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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. RICHARD SCOTT BROOKS, Defendant and Appellant.	2d Crim. No. B269650 (Super. Ct. No. 14C-33164) (San Luis Obispo County)

Richard Scott Brooks appeals his conviction, by jury, of 19 offenses arising out of his sexual assaults on, and sexual exploitation of the then 17-year-old victim, Jane Doe. The jury found appellant guilty of: four counts of oral copulation with a person who is under 18 years of age (Pen. Code, § 288a, subs. (b)(1), counts 1 through 4)[1]; oral copulation of an intoxicated person (§ 288a, subd. (i), count 5); oral copulation of an unconscious person (§ 288a, subd. (f), count 6); rape by force or

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

fear of a minor who was at least 14 years old (§ 261, subd. (a)(2) count 7); sodomy by force or fear of a minor who was at least 14 years old (§ 286, subd. (c)(2)(C), count 11); two counts of sodomy of a person under 18 years of age (§ 286, subd. (b)(1), counts 12 and 13); sodomy of an unconscious person (§ 286, subd. (f), count 14); human trafficking by causing, inducing or persuading a minor to engage in a commercial sex act by means of force, fear, fraud, deceit, coercion, duress, or menace (§ 236.1, subd. (c)(2), count 16); pimping a minor over the age of 16 (§ 266h, subd. (b)(1), count 17); pandering by encouraging a minor over the age of 16 to engage in an act of prostitution (§ 266i, subd. (b)(1), count 18); using a minor to engage in sexual posing or modeling for commercial purposes (§ 311.4, subd. (b), count 19); possession of child pornography (§ 311.11, subd. (a), count 20); distribution of child pornography (§ 311.2, subd. (b) count 21); contacting a minor with the intent to commit a specified sexual offense (§ 288.3, subd. (a), count 22); human trafficking by causing, inducing or persuading a minor to engage in a commercial sex act. (§ 236.1, subd. (c)(1), count 23.) The trial court sentenced appellant to a total term in state prison of 46 years, eight months plus 15 years to life.

Appellant contends: his convictions of rape, sodomy and human trafficking by force or fear (counts 7, 11 and 16) must be reversed because the trial court improperly excluded evidence of Doe's prior and subsequent sexual conduct, which was relevant to her credibility and to the element of force; his convictions of those same offenses must also be reversed because the trial court erroneously excluded evidence of the "dominant/submissive subculture," which was relevant to the element of force; there is no substantial evidence he used force to commit the offenses

described in counts 7, 11 and 16; the trial court erred when it instructed the jury on human trafficking (count 16) in terms of CALCRIM No. 3184 because the form instruction fails to correctly explain the element of force; the trial court failed to conduct an adequate inquiry into juror misconduct; appellant's sentence was cruel and unusual under both the federal and state constitutions; his trial counsel provided ineffective assistance if counsel's failure to challenge the sentence in the trial court waived or forfeited his constitutional challenge to the sentence; and the cumulative effect of these errors requires reversal. We affirm.

Facts

Jane Doe, who was born in June 1997, lived with her mother and little sister in Los Osos. From the time she was three or four years old until she was nine, Doe was molested by her grandfather. The grandfather threatened to shoot Doe if she disclosed the abuse. When she finally disclosed the abuse, Doe's grandfather committed suicide.

On July 19, 2014, about three weeks after her 17th birthday, Jane Doe's mother and sister left town on a 10-day vacation. Jane Doe had the house to herself. She responded to a Craigslist posting entitled, "Only serious unfaithful sluts apply," created by appellant, a 38-year old San Francisco man. The posting stated that appellant was "looking for: a serious, young, careless, unfaithful, caring slut for a girlfriend."[2] In her response, Doe described herself as "an 18-year-old horny slut"

[2] The post went on to explain that appellant wanted a "sweet and nurturing" girl who would also be "completely unfaithful" with multiple partners engaging in specified sex acts, while he took pictures and video of those acts.

who was looking for "a sexual, dirty relationship" in which she would be controlled.

During the next week, appellant and Doe exchanged numerous text messages, emails, sexually explicit photographs and telephone calls. On several occasions, appellant directed Doe to send him pictures of specific body parts, to pose in specific positions, or to photograph herself with a dated post-it note bearing specific words. Doe referred to appellant as "Daddy" and "master" in some of these communications. She also volunteered information about specific sexual acts she was willing to participate in. Doe recognized that her communications with appellant indicated she was willing to be submissive to him and to engage in a submissive-dominant sexual relationship with him.

Appellant and Doe made plans to meet in person on July 25. Doe drove over 200 miles to meet appellant at the Fremont BART station. As soon as she saw appellant, Doe began to regret her decision. Appellant arrived wearing all black and Doe found his appearance scary. Doe didn't want to follow through on their arrangement, but felt like she couldn't leave because appellant "was very demanding in what he wanted."

Despite her misgivings, Doe let appellant get into her car. While they were still at the Fremont station, appellant took Doe's identification out of her wallet and commented on the fact that she was 17 years old.

Doe and appellant drove away from the station. Within a few minutes, appellant instructed Doe to pull over into a gas station parking lot. There, he "grab[bed] the back of [Doe's] head and shove[d] it onto his genitalia." Doe hesitated. Appellant told her that she "had to do what he wanted and that he – it was too

late for me to change my mind because he was already there." After about five minutes, appellant let go of Doe's head, allowing her to stop and take her mouth off of his penis.

Doe drove appellant back to her house in Los Osos. He stayed there, with her, until July 28. When they arrived, appellant gave Doe alcohol and showed her videos depicting both child pornography and "very rough" adult pornography. Doe told appellant she did not want to look at child pornography because she had been molested by grandfather when she was a child. Appellant yelled at Doe that she did not have a choice; he told Doe she needed to listen to him and like what he told her to like. Later, appellant asked Doe a lot of questions about being molested. Shortly after this conversation, appellant had very forceful sexual intercourse with Doe on the couch in the living room. Appellant had intercourse with Doe again that night.

Appellant stayed at Doe's house for four days. During that time, Doe estimated there were more than five instances of oral copulation and more than 10 instances of sexual intercourse. Doe testified that, on several occasions, sexual activity occurred while she was unconscious from too much alcohol. In one instance, Doe woke up to find appellant having intercourse with her. In another instance, she woke up to find his mouth on her vagina.

Appellant took photographs and videos of Doe posing in sexually suggestive ways and engaging in sexual activity with him. In some of the videos, Doe made statements and behaved in a way that suggested she was enjoying herself. In another video, Doe appeared to be unconscious while appellant sodomized her.

Doe testified that appellant never directly threatened her with physical injury. Appellant told Doe that she was not allowed to object to or protest his advances. He also told Doe, "if

[she] wasn't going to go along with what he wanted, that [Doe] wasn't going to be very happy with the end result." Doe thought appellant looked "scary" and "kind of angry." Appellant said he had gone to jail before and knew how to take care of himself. He wasn't worried about anything because he could get away with whatever he wanted. Later on, appellant told Doe, "law enforcement better not get involved because, um, he wouldn't be very happy about that and I wouldn't be happy with him being upset." He warned Doe that she shouldn't try to "fuck up" his life, because he could "sure as hell" ruin hers. Doe did not believe that she could challenge appellant or get away from him.

On July 27, appellant placed four advertisements on Craigslist, offering to "share" a "barely legal sex slave" for money. The price was $200 per hour and the advertisements specified that appellant would be present to protect the girl and to "make sure she doesn't say no." Appellant posted two more advertisements the next day, July 28. One man who responded to the ad declined to meet Doe after seeing her picture because he concluded she was underage.

Another man, Oscar Higueros, exchanged messages with appellant and then came to Doe's house. When Higueros arrived at the house, he spoke with appellant about the rules and the amount of money he would pay to have sex with Doe. After that, Higueros and Doe went into a bedroom together. Higueros had vaginal sex with Doe and placed his penis inside her mouth. When he was leaving Doe's house, appellant was angry with him because he stayed longer than 30 minutes and did not want to pay more money. Appellant refused to give any of the money to Doe, saying he needed it to get back to San Francisco. Doe took appellant to a motel because her boyfriend was coming to the

house later that day and because her mother was expected home the following day.

The next day, July 29, Doe ended her relationship with her boyfriend and began a relationship with Higueros. At Higueros' request, Doe sent several text messages to appellant. She called appellant the "best daddy ever" and told him that she loved him. Doe also asked appellant to send her the photographs and videos he had taken of her and their sexual activity together. Appellant did not comply. Doe showed up at appellant's motel later that day, because he told her that he had some money for her. When she arrived, appellant did not give Doe any money. She left the motel, feeling like she had been "played."

Appellant returned to San Francisco, where he continued to post on Craigslist, "looking for a very, very dirty little girl," who wanted a "serious daddy master." In another posting, appellant claimed to have a 23-year-old "little cumslut" who wanted to be shared with men and girls. A third advertisement, posted on August 14, sought a "Personal on-call or live-in sex slave/cumslut," who would not be allowed to say "no." About two weeks later, appellant exchanged emails with someone who claimed to be a girl under the age of 18. Appellant wrote that he had had sex with underage girls before.

In early September, Doe contacted law enforcement about appellant. Working with a detective from the Sheriff's Department, Doe made a recorded pretext call to appellant. After the phone call, appellant used Craigslist to solicit men to have sex with Doe for money. He made a reservation at a San Francisco hotel, where he planned to "host" a "party" during which the men who responded to the ad would have sex with Doe. Appellant arranged to meet Doe at a train station. He was

arrested when he arrived. At the time of his arrest, appellant was carrying an external hard drive and two cell phones. Each of these devices held photographs and video of depicting sexual activity between appellant and Doe, and other pornographic images of children. In addition, both the external hard drive and one of the phones held photographs of Doe's driver's license, high school identification card and county health medical card.

Appellant's defense at trial was that he reasonably believed Doe was at least 18 years old, she consented to all of their sexual activity and he never used force or fear with her. He testified that he believed Doe when she told him she had lost her driver's license. He did not discover her actual age until July 28. Appellant further testified that Doe initiated most their sexual activity. She also asked him to post the Craigslist advertisement that brought Higueros to the house. Higueros did not give appellant any money. Instead, appellant made $150 from another person, who hired appellant to do some web design work. Appellant also denied knowingly possessing child pornography images on his cell phone. He speculated the images might have been "imbedded" or hidden in adult pornographic images he had downloaded from a commercial site. Finally, appellant denied that Doe was the girl he advertised for "sharing" on Craigslist. That ad referred to another girl and the request for money was to get help paying for the room.

Discussion

Evidence of Doe's Sexual Activity With Others

Appellant contends the trial court erred when it excluded evidence of Doe's prior and subsequent consensual sexual activity with others, including acts of prostitution. Specifically, appellant contends he should have been permitted to introduce into

evidence: (1) emails and text messages between Doe and appellant in which Doe stated she prostituted herself before she met appellant; (2) Doe's conduct with Higueros after appellant left Doe's house[3]; and (3) texts Doe sent to other girls, to get them to have sex with her and Higueros.

Appellant concedes Doe's sexual conduct is not admissible to prove consent. (Evid. Code, § 1103.) He contends, however, the evidence was relevant to impeach her credibility and to show that appellant did not use force to rape, sodomize or traffic Doe. In addition, because the prosecution introduced some of the emails and text messages exchanged between Doe and appellant to prove appellant knew Doe's true age, appellant contends all their text message and emails should have been admissible under Evidence Code section 356, the "rule of completeness." We conclude the trial court did not err.

Evidence Code section 1103.

California's rape shield law, Evidence Code section 1103, provides that "specific instances of a complaining witness's sexual conduct are not admissible to prove consent by the complaining witness . . . for specified sex offenses." (*People v. Fontana* (2010) 49 Cal.4th 351, 354.) Evidence of sexual conduct may be admissible if it is relevant to an issue other than consent and is not subject to exclusion under Evidence Code section 352. Evidence Code section 782 requires the proponent of such evidence to file a written motion identifying the specific evidence at issue and providing an offer of proof concerning the relevancy of that evidence to an issue other than consent. "[T]he trial court should insist upon strict compliance with the statutory

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[3] Doe moved in with Higueros within a day or two after meeting him.

requirements." (*People v. Rioz* (1984) 161 Cal.App.3d 905, 917, fn. 5.)

Appellant's written motion did not comply with the statutory requirements. Appellant's trial counsel filed a sealed declaration quoting some of the emails and text messages exchanged between Doe and appellant. Counsel did not, however, identify each statement sought to be admitted or explain the theory under which these statements were relevant to prove the absence of force in their sexual relationship.

Even if the motion had complied with Evidence Code section 782 we would, like the trial court, conclude the evidence was not relevant. All of the statements at issue were made before Doe met appellant, or after he left her house. They are irrelevant to prove the absence of force for the same reason they are irrelevant to prove consent. The fact that Doe had un-coerced, unforced sex with others does not prove whether appellant used coercion or force to have sex with her. (*People v. Chandler* (1997) 56 Cal.App.4th 703, 707.)

Nor are the statements relevant to impeach Doe's credibility. On direct examination, Doe acknowledged a number of emails and text messages in which she transmitted sexually explicit photographs of herself and described, in graphic terms, her willingness to engage in various sex acts with appellant. She also acknowledged sending appellant an email in which she suggested they have an orgy at a hotel and that appellant had promised to pay her for having sex with him and others. Her credibility would not have been further impeached by additional, similar statements or by evidence that, after her encounter with appellant, she had sex with others for money.

Evidence Code section 1161.

The trial court properly excluded evidence of Doe's sexual history because Doe was a victim of human trafficking within the meaning of section 236.1. The statute provides, "Evidence of sexual history or history of any commercial sexual act of a victim of human trafficking, as defined in Section 236.1 of the Penal Code, is inadmissible to attack the credibility or impeach the character of the victim in any civil or criminal proceeding." (Evid. Code, § 1161, subd. (b).) Unlike the rape shield law, Evidence Code section 1161 contains no exception for evidence of sexual history or participation in a commercial sexual act, where that evidence is relevant to an issue other than consent. Consequently, the trial court correctly excluded this evidence.

Evidence Code section 356.

The prosecutor introduced into evidence an email in which appellant asked whether Doe had a curfew. He relied on this email to argue that appellant always knew Doe was not yet 18 years old. Appellant contended all of the emails and text messages he exchanged with Doe were admissible under the "rule of completeness," Evidence Code section 356. The trial court correctly rejected this contention.

Evidence Code section 356 provides, "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." (Evid. Code, § 356.) The statute is designed "to prevent the use of selected aspects of a conversation, act,

declaration, or writing, so as to create a misleading impression on the subjects addressed. [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 156.) To that end, section 356 only requires that statements on the same subject matter as the original conversation be admitted into evidence. (*People v. Chism* (2014) 58 Cal.4th 1266, 1324.) "Statements pertaining to other matters may be excluded. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 130.) Section 356 does not authorize admitting into evidence any statement that fails to correct a misleading impression. (*People v. Melendez* (2016) 2 Cal.5th 1, 27-28.) We review the trial court's decision regarding the admissibility of evidence under Evidence Code section 356 for abuse of discretion. (*People v. Farley* (2009) 46 Cal.4th 1053, 1103.)

Appellant has not shown the trial court abused its discretion. The prosecution introduced an email in which appellant asked Doe whether she had a curfew, to prove appellant knew Doe was under 18 years of age. Appellant contends this single email opened the door to every other communication he exchanged with Doe, because those messages would have shown that she was eager to have sex with him.

Appellant reads Evidence Code section 356 too broadly. The evidence was introduced to show appellant's knowledge of Doe's true age, not her willingness to have sex. Had appellant offered additional statements on the subject of Doe's curfew or his knowledge of her true age, that evidence would likely have been admissible. What was inadmissible were the legion of sexually explicit messages exchanged between Doe and appellant that had nothing to do with either her age or her curfew.

Evidence of the Submissive-Dominant Subculture.

Appellant contends the trial court violated his right to present a defense and to confront witnesses when it excluded evidence of the "submissive-dominant subculture." Specifically, appellant contends he should have been allowed to present evidence that, in the subculture, participants agree to ground rules under which one participant controls the behavior of the other.

The trial court admitted extensive evidence about the relationship between Doe and appellant. This included emails, text messages, explicit photographs and videos. In some of the videos, Doe appeared eager to have sex with appellant, and to enjoy being with him. Doe testified that, before they met, she told appellant she was looking for someone to dominate her and that she wanted to be controlled by him. The two also exchanged emails that were, according to Doe, intended to establish rules and set limits for their relationship. In one exchange, Doe asked appellant to tell her everything he was interested in doing to her, so she could let him know which things she was willing to do. Doe also described a type of sexual activity she did not enjoy. Appellant was also permitted to testify regarding his understanding that Doe had agreed to be submissive to him. What the trial court excluded was more generalized testimony concerning a "subculture" in which individuals agree to dominate or be submissive to one another.

We conclude the trial court did not abuse its discretion. First, appellant did not establish that either Doe or appellant had personal knowledge of, or claimed membership in a larger "subculture" involving dominant and submissive sex partners. There was no foundation for either witness to opine about that

subculture or the extent to which their relationship fit into it. Second, evidence concerning a larger subculture was properly excluded because its negligible probative value would have been substantially outweighed by the danger of undue prejudice and of confusing the issues or misleading the jury. (Evid. Code, § 352.) The jury heard ample evidence about the actual relationship between Doe and appellant, and their respective expectations. Evidence that members of a sexual subculture typically behave in similar (or different) ways would only create the potential for confusion or undue prejudice.

Further, any error in excluding the evidence was harmless. The jury had extensive evidence concerning the relationship between Doe and appellant, and the statements they made to each other regarding their desires and boundaries. There is no reasonable probability that appellant would have obtained a more favorable result had he been permitted to introduce evidence that different people, in different relationships observed different boundaries and followed different rules.

Substantial Evidence

Appellant contends there is no substantial evidence to support the force, violence, duress, menace or fear element required for his convictions of rape, sodomy, and human trafficking of a minor, as alleged in counts 7, 11 and 16. (§§ 261, subd. (a)(2); 286, subd. (c)(2)(C); 236.1, subd. (c)(2).) Each of these offenses requires proof that appellant accomplished the sex act or trafficking "by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the [victim] or another [person]." (*Ibid*, [enhanced punishment where defendant the trafficking of a minor "involves force, fear, fraud, deceit,

coercion, violence, duress, menace or threat of unlawful injury to the victim or to another person."].)

"In reviewing a claim for sufficiency of the evidence, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance beyond a reasonable doubt. We review the entire record in the light most favorable to the judgment below to determine whether it discloses sufficient evidence—that is, evidence that is reasonable, credible, and of solid value—supporting the decision, and not whether the evidence proves guilt beyond a reasonable doubt. [Citation.] We neither reweigh the evidence nor reevaluate the credibility of witnesses. [Citation.] We presume in support of the judgment the existence of every fact the jury reasonably could deduce from the evidence. [Citation.] If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 638-639.)

Appellant contends the evidence is insufficient to establish that he committed the offenses by means of force, fear or duress because Doe never effectively communicated to him that she had withdrawn her consent to have sex with him. Before they met, Doe sent appellant numerous emails and text messages stating her consent. After they met, according to appellant, Doe did not tell him that she no longer consented. Thereafter, she had sex with appellant without objection. She also behaved in a way that was consistent with consent, and inconsistent with the use of force or duress by appellant. Doe took time off work to spend

time with appellant. She told him that she did not like kissing or watching his child pornography. She also complained about not making money during their time together. When Doe told appellant to leave, he did.

The prosecution's theory was that Doe submitted to appellant's sexual demands as a result of duress or fear. As a young child, she had been repeatedly molested by her grandfather. Once Doe saw appellant, she decided she did not want to go through with their arrangement. She found him "scary" and intimidating, but she believed it was too late for her to tell him no. Appellant also made comments to Doe that she found intimidating: he told her that she was not allowed to say "no" to him and that, if she failed to do what he wanted, things would not end well for her. Appellant told Doe he had been to prison and knew how to take care of himself. He also said that he would ruin her life if she messed with his. The prosecution argued these statements amounted to duress or fear within the meaning of the three statutes at issue.

To prove that appellant committed the offenses by force, "the prosecutor was merely required to prove that the act of [human trafficking, rape or] sodomy was accomplished by enough physical force to overcome the victim's will. [Citation.]" (*People v. Hale* (2012) 204 Cal.App.4th 961, 978-979 (*Hale*).) These offenses are committed by duress where the perpetrator uses '"'"'a direct or implied threat of . . . hardship or retribution sufficient to coerce a reasonable person of ordinary sensibilities to . . . perform an act which otherwise would not have been performed . . . .'" [Citation.]' [Citations.] 'Duress can arise from various circumstances, including the relationship between the defendant

and the victim and their relative ages and sizes. . . . [Citation.]' [Citation.]" (*Hale*, *supra,* at p. 979.)

A reasonable trier of fact could find that appellant used duress or menace to commit the offenses at issue. Within minutes of meeting Doe, appellant was instructing her to perform oral sex and warning her that, if she did not obey, he would not be happy and things would not end well for her. Appellant made similarly intimidating statements to Doe throughout their time together. He bragged about having been in jail and said he could take care of himself. Appellant told Doe he could get away with anything and that he would ruin her life if she messed with his. He also warned Doe that he would be unhappy if law enforcement got involved, and Doe would not be happy if he wasn't happy. Doe was 21 years younger than appellant. She described herself as a submissive person and a survivor of childhood sexual abuse. The jury could reasonably rely on this evidence to conclude that appellant's menacing, intimidating remarks and demeanor were sufficient to overcome Doe's will and to coerce her into performing acts she would not otherwise have performed. (*Hale*, *supra*, 204 Cal.App.4th at p. 979; *People v. Perez* (2010) 182 Cal.App.4th 231, 243.) Substantial evidence supports the finding that appellant committed rape, sodomy and human trafficking by duress or fear.

Appellant relies on *In re John Z* (2003) 29 Cal.4th 756 to contend these convictions are not supported by substantial evidence because Doe never effectively communicated to him that she had withdrawn her consent. *John Z.* is of no assistance to appellant. There, our Supreme Court held a withdrawal of consent to a sex act can occur and be communicated at any time, even during the act itself. (*Id.* at pp. 762-763.) But that factual

circumstance is not present here. Here, the question is whether appellant used intimidation, threats or coercion to overcome Doe's ability to communicate her lack of consent. (See, e.g., *People v. Maury* (2003) 30 Cal.4th 342, 403; *People v. Ireland* (2010) 188 Cal.App.4th 328, 338.) The jury resolved that question against appellant. As we have explained, its determination is supported by substantial evidence.

Instructional Error

The trial court instructed the jury in terms of CALCRIM No. 3184 concerning the allegation, in count 16, that he used force or fear to cause Doe, a minor, to engage in a commercial sex act. Although he made no objection in the trial court, appellant now contends the trial court erred because the instruction does not define the term "force," and the trial court did not define it sua sponte. There was no error.

In *People v. Griffin* (2004) 33 Cal.4th 1015, our Supreme Court held that the term "force," as it is used in section 261, subdivision (a)(2), has no "specialized legal definition" or meaning that is significantly different from its common usage. (*Id.* at p. 1023.) Because the term has no specialized legal definition, the trial court is "under no duty to specially instruct sua sponte on the commonly understood definition of force as it is used in the rape statute [citation]." (*Id.* at p. 1028.)

The human trafficking statute, section 236.1, has the same structure as the rape statute, section 261. It mandates greater punishment where the human trafficking of a minor "involves force, fear, fraud, deceit, coercion, violence, duress, menace, or threat of unlawful injury to the victim or to another person." (§ 236.1, subd. (c)(2).) Like the rape statute, the human trafficking statute defines duress, menace and coercion, but does

not define force. The pattern jury instruction, CALCRIM No. 3184, tracks the statutory language. As the court held in *Griffin*, the trial court had no sua sponte duty to define force because the term has no specialized legal meaning.

Juror Misconduct

Appellant contends the trial court erred because it did not conduct a sufficient investigation into an allegation that one of the jurors was under the influence of alcohol during the trial. Specifically, appellant contends the trial court should have interviewed all of the jurors, including the juror at issue. We conclude appellant has forfeited the claim because he did not ask the trial court to conduct a more extensive investigation or to excuse the juror. There was no error.

After defense counsel completed his closing argument, Juror No. 157708 gave the trial court a note that stated, "'Some jurors have concern that Juror number 9 is under the influence of alcohol more than once during the trial. Today is an example.'" The trial court reviewed the note and asked counsel to observe Juror No. 9 when proceedings resumed. About an hour later, the trial recessed for lunch.

After the lunch recess, the trial court read the note into the record and expressed surprise. The court stated it had observed Juror No. 9 throughout the trial and did not see any signs of intoxication or other impairment. At points, Juror No. 9 had been taking notes. He was, however, an older person whose skin was often flushed. Juror No. 9 moved somewhat slowly and appeared to have the typical aches and pains of an older person.

The trial court asked counsel and the bailiff whether they had noticed anything unusual. Both counsel stated they had not seen any signs of impairment. Neither counsel asked the court to

voir dire the entire jury, or to interview Juror No. 9 individually. Similarly, the bailiff stated he had not observed any sign of intoxication from Juror No. 9. The bailiff reported that he made small talk with Juror No. 9 on several occasions and had never noticed an odor of alcohol on his breath, slurred speech or any other sign of intoxication, such as balance problems or red, watery eyes.

The trial court decided to speak with Juror No. 157708, the author of the note. She told the court that she smelled alcohol on Juror No. 9's breath earlier that morning and noticed that he had an unusual walk. She also said Juror No. 9 had trouble understanding her when she spoke, but she acknowledged that she had an accent which made it difficult for many people to understand her. Juror No. 157708 told the court that she discussed Juror No. 9 with Juror No. 11594365. Finally, she agreed to inform the court if she noticed that Juror No. 9 was impaired or unable to deliberate with the other jurors. The court then spoke with Juror No. 11594365. He told the court that he smelled alcohol on Juror No. 9's breath once, a few days earlier. Juror No. 11594365 also agreed to inform the court if he noticed that Juror No. 9 was impaired or unable to deliberate. After these interviews, the trial court informed the parties that it intended to resume the trial. Defense counsel did not object or request that Juror No. 9 be interviewed.

A claim of juror misconduct is forfeited unless the defense requests that the juror be excused or otherwise objects to the trial court's course of action. (*People v. Holloway* (2004) 33 Cal.4th 96, 124.) Appellant's trial counsel did not request that Juror 9 be excused or object when the trial court resumed the trial without

conducting additional juror interviews. His claim of error has been forfeited.

Had the claim not been forfeited, we would reject it because the trial court did not abuse its discretion when it declined to excuse Juror No. 9. (*People v. Bonilla* (2007) 41 Cal.4th 313, 350-353.) The trial court spoke to both jurors who expressed concern about Juror No. 9. It also questioned defense counsel, the prosecutor and the bailiff about their observations of the juror. The bailiff explained he made small talk with Juror No. 9 on several occasions and had never smelled alcohol on his breath or observed other signs of intoxication. Similarly, the trial court noted it had personally observed Juror No. 9 and had concluded he was not intoxicated or impaired. In the absence of any other evidence that Juror No. 9 could not perform his duties, or a request for additional action by the defense, the trial court acted within the bounds of reason when it concluded the inquiry and resumed trial. (*People v. Manibusan* (2013) 58 Cal.4th 40, 53; *People v. Allen* (1986) 42 Cal.3d 1222, 1266.)

Cruel and Unusual Punishment

Appellant contends his sentence, 46 years and 8 months plus an indeterminate term of 15 years to life, constitutes cruel and unusual punishment under both the Eighth Amendment to the United States Constitution and the California Constitution. We conclude the claim has been forfeited because appellant did not object to his sentence on this basis in the trial court. (*People v. Burgener* (2003) 29 Cal.4th 833, 886; *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1045.)

Had the claim not been forfeited, we would reject it. A sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment in the "exceedingly rare"

circumstance that the sentence is grossly disproportionate to the severity of the crime. (*Ewing v. California* (2003) 538 U.S. 11, 20-21.) The California constitution is violated by a sentence that is so disproportionate to the crime as to shock the conscience and offend fundamental notions of dignity. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

Appellant's sentence was comprised of the statutorily mandated term of 15 years to life for the forcible human trafficking of a minor, plus an additional aggregate term of 46 years and 8 months for numerous other sex crimes committed against the same minor. The sentence is similar to sentences that have been upheld in other cases involving multiple sex crimes. (See, e.g., *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 5631-532 [129 years for multiple sex crimes against one victim]; *People v. Retanan* (2007) 154 Cal.App.4th 1219, 1222 [135 years to life for multiple offenses against multiple victims].) We acknowledge appellant's sentence is longer than the term that would have been imposed had he committed a single second degree murder. However, penalties imposed for a single offense "cannot properly be compared to those for multiple offenses . . . ." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 807.)

Ineffective Assistance of Counsel

Appellant contends he received ineffective assistance of counsel at trial because counsel failed to object to the sentence imposed. As we have noted, however, appellant's sentence did not violate either the state or federal constitutions. Counsel is not ineffective because he did not raise a meritless objection. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Reyes* (2016) 246 Cal.App.4th 62, 86.)

Cumulative Error

Appellant contends the cumulative effect of these errors deprived him a fair trial and due process. As we have found no error, "there is nothing to cumulate and hence there can be no cumulative prejudice." (*People v. Grimes* (2016) 1 Cal.5th 698, 737.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Rita Federman, Judge

Superior Court County of San Luis Obispo

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Xaiver Becerra Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven Mercer, Acting, Supervising Deputy Attorney General, Michael C. Keller, Deputy Attorney General, for Plaintiff and Respondent.