

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUE CLARK,

Defendant and Appellant.

B224510

(Los Angeles County
Super. Ct. No. MA036250)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa M. Chung, Judge. Reversed in part and affirmed in part as modified.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, James William Bilderback II and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Marque Clark appeals from a judgment entered after a jury convicted him of multiple sex crimes against a child under 14 years of age and more than 10 years younger than him.¹ He contends that the trial court committed reversible error when it declined to suppress his confession (statements he made after he took a polygraph examination and was told he failed it).² Clark argues that his confession was involuntary and its admission—and the admission of other evidence “tainted” by the involuntary confession—was error. We disagree and affirm the judgment as modified, after correction of sentencing errors.

BACKGROUND

1. Evidence at Trial

The crimes

On August 29, 2006, 10-year-old Kirsten B. and her father went to the mall. Kirsten’s father worked at the mall as a construction manager. When they arrived at the mall, Kirsten bought a ticket for the movie Barnyard and went inside the theater showing that movie. Her father went to his office.

Not long after Kirsten started watching the movie, she received a text message on her cell phone from her father. He asked her to meet him at the mall’s front office so she could attend a birthday party happening there. Kirsten exited the theater while the movie was still playing. As she left, she saw a man standing at the back of the theater.

When Kirsten reached the front office, she learned that the birthday party had been cancelled. She headed back to the theater. As Kirsten approached the doors to the theater where Barnyard was playing, she saw a man walking around. He was dressed like the man who had been standing at the back of the theater when she left. According to the investigating officer on the case, Kirsten stated that the man was wearing a white shirt with some kind of logo on it and dark blue jogging pants with white stripes on them. At trial, Kirsten identified the man walking around outside the theater as Clark.

¹ The age difference between victim and defendant is an element of some of the crimes.

² No evidence was admitted regarding the fact that Clark took a polygraph examination.

Clark grabbed Kirsten's wrist, picked her up and said, "'Come on. Let's go.'" Kirsten started kicking and screaming. Clark took Kirsten into an empty theater where the movie Step Up was showing. As he carried her down the aisle of the theater, she "was calling him names" and telling him to put her down. Clark put his hand over her mouth. As Kirsten tried to fight Clark off, one of her fake fingernails fell off.

Clark carried Kirsten through a door behind the movie screen and into a small hallway with stairs which led to a fire escape. Kirsten took her cell phone out of her pants pocket and started to call her father. Clark took the phone from her. He "guided" her into a corner and touched her chest.

Then Clark moved Kirsten away from the corner and had her lie face-down on the stairs. As Kirsten lay on her stomach, Clark took off her shoes, socks, pants and underwear, and pulled her shirt over her head. Clark asked Kirsten her name. She told him it was Maria. He asked her mother's name. Again, she gave a false name. He asked her where she lived. She told him she did not know because she was "still young." Clark responded, "'I thought so.'" Kirsten continued to talk, but Clark told her to stop. He told her what would happen if she did not stop talking: "He said, 'I'm gonna snap your neck. And I'm gonna cut you with my pocket knife.'" Kirsten did not see a knife, but she feared that Clark had one. She stopped talking.

Kirsten found it hard to understand Clark when he talked. She thought he sounded like her fourth grade teacher. According to the investigating officer, Kirsten compared Clark's voice to that of a former teacher who had "a very thick . . . Nigerian accent."

Clark put his penis inside Kirsten's anus. He moved his penis against her for what "seemed like a long time" to Kirsten. She estimated that it was 30 minutes. When Clark was finished, he told Kirsten to stand in the corner and count to 30. She did. When she turned around, Clark was gone. Kirsten's socks, pants, underwear and cell phone also were gone.

Kirsten picked up her shoes and tried to open the door that led back to the theater where the movie Step Up was showing. She could not open it. She ran up the stairs and

into another hallway. She “bang[ed] on the door” that led to the next theater, but the door would not open. She continued to run until she found a door that led out of the mall.

Kirsten exited the mall wearing only her shirt. A mall employee who was taking a break outside saw Kirsten come through the exit. The employee noticed that Kirsten was crying and trying to pull her shirt down to cover “her bottom.” Realizing there was “a problem,” the employee approached Kirsten and asked her what had happened. Kirsten said she had been raped. The employee walked Kirsten back inside the mall and into a nearby store, where someone called security and Kirsten’s father. Police officers responded to the mall.

Kirsten went to the hospital and had a sexual assault examination. The nurse who conducted the examination took photographs of Kirsten and her injuries. Kirsten had an abrasion on her back and “some patches of redness like she had had contact . . . with a hard surface.” She had a tear on the bottom of her vaginal opening which was consistent with her vagina being opened forcibly and penetrated. She had more redness in this area than normal. Her vaginal opening was “inflamed.” Kirsten also had an abrasion on her anus which was “consistent with some kind of pulling, tugging” and penetration. Kirsten complained of pain and burning when she urinated. She was uncomfortable when she sat because her “bottom hurt.” The nurse took swabs from Kirsten’s fingernails, some scratches on her chest,³ and her genital and anal areas.

The investigation

On August 29, 2006, the same day as the attack, Kirsten worked with a sketch artist to create a drawing of her attacker. She thought the sketch prepared was “just okay.” She described her attacker as having a mustache with a few gray hairs in it.

On August 30, 2006, Kirsten looked at two six-pack photographic lineups. Clark’s picture was not included in either lineup. In one of the two lineups, Kirsten

³ According to the investigating officer, Kirsten stated that she sustained the scratches on her chest during a gymnastics practice two days before the incident. She stated that the abrasion on her back was from the attack.

circled a picture and stated that the man looked like the attacker. At trial, Kirsten testified that the man whose picture she circled was not the attacker.

On September 1, 2006, Kirsten looked at a third six-pack photographic lineup. Clark's picture was not included. Kirsten circled a picture of a man who "kind of looked like" the attacker, but she did not state that he was the attacker.

The Los Angeles County Sheriff's Department decided to visit Clark's home as part of its investigation, after it developed a list of residents "of interest" who lived within a two-mile radius of the mall. One of the residents on that list was Clark's father. Clark lived with his father in a home located about a half-mile from the mall. Clark was 31 years old at the time of the attack.

On September 8, 2006, deputies Steven Saylor and Denise McCormick went to Clark's home to speak with his father. Clark answered the door. Saylor asked Clark if his father was home. Clark said that his father was at work. Clark asked the deputies if they were there to inquire about the rape at the mall. McCormick asked Clark why he had brought up that incident. Clark stated that on Tuesdays, which were his days off from work, he would go to the movies at the mall. Saylor asked Clark if he went to the movies on August 29, 2006, and Clark said that he did.

Clark explained that he went to the mall alone on that day and he saw the movie *Idlewild*, which started at 10:10 a.m. and ended at about 12:10 p.m. After the movie, he went to the food court at the mall and ate lunch at McDonald's. Then he rode his bicycle home. Clark told the deputies that he was wearing a white t-shirt and black jeans on that day when he went to the mall.

Saylor told Clark that there was a surveillance video taken at the theater on August 29, 2006. Clark stated that the deputies would be able to see him standing in front of the theater where *Idlewild* was being shown. Saylor asked Clark if he went into any other theater that day. Clark said he did not. Saylor asked Clark if he "noticed any unusual activity at the mall" or at the movie theater that day. Clark said he did not.

McCormick asked Clark if he had worn a mustache recently. Clark stated that he had been shaving his facial hair for the past two months. Saylor noticed "numerous

hairs” spread out along Clark’s upper lip which had not been shaved and which appeared to be longer than “a single day’s growth.”

It appeared to Saylor and McCormick that Clark had a speech impediment. According to Saylor, “every once in a while,” Clark’s “pronunciation wasn’t clear.” Saylor did not believe that Clark had an accent. It did not seem to Saylor that Clark was mentally impaired or of below-average intelligence.

Saylor asked Clark if he would give a DNA sample. Clark agreed, and Saylor took a swab sample. McCormick took a photograph of Clark while Clark was standing outside on the porch of his home.

The photo of Clark that McCormick took on September 8, 2006 was included in a “mug book” containing about 50 photographs. A couple of weeks after the attack Kirsten looked at the mug book, but she did not identify Clark as the attacker. She identified another man.

On September 13, 2006, Detective Ty Lauderdale and Sergeant Joseph Acevedo went to Clark’s home. They spoke with Clark’s father about his whereabouts on August 29, 2006, and asked if he would give a DNA sample. Clark’s father agreed, and the officers took a swab sample.

As Lauderdale and Acevedo spoke with Clark’s father in the foyer, Lauderdale looked up and saw Clark upstairs looking down at them. Clark turned away and went into a room. Shortly thereafter, Clark came down the stairs carrying a backpack. He walked quickly past the officers. Sergeant Acevedo asked Clark if he was going to work. Clark answered affirmatively as he continued to walk away quickly. Clark walked out the door and closed it behind him. Lauderdale could see Clark standing outside a window next to the door. Clark was pressed against the window. It appeared to Lauderdale that Clark was listening to their conversation with his father.

When the officers left Clark’s home, they went to the Burger King restaurant where Clark worked. Clark was not there. They gave the DNA sample they collected from Clark’s father to the investigating officer, Detective Timothy O’Quinn. They told O’Quinn about Clark’s “odd behavior.”

Detective O'Quinn obtained and reviewed surveillance video from the movie theaters and other areas in the mall from the day of the attack. The videos were played for the jury.⁴ The videos are time-stamped and show Clark's movements at various points throughout the morning and afternoon on August 29, 2006. Clark was wearing a white shirt and dark-colored pants.⁵ The theater video shows Clark purchasing a movie ticket at 10:17 a.m. A minute later he walked toward the theater where the movie Idlewild was showing. At 12:21 p.m., he walked toward the theater where the movie Barnyard was showing.⁶ The video shows Kirsten purchasing a movie ticket at 12:28 p.m. At 12:32 p.m., she entered the theater where Barnyard was showing. At 12:48 p.m., Clark exited the theater where Step Up was playing and paced the hallway outside the theater. The camera did not capture footage of Kirsten leaving the theater to go meet her father, but the video shows Kirsten returning to the theater area at 1:08 p.m. Then the video shows a person in a white shirt moving toward the theater where the movie Step Up was playing. Cameras outside of stores in the mall captured footage of Clark walking toward the food court area of the mall at 1:22 p.m.

On September 18, 2006, Detective O'Quinn and Deputy Scott Mitchell went to Clark's home to speak with him. They made an audio recording of their conversation with Clark. A redacted version of that recording was played for the jury. O'Quinn asked Clark questions about his trip to the movies on August 29, 2006. Clark stated that he went to the movie theater at about 10:00 a.m., and saw the movie Idlewild. Next he went into the theater where the movie Step Up was showing. There were a few people in that theater. The movie was over and the credits were rolling. He left and went into the theater where the movie Talladega Nights was showing. He stayed there briefly and then

⁴ We requested from the trial court and received all of the exhibits which were admitted into evidence at trial. We reviewed all of the exhibits.

⁵ In the video, it does not appear that Clark's pants have stripes on them.

⁶ During an interview with Detective O'Quinn, Clark acknowledged that he was the man depicted in the surveillance video from August 29, 2006, who was shown walking toward the theater where Barnyard was showing at 12:21 p.m.

went into the theater where Barnyard was showing. After he left that theater, he “stayed in the hallway for awhile.” Then, at about 12:15 p.m., he walked over to a McDonald’s restaurant in the food court at the mall. After he left McDonald’s, he went “[s]traight home.”

O’Quinn asked Clark if he knew the “type [of] person” they were looking for in the case and if had seen any news or newspaper reports about the case. Clark stated that he had read about it in the newspaper. O’Quinn explained that they were looking for a man who might have been wearing running or jogging pants and a white shirt with an emblem or something like it on the front. O’Quinn asked Clark if he had seen a man matching that description at the theater. Clark stated that when he was watching the movie Idlewild, a man wearing a white t-shirt and dark-colored pants came into the theater. The man left the theater before Clark did.

Clark agreed to accompany the officers to the crime lab for a longer interview.

The interview at the crime lab

O’Quinn drove Mitchell and Clark to the crime lab in an unmarked car. Clark sat in the front passenger seat and Mitchell sat in the back. The conversation between the three men was audio recorded. A redacted version of that recording was played for the jury. The officers asked Clark about his family, where he had gone to college, how he liked his job at Burger King, what movies he had seen recently, and what hobbies he had. Clark answered all of their questions. He told them that he had played quarterback on his high school football team. He also told them that he liked to write short stories and was working to get them published. The conversation also included discussion about current events.

The interview at the crime lab lasted just over four hours. It was audio and video recorded. A redacted version of the audio and video recording was played for the jury.

Mitchell interviewed Clark alone at first. At the start of the interview, he informed Clark that he was not in custody; he had not been arrested or detained; and he could leave if he wanted because he was there voluntarily. He asked Clark to sign a form acknowledging these facts.

Clark initially denied that he had done anything to Kirsten. He told Mitchell that he had never had sexual intercourse before. Later in the interview, Mitchell asked Clark if he felt bad about what he did, and Clark answered affirmatively. Mitchell asked Clark what he would do differently if he could go back in time. Clark stated that he “would definitely try to avoid it.” Mitchell asked Clark if it would have helped to go home and masturbate. Clark agreed that it probably would have helped him avoid the situation.

Mitchell suggested that Clark probably wanted to apologize to Kirsten. Clark agreed. Mitchell asked Clark what he would say to her. Clark stated that he would tell Kirsten that he is “not that type of person to do something like that” and he did not “know what [he] was thinking.”

Mitchell asked Clark if he thought he scared Kirsten. Clark responded, “Probably, yeah.” Mitchell suggested that Clark had bad thoughts in his head when he saw Kirsten. Clark agreed that he did.

Mitchell asked Clark: “Do you feel bad about banging your penis up against her vagina or touching up against her vagina?” Clark responded: “Yes, I do.” Mitchell asked Clark how far he put his penis into Kirsten’s vagina. Clark responded: “The truth, I don’t think it went in.”

Clark initially told Mitchell that he had thrown away all of Kirsten’s property, including her cell phone. Later, when Detective O’Quinn joined the interview, Clark admitted that he had kept Kirsten’s cell phone and stored it outside his house. He told the officers where they could find it.

Search warrant and post-arrest investigation

On September 18, 2006, the same day as the interview at the crime lab, Detective O’Quinn executed a search warrant at Clark’s home. From Clark’s bedroom, the officers seized about 50 ticket stubs for movies shown at the mall, including one for the 10:05 a.m. showing of Idlewild on August 29, 2006, and six newspapers with front-page articles about the rape at the mall. Outside of Clark’s home, the officers found a cell phone in the location where Clark said it would be. To verify that it was Kirsten’s cell

phone, O'Quinn used his own cell phone and dialed the phone number that Kirsten had given him. The cell phone that was found outside of Clark's home rang.

On September 19, 2006, Deputy John Mayfield interviewed Clark in a holding cell at the sheriff's station. Before starting the interview, Mayfield advised Clark of his rights. Mayfield asked Clark if he understood his rights and if he wanted to talk. Clark paused before he responded. He inquired about what Mayfield planned to ask him. Mayfield told Clark that he wanted to talk to him about the items found in his bedroom when the search warrant was executed. Clark agreed to talk. In response to Mayfield's questions, Clark admitted that the ticket stubs and newspapers were his. He told Mayfield that he had the newspapers because "he was curious about the sexual assault at the movies."

Mayfield asked Clark if he had any questions. In response, Clark stated that "the victim wanted to have sex." He explained that he approached her in the hallway of the movie theater and asked her if she wanted to have sex, and she agreed to have sex with him. Clark stated that they walked into an empty theater, he took off her clothes, they had sex and then they walked off in "separate directions."

Mayfield asked Clark how the victim was able to leave if Clark had kept her clothes. According to Mayfield, Clark "said that he thought that he had done something wrong. He got nervous and decided to keep her clothes."

Mayfield told Clark he did not believe that a 10-year-old girl would agree to have sex. Clark responded that he thought Kirsten was 13.

Sometime after Clark's arrest, Kirsten was watching the news with her mother and she saw a report about the case. The news program broadcast a photograph of Clark. Kirsten told her mother that she did not think the person in the photograph looked like the person who had attacked her.

Results of DNA testing demonstrated that Clark was a "possible contributor" to the sample taken from Kirsten's chest. The testing did not establish that Clark was "a perfect match" because the criminalist who performed the testing did not have a full DNA profile from the sample taken from Kirsten's chest. The criminalist determined that

one in 2.1 million black persons, one in 55 million white persons and one in 81.9 million Hispanic persons could be a contributor to that sample. Clark's father was excluded as a contributor to the DNA sample taken from Kirsten's chest. Clark was excluded as a contributor with respect to the DNA samples taken from other parts of Kirsten's body.

A deputy sheriff from the crime lab compared Clark's fingerprints with fingerprints found on Kirsten's cell phone. He determined that Clark's fingerprints were on the phone.

2. Verdicts and Sentence

The jury found Clark guilty of forcible rape (Pen. Code, § 261, subd. (a)(2);⁷ count 1), forcible lewd or lascivious act upon a child under 14 years of age (§ 288, subd. (b)(1); count 2), sodomy of a person under 14 years of age and at least 10 years younger than the defendant (§ 286, subd. (c)(1); count 3), aggravated sexual assault of a person under 14 years of age and at least 10 years younger than the defendant (§ 269, subd. (a)(1); count 4), kidnapping to commit rape (§ 209, subd. (b)(1); count 5), and criminal threats (§ 422; count 6).

With respect to counts 1-3, the jury found true the special allegation that the kidnapping of the victim substantially increased the risk of harm to her, within the meaning of section 667.61, subdivisions (a) and (d). With respect to counts 1 and 3, the jury found true the special allegation that Clark kidnapped the victim to commit the crime, within the meaning of section 667.8, subdivision (b).

The trial court sentenced Clark to indeterminate and determinate terms. On count 2, the court sentenced Clark to 25 years to life and stayed the sentence on the kidnapping enhancement. On count 4, the court sentenced Clark to a consecutive term of 15 years to life. The court stayed the indeterminate term on count 1. On count 5, the court sentenced Clark to a life term to be served concurrently with the sentence on count 2. The total indeterminate term is 40 years to life.

⁷ Further statutory references are to the Penal Code.

On count 3, the trial court sentenced Clark to the high term of eight years plus a consecutive 15-year term for the kidnapping enhancement under section 667.8, subdivision (b). On count 6, the court sentenced Clark to a consecutive term of eight months (one-third the mid-term). The court stayed the determinate term on count 1. The total determinate term, to be served before the indeterminate term, is 23 years and eight months.

DISCUSSION

Voluntariness of Statements

Clark contends that any incriminating statements he made at the crime lab were involuntary, and the trial court prejudicially erred in admitting them into evidence. He also contends that the statements he made to Detective Mayfield the day after his polygraph examination and the evidence recovered at his home were “tainted” by the involuntary statements he made at the crime lab and should have been suppressed as well.

I. Proceedings Below

This case was filed in November 2006. In February 2008, Clark’s counsel declared a doubt about his mental competence. Counsel believed there was information indicating that Clark was “developmentally disabled.” At least four doctors interviewed and evaluated Clark and prepared written reports in this case during 2008. All of the doctors determined that Clark was competent to stand trial.⁸ Based on the reports, the trial court ruled that Clark was competent to stand trial.

A. The motion

On October 9, 2009, Clark filed a motion to suppress the results of his polygraph examination, the statements he made at the crime lab, the evidence recovered at his residence and the statements he made to Detective Mayfield at the jail after his arrest. Clark contended that all of this evidence was obtained in violation of *Miranda*.⁹

⁸ We have received these reports from the trial court and reviewed them.

⁹ *Miranda v. Arizona* (1966) 384 U.S. 436.

Clark argued that “he was entitled to his *Miranda* rights at the beginning and the conclusion of the polygraph examination, and all statements regarding his involvement in the crime are not admissible for the failure to administer these rights.” He also argued that “all evidence seized at his home based upon the failure to advise him of his rights . . . is fruit of the poisonous tree” and must be suppressed. With respect to the statements to Detective Mayfield, he asserted that, even assuming Detective Mayfield read him his rights, “there are no facts that he knew what his rights were” or “that he knowingly and intelligently waived said rights.”

Clark filed a supplemental memorandum of points and authorities in support of his motion to suppress, in which he argued that all of his statements were involuntary and must be suppressed on that basis as well. He asserted that Deputy Mitchell and Detective O’Quinn used “coercive, inquisitorial tactics” at the crime lab “to wrench a confession from Mr. Clark against his will.” Clark cited a lot of case law about the improper use of threats and promises of leniency, but did not specifically describe the “tactics” he believed Deputy Mitchell and Detective Quinn had used.

The prosecution did not file a written opposition to the motion to suppress.

B. The hearing

1. Recording of the polygraph examination and interview

The day before the hearing, the prosecution provided the trial court with a disc containing audio and video of Clark’s four-hour polygraph examination and interview at the crime lab, and a written transcript of the statements on the disc. At the outset of the hearing, the trial court stated that it had listened to the disc in its entirety. The court marked the disc as Court’s Exhibit A.¹⁰ The recording was authenticated at the hearing and admitted into evidence. The following is a summary of pertinent information from

¹⁰ We requested and received Court’s Exhibit A from the trial court. We have reviewed the audio and video on the disc.

We granted Clark’s request for judicial notice of the 215-page transcript of Clark’s polygraph examination and interview at the crime lab.

the recording. This recording includes the portions of the interview at the crime lab which were played for the jury.

At the beginning of the interview, Deputy Mitchell confirmed that Clark was taking the polygraph examination voluntarily. Mitchell asked Clark to review and sign a consent form stating that fact. Mitchell explained to Clark that it was okay if he felt nervous because being nervous would not cause him to fail the examination. In response to Mitchell's questions, Clark stated he had slept for six hours the night before, had not consumed any alcohol in the past 24 hours and had eaten breakfast that morning. During the preliminary part of the interview, Mitchell and Clark talked about sports, Clark's job at Burger King and Clark's family. Mitchell also asked Clark about the stories he wrote, the books he read and movies he enjoyed.

Mitchell asked Clark if he was a good person. Clark answered affirmatively. Mitchell also asked Clark if he believed that sometimes good people make mistakes. Again, Clark answered affirmatively. Mitchell agreed that "quite often good people do make mistakes." Mitchell stated that a person can be honest even if that person is not perfect. Mitchell asked Clark if his mother taught him "that honesty is an extremely important thing in being a good human being." Clark confirmed that his mother taught him that.

Mitchell inquired about Clark's prior conversations with law enforcement. Clark told Mitchell that none of the other officers had asked him if he had done anything to the victim.

Mitchell asked Clark: "[D]id you do anything to that girl?" Clark responded: "No." Mitchell asked Clark what he would say to the victim's mother if she accused Clark of having sex with her daughter. Clark stated that he would tell her she had the wrong person. He added, "I would never do such a thing."

Mitchell asked Clark what should happen to a person who puts something in a young "girl's vagina in the back of a movie theater." Clark responded that if it was a first-time offense, and the man had a clean record, the man should be punished but not too harshly. Clark believed that if the man had assaulted another girl in the past, then

“he’s sick in the head” and “need[s] to be put away.” Mitchell suggested that counseling might help the first-time offender, and Clark agreed. Clark again denied that he had inserted anything into the victim’s vagina.

Mitchell asked Clark to think about why a man might have sex with a young girl in the back of a movie theater. Clark indicated that the man might have had an urge, but did not know it until he acted upon it.

Mitchell stated that he would review the examination questions with Clark before they started the polygraph test. Mitchell explained to Clark how a polygraph test works, and how it indicates that someone is lying. Mitchell told Clark: “If you did do what they’re talking about, don’t take today’s polygraph test.” Clark asked Mitchell what would happen if he did not take the test. Mitchell responded: “Nothing happens to you.” But Mitchell suggested that if Clark declined to take the test, it would probably make the detective think that Clark was the person who did it. Mitchell assured Clark that he was going to give him “a nice, good, solid, clean, fair test.”

Mitchell asked Clark if he wanted a drink of water. Clark declined, and said he felt fine. Mitchell confirmed that Clark had had an opportunity to use the restroom before the interview. Mitchell inquired about Clark’s health. Clark stated that he took medication for a short-term memory problem.

Mitchell told Clark that they were going to do a “practice run,” meaning that Mitchell would ask Clark the “exact same questions” that were going to be on the test. One of the questions was: “Regarding inserting objects into that girl’s vagina, do you intend to answer each question truthfully?” Clark asked for clarification on the definition of the word “inserting.” He told Mitchell that he did not believe that a man inserts his penis into the vagina “just by bumping into it.”

Clark told Mitchell that he was embarrassed to be discussing this topic because he was 31 years old and he was “a virgin.” He added, “So I wouldn’t know about that stuff.” Mitchell revised the question. Instead of asking about inserting objects into the girl’s vagina he would ask about touching the girl’s bare vagina. Clark denied that he touched the girl’s vagina. He stated that he was an honest person.

Before the test, Clark went to the restroom. Mitchell remained in the interview room.

During the test, Mitchell asked Clark: “Prior to this year, did you ever lie to anyone?” Clark responded: “No.” Clark also denied that he had ever touched the victim’s bare vagina.

After the test was completed, Mitchell told Clark that he knew Clark was a good person. He also told Clark that he failed the test, and the reason he failed the test is because he “did touch that girl.” Mitchell continued: “I’m not worried that you touched that girl. Does that make sense? That’s not what I’m concerned about. [¶] What I’m concerned about is this: Do you feel sorry about what you did, and is it going to happen again?”

We will not summarize here the incriminating statements that Clark made to Mitchell during the interview regarding his remorse for what he did, because they are set forth above in the section of the opinion discussing the evidence that the jury heard at trial.

Mitchell asked Clark if he could return Kirsten’s property to her. In response, Clark asked if he was “going to be placed under arrest.” Mitchell told him, “there is no arrest here,” and the interview continued.

Mitchell asked if Clark had ever assaulted a girl before. Clark stated that this was his “[f]irst time.” Clark reiterated that if he could go back, he would leave the theater without assaulting Kirsten.

Mitchell again asked Clark if he could return any of Kirsten’s property. Clark stated that he threw it all away. Mitchell indicated that he believed Clark was not telling him everything. Mitchell stated: “The good person will step out from the shadows and tell the truth. You know you did it, I know you did it, I’m not upset about it, but you need to learn that it can’t happen again[.]” Clark responded: “It won’t happen again.”

Mitchell told Clark that they were going to take a break. He asked Clark if he wanted a glass of water. Clark said he was not thirsty. Mitchell stated that the detective

wanted to talk to Clark. Clark responded: "Okay. So I -- I failed the test?" Mitchell reiterated that Clark failed the test. Mitchell left the interview room.

Detective O'Quinn entered the room and interviewed Clark. He asked Clark to explain to him how the assault occurred. Clark did not tell him anything about the assault at that point. O'Quinn told Clark that he knew that Clark had failed the test and that Clark had assaulted the victim. At some point, Mitchell reentered the room and stated that both he and the detective knew that Clark had done it.

O'Quinn asked Clark: "Realistically, Marque, all I'm trying to do now is figure out is this a guy that I need to worry about doing this again, or is this a guy who made a one-time mistake?" Clark responded: "Yeah, I know, but I'm -- I'm saying that -- am I going to be placed under arrest for this?" O'Quinn told him: "What I'm going to tell you is this right now, I would not lie to you and tell you there's not going to be repercussions. There's going to be repercussions for this. There is. Okay? How could we say there's not going to be repercussions to a situation like this? We're talking about a 10-year-old girl. Okay?" Clark answered O'Quinn's questions about how the assault occurred.

O'Quinn asked Clark if he could help them by explaining what happened to the victim's property. Clark stated that he threw away the victim's clothes and cell phone. O'Quinn told Clark that he knew that someone had turned on the phone during Labor Day weekend. Clark denied that he did that. Clark said that he threw away the phone the same day the assault occurred.

O'Quinn asked Clark to sign a form giving consent for a search of his home. Clark complied.

Toward the end of the interview, O'Quinn told Clark he did not believe that Clark had thrown away Kirsten's cell phone. Clark admitted that he had brought the phone inside his house a few times and then left it outside. He told the officers where they could find the phone outside his house. He also admitted that he had turned the phone on and off three times. Clark explained that he kept Kirsten's clothes for three or four days and then threw them away.

Shortly thereafter, O'Quinn placed Clark under arrest.

2. Testimony of officers

The prosecution called Detective Mayfield, Detective O'Quinn and Deputy Mitchell to testify at the hearing on Clark's motion to suppress on March 2, 2010.

Detective Mayfield testified first. He interviewed Clark at the Lancaster jail. He did not record the interview. Prior to the interview he advised Clark of his *Miranda* rights. Mayfield did not read the rights. He gave them from memory. Mayfield asked Clark if he understood his rights and if he wanted to talk to Mayfield. There was a pause before Clark responded. Clark's response was a question. He asked Mayfield what he wanted to talk about. Mayfield explained that he wanted to talk about items found during the search of Clark's home. Clark stated that he would talk to Mayfield.

Mayfield stated that his interview with Clark lasted 30 to 40 minutes. Mayfield did not prepare a statement for Clark to review. Mayfield testified that he did not threaten Clark or make him any promises during the interview. Mayfield did not perceive that Clark was having difficulty understanding the questions or that Clark had "lower than average intelligence." Clark did not complain about anything during the interview.

Detective O'Quinn, the investigating officer on Clark's case, testified next. As set forth above, O'Quinn and Deputy Mitchell (the polygraph examiner) went to Clark's home on September 18, 2006, and spoke to him about his visit to the movies and the mall on August 29, 2006. O'Quinn testified that Clark was a "person of interest" based on surveillance footage which appeared to show him at the movie theater. The officers showed Clark and his stepmother a surveillance photograph from the theater. Both identified Clark as the man in the photo.

O'Quinn stated that he and Mitchell asked Clark if he wanted to take a polygraph examination. Clark's stepmother, who was present when the officers were questioning him, told Clark she thought it was "a good idea" for him to take the polygraph. Clark agreed to take the examination. O'Quinn stated that he did not threaten Clark, nor was Clark promised anything, prior to the polygraph examination and interview.

O'Quinn explained that the officers offered Clark a ride to the crime lab and Clark accepted. Clark sat in the front passenger seat of the unmarked car. The officers were wearing plain clothes. As discussed above, the three men talked during the drive about "general things," such as "what college [Clark] had attended, what books he liked to read, a couple of world events that were in the news, movies." Clark told the officers he liked to write short stories. Clark told the officers that he had completed the 11th grade in high school and had attended "L.A. College." It took about 15 minutes to get to the crime lab from Clark's home.

O'Quinn testified that when they arrived at the crime lab, which is in a different building from the sheriff's station, Deputy Mitchell took Clark into an interview room. O'Quinn went into an adjacent room and watched the polygraph examination and interview on a closed circuit television. After the polygraph examination, O'Quinn also interviewed Clark. The officers made an audio and video recording of the entire polygraph examination and the interviews by Mitchell and O'Quinn. At no point was Clark locked in the interview room. When Clark took a bathroom break, he went alone. He was not escorted to the restroom by an officer.

O'Quinn stated that Clark was not given *Miranda* rights during the polygraph examination/interview. O'Quinn learned that Clark had failed the polygraph examination, but he did not make the decision to arrest Clark at that time. O'Quinn made the decision to arrest Clark at the end of the interview when Clark admitted that he had kept the victim's cell phone and told the officers where they could find it. O'Quinn explained: "When he gave me the location where I could find that cell phone, I then felt that we had the correct person who committed this crime."

As set forth above, O'Quinn asked Clark to sign a waiver for the search of his home prior to the conclusion of the interview. O'Quinn testified that he did not advise Clark that evidence recovered from the search could be used against him. O'Quinn could not state "with certainty" whether the officers would have found Kirsten's cell phone if they had not conducted the interview with Clark at the crime lab. O'Quinn prepared the search warrant after the interview. He stated that he received the results of the DNA

testing later the same week, indicating that Clark's DNA "matched" DNA taken from the victim's body.¹¹

Deputy Mitchell was the final witness to testify at the hearing. He administered the polygraph examination. Before he began the test, he asked Clark to sign a consent form.¹² He observed Clark read and sign the form.

The consent form states that Clark was not in custody at the time of the polygraph examination, the examination was voluntary, and Clark was "free to terminate [the] examination at any time." Clark initialed the form in eight places and signed his name at the bottom.

Mitchell stated that one of the control questions on the polygraph examination was whether Clark had ever lied to anybody in his life. Mitchell tried to elicit a "no" answer to this question by trying to get Clark "to portray [himself] as being a truthful and honest person." Mitchell explained: "[T]here is a certain amount of pressure that you do apply on someone to get them to say no to those questions. And the reason being . . . is because if he's a truthful person regarding the relevant issue, you want him to be more concerned about those control questions or comparison questions." Mitchell testified that there were "two key relevant questions" in the polygraph examination: (1) "Did you touch that girl's bare vagina?" and "Did you touch that girl's bare vagina in Palmdale?"

Mitchell explained that, after reviewing the charts from the examination, he formed the opinion that Clark was being deceptive when he responded to questions about whether he had touched the girl's vagina.

Mitchell testified that he discussed the possibility of counseling with Clark "to help to minimize the whole entire situation" so that Clark would feel more comfortable talking to him.

¹¹ As discussed above, the DNA testing demonstrated that Clark was a "possible contributor" to the sample taken from Kirsten's chest. The testing did not establish that Clark was "a perfect match."

¹² The trial court marked the consent form as Court's Exhibit B. We have reviewed this exhibit.

Near the conclusion of the hearing on Clark's motion to suppress, the prosecutor provided the trial court with a disc containing audio of the interview at Clark's home and in the car on the way to the crime lab on September 18, 2006. The court marked the disc as Court's Exhibit C.¹³ The recording was authenticated and admitted into evidence at the hearing. This recording includes the portions of the interview at Clark's home and in the car which were played for the jury.

3. Trial court's ruling

The trial court ruled on the *Miranda* issue first. The court explained that, the fact Clark submitted to a polygraph test and was told that he failed it, did not necessarily mean that he was in custody and needed to be given *Miranda* warnings. The court found that the polygraph examination was voluntary. Clark had acknowledged this verbally and in writing when he signed the consent form.

The court looked at the totality of the circumstances in evaluating whether a reasonable person would have believed he was in custody. The court considered the location of the interview, the lack of indicia of arrest, the length of the interview, the ratio of officers to suspect, the officers' demeanor and Clark's demeanor.

The court stated: "I will . . . note that the general tone and demeanor of the officers both in transporting him and during the course of the interview appear to be respectful. There were no raised voices. I did not detect any particular distress in watching Mr. Clark or in any of his responses or I didn't detect any attempt by the officers to confuse him, to take advantage in any way." [¶] I didn't see any evidence of low intelligence to the point where he could not comprehend his surroundings or what was going on."

The court concluded that Clark should have been given *Miranda* warnings the second time he asked whether he was going to be placed under arrest, and the detective told him there would be "repercussions" (page 130 of the transcript). The court found that a reasonable person would not have felt free to leave at that point. The court ruled

¹³ We have reviewed Court's Exhibit C.

that any subsequent statements that Clark made could not be used in the prosecution's case in chief.

The court next ruled on the voluntariness of the entire interview at the crime lab. The court concluded that it was voluntary, explaining: "We're not talking physical torture, physical coercion. We're not talking about somebody lying in a hospital bed. We're not talking about somebody being deprived of food or water. The record is clear on the CD that the tone was respectful, that he was offered many times the use of a bathroom, whether he was thirsty, even though at times he declined a drink of water. But that did happen at least four times during the course of the interview."

"I noted the colloquy by the officer about good person vs. bad person, the issue of counseling. I don't feel that rises or amounts to an implied or express promise of leniency. There are no representations being made that the D.A.'s office is somehow going to give him a break, that he's not going to be prosecuted. In fact, it is punctuated consistently with talk of repercussions as well."

The court found that Clark's consent for the search of his home was voluntary. Moreover, the court explained that even if the search warrant was based on statements obtained in violation of *Miranda*, the search warrant was not invalid because the statements were voluntary and not coerced. The court concluded that this was not "a bad faith violation of *Miranda*." The court did not find this to be a case where the officers purposely withheld *Miranda* warnings until after the defendant confessed. Accordingly, the court declined to exclude evidence regarding the recovery of Kirsten's cell phone.

With regard to Detective Mayfield's interview at the jail, the court found that it was not tainted by the *Miranda* violation because Clark's statements at the crime lab were voluntary. Moreover, evidence demonstrated that prior to the interview at the jail, Mayfield advised Clark of his *Miranda* rights and Clark waived those rights. The court stated: "The evidence that I heard is that the defendant had sufficient intelligence to be able to waive them, and he did. There was no evidence that I heard that he was under the influence of alcohol or drugs, that there was anything about his speech or intelligence that

would have impaired in any way his capacity to waive that.” Finally, the court noted that it found Mayfield’s interview to be voluntary and “not coerced in any way.”

II. Legal Principles

“A defendant’s admission or confession challenged as involuntary may not be introduced into evidence at trial unless the prosecution proves by a preponderance of the evidence that it was voluntary. [Citations.] A confession or admission is involuntary, and thus subject to exclusion at trial, only if it is the product of coercive police activity. [Citations.] On appeal, we review independently the trial court’s determination on the ultimate legal issue of voluntariness. [Citation.] But any factual findings by the trial court as to the circumstances surrounding an admission or confession, including “‘the characteristics of the accused and the details of the interrogation” [citation]’ are subject to review under the deferential substantial evidence standard. [Citation.]

“In deciding the question of voluntariness, the United States Supreme Court has directed courts to consider ‘the totality of circumstances.’ [Citations.] Relevant are ‘the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity’ as well as ‘the defendant’s maturity [citation]; education [citation]; physical condition [citation]; and mental health.’ [Citation.]” (*People v. Williams* (1997) 16 Cal.4th 635, 659-660.) “The question is whether defendant’s will was overborne.” (*People v. Mays* (2009) 174 Cal.App.4th 156, 164.)

“In California, it has been held that if a defendant takes a lie detector test willingly, “‘neither the fact it was given nor the fact the defendant was told by the test giver it revealed in his opinion the defendant was not telling the truth, inherently demonstrates coercion. [Citation.]” [Citation.]” (*People v. Mays, supra*, 174 Cal.App.4th at p. 166.) “A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable. [Citations.]” (*People v. Mays, supra*, 174 Cal.App.4th at p. 164.)

“[A] failure to admonish [a defendant about his *Miranda* rights] does not render a statement involuntary and coerced.” (*People v. Brewer* (2000) 81 Cal.App.4th 442, 456.)

Where statements are voluntary and not coerced, they may be used as the basis for a search warrant even if the statements were obtained in violation of *Miranda*. (*Id.* at pp. 454-455.) Moreover, voluntary and noncoerced statements obtained in violation of *Miranda* will not taint subsequent statements which are obtained after proper *Miranda* warnings are given. (*Oregon v. Elstad* (1985) 470 U.S. 298, 308-311.) “[T]he fruit of the poisonous tree analysis does not apply to the ‘fruit’ of a noncoerced *Miranda* violation.” (*People v. Brewer, supra*, 81 Cal.App.4th at p. 454.)

III. Analysis

Clark challenges the admission of incriminating statements he made at the crime lab based on his claim that those statements were involuntary. He has made clear in his appellate reply brief that he is not arguing that any statements were admitted at trial in violation of *Miranda*. He is not challenging the trial court’s ruling as to when the *Miranda* violation occurred during the interview at the crime lab.

We do not find this to be a close case on the issue of voluntariness. A review of the record makes clear that the interview at the crime lab was voluntary.

Clark was 31 years old at the time of the interview. He told the officers he had completed the 11th grade in high school, was the quarterback on his high school football team and had attended some college classes. He enjoyed writing short stories and reading books, such as Stephen King novels. In short, the record demonstrates that he was mature and intelligent enough to consent to the interview. Furthermore, his stepmother supported his decision to take the polygraph test. Clark raised no disagreement when his stepmother indicated she thought it was a good idea for him to take the test.

To the extent Clark had a mental disability which would have had some bearing on the issue of voluntariness, it was not evident from the audio or video recording and he did not present evidence of such a disability. He told the officers that he took medication for short-term memory loss but did not present evidence that the medication, or a failure to

take the medication at certain intervals, would have influenced his ability to consent to the interview or to function during the interview.¹⁴

Clark agreed to go to the crime lab with Deputy Mitchell and Detective O'Quinn. He was not forced to go. He rode there without restraints in the front seat of O'Quinn's unmarked car. At the crime lab, Mitchell explained to Clark that the interview and polygraph examination were voluntary. Clark reviewed, initialed and signed a consent form stating that he was not in custody, the polygraph examination was voluntary and he could stop the examination at any time.

Despite Clark's argument to the contrary, a polygraph examination is not inherently coercive under California law. (*People v. Mays, supra*, 174 Cal.App.4th at p. 166.) Moreover, an examiner's statement that the defendant has failed the polygraph test does not automatically transform a voluntary interview into an involuntary one. (*Ibid.*)

Although the interview was long, lasting four hours, Clark never complained about any discomfort. He told Mitchell that he had slept for six hours the night before and had eaten breakfast that morning. Mitchell repeatedly asked Clark if he was okay, if he wanted a drink and if needed to use the restroom. Mitchell also offered Clark breaks. Considering the totality of the circumstances, we do not find the interview to be coercive because it lasted four hours and was conducted at the crime lab rather than at Clark's home or in a neutral setting.

Deputy Mitchell and Detective O'Quinn were respectful and calm as they interviewed Clark. They did not threaten him or promise him leniency. We do not construe Mitchell's suggestion that counseling might help a sex offender like Clark as an implied promise that Clark would not face other punishment if he had in fact assaulted Kirsten.

¹⁴ Clark references the fact that a doubt was declared about his competency and the criminal proceedings were suspended for a time. All of the doctors who evaluated Clark in this case found him competent to stand trial. Thus, the competency issue is not evidence tending to show that Clark's "will was overborne," as Clark argues on appeal.

Clark argues that “when the police were being nice to [him] this was all part of the psychological ploy to force a confession out of him.” As discussed above, “A psychological ploy is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable. [Citations.]” (*People v. Mays, supra*, 174 Cal.App.4th at p. 164.) The interview was not rendered involuntary because the officers were being “nice.”

Clark asserts that, “The failure to give Miranda warnings even after confronting [Clark] with test results was also indicative of coercion.” As set forth above, “a failure to admonish [a defendant about his *Miranda* rights] does not render a statement involuntary and coerced.” (*People v. Brewer, supra*, 81 Cal.App.4th at p. 456.)

Considering the totality of the circumstances, we find that the entire interview at the crime lab was voluntary and not coerced. There is no evidence that Clark’s “will was overborne” at any point during the interview. (*People v. Mays, supra*, 174 Cal.App.4th at p. 164.)

Clark’s arguments in favor of suppression of the cell phone and the statements he made to Detective Mayfield at the jail are dependent on his claim that the incriminating statements he made at the crime lab were involuntary and coerced. Because the statements at the crime lab were voluntary and not coerced, the evidence recovered at Clark’s home and the statements to Mayfield were not tainted. As discussed above, voluntary and noncoerced statements may be used as the basis for a search warrant even if the statements were obtained in violation of *Miranda*. (*People v. Mays, supra*, 174 Cal.App.4th at pp. 164-165.) Moreover, voluntary and noncoerced statements obtained in violation of *Miranda* do not taint subsequent statements which are obtained after proper *Miranda* warnings are given. (*Oregon v. Elstad, supra*, 470 U.S. at pp. 308-311.) Substantial evidence demonstrates that Mayfield advised Clark of his *Miranda* rights and that Clark knowingly and intelligently waived those rights.

Sentencing Issues

This court sent letters to the parties asking them to file supplemental briefing addressing the legality of the sentence imposed by the trial court, including issues regarding the fines and fees imposed.

I. Background

As set forth above, the trial court sentenced Clark to indeterminate and determinate terms. The court pronounced the indeterminate terms first. On count 2 for forcible lewd or lascivious act upon a child under 14 years of age (§ 288, subd. (b)(1)), the court sentenced Clark to 25 years to life under section 667.61, subdivisions (a) and (d), based on the jury's true finding on the kidnapping allegation, and imposed and stayed a term of nine years on the kidnapping enhancement under section 667.8, subdivision (a). On count 4 for aggravated sexual assault of a person under 14 years of age and at least 10 years younger than the defendant (§ 269, subd. (a)(1)), the court sentenced Clark to a consecutive term of 15 years to life. On count 1 for forcible rape (§ 261, subd. (a)(2)), the court imposed and stayed the indeterminate term of 25 years to life under section 667.61, subdivisions (a) and (d). On count 5 for kidnapping to commit rape (§ 209, subd. (b)(1), the court sentenced Clark to a life term to be served concurrently with the sentence on count 2. The total indeterminate term is 40 years to life.

On count 3 for sodomy of a person under 14 years of age and at least 10 years younger than the defendant (§ 286, subd. (c)(1)), the trial court sentenced Clark to the high term of eight years plus a consecutive 15-year term for the kidnapping enhancement under section 667.8, subdivision (b). On count 6 for criminal threats (§ 422), the court sentenced Clark to a consecutive term of eight months (one-third the mid-term). On count 1 for forcible rape, the court imposed and stayed the upper term of eight years for the offense plus a nine-year term for the kidnapping enhancement under section 667.8, subdivision (a). The total determinate term, to be served before the indeterminate term, is 23 years and eight months.

II. Issues raised by the Attorney General

In her opening letter brief, the Attorney General pointed out four sentencing errors that must be corrected (in Clark's favor). Clark does not dispute the modifications to the judgment proposed by the Attorney General.

First, the kidnapping enhancement imposed and stayed on count 2 under section 667.8, subdivision (a), must be reversed and stricken. The enhancement was not alleged in the information or found true by the jury. (§ 1170.1, subd. (e) ["All enhancements shall be alleged in the accusatory pleading and either admitted by the defendant in open court or found to be true by the trier of fact"].) Moreover, the statute does not provide for imposition of this enhancement on a conviction for forcible lewd or lascivious act upon a child under 14 years of age (§ 288, subd. (b)(1)), the crime charged in count 2. (§ 667.8, subd. (a).)

Second, the 25-years-to-life term imposed and stayed on count 1 under section 667.61, subdivisions (a) and (d), must be stricken. At the time the trial court imposed and stayed this term, it already had imposed a term of 25 years to life under section 667.61, subdivisions (a) and (d), on count 2. When Clark committed these offenses on August 29, 2006, section 667.61, subdivision (g), provided in pertinent part: "The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion." (Stats. 1998, ch. 936, § 9.) For purposes of this provision, "offenses occurred on a 'single occasion' if they were committed in close temporal and spatial proximity." (*People v. Jones* (2001) 25 Cal.4th 98, 107.) As the trial court stated on the record (and the Attorney General concedes), "The cluster of activities, criminal activities, that were perpetrated upon Kirsten appeared to fall within close temporal and spatial proximity." The Attorney General notes in her opening letter brief that, "All of the sexual offenses occurred within a period of 10 to 15 minutes in the same hallway."¹⁵

¹⁵ We do not disturb the remainder of the sentence the trial court imposed and stayed on count 1: the upper term of eight years for the offense plus a nine-year term for the kidnapping enhancement under section 667.8, subdivision (a).

Third, the concurrent life term that the trial court imposed on count 5 for kidnapping to commit rape under section 209, subdivision (b)(1), must be stayed. Under section 209, subdivision (d), “A person may be charged with a violation of subdivision (b) and Section 667.61. However, a person may not be punished under subdivision (b) and Section 667.61 for the same act that constitutes a violation of both subdivision (b) and Section 667.61.” As set forth above, at the time the trial court imposed and stayed this term, it already had imposed a term of 25 years to life under section 667.61, subdivisions (a) and (d), on count 2, based on Clark’s kidnapping of Kirsten. Clark committed one act of kidnapping. As the Attorney General notes in her opening letter brief, Clark “carried Kirsten from the movie theater hallway, through the empty theater, and into the secluded fire escape hallway.”

Fourth, the kidnapping enhancement imposed on count 3 under section 667.8, subdivision (b), should be stayed. As discussed above, Clark’s kidnapping of Kirsten was the fact used to impose the sentence of 25 years to life on count 2. The same fact could not be used to enhance the sentence on count 3. The court sentenced Clark to a consecutive 15-year term for the kidnapping enhancement on count 3.

With these modifications, the total indeterminate term remains 40 years to life. The total determinate term is reduced from 23 years and eight months to eight years and eight months.

Neither the Attorney General nor Clark argues that remand for resentencing is required based on these issues raised by the Attorney General.

III. Issues raised by Clark

A. Consecutive term on count 4

In his opening letter brief, Clark raises one sentencing issue. He contends that the trial court erred in imposing the sentence on count 4 to run consecutively with the sentence on count 2. The Attorney General disputes Clark’s contention of error, as discussed in her responding letter brief.

In count 2, Clark was convicted of forcible lewd or lascivious act upon a child under 14 years of age. (§ 288, subd. (b)(1).) Count 2 was based on Clark’s act of

fondling Kirsten's chest. In count 4, Clark was convicted of aggravated sexual assault of a person under 14 years of age and at least 10 years younger than the defendant. (§ 269, subd. (a)(1).) Count 4 was based on Clark's act of raping Kirsten.

The trial court imposed consecutive terms under section 667.6, subdivision (d), which provides in pertinent part, "A full, separate, and consecutive term shall be imposed for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions." Clark does not dispute that the offenses in counts 2 and 4 occurred on "separate occasions" within the meaning of the statute. (§ 667.6, subd. (d).) He argues that the court erred in imposing consecutive terms because the offense in count 4, aggravated sexual assault of a person under 14 years of age and at least 10 years younger than the defendant (§ 269, subd. (a)(1)), is not specified in subdivision (e).

The offense in count 2, a violation of section 288, subdivision (b) (lewd or lascivious act), is one of the offenses listed in section 667.6, subdivision (e). (§ 667.6, subd. (e)(5).) As Clark points out, the offense in count 4, a violation of section 269 (aggravated sexual assault of a child), is not one of the offenses listed in section 667.6, subdivision (e). Clark does not dispute that count 4 was based on his act of raping Kirsten. (§ 269, subd. (a)(1).) A violation of section 261 (rape) is one of the offenses listed in section 667.6, subdivision (e). (§ 667.6, subd. (e)(3).)

In *People v. Jimenez* (2000) 80 Cal.App.4th 286, 291-292, the Court of Appeal affirmed the trial court's imposition of consecutive sentencing on three counts of aggravated sexual assault of a child based on acts of sodomy (§ 269, subd. (a)(3)) pursuant to section 667.6, subdivision (d), even though a violation of section 269 is not one of the offenses listed in section 667.6, subdivision (e). The appellate court explained: "Defendant correctly points out that section 667.6, subdivision (d) does not explicitly provide that it applies to violations of section 269. However, he makes too much of this omission, ignoring the fact that violation of section 286 is one of the predicate offenses of section 269; one committing a forcible sodomy offense with the prescribed age disparity violates section 269. When the jury found defendant had violated section 269 under the

circumstances presented here, it necessarily found he had violated section 286 and he had done so by force or fear. Thus, the factual predicate necessary to apply section 667.6, subdivision (d) was proved beyond a reasonable doubt.” (*Id.* at p. 291; see also *People v. Glass* (2004) 114 Cal.App.4th 1032, 1037, fns. omitted [“Section 269 is not one of the sex crimes listed in section 667.6. However, . . . each of the crimes listed in section 269 is also listed in section 667.6. Nonetheless, the bill analysis for section 269 from the Assembly Committee on Public Safety specifically refers to the applicability of section 667.6 to section 269 crimes. [Citation.] It appears, therefore, that the Legislature anticipated that a defendant convicted of violating section 269 would be subject to the sentencing requirements of section 667.6, even though section 269 was not listed in section 667.6”].)

The trial court did not err in imposing the sentence on count 4 to run consecutively with the sentence on count 2. When the jury found Clark guilty on count 4 in violation of section 269, subdivision (a)(1), it necessarily found beyond a reasonable doubt that he had raped Kirsten. Rape is one of the offenses listed in section 667.6, subdivision (e). Therefore, a consecutive sentence was permissible under section 667.6, subdivision (d). As the Court of Appeal reasoned in *People v. Jimenez*, *supra*, 80 Cal.App.4th at page 291, “It would be irrational to suppose the Legislature intended that criminals who commit multiple violent sexual offenses would be exempt from the aggravated punishment prescribed by section 667.6 merely because their victims happened to be children under age 14 who were 10 or more years younger than they.”¹⁶

B. Fines and fees

We asked the parties to address any issues regarding the imposition of fines and fees in their responding letter briefs. Clark raised two such issues.

¹⁶ Clark’s reliance on *People v. Goodliffe* (2009) 177 Cal.App.4th 723 is misplaced. There, the Court of Appeal held that the trial court erred in imposing a full, consecutive term under 667.6, subdivision (c), for a violation of section 288, subdivision (b) (lewd or lascivious act), because the crime did not involve the same victim on the same occasion as required under section 667.6, subdivision (c). (*Id.* at p. 732.) That is not the issue before us.

First, he contends that the trial court erred in imposing fines under section 290.3, subdivision (a), because the court did not make a finding on whether he had the ability to pay. The court applied the version of section 290.3, subdivision (a), in effect at the time Clark committed the offenses, which provided: “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of two hundred dollars (\$200) upon the first conviction or a fine of three hundred dollars (\$300) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” (Stats. 2006, ch. 69, § 27.) The trial court stated that it was imposing a total fine of \$1,400 for the five convictions of sexual offenses.¹⁷

The defendant has the burden of proving inability to pay this fine. (*People v. Waltz* (2008) 160 Cal.App.4th 1364, 1371; *People v. McMahan* (1992) 3 Cal.App.4th 740, 749-750.) Clark did not assert below that he did not have the ability to pay. He has forfeited this claim. (*People v. McMahan, supra*, 3 Cal.App.4th at pp. 749-750.)

Second, Clark contends that the trial court erred in imposing the maximum restitution fine of \$10,000 under section 1202.4, subdivision (b), because the court did not make a finding on whether he had the ability to pay. A trial court exercises its discretion in setting the amount of this fine. (§ 1202.4, subd. (b)(1).) At the time Clark committed these offenses, section 1202.4, subdivision (b)(2) provided: “In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars (\$200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted.” (Stats. 2005, ch. 240, § 10.5.) Where the court sets the fine

¹⁷ The abstract of judgment and minute order from the April 20, 2010 sentencing hearing indicate that the trial court imposed a total fine of \$1,700, including \$300 on the criminal threats conviction (count 6). This fine is not applicable to the criminal threats conviction. (See, §§ 290, subd. (c), 290.3, subd. (a).) We order the trial court to correct this error.

above the minimum, “the court shall consider any relevant factors, including but not limited to, the defendant’s inability to pay, the seriousness and gravity of the offense and the circumstances of its commission” (§ 1202.4, subd. (d).) The defendant bears the burden of demonstrating inability to pay. (*Ibid.*)

The trial court stated that it was imposing the \$10,000 fine “because of the seriousness of the crimes, the number of crimes and the sentencing imposed.” Clark did not assert below that he did not have the ability to pay. We cannot find that the trial court abused its discretion in imposing the maximum fine under section 1202.4, subdivision (b).

DISPOSITION

The 25-years-to-life term imposed and stayed on count 1 under section 667.61, subdivisions (a) and (d), is stricken. The kidnapping enhancement imposed and stayed on count 2 under section 667.8, subdivision (a), is reversed and stricken. The kidnapping enhancement imposed on count 3 under section 667.8, subdivision (b), is ordered stayed. The concurrent life term imposed on count 5 is ordered stayed. The abstract of judgment and minute order from the April 20, 2010 sentencing hearing shall be corrected to reflect a total fine of \$1,400 under section 290.3, subdivision (a); any reference to a \$300 fine on count 6 under section 290.3, subdivision (a), shall be eliminated. As so modified, the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.