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

THE PEOPLE,

Plaintiff and Respondent,

v.

TOBIAS DUSTIN SUMMERS,

Defendant and Appellant.

B267914

Los Angeles County

Super. Ct. No. PA076500

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Ronald S. Coen, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal,  
for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,  
Chief Assistant Attorney General, Lance E. Winters, Senior  
Assistant Attorney General, and Jonathan J. Kline and  
Stephanie C. Santoro, Deputy Attorneys General, for Plaintiff  
and Respondent.

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## INTRODUCTION

Defendant Tobias Summers was convicted of 31 counts relating to the abduction and sexual assault of 10-year-old Nicole R. On appeal, he contends that the trial court violated his rights to present a defense and to confront witnesses by limiting his questioning of certain DNA experts. We conclude that any error was harmless beyond a reasonable doubt, and affirm.

## PROCEDURAL BACKGROUND

By first amended information filed April 29, 2015, defendant was charged with kidnapping (Pen. Code,<sup>1</sup> § 207, subd. (a); count 1); first-degree burglary (§ 459; count 2); kidnapping to commit a sex offense (§ 209, subd. (b)(1); count 3); aggravated sexual assault of a child (§ 269, subd. (a)(1) [rape; count 34], (a)(3) [sodomy; count 36], (a)(4) [oral copulation; counts 5, 8, 12, 14, 16, 20, 22, 24, 30], (a)(5) [sexual penetration; counts 10, 18, 26, 28, 32]); forcible lewd act on a child under 14 (§ 288, subd. (b)(1); count 6); sex or sodomy with a child 10 or younger (§ 288.7, subd. (a); count 35); oral copulation or sexual penetration of a child 10 or younger (§ 288.7, subd. (b); counts 4, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33); use of a minor to produce obscene matter for distribution (§ 311.4, subd. (a); count 37); and possession of child pornography (§ 311.11, subd. (a); count 38).<sup>2</sup>

The information alleged that counts 4 through 36 were committed under the One Strike Law (§ 667.61, subd. (a),

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<sup>1</sup> All undesignated statutory references are to the Penal Code.

<sup>2</sup> Counts 16, 24, and 27–31 were later dismissed under section 1385.

(d)(2) [kidnapping], (e) [use of a firearm, binding/tying, burglary]).<sup>3</sup> The information also alleged that defendant was armed with a firearm (§ 12022.3, subd. (b); counts 4, 6, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33, 35), that he used a knife (§ 12022, subd. (b)(1); counts 1–37) and a belt (§ 12022, subd. (b)(1); counts 1–37) to commit the offenses, and that he had four prison priors (§ 667.5, subd. (a); count 38).

Defendant pled not guilty and denied the allegations. After a bifurcated trial at which he testified in his own defense, a jury convicted defendant of all remaining counts. As to the remaining allegations, the jury found the firearm allegation true for counts 4, 17, and 33; found the knife allegation true for counts 1–5, 7, 10, 14, 17, and 26; found the belt allegation true for counts 33 and 34; and found the one-strike allegations true for count 6. The jury found all other allegations not true.

Defendant waived jury trial on the prior convictions. After a bench trial, the court found three prison priors true and one not true.

The court sentenced defendant to life in prison without the possibility of parole plus 269 years, 8 months. The court selected count 37 (§ 311.4, subd. (a)) as the base term and sentenced defendant to the upper term of three years. The court imposed eight months for count 38 (§ 311.11, subd. (a))—one-third the middle term of two years—to run consecutive. The court imposed life without the possibility of parole under the One Strike Law

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<sup>3</sup> The one-strike allegations were later stricken for all counts except count 6. The firearm allegation was stricken for counts 19–35. The knife allegation was stricken for counts 19–25, 32, 35, and 36. The belt allegation was stricken for counts 1–5, 7, 10, 14, 16, 17, 19–25, 32, 35, and 36.

(§ 667.61, subd. (a), (d)(1)) for count 6 (§ 288, subd. (b)(1)), to run consecutive. For counts 7 (§ 288.7, subd. (b)) and 14 (§ 269, subd. (a)(4)), the court imposed consecutive sentences of 15 years to life plus one year for the weapon enhancement (§ 12022, subd. (b)(1)). For counts 9, 11, 13, 15, 19, 21, 23, and 25 (§ 288.7, subd. (b)), the court imposed consecutive sentences of 15 years to life. For count 17 (§ 288.7, subd. (b)), the court sentenced defendant to 15 years to life, plus five years for the firearm allegation (§ 12022.3, subd. (b)), to run consecutive, and stayed the knife allegation (§ 12022, subd. (b)(1)) under section 654. For count 33 (§ 288.7, subd. (b)), the court sentenced defendant to 25 years to life, plus five years for the firearm allegation, to run consecutive, and stayed the belt allegation (§ 12022, subd. (b)(1)) under section 654. The court sentenced defendant to 25 years to life for count 35 (§ 288.7, subd. (a)), to run consecutive. Finally, the court imposed one year for each of the three prior prison terms (§ 667.5, subd. (b)), to run consecutive. The court stayed counts 1–5, 8, 10, 12, 18, 20, 22, 26, 32, 34, 36, and their related allegations under section 654.

Defendant filed a timely notice of appeal.

## **FACTUAL BACKGROUND**

### **1. Defendant takes drugs and plans a burglary.**

On March 26, 2013, John Morgan, Morgan’s friend defendant, defendant’s friend Daniel Martinez, defendant’s brother Timothy Taylor, and Taylor’s girlfriend, Tiffany Lynn Doherty rented a hotel room in Northridge. Throughout the afternoon and evening, the group consumed alcohol and drugs, including methamphetamine and “Scooby Snax,” a type of synthetic marijuana. The drugs and alcohol made Morgan tired,

but defendant and Martinez appeared “hyped up,” as if they wanted to go out and “do something.”

Around midnight, Morgan heard defendant and Martinez talking about doing a job involving “gold and silver work.” Morgan did not know what the pair meant by gold and silver jobs, but they appeared to understand each other. Shortly after this conversation, defendant and Martinez left the hotel. As they left, defendant said, “We’re gonna do some gangster shit.”

## **2. Defendant abducts Nicole.**

Sometime between 1:00 and 3:30 a.m., 10-year-old Nicole awoke to a man’s voice telling her to get up. Defendant was next to her bed with a knife, shaking her shoulder. Nicole got out of bed. She was wearing panties, purple shorts, and a black shirt with a logo from the television show *Heroes*. She was barefoot. Defendant led her out of the house through the back sliding door, then through the side gate to an adjacent alley. Whenever a car approached, he made her hide behind the trash bins lining the alley.

After a few minutes, a black car pulled up, and defendant told Nicole to get inside. Nicole got into the back seat; defendant sat in the front. The driver, later identified as Martinez, asked, “What’s with the girl? Why is she here?” Defendant replied that Nicole had seen the robbery and said they would drop her off at a fire station. About 10 minutes later, Martinez stopped the car, got out, and left.<sup>4</sup>

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<sup>4</sup> Martinez was tried separately and convicted of aiding and abetting residential burglary. We affirmed his conviction by unpublished opinion in *People v. Martinez* (B260141, Jun. 22, 2016 [unpub. opn.]).

### **3. Defendant repeatedly assaults Nicole.**

#### **3.1. Getaway Car**

Defendant moved to the driver's seat and began to drive. He told Nicole to crawl to the front passenger seat, hide in the space under the glove compartment, and raise her bottom. When she complied, defendant pulled down her shorts and panties, put his finger in her anus, and moved his finger around. Nicole asked him to stop because it hurt; he spanked her in response. Defendant told Nicole to "suck his dick." He also swore at her, telling her to "fuck him" and calling her "bitch." Defendant sounded annoyed.

#### **3.2. Bekins**

Defendant stopped the car at a Bekins storage facility. There were several moving trucks parked outside, and defendant took Nicole into one. He brought a black bag with him. There were moving blankets on the floor.

Defendant made Nicole undress and forced her to orally copulate him. As she complied, he told her to act like a "slut." Then, he made her drink his urine. Nicole tried to spit it out, but he told her to swallow it. Afterwards, defendant took nude pictures of her. For one photo, he made Nicole pose with a cigarette in her mouth; then he blew smoke into her mouth.

Next, defendant told Nicole to lie down. He licked her vagina, put his fingers in her anus and vagina, and licked her chest. Then defendant put his penis in Nicole's vagina. Nicole was in pain, and asked him to stop. Defendant responded by putting a belt around her neck; he tightened it when she complained or made too much noise. At some point, he also put a rag in her mouth and wrapped the belt around it so she could not

scream. Defendant hit Nicole in the face with the belt at least once. He talked to himself a lot.

Nicole and defendant left Bekins while it was still dark. She was wearing her shorts. Defendant wore her *Heroes* shirt. He would not return her underwear. They got back into the same car—but this time, defendant told Nicole to get in the trunk. The trunk contained a child’s drawing, paper towels, a cloth towel, and a package of Scooby Snax that contained cigarettes.<sup>5</sup>

### **3.3. Martinez returns to the hotel.**

While defendant was assaulting Nicole at Bekins, Martinez returned to the hotel room alone. He seemed scared. Martinez told Morgan that he and defendant had gone to rob a house. Defendant went inside while Martinez waited in the car. When defendant came back, he had a seven- or eight-year-old girl with him. After defendant brought the girl into the car, Martinez “freaked out,” left defendant, and returned to the hotel. For the next several hours, Morgan and Martinez talked about the incident.

### **3.4. The Woods and Tunnel**

Meanwhile, after leaving Bekins with Nicole in the trunk of his car, defendant drove for 10 to 20 minutes, then stopped the car and let her out. Nicole found herself in a parking lot adjacent to a “forest area” with trees and hiking trails.<sup>6</sup> She was barefoot and shirtless, but defendant had given her a blanket to wrap

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<sup>5</sup> A later search of defendant’s trunk revealed plaid shorts, a child’s drawing, paper towels, a white towel, a package of Scooby Snax, and Nicole’s hair.

<sup>6</sup> The forest area was later identified as El Scorpion Park, which is about seven miles from Bekins.

around her shoulders. Defendant made Nicole walk down a trail and into the forest. It was still dark outside, and there was no lighting along the trail.

Defendant put some blankets on the ground—including the blanket that had been keeping Nicole warm. He placed a knife on the blanket. Then, defendant made Nicole suck his penis and drink his urine. Nicole resisted—but defendant told her that if she kept complaining, he would hurt or kill her. Once she complied, defendant put his finger in her vagina.

Nicole fell asleep. She awoke at sunrise next to a tree. Defendant was walking around the blankets. He said he saw other people in the forest, but Nicole did not see anyone.

Defendant and Nicole walked through the forest until they reached a tunnel. The walls of the tunnel were covered in graffiti; there were oranges, cans of food, and water on the ground.<sup>7</sup> Although the sun was rising, the tunnel was still dark. Defendant made Nicole suck his penis again. This time, however, she did not have to drink his urine. Defendant put his finger in her vagina, then raped her.

By this point, Nicole was feeling sick. Defendant tried to give her some pills—he said they would help her relax—but Nicole refused to take them. Defendant told her that if she did not take the “medicine,” he would hit her to make her better. Then he told Nicole to close her eyes. As soon as she did, she felt a hard blow to the head. Nicole fell to the ground and bumped her head again; she felt dizzy.

Nicole struggled to her feet, and defendant led her out of the tunnel. They left most of the blankets behind, but defendant

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<sup>7</sup> The tunnel is part of the flood control channel through which Bell Creek drains into the Los Angeles River.



allowed Nicole—who was still shirtless—to use one of them to cover up. By the time they emerged, the sun was up. Defendant led Nicole to another car; it was black or red. Defendant told her to get in the back seat, lie down, and cover herself with the blanket.

### **3.5. The Empty House**

Defendant pulled into the driveway of a vacant house and stopped the car. Defendant and Nicole walked through a side gate and entered the house through the back sliding door. The house was empty and appeared new.

Defendant took Nicole to the bathroom and told her to get in the bathtub. He said he wanted her to take a bath to wash off the DNA. Defendant still had Nicole's underwear and used it to plug the drain. Then he washed her mouth, bottom, and vagina. Nicole washed the rest of her body. When she was done bathing, defendant made Nicole suck his penis again. Then, he raped her on the bathroom floor.

Defendant and Nicole were still sitting on the bathroom floor when they heard helicopters. Defendant believed snipers were after him. He told Nicole to hide in the hall closet.

## **4. Defendant lets Nicole go.**

Defendant and Nicole left the vacant house early that afternoon. Nicole was wearing her purple shorts. She was still shirtless, and was wrapped in a blanket.<sup>8</sup> Defendant and Nicole got into the same car they had arrived in. Again, defendant told her to get in the back seat, lie down, and cover herself with the blanket. He said he was going to drive her to a hospital.

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<sup>8</sup> Nicole's panties were later found wrapped in a towel in the trash can in the backyard.

Defendant stopped in a residential neighborhood. He gave Nicole two shirts to wear—her black shirt, which was now ripped, and a grey tank top. He warned her to wait at least a year before telling anyone what happened to her. He said he knew where she lived, and if she told anyone what had happened to her, he would post the naked photos he took, then kill her and her entire family. Before she left, Nicole asked defendant to return her Hello Kitty iPod case. Defendant wiped it off with a paper towel and handed it back; he did not return the iPod. As Nicole left the car, defendant told her not to look back.

Nicole looked for the hospital, but couldn't find it. She walked around, trying to find help. After walking for almost a mile, Nicole found a police officer in a local Starbucks. He called an ambulance, which took her to the hospital.

#### **5. Defendant flees the country.**

The next day, March 28, 2013, defendant spent several hours online searching his laptop for information about both Nicole's abduction and the French Foreign Legion. He first considered flying to Paris—but after visiting several law enforcement websites, he changed his focus to getting to France by cargo ship or "freightercruiser." Defendant also investigated whether he could immediately sell his car for cash, get a passport online, or get a passport that day.

That evening, defendant called David Lugo in San Diego and left several messages.<sup>9</sup> Lugo and defendant had become friends the year before when they met in rehab. When Lugo called him back around 9:45 p.m., defendant asked if he could spend the weekend with Lugo in San Diego. Despite the late

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<sup>9</sup> Lugo testified under a grant of use immunity.

hour, defendant pushed Lugo to pick him up in Los Angeles that night. Lugo eventually agreed, and arrived at defendant's mother's house just after midnight on the morning of March 29, 2013. When Lugo arrived, defendant provided more details about why he was so eager to leave town.

Defendant explained that the night before, he and a friend got high and broke into a house. As soon as they realized there were people inside the house, they left without taking anything—but since defendant broke a window and left his fingerprints at the scene, he was worried he would get in trouble. Defendant wanted to leave for San Diego at once, but agreed to wait until the next morning to give Lugo a chance to rest.

The next morning, defendant spent another 25 minutes online, searching his laptop for more information about Nicole's abduction, how to get a passport in one day, and how to join the French Foreign Legion. Before he logged off for the last time, he searched for "Tobias Summers."

On their way out of town, Lugo and defendant stopped by the hotel to pick up Taylor's ID and passport. While he was there, defendant spoke privately with Morgan and admitted taking Nicole. He also told Morgan that he had to hit her to keep her from screaming or disobeying him. Defendant asked Morgan for several thousand dollars to help him get away. He also gave Morgan three two-dollar bills.<sup>10</sup>

Defendant and Lugo reached San Diego around 10:30 a.m. The next day, March 30, 2013, Lugo gave defendant some clothes, took him to buy a new mobile phone, and dropped him off at the Mexican border. As they hugged goodbye, defendant told Lugo,

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<sup>10</sup> Several two-dollar bills had gone missing from Nicole's house the night of the burglary.

“You’ll probably never see me again.” Defendant was apprehended trying to cross into Mexico.

## **6. The Investigation**

A sexual assault exam revealed that Nicole had suffered injuries consistent with sexual assault. For several days after her return, she tested positive for a form of methamphetamine consistent with the drugs defendant used at the hotel with Martinez and Morgan.

Nicole described her attacker as having a Superman tattoo on his chest and a tattoo of a woman on his arm. The woman had a tiny body, bigger face, and long, wavy hair.<sup>11</sup> She later identified defendant and another man from a six-pack photo array as both looking like her attacker, and also recognized defendant from a photograph on the evening news.

Authorities gathered and analyzed copious DNA evidence from each attack site. They found Nicole’s hair at Bekins and in the back seat and trunk of defendant’s car. They recovered male DNA from the white tank top, semen found on a blanket in the Bekins trailer, a napkin found near the trailer, the paper towel wrapped around Nicole’s underwear, and cigarette butts discovered at Bekins and near Nicole’s home. None of the DNA matched defendant’s.<sup>12</sup>

Defendant’s fingerprints told a different story. Authorities recovered defendant’s left palm print from the door of the Bekins

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<sup>11</sup> Defendant has a Superman logo tattooed on his chest and a woman with long, flowing hair tattooed on his arm.

<sup>12</sup> As we discuss below, two partial Y-STR profiles were consistent with defendant’s DNA. They were also consistent with defendant’s version of events.

truck. Defendant's right palm print was recovered from a window at the vacant house. In the garage, police found tire tracks consistent with defendant's car. Defendant's laptop was seized from his bedroom. A search revealed hundreds of images of child pornography—and defendant admitted that the images were his. Lugo later found a knife in the center console of his car. The knife looked like the one used to threaten Nicole.

## **7. Defendant's Testimony**

Defendant testified in his own defense.<sup>13</sup> He admitted using drugs with his friends at the hotel and admitted leaving the hotel with Martinez, but then his story diverged from the prosecution's account. Defendant testified that he accompanied Martinez to see a relative of Martinez's named Wayne or "Wino" who was going to give them drugs.<sup>14</sup> Martinez and defendant met Wino at the Bekins facility.

Once they arrived, Wino gave them drugs. He said he would give defendant more drugs if defendant loaned them his car for the evening. Defendant agreed, so Martinez and Wino—who was driving his own car, despite wanting to borrow defendant's—followed defendant back to defendant's mother's house. Martinez drove off in defendant's car.

The following morning, defendant walked to the vacant house to hang out with Martinez. When he arrived, he saw a black car, which he recognized from the night before as belonging to Wino. Wino's car was in the driveway, and defendant saw his own car in the garage. Defendant found Martinez, who was still

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<sup>13</sup> At defense counsel's request, the court allowed defendant to testify narratively.

<sup>14</sup> Wino did not testify at trial and was never identified.

high, and Martinez confessed that while he and Wino were committing burglaries the night before, Wino had abducted Nicole. Martinez explained that they would need to kill Nicole because she could identify them. After defendant assured Martinez he would “take care of this” for them, Martinez and Wino left in Wino’s car.

Defendant spoke to Nicole, who seemed okay. He told her he was going to take her to a hospital to get her help. Defendant noticed Nicole’s shirt was ripped and took a shirt from the laundry room for her to wear. Then he told Nicole to get in the backseat of his car and hide under the moving blankets he found in the garage. Defendant dropped Nicole off at a cul-de-sac across from Kaiser Hospital and went home.

Two days later, defendant went to the Bekins facility, the park, and the tunnel area to search for his mobile phone. It seems Martinez lost the phone—which had been charging in defendant’s car when he loaned the car to Wino—and suggested it might be at one of the places he went with Wino. Defendant explained that he looked online for news about the abduction because he did not believe Martinez told him everything about it. He decided to leave town because he felt like he could somehow be implicated in the crimes.

## **DISCUSSION**

Defendant contends that “the trial court improperly restricted [his] ability to present impeachment evidence related to the forensic DNA analysis, both in terms of cross-examination of the Government’s expert, and in presenting defense expert testimony which would have contradicted the prosecution’s interpretation of that evidence.” In light of the overwhelming

evidence in this case, we conclude that any error was harmless beyond a reasonable doubt.

**1. A criminal defendant has a constitutional right to present a complete defense.**

“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” (*Chambers v. Mississippi* (1973) 410 U.S. 284, 294.) “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; see *Washington v. Texas* (1967) 388 U.S. 14, 19 [discussing fundamental nature of Compulsory Process Clause].)

A defendant’s “right to present relevant evidence is not unlimited,” however, and may “‘bow to accommodate other legitimate interests in the criminal trial process.’” (*United States v. Scheffer* (1998) 523 U.S. 303, 308.) The standard rules of evidence are one such interest. (*Taylor v. Illinois* (1988) 484 U.S. 400, 410 [“The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence. The Compulsory Process Clause provides him with an effective weapon, but it is a weapon that cannot be used irresponsibly.”].)

A violation of the right to present a complete defense is an error of constitutional magnitude that we assess under *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1759.) Under *Chapman*, we must reverse unless the People “prove beyond a reasonable doubt that the error complained of did not contribute to the

verdict obtained.” (*Chapman*, at p. 24; see *People v. Valenti* (2016) 243 Cal.App.4th 1140, 1165–1166 [discussing People’s burden of proof under *Chapman*].) Because the People have clearly met this high burden, we turn to the issue of prejudice without determining whether the court erred in the first instance.

## **2. The DNA evidence was weak.**

While DNA can often be powerful evidence against a criminal defendant, the DNA evidence in this case was not critical to the prosecution. Other than the DNA found on his steering wheel, defendant’s DNA did not match any of the samples analyzed in this case. The significant quantity of semen found in the Bekins truck came from someone else. The DNA on the paper towel wrapped around Nicole’s underwear also came from someone else, as did the DNA from the white tank top.

As for the Y-STR evidence,<sup>15</sup> Nicole’s hand swab contained partial Y-STR profiles for two or three different men; whether defendant was one of those men was inconclusive. The partial Y-STR profile obtained from Nicole’s face swab was consistent with defendant being a partial contributor, as was the partial profile obtained from her shorts. Yet Y-STR evidence is weaker than typical DNA evidence, and the partial profiles obtained in this case were less persuasive still. The evidence also failed to contradict defendant’s testimony; Nicole could have picked up either sample while defendant was rescuing her in his car.

For these reasons, the prosecutor did not present the DNA evidence as conclusive proof that defendant was the perpetrator.

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<sup>15</sup> Y-STR testing is similar to DNA testing. They differ in that Y-STR testing looks for a portion of DNA found only in men.



In her opening statement, she mentioned the DNA analysis only in passing. In closing, she said the Y-STR analysis was significant because defendant “can’t be excluded as a contributor of that DNA.” And when defense counsel insisted that “DNA, it was everything in this case,” and ably shredded the evidence, the prosecutor disagreed. In rebuttal, she asked the jury, “Do you need it? Do you? Think about the facts of this case.” She indicated that the Y-STR analysis merely corroborated the other evidence and again emphasized the character of the DNA evidence as indicating that “it doesn’t exclude that defendant.”

In any event, although defendant complains that the trial court improperly truncated his questioning of the DNA experts, he was able to elicit the following:

- Y-STR testing was requested because standard DNA testing was “not usable”;
- Y-STR testing does not determine the bodily source of the material tested;
- DNA and Y-STR samples may be transferred through contact with an item of clothing;
- Partial Y-STR profiles are less statistically significant than full profiles—and only partial profiles were obtained in this case;
- Since Y-STR is not individualized, even if you obtain a full profile that “matches” a suspect, you cannot conclude that the suspect’s DNA is present;

- If all men in Los Angeles County were tested, several individuals would likely match the partial Y-STR profile.

In short, the standard DNA evidence was entirely consistent with defendant's testimony—and while some of the Y-STR evidence could have come from defendant, none of it contradicted his story. The jury's verdict in this case demonstrates not that the DNA evidence was unduly persuasive, but rather that defendant's testimony wasn't persuasive at all.

### **3. The other evidence was overwhelming.**

Fundamentally, the jury did not believe defendant—and allowing the defense to ask more questions about the Y-STR or DNA evidence would not have changed that. Even excluding all forms of DNA analysis, defendant's guilt was overwhelmingly demonstrated by victim identification testimony, circumstantial evidence, Nicole's toxicology reports, corroborating witnesses, and defendant's own testimony and statements.

Nicole was very clear about the number of people she encountered that night. A man took her from her bed and brought her to a car. When the driver left, Nicole remained in the car with the man; there was no one else in the car with them. Nicole testified that there was no one else at Bekins, there was no one else in the forest, and there was no one else in the tunnel.

Morgan's testimony corroborates Nicole's account. Martinez returned to the hotel at 3:00 a.m. and told Morgan that defendant had abducted a young girl. Martinez remained with Morgan for the rest of the night, and was still with him the next morning when they saw a news report about the abduction. Taylor joined Morgan and Martinez for breakfast, and they all

went back to the hotel. If Martinez was with Morgan during the assaults, he could not have been attacking Nicole with Wino at the same time. And if Martinez was with Morgan and Taylor that morning, he could not have been confessing to defendant at the vacant house. Defendant's statement to Lugo that he and a friend had gotten high and broken into a house also undermines his story, even as it corroborates Martinez's statements to Morgan.

Even assuming Nicole could have been mistaken about the number of people she encountered, her testimony does not support an inference that the person who released her treated her substantially better than the person who had spent the previous 12 hours assaulting her. To the contrary, the person who released her threatened to post naked photos of her on the internet—photos he could not have known about unless he was with her at Bekins—and to kill her and her entire family. That person had her iPod in the Hello Kitty case, and returned the case, but kept the iPod.

DNA evidence aside, accepting defendant's version of events required the jury to believe that Morgan and Lugo both lied, and that Nicole was assaulted by two people, rescued by a third, and never noticed that there were three different people involved. The story required the jury to believe in a mysterious character named Wino who traded drugs for the use of a second car, and in the existence of a vast law enforcement conspiracy clever enough to manufacture web searches—because defendant “purposely made [his] searches not to include that”—yet not competent enough to create more convincing DNA evidence.

Defendant chose to testify and put his credibility to the test. At the end of the day, the jury was not persuaded.

## **DISPOSITION**

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

STRATTON, 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.