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Briefs and Other Related Documents

Court of Appeal, Fourth District, Division 3, California.
The PEOPLE, Plaintiff and Respondent,
v.
Caesar Gabriel COTA, Defendant and Appellant.
No. G037474.
(Super.Ct.No. 04CF3661).
Nov. 14, 2007.

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.
Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

FYBEL, J.

INTRODUCTION

*1 Near midnight on December 9, 2004, 18-year-old Veronica S. stood on a sidewalk in Santa Ana waiting for her aunt and uncle to pick her up and drive her home. She worked at a factory and had just finished her shift. Her aunt and uncle did not pick her up; they had fallen asleep. Defendant Caesar Gabriel Cota drove by where Veronica was standing. He saw Veronica, and observed that she was alone. He parked the van he was driving, approached Veronica, put a box cutter to her back, and forced her to get into the van. He drove the van behind some businesses and forced her to orally copulate him.

A jury found defendant guilty of one count of kidnapping to commit a sex offense and two counts of forcible oral copulation. The jury also found several charged enhancement allegations true.

We affirm. We consider and reject each of defendant's contentions of trial error as follows.

1. The trial court did not err by refusing to exclude defendant's statements made during an interview with a police officer during which defendant admitted he committed the charged offenses. The record does not support his argument that his statements were made involuntarily.

2. The trial court did not err by refusing to exclude statements Veronica made to her aunt after the incident. Even though Veronica did not testify at trial, Veronica's statements to her aunt were not testimonial within the meaning of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The admission of such statements, therefore, did not offend defendant's right to confrontation under the Sixth Amendment to the United States Constitution.

3. Defendant proffered his wife's testimony that months before the incident, defendant had repeatedly stated a woman named Veronica proposed that she pay defendant to marry her so that she could secure a green card. Defendant contended his statements to his wife were admissible pursuant to the declaration against interest exception to the hearsay rule because such an arrangement would violate laws against bigamy. Defendant's statements did not constitute declarations against his penal or societal interest within the meaning of Evidence Code section 1230. The trial court did not err by excluding defendant's statements.

4. The prosecutor did not engage in prejudicial misconduct during closing argument.

5. Defendant's 25-years-to-life sentence, imposed in accordance with Penal Code section 667.61, did not constitute cruel and/or unusual punishment under either the federal or California Constitution.

FACTS

I.S. is Veronica's aunt. In early December 2004, I.S. lived in Santa Ana with her husband, her daughter, her nephew and 18-year-old Veronica. Veronica worked in a factory in Santa Ana from the afternoon to midnight.

On December 9, 2004, I.S. and her husband were supposed to pick Veronica up at midnight after Veronica finished working. They did not go to pick Veronica up that night because they had fallen asleep. I.S. woke up when she heard the phone ring. Veronica had called her and asked her to open the gate to the apartment complex where they lived.

*2 I.S. met Veronica at the gate. Veronica was trembling and appeared very nervous. Veronica told I.S. “[t]hat somebody had grabbed her with a cutter and had made her go into his car” which Veronica described as a red van. She said she had never seen the man before. Veronica said the man drove the red van to a parking lot. She told I.S. “[h]e took her blouse off, he grabbed her breasts, and he made her do things she didn't want to do.” Veronica stated the man made her “suck his penis” and that she did so because she was afraid.

Veronica then went to the bathroom to wash her mouth. I.S. woke up her husband and they started talking about going outside to look for the man. They went to the factory where Veronica worked to see if they could find the van Veronica had described.

When Veronica had called I.S. to ask her to open the apartment gate, she had used defendant's cell phone. I.S. called defendant's number back and, pretending to be Veronica, told defendant that she “liked it” and wanted to see him. She said a second time, “[p]lease, I want to see you.” Defendant agreed to come to the apartment complex. I.S. then called her brothers, and made a plan with Veronica to apprehend defendant, which involved Veronica standing outside the complex while I.S. and her husband waited inside their truck.

About three minutes later, I.S. saw defendant drive up to the complex in a red van. She watched him drive the van into the parking lot and saw Veronica signal to defendant to park. After he parked, I.S.'s brothers, who had arrived on the scene, “went to grab” defendant. I.S. called her brothers off of defendant because the police had been called. Defendant got back into the van and tried to go in reverse, but one of I.S.'s brothers' trucks had been parked behind defendant's van. The police arrived three minutes later.

Officer Mary Campuzano of the Santa Ana Police Department was dispatched at 1:30 a.m. December 10, 2004, to respond to a possible sexual assault. She interviewed Veronica, who she described as crying and hysterical, Veronica's aunt and uncles, and the apartment complex security guard. Campuzano observed defendant standing to the rear of a red van and briefly spoke with him. During a search of the van, she and another officer found two box cutters in the inside pocket of the driver's side door. Both box cutters were operable.

Campuzano arrested defendant. Defendant was transported to the Santa Ana police station. After Campuzano read defendant his rights under *Miranda v. Arizona* (1966) 384 U.S. 436, defendant agreed to speak with her. Campuzano's interview of defendant lasted for approximately one hour and 20 minutes.

Defendant first told Campuzano he had gotten off of work and was looking for something to eat when he saw Veronica standing alone “outside of where she works.” He drove by Veronica two times before he stopped and asked her if she wanted a ride. He said he saw that she was alone, and it was dark, “so [he] didn't know if she was okay or not so [he] just asked her if she wanted a ride.”

*3 He said Veronica got into his car and he drove her straight to her apartment complex. While he was driving her home, she told him her name and asked to use his phone because she did not have keys to the apartment complex. When they arrived at the apartment complex, she gave him a hug and got out of the van. Defendant drove home and went to bed. An hour later, his phone started ringing. It was Veronica, and "she said that her uncle's [*sic*] were asleep and that [he] c[ould] go over." He "kept asking her why. What's wrong[?]" He figured she "just wanted to talk," and "[s]o [he] said, okay, that's fine." He drove to the apartment complex, saw Veronica standing outside, and asked her "what's up with you[?]" Veronica told him where to park the van. After he parked it and got out of the van, he saw three men get out of a truck and heard them scream at him. He got back into the van, and noticed that a truck was now parked behind him.

Campuzano told defendant what he told her did not make sense because Veronica's "DNA, her mouth, her saliva is all over [defendant's] penis." She told him, "[n]ow if you were there pickin up a prostitute, or whatever. If that is only a misdemeanor, its not that big a deal. Okay. Your wife wouldn't even have to know about it.... [B]ut I find it very hard to believe that her DNA is gonna be on your penis and you're telling me that you just took her home.... So, why don't, you wanna try again, um, what's been going on what was going on with her?"

Defendant initially responded by asking for a glass of water. After Campuzano told defendant that her partner would bring him water,[FN1] she said, "we were getting to where you were gonna be more truthful about what was going on." Defendant then stated, "[o]kay, so yeah, I saw her.... Ah, I thought she was a prostitute.... [S]he has a car. But I didn't force her to do anything. And she's asking if I could, I could give her a ride back to her house. And I said okay." Defendant told Campuzano that while they were driving, he asked her for oral sex and she agreed. She suggested he pull over "towards the back of where she worked." He said she did not ask for money, and he did not pay her anything.

FN1. The record shows defendant was provided water in a matter of minutes. Campuzano then said to defendant, "[w]ell, there's still more to this story that you're not telling me." She told him there is evidence which "[d]oesn't show that you didn't force her. If anything it does show that you forced her and then some." She told defendant there were many surveillance cameras in the area, and the police had secured camera tape showing defendant holding a box cutter to Veronica's back. She told defendant to tell her the truth about what happened. Defendant said, "[o]kay."

Defendant proceeded to tell Campuzano he found the box cutter inside the van and that it was one of the tools his father kept in the van. Defendant said "it all happened too fast." He said he drove by Veronica two times after seeing her. He parked the van and took the box cutter in his hand. Defendant approached Veronica; she was facing away from him and he thought she probably did not hear or see him approach. He put the box cutter to her back and his hand on her shoulder, and they started walking. He thought she was "probably scared." She got into the van through the driver's side door and he got in behind her. He drove behind some businesses. Veronica asked him not to hurt her. He

told her "I wouldn't do anything ... as long as you do something for me." He indicated to her to give him oral sex. She did so in the front seat. The box cutter was on the passenger seat of the van at this time.

*4 Defendant moved the van because a car was coming. After he moved the van, defendant and Veronica moved to the backseat for "[n]o reason." He grabbed the box cutter and put it on the back seat next to him. Veronica orally copulated him a second time. Veronica asked defendant not to hurt her two or three times. She told him she was embarrassed, he said "okay," and they "stopped." Veronica asked defendant to take her home and he said, "sure."

PROCEDURAL BACKGROUND

Defendant was charged in an information with one count of kidnapping to commit a sex offense in violation of Penal Code section 209, subdivision (b)(1) (count 1), and two counts of forcible oral copulation in violation of section 288a, subdivision (c)(2) (count 2 and count 3). The information contained the following enhancement allegations: (1) as to count 2, defendant kidnapped the victim in violation of sections 207, 209, and 209.5 within the meaning of section 667.61, subdivisions (a), (c)(6) and (d)(2); (2) as to counts 2 and 3, defendant kidnapped the victim in violation of sections 207, 209, and 209.5 within the meaning of section 667.61, subdivisions (b), (c)(6) and (e)(1); (3) as to counts 2 and 3, defendant personally used a dangerous and deadly weapon within the meaning of sections 12022.3 and 12022 during the commission of the offenses, within the meaning of section 667.61, subdivision (b), (c)(6) and (e)(4); (4) as to counts 2 and 3, and pursuant to section 12022.3, subdivision (a), defendant used a deadly weapon during the commission and attempted commission of the sex offenses.

The jury found defendant guilty as charged, and found each enhancement allegation true. Defendant was sentenced to a total prison term of 25 years to life. Defendant appealed.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY ADMITTING DEFENDANT'S CONFESSION TO CAMPUZANO INTO EVIDENCE.

Before trial, defendant moved unsuccessfully to have the statements he made to Campuzano during the interview, which consisted of a confession to the charged crimes, excluded from trial on the ground they were made involuntarily. Defendant contends the trial court's refusal to exclude his confession violated his constitutional right against self-incrimination because his confession was involuntarily made. As discussed *post,* the record does not show that defendant's confession was given involuntarily.

“We review independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] We review the trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, for substantial evidence. [Citation.] ‘[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.’ [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093; see *People v. Leonard* (2007) 40 Cal.4th 1370, 1402-1403 [“On appeal, we uphold the trial court's finding of historical fact, but we independently review its determination that defendant's statements were voluntary”].)

*5 “ ‘It long has been held that the due process clause of the Fourteenth Amendment to the United States Constitution makes inadmissible any involuntary statement obtained by a law enforcement officer from a criminal suspect by coercion. [Citations.] A statement is involuntary [citation] when, among other circumstances, it “was ‘ “extracted by any sort of threats ..., [or] obtained by any direct or implied promises, however slight....” ‘ “ [Citations.] Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the “totality of [the] circumstances.” [Citations.]’ “ (*People v. Leonard, supra,* 40 Cal.4th 1370, 1402.) “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.’ “ (*People v. Williams* (1997) 16 Cal.4th 635, 660.) “ ‘In determining whether a confession was voluntary, “[t]he question is whether defendant's choice to confess was not ‘essentially free’ because his will was overborne.” [Citation.]' “ (*People v. Boyette* (2002) 29 Cal.4th 381, 411.)

Defendant contends the following factors establish his statements to Campuzano were made involuntarily: (1) Campuzano deceived defendant by telling him the police had evidence against him that the police did not have; (2) Campuzano made promises of leniency; (3) defendant was only 20 years old at the time and had no prior experience with the criminal justice system; and (4) defendant was tired and hungry during the interview.

In *People v. Smith* (2007) 40 Cal.4th 483, the California Supreme Court held the defendant's incriminating statements to police were not rendered involuntary because police officers falsely told him that they had conducted a test which showed that the defendant had fired a gun recently. (*Id.* at pp. 505-506.) The Supreme Court stated, “[p]olice deception ‘does not necessarily invalidate an incriminating statement’ [Citation.] Courts have repeatedly found proper interrogation tactics far more intimidating and deceptive that those employed in this case. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 ... [officer falsely told the suspect his accomplice had been captured and confessed]; *People v. Jones* (1998) 17 Cal.4th 279, 299 ... [officer implied he could prove more than he actually could]; *People v. Thompson* (1990) 50 Cal.3d 134, 167 ... [officers repeatedly lied, insisting they had evidence linking the suspect to a

homicide]; *In re Walker* (1974) 10 Cal.3d 764, 777 ... [wounded suspect told he might die before he reached the hospital, so he should talk while he still had the chance]; *People v. Watkins* (1970) 6 Cal.App.3d 119, 124-125 ... [officer told suspect his fingerprints had been found on the getaway car, although no prints had been obtained]; *Amaya-Ruiz v. Stewart* (9th Cir.1997) 121 F.3d 486, 495 [suspect falsely told he had been identified by an eyewitness].)" (*Id.* at p. 505.)

*6 In *People v. Jones, supra,* 17 Cal.4th at pages 297 and 298, the California Supreme Court further stated, " '[t]he courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.' " In that case, the Supreme Court held, "[t]he detective implied at various times that he knew more than he did or could prove more than he could. Such deception regarding the evidence was permissible, for it was not ' "of a type reasonably likely to procure an untrue statement." ' " (*Id.* at p. 299.)

Here, Campuzano told defendant that a test had yielded physical evidence that defendant and Veronica had engaged in oral copulation and that surveillance cameras captured defendant's interactions with Veronica that night. In reality, no such evidence had been obtained by the police. Campuzano's statements were designed to elicit a confession from defendant. We cannot say that Campuzano's statements about the existence of such evidence were so coercive that they would tend to drive defendant to make involuntary and unreliable statements about what had happened that night.

Second, the record does not show Campuzano made any promises of leniency to defendant. "A promise to an accused that he will enjoy leniency should he confess obviously implicates the voluntariness of any resulting confession." (*People v. Boyette, supra,* 29 Cal.4th at p. 412.)

Defendant argues Campuzano told defendant "that the matter could be disposed of as a misdemeanor and appellant's wife need not be told about the incident." Defendant mischaracterizes the record. During the interview, Campuzano told defendant that in light of the physical evidence showing defendant and Veronica had engaged in oral copulation, defendant's original story that he drove Veronica straight home did not make sense. Campuzano then stated the following to defendant: "I want to see which one of you's telling me the truth or not. Okay. Now if you were there pickin up a prostitute, or whatever. If that is only a misdemeanor, its not that big a deal. Okay. Your wife wouldn't even have to know about it. Because you're an adult. I'm not gonna go to her and rat you out about it. Okay. Um, but I find it very hard to believe that her DNA is gonna be on your penis and you're telling me that you just took her home. You know, you're being a nice guy and you took her home. I mean, you know, okay, maybe you were being a nice guy by actually givin her a ride home. Okay. Um, but what you're saying and what she's saying are two different stories. And all I want is the truth. Okay. So why don't, you wanna try again, um what's been going on what was going on with her?"

The record does not show Campuzano promised defendant leniency. She stated that *if* defendant had only picked up a prostitute that night, and *if* that conduct was only a

misdemeanor, it would not be a big deal and not something his wife would have to know about. Campuzano said nothing about what would happen to defendant if he confessed to the crimes he had been charged with, which Campuzano had told defendant at the beginning of the interview included kidnapping with the intent to force oral copulation, forcible oral copulation and assault with a deadly weapon.

*7 Third, while defendant may have been only 20 years old and unfamiliar with the criminal justice system, "the record does not even hint that these factors came into play in this case" such as to bear on the question of whether defendant's statements to Campuzano were voluntary. (*People v. Boyette, supra,* 29 Cal.4th at p. 412 [rejecting the defendant's claim that his youth, lack of educational achievement, modest level of literacy and unfamiliarity with the legal system rendered his confession involuntary].) Defendant does not argue that he did not understand the proceedings or Campuzano's questions during the interview, or otherwise show how these facts resulted in him making involuntary statements during the interview.

There is nothing in the record to suggest what defendant characterizes as "fatigue" and/or hunger caused him to make a false confession. Although defendant asked for water and was promptly provided water toward the beginning of the interview, defendant did not mention that he was hungry or that he was tired until the end of the interview and after he had confessed to the charged crimes.

Upon our independent review of the totality of the circumstances (*People v. Boyette, supra,* 29 Cal.4th at p. 412), we conclude defendant's confession was voluntary.

II.

THE TRIAL COURT'S ADMISSION OF VERONICA'S STATEMENTS TO HER AUNT DID NOT VIOLATE DEFENDANT'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT.

Citing *Crawford, supra,* 541 U.S. 36, defendant contends his Sixth Amendment right to confrontation was violated when the trial court denied his motion to exclude evidence of Veronica's statements to I.S., and allowed I.S. to testify about those statements at trial .[FN2] Defendant argues the court erroneously concluded those statements (1) were not testimonial in nature within the meaning of *Crawford, supra,* 541 U.S. 36, and thus (2) their admission did not offend the Sixth Amendment.

FN2. I.S. testified that Veronica has left the jurisdiction. Veronica did not testify at trial. The record does not elaborate on the circumstances surrounding Veronica's absence. "Prior to *Crawford, supra,* 541 U.S. 36, 'the Supreme Court had held that an unavailable witness's out-of-court statement against a criminal defendant could be admitted consistent with the [Sixth Amendment's] confrontation clause if it bore "adequate 'indicia of reliability.' " [Citation.] To qualify under that test, evidence had either to fall within a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness."

[Citation.]' [Citations.] *Crawford* abandoned this approach to such statements, however, and held that testimonial out-of-court statements offered against a criminal defendant are rendered inadmissible by the confrontation clause unless the witness is unavailable at trial and the defendant has a prior opportunity for cross-examination." (*People v. Geier* (2007) 41 Cal.4th 555, 597.)

In *Crawford, supra,* 541 U.S. at page 40, the defendant was tried on charges of criminal assault and attempted murder. The trial court determined the defendant's wife's tape-recorded statement to the police, which undermined in part the defendant's version of the subject incident, was admissible as it bore " 'particularized guarantees of trustworthiness.' " The trial court thereafter allowed the tape-recorded statement to be played for the jury even though the defendant's wife was barred from testifying without the defendant's consent pursuant to Washington state's marital privilege. (*Ibid.*) The United States Supreme Court held the admission of the tape-recorded statement violated the confrontation clause of the Sixth Amendment. (*Crawford, supra,* 541 U.S. at p. 42.) The Supreme Court stated that "at a minimum" testimonial statements within the meaning of the confrontation clause include "prior testimony at a preliminary hearing, before a grand jury, or at least at a former trial" and "police interrogations." (*Crawford, supra,* 541 U.S. at p. 68.) The court noted the defendant's wife's "recorded statement, knowingly given in response to structured police questioning, qualifie[d] under any conceivable definition [of interrogation]." (*Id.* at p. 53, fn. 4.)

*8 The United States Supreme Court "shed some further light on the question of what constitutes a 'testimonial' out-of-court statement" in *Davis v. Washington* (2006) 547 U.S. ---- [126 S.Ct. 2266] (*Davis/Hammon*), in which the Supreme Court decided two consolidated cases, *Davis v. Washington* and *Hammon v. Indiana.* (*People v. Geier, supra,* 41 Cal.4th at pp. 602-603.) In the former case, the court concluded a victim's statements to a 911 operator describing the defendant's ongoing attack did not constitute testimony within the meaning of the confrontation clause. (*Davis/Hammon, supra,* 547 U.S. at p. ---- [126 S.Ct. at pp. 2271, 2273-2274].) The court concluded the questions and answers exchanged during that call were intended primarily to deal with an ongoing emergency, and not to establish past facts for a criminal prosecution. (*Ibid.*) The court held that the confrontation clause is concerned solely with hearsay statements that are testimonial. (*Id.* at p. ---- [126 S.Ct. at pp. 2274-2276].)

In the latter case, the court concluded that a victim's responses to police questioning after the police responded to a domestic violence complaint, were testimonial in that they "were not much different from the statements we found to be testimonial in *Crawford.* It is entirely clear from the circumstances that the interrogation [of the victim] was part of an investigation into possibly criminal past conduct-as, indeed, the testifying officer expressly acknowledged." (*Davis/Hammon, supra,* 547 U.S. at p. ---- [126 S.Ct. at p. 2278]; see *People v. Cage* (2007) 40 Cal.4th 965, 983 (*Cage*).)

The California Supreme Court has rejected the argument arising out of *Davis/Hammon, supra,* 547 U.S. ---- [126 S.Ct. 2266], that only out-of-court statements made in the context of an ongoing emergency are properly classified as nontestimonial. In *Cage,*

supra, 40 Cal.4th 965, the California Supreme Court stated "[i]n our view, neither *Crawford* nor *Davis* made testimonial, and thus inadmissible as hearsay, all statements, other than emergency statements, that might reasonably be available for use in a criminal trial. To the extent they describe criminal events, 'casual remark[s] to an acquaintance,' ... might be so used if otherwise admissible. [Citation.] Yet *Crawford* itself strongly signaled that such casual remarks, made without the 'solem[nity]' and 'purpose' characteristic of 'testimony,' are not the concern of the confrontation clause.' " (*Id.* at p. 991.) In *Cage,* the California Supreme Court concluded that statements a victim made to a physician in the course of the physician's medical evaluation of the victim's injuries were not testimonial. (*Ibid.*)

Even before *Cage,* in *People v. Griffin* (2004) 33 Cal.4th 536, the California Supreme Court held that a victim's out-of-court statement to a friend at school that the defendant had been "fondling her for some time and that she intended to confront him if he continued to do so" did not constitute testimonial hearsay within the meaning of *Crawford, supra,* 541 U.S. 36. (*People v.. Griffin, supra,* 33 Cal.4th at pp. 575, 579-580, fn. 19.)

*9 Here, I.S. testified that when she met Veronica at the gate of the apartment complex, Veronica was trembling and appeared very nervous. Veronica told I.S. that a man had grabbed her with a cutter, forced her to get into a van, and forced her to orally copulate him. Veronica's statements were not testimonial. They were not made with the solemnity and purpose characteristic of testimony. Veronica's statements were not made in the context of "structured questioning" by a police officer conducting a criminal investigation. (*Cage, supra,* 40 Cal.4th at p. 987.) The record shows Veronica had just been released by her assailant and wished to tell her aunt what had just happened to her before she went to the bathroom to wash her mouth out. The admission of Veronica's statements through I.S.'s testimony at trial therefore did not violate defendant's Sixth Amendment rights.

III.

THE TRIAL COURT DID NOT ERR BY EXCLUDING DEFENDANT'S WIFE'S TESTIMONY.

Before trial, defendant filed a motion in limine to admit the testimony of his wife, Esmeralda. Defendant's motion described Esmeralda's proposed testimony as follows: "[S]ometime between April and June 2004, the defendant told Esmeralda that someone named Veronica wanted to marry him to enable Veronica to get her 'green card' to remain in the country. Esmeralda Cota asked for Veronica's last name, but the defendant didn't know it. Esmeralda Cota asked where the defendant had met Veronica, but the defendant would not tell her where. The defendant told [Esmeralda] that it (the marriage) would only be for one year, and that they wouldn't be intimate, and that the woman would pay them for this service. In addition, the defendant asked Esmeralda what she would say if he had another woman. Esmeralda told the defendant that she would not like

it. The defendant told Esmeralda this six or seven more times at later dates, beginning a month or two before she became pregnant, and continuing into her pregnancy."

Defendant argued Esmeralda's testimony was trustworthy and admissible under the declaration against penal and societal interest exception to the hearsay rule codified at Evidence Code section 1230. The trial court denied the motion, stating "it is clearly hearsay. And it clearly lacks trustworthiness, particularly when measured with the statements of the defendant to Officer Campuzano in the hour-plus interview. [¶] And without further evidence to appropriately present this issue, it should not be-that particular aspect of testimony from Esmeralda ... should not be elicited in front of the jury."

A.

The Trial Court Did Not Abuse Its Discretion by Concluding Esmeralda's Testimony Regarding Defendant's Statements Did Not Qualify for the Declaration Against Interest Hearsay Exception.

Evidence Code section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

*10 We review the trial court's refusal to admit Esmeralda's testimony of defendant's statements as declarations against his interests within the meaning of Evidence Code section 1230 for an abuse of discretion. (*People v. Geier, supra,* 41 Cal.4th 555, 585.)

The statements defendant allegedly made to Esmeralda are not statements made against his penal interest within the meaning of Evidence Code section 1230. Esmeralda's proffered testimony would only show that defendant informed her that a woman named Veronica wanted defendant to marry her so that she could obtain a green card. Defendant allegedly told Esmeralda that Veronica would pay him money, the marriage would be brief, though concurrent with his marriage to Esmeralda, and they would not be intimate. Defendant also asked Esmeralda what she would think if he "had another woman." Esmeralda's testimony would not establish that defendant admitted to actually engaging in or attempting to engage in illegal activity. At most, it would show defendant was merely considering "Veronica's" proposal and eliciting Esmeralda's feedback. Defendant failed to show that his statements to Esmeralda would "subject him to the risk of civil or criminal liability."

In the opening brief, defendant argues his alleged statements to Esmeralda qualified as statements against his societal interest within the meaning of Evidence Code section 1230 because such statements "constituted such a breach of trust in his marital relationship with Esmeralda." But as discussed *ante,* defendant's alleged statements merely informed Esmeralda of "Veronica's" proposal. Defendant did not admit any wrongdoing to his wife. Rather, he elicited her feedback on the proposal and the financial pay off they might enjoy if they accepted the proposal. Defendant's analogy to *People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1428, in which a wife's admission to her husband that she had committed adultery constituted a statement against societal interest is therefore inapt.

The trial court correctly ruled that Esmeralda's proposed testimony was inadmissible hearsay.

B.

The Trial Court's Refusal to Allow Esmeralda to Testify Did Not Violate Defendant's Constitutional Rights to Present Evidence in His Defense.

Defendant argues that, notwithstanding its hearsay character, the exclusion of Esmeralda's testimony violated his federal and state constitutional rights to present evidence in his defense. His argument is meritless.

In *United States v. Scheffer* (1998) 523 U.S. 303, 308, the United States Supreme Court stated, "[a] defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions. [Citations.] A defendant's interest in presenting such evidence may thus ' "bow to accommodate other legitimate interests in the criminal trial process." ' [Citations.] As a result, state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.' [Citations.] Moreover, we have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused." (Fn.omitted.)

*11 The California Supreme Court in *People v. Morrison* (2004) 34 Cal.4th 698, 724 stated, "[a]lthough a trial court enjoys broad discretion in determining the relevance of evidence [citation], it lacks discretion to admit evidence that is irrelevant [citations] or excluded under constitutional or statutory law [citation]. The proponent of proffered testimony has the burden of establishing its relevance, and if the testimony is comprised of hearsay, the foundational requirements for its admissibility under an exception to the hearsay rule. [Citations.] Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence."

In *People v. Morrison, supra,* 34 Cal.4th 698, the defendant, who had been convicted of murder, robbery, burglary and two counts of attempted murder, unsuccessfully sought to

introduce evidence during the penalty phase of his trial that showed alleged drug-trafficking activity by the victims' family and the presence of over $30,000 at the time and place of the crimes. (*Id.* at pp. 704, 720-721.) The trial court excluded the evidence because it was irrelevant and because the majority of the proffered testimony was hearsay. (*Id.* at p. 723.) The defendant appealed, arguing the exclusion of the proffered evidence was error because, inter alia, it violated his federal constitutional rights to confrontation and to put forward a defense and present evidence in mitigation. (*Id.* at p. 721.)

The California Supreme Court rejected the defendant's argument, stating, "[h]ere, defendant's offers of proof ... consisted largely of inadmissible third party hearsay.... [¶] Exclusion of the inadmissible hearsay at issue did not violate defendant's constitutional rights. As we recently explained, the United States Supreme Court has never suggested that states are without power to formulate and apply reasonable foundational requirements for the admission of evidence. [Citations.] Foundational prerequisites are fundamental, of course, to any exception to the hearsay rule. [Citation.] Application of these ordinary rules of evidence to the alleged drug-related components of the proffered testimony did not impermissibly infringe on defendant's right to present a defense." (*People v. Morrison, supra,* 34 Cal.4th at pp. 724-725.) [FN3]

FN3. The Supreme Court in *People v. Morrison, supra,* 34 Cal.4th at page 725, further stated, "it has been recognized that due process requires the admission of hearsay evidence at the penalty phase of a capital trial, even though a state's evidentiary rules are to the contrary, ' "if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of trial,' and (2) there are substantial reasons to assume the reliability of the evidence." ' " The Supreme Court concluded in *People v. Morrison* that "there appear no reasons, substantial or otherwise," supporting the reliability of the proffered evidence in that case. (*Ibid.*) Defendant cites *Green v. Georgia* (1979) 442 U.S. 95, 97 for the proposition that "[w]hile it is recognized that the constitutional right to present defense evidence is not limitless, state evidentiary rules authorizing the exclusion of such evidence must adhere to a constitutional standard of admissibility." *Green v. Georgia* is inapplicable to this case because, like *People v. Morrison,* it involved the admission of hearsay in the penalty phase of a capital trial. (See *People v. Williams* (2006) 40 Cal .4th 287, 293.) Defendant has not cited any legal authority, and we have found none, in which the enforcement of the requirements of Evidence Code section 1230 was found to infringe upon the federal or state constitutional rights of a criminal defendant. Evidence Code section 1230 sets forth reasonable foundational prerequisites for the admission of hearsay evidence. The exclusion of Esmeralda's statement as inadmissible hearsay cannot be said to "infringe [ ] upon a weighty interest of the accused." (*United States v. Scheffer, supra,* 523 U.S. at p. 308.)

Defendant cites *Chambers v. Mississippi* (1973) 410 U.S. 284 (*Chambers*) in support of his argument that the trial court was constitutionally required to admit Esmeralda's testimony notwithstanding its hearsay nature. *Chambers* is inapposite. In *Chambers,* a defendant in a murder trial called as a witness a man who had previously confessed to the

murder. (*Id.* at p. 294.) After the witness repudiated his confession on the stand, the defendant was denied permission to examine him as an adverse witness based on Mississippi's " 'voucher' rule" which bars parties from impeaching their own witnesses. (*Id.* at pp. 294-295.) In addition, Mississippi did not recognize an exception to the hearsay rule for statements made against penal interests, thus preventing the defendant from introducing evidence that the witness had made self-incriminating statements to three other people. (*Id.* at pp. 297-299.) The United States Supreme Court noted that the State of Mississippi had not attempted to defend or explain the rationale for the voucher rule. (*Ibid.*) The court held that "the exclusion of this critical evidence, coupled with the State's refusal to permit [the defendant] to cross-examine [the witness], denied him a trial in accord with traditional and fundamental standards of due process." (*Id.* at p. 302.) In *United States v. Scheffer, supra,* 523 U.S. at page 316, the United States Supreme Court stated its decision in *Chambers* was "confined ... to the 'facts and circumstances' presented in that case."

*12 In *People v. Ayala* (2000) 23 Cal.4th 225, 266, the California Supreme Court considered whether the defendant "had either a constitutional or a state law right to present exculpatory but unreliable hearsay evidence that is not admissible under any statutory exception to the hearsay rule." Citing *Chambers,* the defendant in *People v. Ayala, supra,* 23 Cal.4th 225 argued the trial court had "infringed on various constitutional guaranties when it barred the jury from hearing potentially exculpatory evidence." (*Id.* at p. 269.) The Supreme Court rejected the defendant's argument, noting, " '[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense. [Citations.] [But i]n the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.' [Citation .] Thus, '[a] defendant does not have a constitutional right to the admission of unreliable hearsay statements.' [Citations.] Moreover, both we [citation] and the United States Supreme Court [citation] have explained that *Chambers* is closely tied to the facts and the Mississippi evidence law that it considered. *Chambers* is not authority for the result defendant urges here." (*Ibid.*)

The trial court did not err.

IV.

THE PROSECUTOR DID NOT ENGAGE IN PREJUDICIAL MISCONDUCT.

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44; see *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) "Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under [California] law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales, supra,* 25 Cal.4th at p. 44.)

Defendant argues that during closing argument the prosecutor improperly "told the jury that the defense was trying to 'fool' the jury and that if only one juror was 'fooled' that [defendant] would escape responsibility for the offense." Defendant argues the prosecutor further engaged in misconduct by "vouch[ing] for the validity of [defendant's] confession." We address each of the prosecutor's comments in turn.

During trial, defense psychological expert Dr. Richard Ofshe testified about interrogation tactics used by police in order to elicit confessions from suspects and factors that contribute to suspects making false confessions. During closing argument, the prosecutor read an excerpt from a law review article in which Ofshe was quoted as saying: " 'While a guilty party will likely be very unhappy that he is being accused and confronted with evidence that supports the accusation, he is somewhat insulated from shock because he has always been aware of possible detection and can understand that he has been caught. An innocent suspect is likely to experience considerable shock and disorientation during interrogation because he is wholly unprepared for the confrontation and accusations that are at the core of the process and will not understand how an investigator could possibly suspect him.' "

*13 The prosecutor then proceeded to argue, "[w]hen you look at this videotape [of the defendant's interview with Campuzano], ask yourself that question. Where is the shock of being accused of these horrific crimes? [¶] ... There isn't because the defendant knew what he did, period. [¶] And because this evidence is so compelling, because it is so compelling, the defense is grasping at straws.... And all they need to do is fool one of you. If they fool one of you, then the defendant is not held responsible."

Defense counsel objected and the following colloquy ensued.

"The Court: Your objection?

"[Defense counsel]: Counsel is indicating that the defense is attempting to fool a juror.

"The Court: Just a second.

"Ladies and Gentlemen, the statements of counsel are not evidence in the case. You must go by what you heard from the witness stand, and then apply the law that the court will give you at the conclusion of these arguments.

"You may proceed.

"[The prosecutor]: Thank you.

"The defense only has to fool one of you and the defendant is not held responsible."

The prosecutor's comments did not constitute misconduct. The California Supreme Court has stated, " '[t]he prosecutor is permitted to urge, in colorful terms, that defense

witnesses are not entitled to credence, ... [and] to argue on the basis of inference from the evidence that a defense is fabricated....' " (*People v. Tafoya* (2007) 42 Cal.4th 147, 182, citing *People v.. Wilson* (2005) 36 Cal.4th 309, 338 [not improper for prosecutor to assert the defendant was lying after the defendant provided conflicting versions of the event].) Contrary to defendant's argument, the record does not show the trial court ever concluded the prosecutor's statements on this point were improper; the record shows the trial court simply took the opportunity to inform the jury that the prosecutor's statements in argument did not constitute evidence in the case. Before deliberations began, the jury was again instructed that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence."

Nothing in the record shows the prosecutor suggested that defense counsel fabricated evidence, or otherwise attacked defense counsel's credibility. The prosecutor argued his interpretation of the interview as containing a true and voluntary confession by defendant of the charged offenses. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1003 [prosecutor's comments "would be understood by the jury as an admonition not to be misled by the defense interpretation of the evidence, rather than as a personal attack on defense counsel"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47 ["An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper"].)

*14 Turning to defendant's second contention of alleged prosecutorial misconduct, the record shows that during closing argument the prosecutor argued, "[w]e know what [Veronica's] demeanor was like, not only from the aunt, but from Officer Campuzano. When she drove up on the scene, she described the victim as crying hysterically, uncontrollable, consistent with a victim of a heinous attack, the heinous attack that occurred at his hands. [¶] And it's because of those facts-the search of the car that located these box cutters, the box cutters that the victim said that he used-we are able to get in the statement of this defendant, the defendant's own words. The defendant's own words are what sealed his fate. [¶] There's nothing impermissible or inappropriate about it. We heard a lot from Dr. Ofshe. We're going to talk about him. [¶] *If there was a problem with that videotape or the confession, you know the judge would have excluded it.*" (Italics added.)

Defendant's counsel objected, and the court sustained defendant's counsel's objection, stating, "[a]ny legal rulings are up to the court. You are only to consider what the evidence is before you." The prosecutor proceeded to argue that the facts of this case did not suggest defendant offered a false confession during his interview with Campuzano.

Defendant argues the prosecutor's comment "if there was a problem with that videotape or the confession ... the judge would have excluded it" constituted prosecutorial misconduct because the prosecutor vouched "for the voluntariness and validity" of

defendant's confession by implying the judge had previously determined, outside the presence of the jury, there was "no 'problem' " with the confession.

The Attorney General agrees the prosecutor "improperly argued to the jury the judge would not have admitted the interrogation video if there had been a problem with it." The Attorney General further argues, however, that the prosecutor's "comment was harmless and could not reasonably be viewed as rendering the trial fundamentally unfair."

We agree that the prosecutor's comment was improper. However, any harm was cured because defendant's counsel objected to the comment and the trial court sustained the objection, thereby communicating to the jury that the prosecutor's comment was not proper. The court then admonished the jury not to worry about legal rulings and to focus solely on the evidence before it. (*People v. Dennis* (1998) 17 Cal.4th 468, 521 [even when misconduct is found, an objection and admonition from the trial court generally cures any prejudice].) The evidence before the jury included Dr. Ofshe's testimony suggesting defendant had been subjected to coercive police interrogation tactics which resulted in defendant making an involuntary confession to Campuzano. The prosecutor argued to the jury that it should not be persuaded by such testimony, and that the evidence, and in particular the videotape of the interview itself, showed that defendant's confession during that interview was voluntary and true. The jury was further instructed following closing argument that it was to consider the evidence of defendant's statements to Campuzano during the interview "along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such statements."

*15 Under these circumstances, no reasonable juror could have concluded from the prosecutor's statement that the trial court had already determined that defendant's statements to Campuzano constituted a true confession. Such a conclusion would have rendered not only Dr. Ofshe's testimony irrelevant, but also a good part of the prosecutor's argument and the court's instructions to the jury. The record does not show, therefore, that the prosecutor's improper but isolated comment "infect[ed] the trial with such unfairness as to make the conviction a denial of due process" (*People v. Morales, supra,* 25 Cal.4th at p. 44), or otherwise infringed on defendant's federal or state constitutional rights.

V.

DEFENDANT'S 25-YEARS-TO-LIFE SENTENCE DOES NOT CONSTITUTE CRUEL AND/OR UNUSUAL PUNISHMENT.

Defendant contends that as applied to the facts of this case, his prison sentence of 25 years to life determined under Penal Code section 667.61 constitutes cruel and/or unusual punishment under both the United States and California Constitutions. Defendant did not raise this issue in the trial court. Even if this argument is not waived, for the reasons discussed *post,* we conclude defendant's sentence did not constitute cruel and/or unusual punishment.

Defendant was sentenced in accordance with former Penal Code section 667.61, subdivision (a), applicable at the time of the sentencing hearing, which provided: "A person who is convicted of an offense specified in subdivision (c) under one or more of the circumstances specified in subdivision (d) or under two or more of the circumstances specified in subdivision (e) shall be punished by imprisonment in the state prison for life and shall not be eligible for release on parole for 25 years except as provided in subdivision (j)." Defendant was convicted of oral copulation by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person in violation of section 288a, subdivision (c)(2)-an offense specifically listed in section 667.61, subdivision (c)(6). The jury found true one of the circumstances listed in section 667.61, subdivision (d) that defendant "kidnapped the victim of the present offense and the movement of the victim substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense in subdivision (c)." (§ 667.61, subd. (d)(2) .) The jury also found two circumstances listed in section 667.61, subdivision (e) true, namely that defendant kidnapped the victim of the present offense in violation of section 209 (§ 667.61, subd. (e)(1)) and he personally used a deadly weapon in the commission of the forced oral copulation in violation of section 12022.3 (§ 667.61, subd. (e)(4)).

Defendant does not argue on appeal that the trial court failed to properly sentence him pursuant to applicable statutory authority. Defendant's sole challenge to his sentence under section 667.61 is that it constitutes cruel and unusual punishment under the United States Constitution and cruel or unusual punishment under the California Constitution because it "is grossly disproportionate to the crime under the circumstances of the case." (See *Gregg v. Georgia* (1976) 428 U.S. 153, 173 [a punishment is excessive under the Eighth Amendment if it involves the "unnecessary and wanton infliction of pain" or if it is "grossly out of proportion to the severity of the crime"]; *In re Lynch* (1972) 8 Cal.3d 410, 424 [a punishment may violate article I, section 17 of the California Constitution if "it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity"].) Defendant's argument is without merit.

A.

Defendant's Sentence Is Not Cruel and Unusual Punishment Under the Federal Constitution.

*16 The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The United States Supreme Court has stated, "[t]he Eighth Amendment, which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' " (*Ewing v. California* (2003) 538 U.S. 11, 20.) In *Ewing v. California, supra,* 538 U.S. at pages 30 and 31, and the companion case of *Lockyer v. Andrade* (2003) 538 U.S. 63, 73, the United States Supreme Court confirmed

the appropriate standard for determining whether a particular sentence for a term of years violates the Eighth Amendment is gross disproportionality. (See *Harmelin v. Michigan* (1991) 501 U.S. 957, 1001 (conc. opn. of Kennedy, J.) ["[t]he Eighth Amendment does not require strict proportionality between crime and sentence," but "forbids only extreme sentences that are 'grossly disproportionate' to the crime"].)

In *Ewing v. California, supra,* 538 U.S. at pages 18, 20, 30-31, the Supreme Court affirmed the defendant's sentence of 25 years to life under the California Three Strikes law for the third strike of grand theft (stealing three golf clubs priced at $399 each) holding the sentence "is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments." (*Id.* at pp. 30-31.) In *Lockyer v. Andrade, supra,* 538 U.S. at pages 68 and 73, the Supreme Court affirmed defendant's sentence under California's Three Strikes law to two consecutive terms of 25 years to life on two counts of petty theft with prior theft-related convictions, noting that successful grossly disproportionate challenges are " 'exceedingly rare' " and appear only in an " 'extreme' " case. (*Id.* at p. 73.)

In light of these authorities, and the seriousness of the offenses in this case, a sentence of 25 years to life for kidnapping, committing forcible oral copulation, and personally using a deadly weapon within the meaning of Penal Code section 667.61, does not constitute cruel and unusual punishment within the meaning of the Eighth Amendment.

B.

Defendant's Sentence Is Not Cruel or Unusual Punishment Under the California Constitution.

The California Supreme Court has held "a punishment may violate article I, section 6, of the Constitution if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra,* 8 Cal.3d at p. 424.) In conducting an analysis of whether defendant's sentence is so disproportionate to the crime as to offend the California Constitution, we consider: (1) the nature of the offense and/or the offender; (2) a comparison of the penalty imposed with punishments for more serious crimes in the same jurisdiction; and (3) a comparison of the penalty with the punishment imposed with punishments for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) Disproportionality need not be established in all three areas. (*People v. Dillon* (1983) 4 Cal.3d 441, 487, fn. 38.)

*17 Defendant's argument that his sentence is disproportionate because the facts of the crime show his conduct was "relatively insubstantial in the realm of sexual offenses" is without merit. Defendant personally used a box cutter to force an 18-year-old girl into his van, drove her to an isolated area, and forced her to orally copulate him twice. We disagree with defendant that his acts were relatively insubstantial. While the record does not show one way or the other whether Veronica suffered specific physical injuries, it

does show, through Campuzano's and I.S.'s testimony and defendant's own statements during the interview with Campuzano, that defendant not only forcibly sexually abused Veronica but also terrorized her. That defendant was only 20 years old and did not have a criminal record does not significantly mitigate against the gravity of his conduct.

Defendant's sole argument with regard to the remaining prongs of the analysis set forth in *In re Lynch, supra,* 8 Cal.3d 410 is as follows: "California punishes second degree murder less harshly than the punishment required in [defendant's] case. To the extent the criminal activity in the present case is less serious than murder in the second degree, any potential sentence in excess of 15-years-to-life is suspect."

This argument was specifically rejected in *People v. Estrada* (1997) 57 Cal.App.4th 1270 in which the appellate court stated, "[d]efendant is incorrect in arguing that constitutionally no crime can be punished more severely than homicide. For example, the Legislature has chosen to punish kidnapping for the purpose of ransom, extortion or robbery with bodily harm by life imprisonment *without* possibility of parole even though no death resulted. [Citation.] Courts have uniformly rejected claims such a sentence is constitutionally disproportionate 'given the longstanding, even ancient, horror of kidnapping [citation] and the substantial risk to human life that it presents[.]" (*Id.* at p. 1281.)

As discussed *ante,* defendant's sentence was imposed based on Penal Code section 667.61, which mandates a 25-years-to-life sentence for oral copulation by force when a victim is kidnapped and the movement of the victim "substantially increased the risk of harm to the victim over and above that level of risk necessarily inherent in the underlying offense." (§ 667.61, subds.(c)(2) & (d)(2).) Defendant's sentence did not constitute cruel or unusual punishment under the California Constitution.

DISPOSITION

The judgment is affirmed.

WE CONCUR: RYLAARSDAM, Acting P.J., and IKOLA, J.

Cal.App. 4 Dist.,2007.
People v. Cota
Not Reported in Cal.Rptr.3d, 2007 WL 3360054 (Cal.App. 4 Dist.)
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