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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. CHARLES EDWARD ALLEN, Defendant and Appellant.	B275519 (Los Angeles County Super. Ct. No. BA422205)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Abzug, Judge. Affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Charles Edward Allen (defendant) appeals from his conviction of assault with intent to commit rape, criminal threats, and attempting to dissuade a witness. He contends that the trial court erred in denying his motions to allow his investigator to examine the crime scene, in excluding demonstrative and impeachment evidence, in admitting evidence of his uncharged violence toward the victim, and in affirming the jail administration's decision to terminate his pro. per. library privileges. Defendant further contends that the trial court abused its discretion in denying his *Romero* motion to dismiss his prior strikes[1]; and that his sentence was cruel and unusual in violation of the Eight Amendment. Defendant also requests that we review the sealed transcript of the in camera hearing on his *Pitchess* motion.[2] We find no merit to defendant's contentions, and after our review of the sealed *Pitchess* transcript, we conclude that the trial court properly exercised its discretion. We thus affirm the judgment.

BACKGROUND

An amended information charged defendant with seven felonies, as follows: count 1, assault with intent to commit a felony (rape) in violation of Penal Code section 220, subdivision (a)(1)[3]; count 2, criminal threats in violation of section 422,

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1 See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

2 See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220 (*Jackson*); Penal Code sections 832.5 and 832.7; Evidence Code sections 1043 through 1045.

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

subdivision (a); counts 3, 4, and 5, attempting to prevent or dissuade a witness in violation of section 136.1, subdivision (a)(2); counts 6 and 7, dissuading a witness from prosecuting a crime in violation of section 136.1, subdivision (b)(2). The information further alleged that defendant had suffered two prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1), and five serious or violent felony convictions within the meaning of the "Three Strikes" law (§§ 667, subd. (b)(j) & 1170.12, subd. (a)-(d).)

A jury found defendant guilty of counts 1, 2, 3, 5, and 7, and not guilty of counts 4 and 6. In a bifurcated trial, the jury found true the prior conviction allegations. On May 18, 2016, the trial court sentenced defendant as a third-strike offender to consecutive terms of 25 years to life in prison as to each of counts 1 and 5, plus an enhancement under section 667, subdivision (a)(1), for a total of 60 years to life. The court imposed concurrent terms of 25 years to life each as to counts 2, 3, and 7; awarded 925 combined days of custody credit; and ordered defendant to pay mandatory fines and fees.

Defendant filed a timely notice of appeal.

Prosecution evidence

Melvin Hamilton (Hamilton) and Yolanda H. were friends, and although she thought of him as her grandfather, they were not related. Yolanda often helped Hamilton in his home, as he was elderly and had difficulty moving around. Sometimes she spent the night. Yolanda met defendant in early November 2013, and about three weeks later, they became sexually intimate. Defendant soon became possessive and obsessive, and Yolanda felt threatened by him. Sometimes defendant would enter Hamilton's house uninvited, and refuse to leave when asked. Although this upset both Yolanda and Hamilton, Hamilton did

not tell defendant to leave, because defendant had shown a pistol to Hamilton, which frightened him.

In late November, defendant took Hamilton's truck, ostensibly to fix the brakes, but did not return it, despite Yolanda's repeated requests for its return. Finally Yolanda rode in the truck with defendant and begged him to return the truck. In response, defendant drove on the freeway at speeds over 100 miles per hour, and told Yolanda he was going to kill her. He stopped when she pretended to call the police, and ran away with the key to the truck when he saw police officers approaching. The officers detained defendant and returned the key.

Yolanda continued to have contact with defendant because she was afraid of him and did not know how to get out of the relationship. Sometime in December, Yolanda falsely told defendant she was pregnant, thinking it would keep him from hitting her. Since it did not stop him, she later told him she had miscarried, hoping in vain that he would feel sorry for her and leave her alone.

Yolanda and Hamilton recounted three incidents which occurred at Hamilton's home. During the first one, soon after the truck incident, defendant was angry, came into the house, took out a semiautomatic handgun, chambered a bullet, pressed it to the center of Yolanda's forehead, and said he was going to kill her. During the second incident, in December 2013, defendant accused Yolanda of being with different men, called her a liar, said she had misled him, and then jumped on her. When she fought back, he calmly went to the kitchen. He returned with a 10-inch butcher knife, knocked Yolanda off the couch onto the floor, and while holding the knife near her stomach, said he was going to kill her and Hamilton. When defendant finally left the house, he took the knife with him.

The third incident led to the charges in this case. Defendant was in custody in January and February 2014. When he was released from jail, Yolanda told him to stay away and to leave her alone, but defendant refused. When Yolanda arrived at Hamilton's home in the late afternoon on March 5, 2014, she saw defendant follow Hamilton's friend Lester to the porch. Yolanda told defendant he could not enter, but defendant pushed her out of the way and followed Lester inside while asking Lester whether he was "fucking" Yolanda. She told defendant to leave, but he refused. Lester left, leaving Yolanda, Hamilton and their friend Marie still inside. Yolanda asked defendant several times to leave, but he continued to refuse. Yolanda begged him to get out, but defendant replied, "No, I'm not going anywhere until I kill everybody in here." Defendant told the others stay in the kitchen while he argued with Yolanda for about 40 minutes in the living room, keeping his hand in his pocket. Both Yolanda and Hamilton were afraid defendant had his gun with him.

Defendant allowed Marie to leave to smoke a cigarette. Yolanda then ran toward the back of the house, intending to lock herself in the bedroom, but defendant caught her. Defendant then pushed Yolanda into the bathroom, locked the door, grabbed her by the throat with one hand, and pushed her up onto the counter and slightly into the sink. Then, while pressing her face against the mirror, defendant said he was going to rape her. With his free hand, he pulled off her underwear, pulled down her elastic-waist skirt, and punched her in the area of her vagina. He then loosened his belt and unzipped his pants. After Hamilton pounded on the bathroom door, defendant opened it and stood there with his belt loose and pants unzipped.

As Yolanda pushed past defendant to run into the bedroom, defendant calmly said to Hamilton: "You think this is something? This is nothing. Wait until me and my homies [or

posse] come back and spray your house. We don't care about anybody here. This is nothing compared to what you're gonna get." Defendant then followed Yolanda into the bedroom, where he pushed her onto the bed. As defendant came toward her, she kicked him back each time he came toward her. After she stood up and jumped onto defendant's back, defendant laughed and swung her off. Yolanda then ran out of the house, screaming.

Los Angeles Police Officers Michael Digangi and Abraham Estrada were dispatched to the area after a 911 caller reported hearing a woman screaming. Upon their 5:29 p.m. arrival, Officer Estrada heard screaming, and then saw Yolanda leaving Hamilton's house. She appeared to be very frightened. She was crying hysterically, hyperventilating, and trembling, making it difficult for her to tell what had happened until after defendant came out of the house. While Officer Degangi spoke to defendant a short distance away, Yolanda told Officer Estrada that defendant had tried to rape her and had said he was going to kill her. Officer Estrada signaled to Officer Degangi to detain defendant, but when the officer moved toward him, defendant jumped backwards, spun around, and ran into Gage Avenue, a four-lane highway. The officers identified themselves as police officers, commanded him to stop, and gave chase into the lanes of traffic. Defendant was struck by a car after he ran directly into its path, causing him to fly about 10 feet into the air. Defendant got up almost immediately and resumed his flight, but soon fell to the ground. The officers then took him into custody.

Defendant telephoned Yolanda three times from jail, and excerpts of the recorded conversations were played for the jury. During the conversations Yolanda repeatedly told defendant that he had tried to rape her and had threatened her life. At no time did defendant either deny or respond to the statement, instead he spoke of something else. In the third conversation defendant

asked Yolanda whether she intended to come to court, and whether she wanted to see him in jail for the rest of his life. Defendant asked several times, "Could you do this?" He then said, "I want to be around my family. Can I be around my family?" Following a redacted portion of the recording, defendant and Yolanda engaged in the following colloquy:

> Defendant: "Look. All I ask is to let me be with my family."
>
> Yolanda: "[unintelligible] . . . I ain't got nothing to do with your family."
>
> Defendant: "If you go to court, you're stopping it."
>
> Yolanda: "So what?"
>
> Defendant: "So you do."

The jury heard other recorded telephone conversations defendant had in the jail with unidentified persons. In one, he told his "homey" that he did not try to rape "her" and asked him to find her and tell her to come to court to say that. In another, defendant asked "Kitty" to tell Yolanda to let him go, and that Yolanda had got him jailed by saying that he attempted to rape her.

Defense evidence

Hamilton's landlord, Oscar Pineda, testified that he was at the house on March 3, 2014, collecting the rent, and that he saw Yolanda enter the house looking upset, around noon. He added he could not have been there between 5:00 and 6:00 p.m., due to his work schedule. Pineda remembered seeing a couple arguing on the corner, but he could not identify them.

William McLaughlin, a digital forensic examiner, recovered text messages from Yolanda's cell phone, as well as photographs

of Yolanda with defendant's family. In one text sent to defendant on December 16, 2013, Yolanda wrote, "So tell me do you want me. I love you." On December 23, Yolanda texted defendant, "Baby I'm sorry. . . . I want your baby . . . Thank you for loving me . . . ." On January 4, 2014, Yolanda texted: "it why fuck my life up make it more stressful now u fuk my life my daughters all u can think about is a relationship u help my baby leave and u still."

Defendant did not testify.

DISCUSSION

I. Crime scene examination

Defendant contends that the trial court erred when it denied his three motions to allow his investigator to examine the crime scene. In particular, defendant contends that the height of the bathroom sink and the dimensions of the bathroom and bedroom would have demonstrated that it was physically impossible for defendant to have picked up Yolanda, place her in the sink, and then remove her underwear and skirt, all with one hand. Defendant contends that the error deprived him of possible impeachment evidence, and had the additional consequence of violating his federal constitutional rights to present a defense. (See *People v. Partida* (2005) 37 Cal.4th 428, 435 (*Partida*).)

Defendant argues that the judgment must be reversed because the trial court mistakenly believed that it lacked discretion to order Hamilton to provide access to his home, and thus failed to reach the merits of defendant's motions. Defendant infers the court's allegedly mistaken belief from the following comments made at the time defendant's third motion was denied: "I cannot order him to let somebody into the house." However, the first and second motions had been heard by another judge, who made no such comment. Regardless, assuming both judges

were mistaken in believing they had no authority to grant defendant's motions, and thus failed to exercise discretion, we reject defendant's suggestion that reversal is automatic. A failure to exercise discretion may itself be an abuse of discretion. (*People v. Crandell* (1988) 46 Cal.3d 833, 861.) However, reversal is not required in a noncapital case where the court's ruling would not have been an abuse of discretion. (*Id*. at pp. 864-865.)

Defendant contends that *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22 (*Bullen*), held at pages 26 and 27 that the trial court has "broad discretion" to allow access to a private home which is alleged to be the scene of a crime. *Bullen* did not use the word "broad" to describe the court's discretion, and it did not hold that trial courts have the authority or jurisdiction to allow such access.[4]

All persons have a constitutional right to be free from unreasonable searches and seizures; thus the value of the information sought by the accused must be balanced against the legitimate interests of third parties. (*Bullen*, *supra*, 204 Cal.App.3d at p. 26.) To do so, the *Bullen* court applied general discovery law to balance the competing interests, noting that in general, "'an accused's motion for discovery must be timely, must describe the information sought with reasonable specificity, and must present a plausible justification for production of the items requested. [Citations.] Although the accused need not

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[4] The court noted that the issue of the court's authority to make such an order implicated the competing fundamental interests of the resident's right to privacy in her own home and "defendant's right to a fair trial and a defense informed by all relevant and reasonably accessible information"; however, the court declined to resolve that issue, as the defendant had not made an adequate showing of need for such discovery. (*Bullen*, *supra*, 204 Cal.App.3d at pp. 25-26.)

demonstrate the admissibility at trial of all requested items, his showing must be more than speculative and must indicate that the requested information will facilitate ascertainment of the facts and promote a fair trial. . . . [Citations.]' . . . [¶] Hence, '[a]n accused . . . is not entitled to inspect material as a matter of right without regard to the adverse effects of disclosure and without a prior showing of good cause . . . .'" (*Ibid.*)

The first of defendant's three motions was filed, heard, and denied on August 5, 2014. The minutes state no reason for the denial, and as respondent notes, the reporter's transcript of the hearing of that date has not been included in the record on appeal. We also observe that the appellate record contains no reporter's transcript relating to the second motion, filed September 16, 2014. Also the minutes of that date do not mention the motion or any ruling. As the trial court's orders are presumed correct, it is defendant's burden, not only to present a record adequate for review, but also to affirmatively demonstrate error. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564-565 (*Denham*).) In general, no statement of reasons is required in denying a discovery request. (*Kennedy v. Superior Court* (2006) 145 Cal.App.4th 359, 368-369.) We thus presume from the silent record that the trial court properly exercised its discretion, unless defendant "carries his burden of showing the trial court abused its discretion because the trial court could have had *no* reasonable basis for its ruling. (*Ibid.*; see *People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Defendant has not met his burden.

With regard to the first motion, the need for the discovery was stated in defendant's declaration, as follows: "3. The victim witness testified to facts in the preliminary hearing that are factually impossible based on the size and dimension of the bathroom, hallway and bedroom; [¶] 4. The instant request is critical in establishing the victim witness made up her testimony

from whole cloth; [¶] [and] 5. The instant request will establish the state's investigation was sloppy, and this defense will be critical in resolving this case." The motion did not describe the testimony that was alleged to be factually impossible, and it alleged no facts that might support the conclusion that any of Yolanda's testimony was factually impossible. Further, defendant has made no showing on this record that the trial court understood that he was referring to the one-handed lifting of Yolanda to the sink. Thus the first motion failed to demonstrate good cause for the discovery.

The second motion, filed September 16, 2014, was made on the ground that the prosecutor had not cooperated in obtaining the homeowner's consent to access, and that access was needed to develop exculpatory evidence showing that the victim committed perjury in downplaying the sexual side of her relationship with defendant. The motion also alleged that photographs were necessary to establish the inaccuracy of the victim's version of events. As this showing was even more conclusory and devoid of facts than the first, we presume that the trial court properly balanced the value to defendant of the information sought against the homeowner's privacy, and found that defendant had failed to show good cause. Defendant has not met his burden to show otherwise.

The third motion, filed April 8, 2015, was in the form of an order granting access to the crime scene for the purpose of taking measurements and photographs. It was accompanied by defendant's declaration, in which the need for the discovery was described in language identical to that in the declaration supporting the first motion, without any additional facts that might support the conclusion that Yolanda's testimony was factually impossible. No additional facts were provided in the hearing on the motion. Further, there is no indication in the

record that the trial court understood that defendant was referring to the one-handed lifting of Yolanda to the sink. Defendant gave no explanation for the nearly seven-month delay in filing a third motion, or how long he waited after Hamilton refused to consent to inspection by the defense investigator. Thus, as defendant's motion for discovery was speculative and failed to describe the information sought with reasonable specificity, it did not "'present a plausible justification for production of the items requested. [Citations.]'" (*Bullen*, *supra*, 204 Cal.App.3d at p. 26.)

Assuming the judges erroneously believed they had no discretion to grant the motions, defendant's failure to show good cause would justify denying them. Moreover, there can be no reversal for an abuse of discretion unless the defendant demonstrates a miscarriage of justice. (*Denham, supra*, 2 Cal.3d at p. 566.) A miscarriage of justice occurs when a result more favorable would have been reasonably probable absent the alleged error. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.)

Defendant has failed to demonstrate that if the two judges had understood their authority, there was any probability that the motions would have been granted. Nor has defendant demonstrated that having to rely on police photographs and the absence of precise measurements, prevented defendant from proving that lifting Yolanda or removing her underwear and skirt with one hand, was impossible. Defendant apparently did not attempt to ascertain whether bathroom counter heights were ordinarily within a standard range, as he did not ask the court to take judicial notice of a range.[5] Further, Yolanda testified that

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[5] Defendant had other sources of information, as well. Hamilton was called for conditional examination one year prior to

the counter was about four feet high. Thus, if lifting Yolanda with one hand that height were in fact impossible, the lack of measurements did not prevent defendant from proving it. Moreover, as defendant has not caused the photographs to be transmitted for review, he has not met his burden to demonstrate that the photographs would depict an abnormally high bathroom counter. (See *Denham, supra*, 2 Cal.3d at pp. 564-565; *Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291.)

Defendant contends that because the denial of discovery adversely affected his right to cross-examine Yolanda, prejudice must be assessed under the standard of *Chapman v. California* (1967) 386 U.S. 18, 24, to determine whether the error was harmless beyond a reasonable doubt. However, as defendant did not raise a constitutional claim below, and as he failed to demonstrate that the trial court erred under state law, he has not met the prerequisite to a review of his constitutional claims. (See *Partida, supra*, 37 Cal.4th at p. 435.)

II. *Pitchess* motion

The trial court granted defendant's *Pitchess* motion for the discovery of all material in the personnel files of Officers Digangi and Estrada, regarding any allegations of falsehood or dishonesty, including allegations of planting or fabricating

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trial, three weeks after defendant's first discovery motion was denied and just over two weeks before he filed the second motion. Defendant did not ask Hamilton for an estimate of the height of the bathroom counter; nor did he later ask Oscar Pineda, his own defense witness, who was the owner of the house. Moreover, defendant has never explained how the height of the counter would prevent lifting Yolanda with one hand, such as by showing that he was too short, and Yolanda was too tall and heavy. Defendant's prison records reflect that he is five feet eight inches tall. The record does not reflect Yolanda's height or weight.

evidence. The court denied the motion as to a third officer. After conducting an in camera review, the trial court ordered the production of the complainant's name and last known contact information in three incidents relating to Officer Estrada and in one incident relating to Officer Digangi.

Since defendant requested that we review the sealed transcript of the *Pitchess* hearing for possible error, to which respondent had no objection, we reviewed the trial court's in camera examination and its determination for an abuse of discretion. (*Jackson, supra*, 13 Cal.4th at pp. 1220-1221.)

The custodian of the records was sworn and produced all complaints found in the officers' personnel and other files. As the court examined and described each document produced before stating reasons for ordering or denying its production, we find the sealed transcript sufficient to review the trial court's determination. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) We conclude that the trial court properly exercised its discretion in determining that the documents produced complied with the scope of the *Pitchess* motion, and in ordering disclosure of information regarding the four incidents. No abuse of discretion appears.

III. Exclusion of evidence

A. Standard of review

Defendant asserts three evidentiary errors: the exclusion of demonstrative evidence with the use of a mannequin; the exclusion of evidence suggesting Yolanda made a prior accusation of rape; and the admission of evidence of uncharged violent conduct toward Yolanda. He contends that the court's rulings resulted in a violation of his constitutional rights to confrontation, to present a defense, and to due process.

"We review a trial court's evidentiary rulings for abuse of discretion. [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522,

597.) Whenever "a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide 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.]" (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) "'The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham, supra*, 2 Cal.3d at p. 566; see Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354.)

As defendant did not raise a constitutional claim below, he must first demonstrate that the trial court erred under state law to be entitled to review of his constitutional claims. (See *Partida, supra*, 37 Cal.4th at p. 435.)

B. The mannequin

Defendant, who defended himself at trial in pro. per., brought a motion in limine to use a mannequin during his cross-examination of Yolanda. He explained to the court that he would personally manipulate the mannequin to demonstrate that it would have been impossible to pick Yolanda up, place her on the counter, and remove her skirt with one hand. Defendant contends that this was proper impeachment evidence.

The prosecutor objected on the ground that since defendant would manipulate the mannequin, the demonstration would amount to testimony. The trial court agreed it could be misleading. However, as respondent points out, the trial court did not deny the motion, but deferred ruling, allowing defendant the opportunity to renew it after the cross-examination of Yolanda. The court stated that it would "make a final

determination at that point. But . . . there are just too many variables, . . . that make the use of a mannequin potentially misleading to the jury rather than helpful. . . . [S]ee how it goes during the cross-examination, and I will revisit the issue, and then of course you have the right to testify yourself if you feel that your -- your cross-examination was ineffective to represent your view of what happened." The prosecution then called and examined Yolanda, and defendant cross-examined her, but he never renewed his motion; nor did he make a new offer of proof or press for a final ruling. Defendant thus failed to preserve the issue for appeal. (*People v. Holloway* (2004) 33 Cal.4th 96, 133.)

Regardless, had the trial court denied the motion, we would find no error, as defendant's proposed demonstrative evidence was inadmissible and had no probative value. "Mannequins may be used as illustrative evidence to assist the jury in understanding the testimony of witnesses or to clarify the circumstances of a crime. [Citations.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1291.) However, demonstrative evidence is inadmissible unless it is relevant and will not confuse or mislead the jury. (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1387-1388.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) "'Evidence' means testimony . . . or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." (Evid. Code, § 140.) "It is undisputed that at trial evidence may include a nonverbal answer to a question, including a physical demonstration or reenactment of an incident." [Citations.] (*Emerson Electric Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1107; see also *People v. Buttles* (1990) 223 Cal.App.3d 1631, 1639.) Thus, as defendant would be the person presenting the demonstration, he would be presenting the

evidence. However, every witness who gives evidence must do so under oath and subject to cross-examination. (Evid. Code, §§ 710-711.) Unsworn testimony cannot constitute "evidence" within the meaning of the Evidence Code. (*People v. Lee* (1985) 164 Cal.App.3d 830, 841.) Thus, the demonstration would have no tendency in reason to prove or disprove any disputed fact, as it would not be "evidence"; and as such, would most certainly be misleading and confusing for the jury. Under such circumstances, the trial court's exclusion of the demonstration is not an abuse of discretion.

C. Alleged false accusation

Defendant contends that the trial court erred in excluding evidence that Yolanda had previously made a false accusation of rape against another man.

"A prior accusation of rape is relevant to the complaining witness's credibility, but only if the accusation is shown to be false. [Citation.] (*People v. Winbush* (2017) 2 Cal.5th 402, 469, citing *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.) Here, when defendant asked the trial court to allow the evidence, the trial court asked why the evidence was relevant. Defendant replied that Yolanda had told him that another man had attempted to rape her and had threatened her. However, he admitted to the court that she had never reported the crime, and that he had no evidence that her statement was false, as he never asked her whether it was true. Thus, there was no prior charge, true or false, and no evidence of falsity.

The court found the evidence irrelevant, and explained: "If you had evidence -- reliable evidence that she had in the past accused people of attempted rapes when they didn't occur, that's one thing. But what you're telling me is she told you that it had happened once before. She didn't say it didn't happen. She said it did happen, but she didn't report it." The trial court acted well

within its discretion to exclude such evidence under Evidence Code section 352. (See *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097; *People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424.)

D. Prior acts of violence

Defendant contends that the trial court abused its discretion in admitting evidence of the following three prior uncharged incidents: (1) taking Hamilton's truck and holding a gun to Yolanda's head; (2) accusing Yolanda of infidelity and holding a knife to her stomach; and (3) hitting Yolanda in the face and pushing her from the couch onto the floor.

"'Evidence that a defendant committed crimes other than those for which he is on trial is admissible when it is logically, naturally, and by reasonable inference relevant to prove some fact at issue, such as motive, intent, preparation or identity. [Citations.] The trial court judge has the discretion to admit such evidence after weighing the probative value against the prejudicial effect. [Citation.] . . .' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 667; Evid. Code, § 1101, subd. (b).)

As defendant was charged with criminal threats and assault with intent to commit rape, the victim's reasonable and sustained fear is an element of criminal threat. (§ 422; *People v. Garrett* (1994) 30 Cal.App.4th 962, 966-967.) "Assault with intent to commit forcible rape requires an intent to and an unlawful attempt to have sexual intercourse by force, violence or fear of bodily injury, without consent of the victim. [Citations.]" (*People v. Dixon* (1999) 75 Cal.App.4th 935, 942-943; §§ 220, 261, subd. (a)(2).) The victim's fear is relevant to prove the defendant's intent to overcome the victim's will by means of force or fear. (See *People v. Solis* (1985) 172 Cal.App.3d 877, 885-886.) The victim's knowledge of the defendant's prior violent conduct is relevant and admissible in establishing her fear and the reasonableness of the fear. (See *People v. Wilson* (2010) 186

Cal.App.4th 789, 808 [criminal threat]; *People v. Garrett, supra*, at pp. 966-968 [rape].) Thus, defendant's uncharged acts of violence against Yolanda were relevant to prove a fact in issue, her fear.

Defendant does not contend otherwise, but claims that the probative value of the evidence was outweighed by the risk of undue prejudice. Defendant argues that the prior acts had little probative value not only because they occurred on a different day, but the current crimes did not involve use of a weapon. Defendant fails to explain how a prior act of violence is insufficient to create fear because it was committed on a different day, or how the prior use of a weapon would have little effect on the victim's state of mind simply because no weapon was used on this occasion. Defendant has merely posited a different opinion on the probative value of the evidence, which does not demonstrate an abuse of discretion. (See *People v. Clair* (1992) 2 Cal.4th 629, 655; *People v. Stewart* (1985) 171 Cal.App.3d 59, 65.)

E. No prejudice

Defendant has not demonstrated that the trial court's rulings resulted in a miscarriage of justice, but merely concludes that a more favorable verdict would have been reasonably probable. With regard to the prior violent acts, defendant's conclusion serves only to demonstrate that the evidence had substantial probative value. Regardless, other evidence of Yolanda's fear was also compelling. When Officers Digangi and Estrada arrived, Officer Estrada heard Yolanda screaming, and when they tried to speak to her, she appeared to be very frightened; she was crying hysterically, hyperventilating, and trembling. She told the officers that defendant had tried to rape her and had said he was going to kill her.

Defendant's behavior provided strong evidence, not only of the reasonableness of Yolanda's fear, but also of his guilt.

Evidence of flight immediately after the commission of a crime is relevant to show consciousness of guilt. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1054-1055.) When one of the officers began to detain defendant, he fled until a car struck him. Also after his arrest defendant telephoned Yolanda three times from jail, and many times during the conversations Yolanda accused defendant of trying to rape her and of threatening her life. Defendant's failure to deny the accusations, as well as his evasive responses, were evidence of his guilt. (See *People v. Riel* (2000) 22 Cal.4th 1153, 1189; Evid. Code § 1221.) Finally, the jury found beyond a reasonable doubt that defendant had attempted to dissuade Yolanda from testifying against him. Defendant does not challenge the evidence supporting that verdict. Attempts to suppress evidence show a consciousness of guilt. (See Evid. Code, § 413; *People v. Lee* (1994) 28 Cal.App.4th 1724, 1740 [exhorting friends to lie].)

Defendant's evidence on the other hand, was weak. Hamilton's landlord testified that he was not at the house at the time of the incident. Yolanda's texts indicating a continuing affection for defendant were sent three months before the incident.

We thus discern no reasonable probability of a more favorable result had the trial court ruled in defendant's favor on the three evidentiary issues. And as defendant has failed to demonstrate that the trial court erred under state law, we do not review his constitutional claims. (See *Partida, supra*, 37 Cal.4th at p. 435.)

IV. Pro. per. library privileges

A. Defendant's contentions

Defendant contends that when the jail conducted an administrative hearing at which it revoked his pro. per. library privileges, it failed to afford him the required procedural due

process, and that the trial court erred in refusing to overturn the jail's decision. In particular, defendant contends that the jail failed to allow him to present witnesses or their statements at the administrative hearing, did not give him a copy of the administrative decision, and failed to have the hearing conducted by a neutral magistrate, rather than a deputy sheriff. Defendant also contends that the trial court's ruling was unsupported by the record.

B. Due process requirements and standard of review

Although the Sixth Amendment right to counsel includes an implied right of self-representation, the right to act as one's own attorney is not without limits. (*People v. Butler* (2009) 47 Cal.4th 814, 827, citing *Faretta v. California* (1975) 422 U.S. 806, 821, 834; *Indiana v. Edwards* (2008) 554 U.S. 164, 171-172.) "*Faretta* gives [defendants] the right to make a thoroughly disadvantageous decision to act as their own counsel, so long as they are fully advised and cognizant of the risks and consequences of their choice. [Citations.] Those risks may include custodial limitations on the ability to prepare a defense in jail." (*People v. Butler, supra*, at p. 828; see also *Ferrel v. Superior Court* (1978) 20 Cal.3d 888, 891-892.)[6] Although there

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[6] The trial court warned defendant when he was granted pro. per. status that he would be required to follow the rules. Defendant also signed a "*Faretta* Waiver," which lists extensive warnings of the disadvantages of self-representation. Among the warnings defendant initialed to signify his understanding were the following: "F. I understand that if I am in jail, . . . I will be provided no more access to the law library than any other inmate who acts as his own attorney, and that access is limited. . ." and, "L. I understand that misconduct occurring outside of court may also result in restriction or termination of my right to act as my own attorney. I also understand that acting as my own attorney will not shield me from disciplinary actions within the jail, and

is no constitutional right to pro. per. privileges, once they have been granted they may not be arbitrarily withheld, and any substantial limitation on those privileges may be imposed only after the jail has afforded defendant procedural due process. (*Wilson v. Superior Court* (1978) 21 Cal.3d 816, 824-828 (*Wilson*).)

In *Wilson*, the California Supreme Court adopted the following minimum due process requirements enunciated by the United States Supreme Court in *Wolff v. McDonnell* (1974) 418 U.S. 539, 570-571 (*Wolff*), for prison discipline resulting in the loss of custody credit: "(1) an opportunity to appear before the decision-making body, (2) written notice of the charge against him at least 24 hours in advance of the hearing, (3) an opportunity to present witnesses and documentary evidence if doing so will not be unduly hazardous to institutional safety, (4) an impartial hearing body, and (5) a written statement of the evidence relied on and of the reasons for the disciplinary action taken." (*Wilson*, *supra*, 21 Cal.3d at pp. 825-826, fns. omitted.) "Except in an emergency situation, the privileges may be restricted only after such notice and hearing; in emergency situations, the notice and hearing should be provided as soon as practical but in no event more than 72 hours after initial restriction of the privileges. [Citation.]" (*Id.* at p. 827.)

"Because of the hazards to institutional interests," the right of confrontation and cross-examination is not required, but would be left "to the sound discretion of correctional officials." (*Wilson*, *supra*, 21 Cal.3d at p. 826.) And contrary to defendant's assertion that *Wilson* adopted or enunciated a requirement that the hearing body consist of a "neutral magistrate," it did not. Indeed,

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that I will be subject to the same disciplinary measures as all other inmates for misconduct occurring in the jail."

the court noted in *Wolff,* where the hearing body consisted of "the associate warden custody, the correctional industries superintendent, and the reception center director, governed by regulations setting forth standards," the United States Supreme Court declined to find it "insufficiently impartial to satisfy the due process clause. [Citation.]" (*Wilson*, at p. 826, fn. 10, quoting *Wolff, supra*, 418 U.S. at pp. 570-571.)

Good cause for restriction or termination of pro. per. jail privileges include violation of jail rules, or a demonstrable need to place the defendant in administrative segregation due his threat to jail security. (*Wilson*, *supra*, 21 Cal.3d at pp. 821-822.) Some provision must be made for court review of the jail's evidentiary hearing, and for the defendant to appear before the court. (*Wilson, supra*, 21 Cal.3d at p. 827.) The trial court's findings are reviewed for substantial evidence. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1126 (*Moore*).) As in any substantial evidence review, we examine the record in the light most favorable to the trial court's decision to determine whether it discloses "credible evidence of solid value upon which a reasonable trier of fact *could* have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 711.)

C. Good cause

Substantial evidence of good cause for the jail's termination of library privileges was supplied by Los Angeles Sheriff Custody Assistant Donald Hinton (Hinton), who was employed as the jail's pro. per. liaison, and was the hearing officer in this case.[7] He testified that on January 3, 2015, a security check of defendant's

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[7] Custody Assistant Hinton did not testify that he was a Sheriff's deputy, as defendant claims.

cell disclosed a prisoner made nunchuck.[8] The weapon appeared to be a striking device, fashioned from some sort of legal material or law literature. It consisted of two solid bars of tightly rolled paper fastened with a rope between the two bars.

The month prior to the discovery of the nunchuck, when defendant was supposed to be in the law library, Deputy Palacios found him instead roaming in an area for which he had no authorization. When the deputy investigated, defendant refused to be searched, and a physical struggle ensued. Hinton reviewed the deputy's written report and interviewed him. The previous June, after refusing to go to another jail facility, defendant made an implied threat against Deputy Aldana as a warning to the deputy of his "caliber," and to show what he was capable of doing. Defendant told Deputy Aldana that he had stabbed another officer. After a report and formal hearing, defendant was reprimanded and placed in the discipline module.

When the nunchuck was discovered, defendant was deemed a security threat and safety risk, and was notified that a "*Wilson* hearing" would be conducted. The possession of a prisoner-made weapon constitutes a threat to jail security, and thus may provide the jail with good cause to limit pro. per. privileges. (*Moore, supra*, 51 Cal.4th at pp. 1124-1126.) In *Moore*, a sharpened rod was found in the defendant's possession after it had been removed from the typewriter he had been using at the jail's law library. (*Id*. at p. 1124.) The California Supreme Court upheld the trial court's finding of good cause to terminate the defendant's library privileges. (*Id*. at p. 1126.) Here, as in

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[8] The Oxford English Dictionary defines nunchuck (or nunchaku) as a "Japanese weapon consisting of two hardwood sticks joined together by a chain, strap, or silk cords." (See OED Online, 2017, Oxford University Press <http://www.oed.com/view/Entry/129179; and Entry/261034>.)

Moore, the weapon appeared to have been fashioned with material obtained in the law library. Thus, the jail authorities could reasonably conclude that defendant posed a security threat due to his possession of such a weapon, particularly in light of his prior discipline for leaving the library without authorization, physically resisting a deputy, and threatening another deputy.

Defendant argues that the record does not support the jail's finding of good cause because he testified at the trial court's review hearing that he kept the nunchuck only in order to stop the rats, roaches, and "feces water" from coming into his cell.[9] Hinton testified that he had considered the statements of defendant's three witnesses, inmates who were housed in the same area as defendant, who claimed that the nunchuck was not a weapon, but rather a door stopper to keep out rats and roaches. Nevertheless, in his opinion, the nunchuck was a weapon and usable as a striking device. The trial court viewed photographs of the nunchuck and found that it did not appear to be a device for blocking the bottom of the cell gate. The court concluded it was a weapon. Defendant is suggesting that his testimony should have been given greater weight than Hinton's opinion and the trial court's observation of the photographs. We may not do so, as a substantial evidence inquiry is a deferential one. (*People v. Fuiava*, *supra*, 53 Cal.4th at pp. 711-712.) Thus, we do not reweigh the evidence, nor do we resolve conflicts or issues of credibility. (See *People v. Johnson* (1980) 26 Cal.3d 557, 576-

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[9] Defendant also explained that he had refused to go to Wayside (another jail facility) because there was no pro. per. module there. He claimed that the day he left the library, he was looking for snack vending machines, and that the deputy who searched him touched him inappropriately, and then grabbed him and choked him when he asked to speak with the sergeant. He denied telling a deputy that he had stabbed an officer.

578.) As we have found substantial evidence supports the trial court's finding, we accept its determination that the nunchuck was a weapon.

D. Procedural Due process

Hinton also testified that after defendant was notified about the "*Wilson* hearing," the hearing was rescheduled several times due to jail lockdowns or other unrelated situations. Nevertheless defendant was always given 24 hours notice of each hearing. Defendant admitted to the trial court that he received notice before the hearing. Hinton gave defendant notice on February 10 for the February 11 hearing, where Hinton heard the testimony of the reporting deputies and considered the statements of defendant's witnesses given in interviews prior to the hearing.

There is no merit to defendant's contention that he was not allowed to present witnesses on his behalf, and he has provided no authority for his suggestion that he was entitled to require their appearance or the admission of their written statements at the hearing. Hinton interviewed defendant's witnesses on February 11, but they would not give written statements, so he considered their verbal statements at the hearing. Hinton interviewed them again on February 12, and persuaded them to give written statements on that date. "'Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence. . . .' [Citation.]" (*Wilson, supra*, 21 Cal.3d at p. 826, quoting *Wolff, supra*, 418 U.S. at p. 566.)

Defendant's claim that he was not given notice of the administrative decision is equally without merit. Defendant's library privileges were revoked February 11, 2015. The

prosecutor represented to the court that on February 13, defendant told the court that his status had been revoked, and defendant neither denied it nor testified to the contrary. On February 23, defendant mailed his written objection to the jail ruling to the court. He has cited no authority that would require that he be given a copy of a written decision, or that reversal would be required despite actual notice.

We conclude that the trial court did not err in finding that defendant had been afforded the required procedural due process.

E. Electronic research

Defendant contends that the jail should have provided access to electronic research. Defendant did not raise this issue below, and it does not appear that defendant ever asked the jail for internet services, or that internet services are available to inmates in some secure setting outside the library, or that such services can safely be made available. Like respondent, we have found no published authority suggesting that inmates are entitled to state-funded, electronic research when they have violated jail rules, and defendant has cited none.

Nevertheless, defendant suggests that providing electronic research would have avoided denying access to *all* legal materials he needed to prepare for trial and defend himself, which violated his constitutional rights to self-representation and due process. He contends that this denial requires reversal per se. The authorities on which defendant relies are inapt, as they did not involve the denial of library privileges due to security concerns, as was the case here. (See, e.g., *McKlaskle v. Wiggins* (1984) 465 U.S. 168; *People v. Dent* (2003) 30 Cal.4th 213.) Defendant had no right to whatever means he might have wanted to prepare his defense, without regard to the jail's institutional and security concerns. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1000-1001.) "'[T]he Sixth Amendment requires only that a self-represented

defendant's access to the resources necessary to present a defense be *reasonable under all the circumstances*.' [Citation.] In assessing the reasonableness of the access provided under all the circumstances, '[i]nstitutional and security concerns of pretrial detention facilities may be considered in determining what means will be accorded to the defendant to prepare his or her defense.' [Citation.]" (*Moore*, *supra*, 51 Cal.4th at p. 1125.) A jail's "interests in effective management of detention facilities can justify restrictions on the inmates' conditions of confinement" and "'[l]imitations on or suspension of a defendant's pro. per. privileges . . . may be necessary in certain circumstances as a result of a defendant's misconduct in jail.'" (*Id*. at p. 1126.)

When defendant's request to represent himself was granted, the trial court appointed a defense investigator, a legal runner, and standby counsel; as well as granting pro. per. funds and telephone access. Under such circumstances, defendant was not denied all means to prepare his defense; thus, he is not entitled to reversal without showing error and resulting prejudice. (*People v. James* (2011) 202 Cal.App.4th 323, 335.) Defendant has not demonstrated error, and makes no prejudice argument.

After upholding the jail's decision, the trial court asked defendant whether he understood that he would have no access to the library or books, and gave him the opportunity to have counsel appointed. Defendant said he understood and wished to continue to represent himself. He did not request counsel. No prejudice appears.

V. *Romero* motion

Defendant contends that the trial court abused its discretion when it refused to dismiss his prior strikes in the interest of justice pursuant to *Romero* and section 1385. He also contends that his sentence was cruel and unusual.

The Three Strikes law limits a sentencing court's discretion to strike a prior serious or violent felony conviction. (*People v. Carmony* (2004) 33 Cal.4th 367, 377-378 (*Carmony*).) The trial court must consider such factors as the nature and circumstances of the defendant's present felony and prior serious or violent felony convictions, as well as his background, character, and prospects, to determine whether he may be deemed outside the spirit of the Three Strikes Law, in whole or in part. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

Our review of the trial court's discretion is deferential, and will not be disturbed unless the ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Williams*, *supra*, 17 Cal.4th at p. 162; *Romero*, *supra*, 13 Cal.4th at p. 530.) It is the defendant's burden to show that the trial court's decision was irrational or arbitrary. (*Carmony, supra*, 33 Cal.4th at pp. 377-378.) The failure to strike constitutes an abuse of discretion only in limited circumstances such as where the court was unaware of its discretion or applied impermissible factors, or in the extraordinary case where the appropriate factors "manifestly support the striking of a prior conviction and no reasonable minds could differ." (*Id*. at p. 378.) The trial court's ""'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.]" (*Id*. at p. 377.)

Here, the trial court issued a five-page written decision in which it thoroughly considered each factor outlined in *Williams, supra*, 17 Cal.4th at p. 161.) With regard to the prior crimes, the court acknowledged that the most recent was 1993, but noted that defendant received a sentence of 392 months in prison for the very serious crime of shooting into an occupied building. The

court found that it was reasonable to assume that the suspension of criminal activity between 1993 and the current crimes was attributable to his imprisonment. The court further noted that defendant was on parole at the time he committed the current crimes. The court concluded that defendant was "precisely the kind of revolving door recidivist for which . . . the three strikes law was designed."

Describing the current crimes, the court stated that defendant assaulted Yolanda with the intent to rape her, and terrorized the elderly Hamilton, "who was so traumatized by the defendant's threats that he broke down in tears as he was recounting them from the witness stand." The court further noted that defendant "punctuated" his criminal behavior with "repeated efforts to dissuade Yolanda from cooperating with law enforcement." The court observed that the Probation Department had found no mitigating circumstances, and that although defendant did not kill or permanently injure anyone, "the victims showed that they suffer humiliation and fear of the defendant to this day."

With regard to defendant's background, character, and prospects, the trial court found no credible evidence that defendant had family support or job skills, and had spent a substantial part of his adult life in custody. The court considered defendant's age, and quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 345, held that middle age alone did not remove a defendant from the spirit of the Three Strikes law: "Otherwise, those criminals with the longest criminal records over the longest period of time would have a built-in argument that the very factor that takes them within the spirit of the Three Strikes law . . . takes them outside the law's spirit."

Defendant does not contend that the trial court was unaware of its discretion, applied impermissible factors, or failed

to consider some of the factors set forth in *Williams*. Instead, defendant simply argues that several factors favored striking the prior convictions. Defendant notes that the strike crimes were remote in time, as they occurred 20 to 29 years earlier; however, he says nothing of the circumstances of those crimes, or the fact that defendant, while still on parole, resumed his criminal activity. With regard to the current crimes, defendant notes that the victim did not *initially* seek medical treatment, and that he used no weapon. Defendant also expresses his opinion that none of the crimes was "unusually violent," and the assault with intent to commit rape was brief and not so egregious, as compared to other (uncited) cases. Despite defendant's attempt to minimize them, assault with intent to commit rape and criminal threats are violent acts. (See *People v. Nettles* (2015) 240 Cal.App.4th 402, 409 [assault with intent to commit rape]; *People v. Solis* (2001) 90 Cal.App.4th 1002, 1023, 1025 [criminal threats].) Defendant's attempts to dissuade his victim from testifying reveals a character lacking in both remorse and compassion. Finally, defendant notes that he was employed by a painting company at the time of his arrest and was 52 years old at the time of sentencing, but does not contend that he matured as he aged, or that there was a prospect of future employment.

We conclude that defendant's citation of isolated facts punctuated by his own perception of the crimes serves only to demonstrate that defendant disagrees with the court. He fails to show that the circumstances "manifestly support the striking of a prior conviction and no reasonable minds could differ." (*Carmony, supra*, 33 Cal.4th at p. 378.) Defendant has not demonstrated an abuse of discretion.

We also reject defendant's contention that his sentence constitutes cruel and unusual punishment under the Eighth Amendment to the United States Constitution simply because

the term imposed is longer than his life expectancy. First, defendant has forfeited the issue, as he did not raise it in the trial court. (See *People v. Burgener* (2003) 29 Cal.4th 833, 886-887.) Further, defendant has not supported his contention with any reasoned argument, and we discuss only those contentions that are sufficiently developed to be cognizable. (*People v. Freeman* (1994) 8 Cal.4th 450, 482, fn. 2.) Defendant simply cites the Constitution and *Solem v. Helm* (1983) 463 U.S. 277, 292. That case is inapposite, as it sets forth the factors to consider in a proportionality analysis, which defendant has not attempted here. Moreover, punishment is not presumed to be disproportionate to the crime of an adult defendant in noncapital cases, even where the defendant is of advanced age. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 995-996.) We thus decline to address the issue further.

DISPOSITION

The judgment is affirmed.

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.