Georgia* (1977) 433 U.S. 584 (*Coker*) and a concurring opinion in *People v. Deloza* (1998) 18 Cal.4th 585 (*Deloza*).

Coker, *supra*, 433 U.S. 584 was a death penalty case in which the court held that it categorically violates the Eighth Amendment to impose the death penalty for the crime of

rape because such a punishment is excessive and grossly disproportionate. (*Id.* at p. 592.) The *Coker* court stated, "[T]he 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. A punishment might fail the test on either ground." (*Ibid.*)

Deloza, *supra*, 18 Cal.4th 585 was a case in which the defendant received a prison sentence of more than 100 years to life. The majority opinion had nothing to do with cruel and unusual punishment. The issue was whether the court had discretion to impose concurrent rather than consecutive terms. The case was remanded for resentencing because the trial court had misunderstood the scope of its discretion to impose concurrent terms. (*Id.* at pp. 599–600.) Justice Mosk concurred separately and opined that a sentence "impossible for a human being to serve" was cruel and unusual. (*Id.* at p. 600.)

Bunton cites no case in which a sentence was found to be cruel and unusual because it was "impossible for a human being to serve," and several published cases have expressly rejected that contention. (See *People v. Haller* (2009) 174

Cal.App.4th 1080, 1089–1090 [78 years to life for stalking and making criminal threats did not violate Eighth Amendment]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1231 [affirming sentence of 135 years to life]; *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1382–1383 [both federal and state constitutions affirm 115 years plus 444 years to life].)

Bunton further asserts that his sentence is cruel and unusual because "a sentence that no human being could conceivably complete serves no rational legislative purpose, under either a retributive or a utilitarian theory of punishment." *Coker*, *supra*, 433 U.S. 584, provides no support for this premise because its holding was that *death* was an excessive punishment for rape. Here, Bunton was not sentenced to death. He was sentenced to 100 years to life plus five years in prison. Moreover, Bunton fails to cite any authority for the proposition that a lengthy sentence for his offenses would serve no rational legislative purpose. As the United States Supreme Court has held, "punishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution." (*Kennedy v. Louisana* (2008) 554 U.S. 407, 420.) Here, Bunton's sentence plainly serves two of those penological goals—deterrence, and retribution. Bunton's sentence unmistakably reflects society's condemnation of his conduct and it provides a strong psychological deterrent to those who would consider

engaging in that sort of conduct in the future. In fact, courts have affirmed sentences as long as or longer than Bunton's. (See *People v. Cartwright*, *supra*, 39 Cal.App.4th at pp. 1134–1137 [375 years to life and a determinate term of 53 years not cruel or unusual under federal or state constitutions]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 666–667 [upholding sentence of 283 years]; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531–532 [upholding sentence of 129 years].)

3. *Bunton's California constitution claim*

In determining whether a punishment is cruel or unusual, our Supreme Court has identified three factors for the reviewing court to consider: (1) the nature of the offense and the offender; (2) a comparison with the punishment imposed for more serious crimes in the same jurisdiction; and (3) a comparison with the punishment imposed for the same offense in different jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 425–427.) "Determinations whether a punishment is cruel or unusual may be made based on the first prong alone," i.e., the nature of the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399.) A defendant bears a "considerable burden" to demonstrate his sentence amounts to cruel or unusual punishment. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.)

" 'To determine whether a sentence is cruel or unusual as applied to a particular defendant, a reviewing court must

examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities.' " (*People v. Leonard* (2007) 40 Cal.4th 1370, 1426–1427; *People v. Dillon* (1983) 34 Cal.3d 441, 479.) The court must give great deference to the penalty prescribed by the Legislature; the Legislature "is in the best position to evaluate the gravity of different crimes and to make judgments among different penological approaches." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 494.) "Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive." (*Ibid.*) This is not such a case.

Here, as discussed above, Bunton has a criminal history involving both violence and the threat of violence against women. The sentence at issue was imposed as the result of yet another violent but far more brutal crime against a woman. Moreover, despite being sentenced to prison for his robbery and stalking convictions, Bunton has not demonstrated an ability to be a law-abiding citizen. He admitted to the police that he not only raped Olivia but that he has been smoking PCP for over 23 years. Consequently, based on the nature of the offense and the offender, we hold

that Bunton's sentence was not cruel or unusual under the state Constitution.

In sum, Bunton did not receive ineffective assistance from his defense counsel when his counsel failed to object to the constitutionality of Bunton's sentence, because the sentence was constitutionally valid.

DISPOSITION

The judgment shall be modified to reflect presentence custody credit of 515 days. The superior court is directed to send an amended abstract of judgment to the Department of Corrections and Rehabilitation reflecting such modification. As modified, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.*

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