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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES DWAYNE SMITH, Defendant and Appellant.	A124895 (Alameda County Super. Ct. No. H43770)

Defendant James Dwayne Smith raped and sodomized a 13-year-old girl, inflicting serious vaginal and anal injuries requiring reconstructive surgery. The jury convicted him of torture (Pen. Code, § 206) and the trial court sentenced him to life in prison with the possibility of parole. His primary contentions are: (1) the results of DNA testing were admitted in violation of his United States Constitution Sixth Amendment right of confrontation, as interpreted by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___, 129 S.Ct. 2527 (*Melendez-Diaz*); and (2) the district attorney committed prosecutorial misconduct. We find no prejudicial error and affirm.

I. FACTS

Under applicable standards of appellate review, we must view the facts in the light most favorable to the judgment of conviction, and presume in support of the judgment the existence of every fact which the jury could reasonably find from the evidence. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Neufer* (1994) 30 Cal.App.4th 244, 247.)

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II B., II C., and II D.

The facts of this case involve three sexual assaults which occurred in the East Bay between New Year's Eve 1990 and mid-March 1991. The sexual assaults were characterized by similar behavior of the assailant, including blindfolding the victims and committing both rape and sodomy. One of the victims is the victim in the present case, 13-year-old Jane Doe 1. The others are two adult women, Jane Doe 2 and Jane Doe 3. After 15 years, and the expiration of the statute of limitations for rape and sodomy, DNA matches connected defendant to the three sexual assaults. The People prosecuted defendant for the torture of Jane Doe 1. Jane Doe 2 and Jane Doe 3 testified at defendant's trial pursuant to Evidence Code section 1101.

A. Jane Doe 1

On March 18, 1991, Jane Doe 1 was in the seventh grade and had just turned 13. She was 5' 2" tall and weighed 86 or 87 pounds.

Jane Doe 1 got out of school early that day and spent some time at a friend's house. At approximately 3:00 or 3:30 p.m., she was walking home along East Avenue in Hayward. She noticed a man, whom DNA would establish was defendant, walk towards her and pass her on her left side. She kept walking. Suddenly she was grabbed from behind above both elbows and lifted off the ground. She screamed and struggled, but could not escape defendant's grasp. Defendant put his hand over Jane Doe 1's mouth to stop her screams. When his hand slipped, Jane Doe 1 asked him, "Are you going to kill me?" Defendant replied, "I will if you don't shut up." Jane Doe 1 stopped screaming because she did not want to be killed.

Defendant threw Jane Doe 1 into a silver-blue van and got in after her. The van had only a driver's and a passenger's seat. The back of the van was empty except for boxes and some clothes. Defendant placed Jane Doe 1 face down on the floor of the van, blindfolded her from behind, and dragged her forward to where her head was between the driver's and the passenger's seats. He drove off holding her down by the base of the neck.

Defendant asked Jane Doe 1 her name and age. She "knew he wanted a child, and . . . didn't know how old he wanted [her] to be," so she replied, "9, 10, 11, 12." From this point on, Jane Doe 1 thought defendant was going to kill her.

Defendant drove for 10−15 minutes. He then stopped the van, removed his hand from Jane Doe 1's neck, and told her, "I'm going to fuck you real bad." Defendant roughly flipped Jane Doe 1 over, removed her shoes, pants, and underwear, and pushed her shirt up around her neck. He took off his clothes, put his finger inside Jane Doe 1's vagina, and sucked on his finger. He then ordered Jane Doe 1 to do the same with her own finger.

Defendant forced open Jane Doe 1's legs and forcefully raped her in the vagina for three to four minutes. He then flipped her over onto her knees, put his penis into her mouth, and forced her head and face onto his penis. Jane Doe 1 was about to vomit and pulled back. She thought defendant would kill her if she threw up, so she swallowed her vomit. Defendant continued to force her to orally copulate him.

Defendant then forced Jane Doe 1 onto her hands and knees and sodomized her. Jane Doe 1 screamed in pain. Defendant said, "Good."

When defendant finished the sexual assault, he lay down with Jane Doe 1, caressed her, and had her put her arms around him and say, "I love you." He kissed her and told her to kiss him back, using her tongue. He asked her personal questions and made a comment about her parents that made her think he was going to kill them. He gave Jane Doe 1 what she thought was false information about where he lived, in case she went to the police.

Defendant dressed Jane Doe 1 and used her sweatshirt as a blindfold. He put her face down between the driver's and passenger's seat and drove for a few minutes. Defendant stopped the van, opened the door, and threw the blindfolded Jane Doe 1 onto the pavement.

A passerby called police and Jane Doe 1 was taken in an ambulance to Children's Hospital in Oakland. Dr. Jeanne Mowry, a pediatric nephrologist, performed a sexual

assault examination of Jane Doe 1. She had cuts and bruises, and a tear on the vaginal wall with oozing blood. Dr. Mowry collected vaginal and rectal swabs.

Dr. James Betts, chief of surgery at the hospital and director of trauma services, was qualified as an expert on pediatric surgery and pediatric urology. He performed reconstructive surgery on Jane Doe 1. Dr. Betts gave his expert opinion that Jane Doe 1 had suffered a "particularly brutal, violent assault, rape, and torture." She had bruising on her hands, mouth, elbows, and back, as well as around her windpipe, suggesting blunt force trauma.

Dr. Betts testified that Jane Doe 1 needed reconstructive surgery because she had "suffered severe, violent injury." She had a "very large, jagged tear in the fourchette of her vagina [which] went down through into the musculature of that area and had two areas of significant laceration within the vaginal canal." The reconstruction of her vaginal canal was "extensive . . . the equivalent of a very major episiotomy . . . that required multiple layers of suture and repair, as well as the repair of the laceration inside her vaginal canal which required multiple suturing[,]" 50 to 80 sutures. Jane Doe 1 also had a torn vaginal wall and a "fairly large fissuring type of laceration in her anus."

Of the thousands of surgeries Dr. Betts had performed on children, "[t]his was one of the worst injuries, most brutal signs of injury, that [he had] seen in a child of this age."

Jane Doe 1 never got a good look at defendant and could not identify him in court. But she testified that when she attended his arraignment and heard him speak, she reacted strongly to his voice: "my teeth started chattering. My whole body started chattering, sort of shaking."

B. Jane Doe 2

On December 31, 1990, 24-year-old Jane Doe 2 was living in an apartment in Castro Valley. She was the same height as Jane Doe 1, 5' 2", and weighed 115 pounds.

Sometime after 4:30 p.m., Jane Doe 2 left her apartment to walk to a corner store to buy cheese for a New Year's Eve party. She saw defendant standing next to the open door of a grayish-blue van, rummaging inside. As she passed by, she looked at defendant and said, "Hello." Defendant seemed surprised, but responded, "Hi."

Defendant then ran up behind Jane Doe 2 and slammed into her, hitting her in the face and chest. She lost her balance because she had an arm in a sling. He silenced her screams by pulling her shirt and jacket over her head and slamming her head and face into the ground. Her mouth filled with blood and she had difficulty breathing. Defendant dragged her into the back of the van, which was cluttered with tools, a toolbox, and a roll of carpet. She passed out.

When she came to, defendant was pulling off her sweatpants. He had pulled her shirt and jacket over her head so she couldn't see. He started jamming his fingers into her anus "really hard," causing her pain. She tried to get away, but defendant grabbed her and flipped her onto her back. She thought defendant was going to kill her.

Defendant asked Jane Doe 2, "How do you want it first? In the ass or the pussy?" He ordered her to open her legs, but she refused. He forced her legs open and vaginally raped her, saying, "Fuck me. Fuck me," and asking personal questions. He told Jane Doe 2 to say, "Fuck me. Fuck me" to him and to put her arms around him. He groped her breasts very hard and bit her nipples so hard she thought he was going to bite them off. He forcibly kissed her and ejaculated.

Defendant tried to sodomize Jane Doe 2, but had difficulty penetrating her anus. He became angry, forced his fingers into her anus and began to hit her. He vaginally raped her again and ejaculated again.

Defendant told Jane Doe 2 he might let her go if she did one more thing. He then flipped her on her stomach and forced her face and head onto his penis. She gagged, but swallowed her vomit so as not to anger defendant by throwing up. He hit her hard in the back of the head to force it down harder on his penis, and eventually ejaculated into her mouth.

Defendant then forced Jane Doe 2 to her knees between the driver's and passenger seat, and forced her head down as he drove. He talked to himself about having to find a way to get rid of Jane Doe 2, who thought that meant defendant was going to kill her. He made a comment to Jane Doe 2 that made her think defendant believed she would go to the police.

Defendant stopped the van and demanded the money that Jane Doe 2 had taken with her on her walk to the store. He got out of the van and pulled Jane Doe 2 out after him. Defendant pinned Jane Doe 2 against him and started walking. Jane Doe 2 asked him if she could go home. Defendant said, "Yeah, I think so" and "Thank you, and have a Happy New Year." He then walked off and left her alone, still with her shirt and jacket over her head.

Jane Doe 2 was treated for sexual assault at Eden Hospital. Emergency room physician Joanne Nelson examined Jane Doe 2, who had bruises under her breasts, injuries to her back, a head contusion, and red hand marks on her legs. There were lacerations in three areas around her genitalia. Dr. Nelson collected vaginal and rectal swabs.

Jane Doe 2 identified defendant in court as her assailant.

C. Jane Doe 3

On January 23, 1991, 29-year-old Jane Doe 3 lived alone in a stand-alone apartment on Allston Way in Berkeley. She returned home about 10:30 that evening, after working a 16-hour shift as a nurse at Alta Bates Hospital.

As she walked into her apartment door, defendant grabbed her from behind and put his hand over her mouth. He said, "I was about to give up on you. I didn't think you were coming home tonight." She started to scream and struggle. Defendant forced her arm high up behind her back, and told her, "Shut up. If you don't shut up, I'll break it." She stopped struggling.

Defendant forced her to the floor on her stomach and started to remove her pantyhose. She told him to leave her alone. He responded, "Shut up. Just shut up."

Defendant fondled Jane Doe 3's anus and vagina with his fingers. He then flipped her on her back, ripped off her shirt, pushed her legs up in the air and vaginally raped her. He said, "That's so good. I'll do it again," and raped and sodomized her many times. During the sexual assault he asked her personal questions.

The assault lasted one and one-half hours. When defendant finished he placed foreign objects in Jane Doe 3's anus. He asked Jane Doe 3 to masturbate him.

Defendant hog-tied Jane Doe 3 with the telephone cord and her pantyhose, urinated onto her, and left by jumping off the side balcony.

Jane Doe 3 had a sexual assault examination, including the taking of vaginal swabs, at Alta Bates.

Jane Doe 3 identified defendant's picture in a photo lineup and identified him in court as her assailant.

Defendant did not testify and presented no witnesses. Defense counsel argued the DNA testing was unreliable and flawed. Counsel's principal argument was that defendant may have committed the sexual assault of Jane Doe 1, but did not act with the specific sadistic intent required for the crime of torture. Defense counsel conceded the element of great bodily injury.

The jury convicted defendant of the torture of Jane Doe 1. The trial court sentenced him to life in prison with the possibility of parole.

II. DISCUSSION

A. The Sixth Amendment Right of Confrontation and Melendez-Diaz

Defendant contends that expert DNA testimony, linking him to all three victims, was admitted in violation of his United States Constitution Sixth Amendment (Sixth Amendment) right to confrontation because the testifying experts did not personally perform all of the DNA testing. We disagree because of the holding of *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), which we believe survives the narrow ruling of the United States Supreme Court majority in *Melendez-Diaz*.

1. Factual Background

The DNA analysis evidence linking defendant to the sexual assaults of Jane Doe 1 and Jane Doe 2 came from the testimony of Eleanor Salmon, a forensic scientist at Forensic Analytical Sciences (FAS) in Hayward, where she had worked for seven and one-half years. She was the DNA technical leader and section supervisor for the DNA unit, and both performed DNA analysis herself and supervised the case work of other analysts. She holds a B.S. in biology and an M.S. in forensic science. She had

previously testified as an expert witness in DNA analysis on 23 occasions. The trial court in this case found she was qualified as an expert on forensic DNA analysis.

Salmon testified in detail about the DNA analysis procedures at FAS, including the use of PCR-based STR analysis, a common forensic DNA tool; measures in place to ensure accuracy of an analysis; DNA comparison techniques; storage procedures; and chain of custody of evidence.

Salmon testified the Alameda County Sheriff's Office requested a DNA analysis of the evidence in Jane Doe 1's sexual assault kit in October 1997. FAS forensic scientist Lisa Calandro performed the testing and prepared a laboratory report. Salmon testified in detail about the procedures Calandro followed in conducting the analysis. She testified she would have done nothing differently from Calandro. She personally reviewed Calandro's laboratory report that was prepared in the ordinary course of business; personally reviewed Calandro's notes and raw data; and spoke to Calandro about her analysis.

Salmon personally conducted the analysis of defendant's DNA. She also personally calculated the statistical meaning of the results of Calandro's DNA analysis of the sperm sample from Jane Doe 1 and prepared a report reflecting those calculations. She concluded that there was a probability of one in 180 billion that the DNA in the sperm sample came from someone other than defendant—or, in layman's terms, defendant's DNA matched that found in the Jane Doe 1 sperm sample.

Salmon testified that Calandro used the same analysis procedures to test the evidence from the sexual assault kit of Jane Doe 2, sperm taken with a vaginal swab. Salmon also testified that, in her opinion, defendant's DNA matched that from the Jane Doe 2 sperm sample—i.e., there was also a probability of one in 180 billion that the DNA in the sperm sample came from someone other than defendant. Calandro's laboratory report and raw data is still on file at the FAS laboratory.

Defense counsel thoroughly cross-examined Salmon on genetics, DNA analysis procedures, FAS recordkeeping, and Calandro's methods of analysis.

Calandro did not testify. Apparently, she was no longer working at FAS at the time of defendant's trial.

The DNA analysis evidence linking defendant to the sexual assault of Jane Doe 3 came from the testimony of Gary Harmor, Assistant Director and Senior Forensic Serologist at the Serological Research Institute (SERI) in Richmond. He had worked at SERI for 30 years, had a B.S. in forensic science, and had testified as an expert witness on DNA analysis over 120 times. The trial court in this case qualified Harmor as an expert on forensic DNA analysis.

Harmor personally tested the evidence from Jane Doe 3's sexual assault kit, using PCR-based SDR analysis, the standard method for DNA testing. He testified in detail how he developed a DNA profile from a sperm sample taken with a vaginal swab.

Harmor testified that SERI also analyzed a DNA sample from defendant. He testified that he extracted DNA from the sample. He further testified that, in his opinion, there was a probability of one in 290 quintillion that the DNA in the Jane Doe 3 sperm sample came from someone other than defendant—i.e., that defendant's DNA profile matched the profile of the DNA taken from the sperm sample from Jane Doe 3.

On cross-examination, however, Harmor admitted he did not actually conduct the DNA analysis of defendant's sample—rather, the analysis was done by forensic scientist Dawn Romano, under Harmor's direction. This was a routine procedure at SERI. Harmor wrote the laboratory report on the DNA analysis.

Defense counsel thoroughly cross-examined Harmor on DNA analysis procedures, SERI's methods, and Romano's qualifications.

Romano did not testify.

2. Legal Analysis

Defendant contends his right to confront the witnesses against him was violated because forensic scientists Calandro and Romano, who performed essential components of the DNA testing linking him to all three victims, did not testify. We disagree for the following reasons.

The Sixth Amendment confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." (U.S. Const., 6th Amend.) Thirty years ago, the United States Supreme Court held that the right to confront witnesses did not extend to the admission of out-of-court statements that fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*).) Such statements could be admitted against criminal defendants without violating their right of confrontation.

In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the court overruled *Roberts*. "*Crawford* abandoned [the *Roberts*] approach to such statements . . . 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." (*Geier, supra,* 41 Cal.4th at p. 597, citing *Crawford, supra,* at p. 59.)

Justice Scalia, writing for the *Crawford* court, reasoned that the key test for a confrontation clause violation is whether the out-of-court statement is "testimonial." The court focused on the text of the confrontation clause, which refers to "witnesses," and cited a Webster's dictionary definition of "witnesses" as those who " 'bear testimony.' " (*Crawford, supra,* 541 U.S. at p. 51, citing 2 N. Webster, An American Dictionary of the English Language (1828).) Citing the same source, the court noted that "testimony" is typically " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " (*Crawford, supra,* at p. 51.) "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." (*Ibid.*)

Crawford listed "[v]arious formulations of this core class of 'testimonial' statements . . . : '*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,' [citation]; 'extrajudicial statements . . .

contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citation]; 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,' [citation]." (*Crawford, supra,* 541 U.S. at pp. 51−52.) *Crawford* "le[ft] for another day any effort to spell out a comprehensive definition of 'testimonial.' " (*Crawford, supra,* 541 U.S. at p. 68.)

Crawford significantly narrowed the scope of admissibility of out-of-court statements, but the exact extent of that narrow scope was not clear in all contexts. Since the case involved a clear example of a testimonial statement—a nontestifying wife's statement to police implicating her husband (*id.* at pp. 39−41, 68)—the law involving expert testimony was left for development.

In *Geier*, the California Supreme Court addressed the issue now before us: whether *Crawford* applies to, and makes inadmissible, DNA test results from nontestifying forensic scientists. The prosecution's DNA expert witness was Dr. Robin Cotton, the laboratory director of a DNA testing lab. (*Geier, supra,* 41 Cal.4th at pp. 593−594.) Cotton testified about the general principles of DNA testing and the specific "recipe"-like protocols for each step of DNA testing done by her lab. (*Id.* at pp. 594−595.) These protocols included a form to be filled out by the analyst at each step, and the requirement that the analyst keep his or her handwritten notes. (*Id.* at p. 595.) "This record is sufficiently complete that [the lab director] or another analyst could reconstruct what the analyst who processed the samples did at every step." (*Ibid.*) Cotton also testified in detail about the "significance of a match in terms of the frequency of a particular DNA profile in a given population." (*Ibid.*)

Cotton also testified about the DNA testing results obtained from comparing defendant's DNA samples with those of the victim and the crime scene. The DNA analysis was not performed by Cotton, but by a laboratory biologist under her supervision, Paula Yates. Cotton reviewed Yates' step-by-step forms and handwritten notes, and cosigned her laboratory report. Cotton testified Yates followed the lab protocol for DNA testing. Cotton testified that, in her opinion, Yates' DNA analysis

showed that defendant's DNA sample matched the DNA sample taken from the victim. (*Geier, supra,* 41 Cal.4th at p. 596.)

Geier reviewed *Crawford*'s reasoning and noted that *Crawford* "made it clear that 'not all hearsay implicates the Sixth Amendment's core concerns,' [citation]," such as business records. (*Geier, supra,* 41 Cal.4th at p. 597, citing *Crawford, supra,* 541 U.S. at p. 51.) The court then acknowledged that it "had not yet had occasion to decide whether the admission of scientific evidence, like laboratory reports, constitutes a testimonial statement that is inadmissible unless the person who prepared the report testifies or *Crawford*'s conditions—unavailability and a prior opportunity for cross-examination—are met." (*Geier, supra,* at p. 598.)

The *Geier* court found guidance in the post-*Crawford* decision in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), which was a consolidation of two cases (*Davis v. Washington*, No. 05-5224, and *Hammon v. Indiana*, No. 05-5705 (*Hammon*)) with distinct fact patterns. *Davis* involved the admission of a 911 tape from a domestic violence victim who described the attack to the 911 operator as it was occurring. *Hammon* involved the admission of a battery affidavit from a domestic violence victim which was filled out after the assault at the request of investigating police officers, to whom the victim had described the attack. (*Geier, supra,* 41 Cal.4th at pp. 602−603; see *Davis, supra,* at pp. 818−821.)

Davis repeated the *Crawford* rule that the key distinction for confrontation clause purposes was whether a hearsay statement was testimonial or nontestimonial. (*Geier, supra,* 41 Cal.4th at p. 603; see *Davis, supra,* 547 U.S. at p. 824.) The *Davis* court concluded that the victim's statements on the 911 tape in *Davis* were not testimonial, but the victim's statements in the affidavit in *Hammon* were. (*Geier, supra,* at p. 603.) "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the

primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis, supra,* 547 U.S. at p. 822.)

Geier noted that the *Davis* court "emphasized the contemporaneity" of the *Davis* victim's statements. (*Geier, supra,* 41 Cal.4th at p. 604.) *Geier* quoted *Davis*' observation that the victim "was speaking about events *as they were actually happening*" rather than describing past events. (*Ibid.*, quoting *Davis, supra,* 547 U.S. at p. 827.) *Geier* observed that *Davis* contrasted the victim's statements in *Hammon,* which described, in response to police questioning, how potentially criminal events occurred in the past. (*Geier, supra,* 41 Cal.4th at p. 604, quoting *Davis, supra,* 547 U.S. at p. 829.) "Such statements under official interrogation are an obvious substitute for live testimony, because they do precisely what a witness does on direct examination; they are inherently testimonial." (*Davis, supra,* at p. 830, fn. & italics omitted.)

Geier also noted its prior interpretation of *Davis*: " 'the statement must have been given and taken primarily for the purpose ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial,' " and " 'statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial'. . . ." (*Geier, supra,* 41 Cal.4th at p. 604, quoting *People v. Cage* (2007) 40 Cal.4th 965, 984.)

Geier then reviewed post-*Davis* decisions from other jurisdictions, which went both ways on the question whether laboratory reports and similar documents were testimonial. (*Geier, supra,* 41 Cal.4th at pp. 604−605.) The *Geier* court was "more persuaded by those cases concluding that such evidence is not testimonial, based on our own interpretation of *Crawford* and *Davis*." (*Id.* at p. 605.) "For our purposes in this case, involving the admission of a DNA report, what we extract from those decisions is that a statement is testimonial if (1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial. Conversely, a statement that does not meet all three criteria is not testimonial." (*Ibid.*)

Geier found the second requirement "critical," calling it "the distinction drawn in *Davis*" between the statements on the 911 tape while the assault was occurring and the statements told to police after the fact. (*Geier, supra,* 41 Cal.4th at p. 605.) "Yates's observations . . . constitute a contemporaneous recordation of observable events rather than the documentation of past events. . . . [S]he recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." Therefore, she was not acting as a witness and not testifying within the meaning of the confrontation clause. (*Id.* at pp. 605−606; see *id.* at p. 607 [Yates performed a routine, nonadversarial laboratory process and thus did not " 'bear witness' " against the defendant].)

Geier observed that Yates' report and notes were generated as part of a standardized scientific protocol which she performed as part of her employment, not to incriminate the defendant; that DNA testing is not inherently accusatory, because it can lead to exculpatory as well as incriminating results; and that "the accusatory opinions in this case [the conclusion that the defendant's DNA matched the sample taken from the victim] were reached and conveyed not through the nontestifying technician's laboratory notes and report, but by the testifying witness, Dr. Cotton." (*Geier, supra,* 41 Cal.4th at p. 607.)

The trial court in the present case relied on *Geier* to overrule defendant's *Crawford* objections and admit the evidence of the DNA testing results from the analyses performed by the nontestifying forensic scientists.

On June 25, 2009, less than two months after defendant was sentenced, the United States Supreme Court decided *Melendez-Diaz*. Justice Scalia wrote the majority opinion, and was joined by Justices Stevens, Souter, Thomas, and Ginsburg.

Melendez-Diaz was not a DNA case. The defendant was charged with distributing and trafficking in cocaine in an amount between 14 and 28 grams. The prosecution submitted three "certificates of analysis" showing the results of the forensic analysis which established the weight of the bags of drugs seized from defendant and that the seized bags contained cocaine. (*Melendez-Diaz, supra,* 129 S.Ct. at pp. 2530−2531.)

The trial court overruled a *Crawford* objection and the jury found the defendant guilty. (*Id.* at p. 2531.)

The *Melendez-Diaz* majority ruled the admission of the certificates violated *Crawford*. The core of its ruling, stated fairly briefly in part II of its opinion, is that the certificates were affidavits and thus fell within the "core class of testimonial statements" described in *Crawford*. (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532, quoting *Crawford, supra,* 541 U.S. at p. 51.) The certificates were the functional equivalent of live testimony, intended to take the place of the direct examination of a prosecution witness. Indeed, as the majority pointed out, the sole purpose of the certificates was to establish the weight and composition of the seized drugs. Because the forensic analysts did not testify, and there was no showing they were unavailable and no prior opportunity for the defendant to cross-examine them, admission of their affidavits violated *Crawford*. (*Melendez-Diaz, supra,* at p. 2532.)

The majority then devoted the remainder of its opinion, the fairly lengthy part III, to rejecting "a potpourri of analytic arguments" advanced by respondent State of Massachusetts and the dissenting opinion of Justice Kennedy.[1] (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2532; see *id.* at pp. 2532−2542 [part III].)

While joining in the majority opinion, Justice Thomas wrote a separate one-paragraph concurrence in which he states his narrow position: "I join the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,' [citation to majority opinion]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. . . ." (*Melendez-Diaz, supra,* 129 S.Ct. at p. 2543.)

The question before us is whether *Melendez-Diaz* has overruled *Geier*. This issue is currently before the California Supreme Court in several cases.[2]

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[1] In which he was joined by Chief Justice Roberts and Justices Breyer and Alito.

[2] The lead cases are *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620; *People v. Lopez* (2009) 177 Cal.App.4th

We believe that *Geier* survives *Melendez-Diaz*. First, the facts of that case are significantly different from those of *Geier*. In *Melendez-Diaz* the prosecution was using written affidavits in lieu of live witnesses as the sole source of information crucial to convict: the weight and qualitative nature of the seized drugs. By contrast, in *Geier* the director of the laboratory which conducted the DNA testing testified in court. Dr. Cotton testified about the general principles of DNA testing and the specific objective protocols for each step of the DNA testing, including a form to be filled out by the analyst at each step and the requirement that the analyst keep his or her handwritten notes. She testified in detail about the "significance of a match in terms of the frequency of a particular DNA profile in a given population." (*Geier, supra,* 41 Cal.4th at p. 595.)

More significantly, she testified about the DNA testing results obtained from comparing the defendant's DNA samples with those of the victim and the crime scene. Although the DNA analysis was not performed by Cotton, but by a laboratory biologist under her supervision, Cotton reviewed the biologist's protocol forms and handwritten notes, cosigned her laboratory report, and testified the biologist followed the lab protocol for DNA testing. Finally, Cotton testified that, in her opinion, her laboratory's DNA analysis showed that the defendant's DNA sample matched the DNA sample taken from the victim. (*Geier, supra,* 41 Cal.4th at p. 596.)

These facts are a far cry from the bare-affidavit basis of guilt in *Melendez-Diaz.* Dr. Cotton was immersed in the DNA testing in *Geier* and testified as to her own conclusion of the DNA match. Unlike *Melendez-Diaz,* the jury in *Geier* was informed about the nature of the testing, how the tests were performed, and how the scientific conclusions were reached. Dr. Cotton was subjected to cross-examination. Nothing in *Melendez-Diaz* undercuts *Geier*'s substantial and careful analysis that the testimony in that case did not violate the Sixth Amendment right of confrontation as interpreted by *Crawford*. We note that the majority in *Melendez-Diaz* limited the scope of its opinion

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202, review granted December 2, 2009, S177046; and *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213.

when it stated, "[c]ontrary to the dissent's suggestion . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device must appear in person as part of the prosecution's case." (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532, fn. 1.)

Defendant points to passages in the *Melendez-Diaz* majority opinion that he claims reject *Geier*'s reasoning and holding. These passages involve the concept of the contemporaneous recording of observable events as opposed to descriptions of past events—with the suggestion that *Geier* might have interpreted *Davis* too broadly and placed too much weight on contemporaneousness—and the value of cross-examination to root out manipulated or incompetent scientific testing. (See *Melendez-Diaz, supra,* 129 S.Ct. at pp. 2535−2539.) But these passages are contained in part III of the majority opinion, which was merely an elaborate response to the dissent.

What is critical here is the nature of Justice Thomas' fifth vote. Justice Thomas joined the majority opinion on the sole and narrow ground that the documents used to convict the defendant were affidavits, which clearly fell within the core class of testimonial statements governed by the confrontation clause. He therefore did not join in the passages in part III which might be interpreted to undercut the reasoning of *Geier*.

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who have concurred in the judgment[] on the narrowest grounds . . . .' [Citation.]" (*Marks v. United States* (1977) 430 U.S. 188, 193; see *Del Monte v. Wilson* (1992) 1 Cal.4th 1009, 1023.) By supplying the fifth vote on substantially narrower grounds than those of the majority opinion, Justice Thomas' position provides critical significance for a lower court's interpretation of *Melendez-Diaz*. (See *Romano v. Oklahoma* (1994) 512 U.S. 1, 9; *People v. Rios* (2009) 179 Cal.App.4th 491, 501.)

This is especially true when we, the Court of Appeal, are bound by *Geier* unless it is clearly overruled, expressly or otherwise, by the United States Supreme Court.

It is worth noting that just four days after issuing its decision in *Melendez-Diaz*, the United States Supreme Court denied certiorari in *Geier*. (*Geier v. California* (2009) 557 U.S. ___, 129 S.Ct. 2856.)

Defendant does not expressly argue that the DNA testimony in this case fails to satisfy *Geier*. Although we need not address the issue, we conclude that the testimony meets the *Geier* requirements. The laboratory supervisors of the nontestifying forensic scientists testified at length in court and were cross-examined. They described the laboratory testing protocol and procedures and said the procedures were properly followed under their supervision and the proper records were kept. Of significant importance under *Geier*, it was the *testifying witnesses* who reached the accusatory conclusion that defendant's DNA matched those of the victims, based upon a personal review of the critical DNA evidence. Here, defendant had an opportunity to cross-examine the key witnesses who were involved in the substantive analysis and reached the conclusion about the DNA match. [3]

Other jurisdictions have reached the same conclusion where the analyst who performed some of the underlying tests was not called as a witness to establish the DNA identification. The Indiana Supreme Court held that *Melendez-Diaz* did not preclude the testimony of a supervisor who testified about the DNA test results when she participated directly in the process by personally checking the test results, explained the standard operating procedures of the laboratory, and was examined about whether the analyst diverged from the procedures. (*Pendergrass v. State* (Ind. 2009) 913 N.E.2d 703; see also *State v. Lopez* (Ohio Ct.App. 2010) 927 N.E.2d 1147; *Carolina v. State* (Ga. Ct.App. 2010) 690 S.E.2d 435; *People v. Johnson* (Ill. Ct.App. 2009) 915 N.E.2d 845 vacated on other grounds in *People v. Johnson* (Ill. Sept. 29, 2010, No. 109172) 2010 Ill. Lexis

[3] The expert testimony regarding the match involving Jane Doe 1 and Jane Doe 3 is not impacted by the *Melendez-Diaz* rationale. Any error in the admission of DNA evidence involving Jane Doe 2 would be harmless given the strength of the rest of the evidence.

1263; and *Larkin v. Yates* (C.D.Cal. July 9, 2009, No. CV 09-2034 DSF) 2009 U.S. Dist. Lexis 60106.)

B. Reference to "Felon Databank"

Prior to trial, the court ordered the parties to admonish their witnesses of what they should not mention during their testimony, especially prior convictions. During trial, the prosecutor asked a testifying police officer how he developed a suspect in this case. The officer replied, "there was a match in their felon databank, their DNA data bank, with offender DNA that was inputted." After defendant objected, the prosecutor had the officer clarify his testimony by stating the DNA databank had DNA profiles from a variety of sources, including missing persons and unidentified bodies.

Defendant contends it was error for the officer to mention that his DNA was taken from a "felon databank," because that implied he had a prior felony conviction. But once the officer clarified his testimony, it became clear to the jury that the DNA databank contained DNA profiles from various sources, some not involving persons who committed crimes. As such, there is no error because the witness "did not purport to explain defendant's inclusion in the database, and . . . made no mention of past crimes defendant committed or was alleged to have committed." (*People v. Farnam* (2002) 28 Cal.4th 107, 161.)

C. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct on several occasions during his closing argument to the jury. While some of his arguments amount to misconduct, we conclude that no inappropriate arguments caused defendant prejudice in light of the conclusive DNA evidence and the in-court identification of defendant by Jane Doe 2 and Jane Doe 3.

1. Comments on Retesting Sperm

During her testimony, forensic scientist Salmon mentioned that, while the DNA extracts Calandro used for her analysis had been consumed by that process, her laboratory had retained the DNA extracts from a sample taken from Jane Doe 1's underwear, as well as Calandro's glass microscope slides. This revelation was contrary

to defense counsel's understanding that no biological evidence existed as to Jane Doe 1 for defense retesting.

In his closing argument, the prosecutor said, "Sperm found on [Jane Doe 1's] underwear is still retained in the lab. . . . It's still at [FAS]. *So if there was really a doubt that it's the defendant's sperm on the victim, . . . that would have been retested. . . .* [¶] *Both sides have access to physical evidence. . . . So if [defense counsel] gets up here and says, 'We can't retest. It's kind of unfair,' there is still evidence in every case that they can retest, the sperm, if they truly believe it wasn't the defendant.*"

Defense counsel objected that this was "improper argument." The trial court admonished the jury that defendant did not have to prove his innocence, and the People had to prove his guilt.

Defendant contends that by using the word "they" the prosecutor improperly implied that defense counsel thought his client was guilty. He also contends the prosecutor improperly raised a false inference: that the defense did not retest the DNA because of a fear it would not show defendant's innocence, when the truth was the defense thought there was no DNA to be tested until Salmon's testimony.

The vague objection of "improper argument" did not preserve these issues for appeal. To preserve a claim of prosecutorial misconduct for appeal, the defense must make a timely objection and request an admonition to cure the harm. (See *People v. Price* (1991) 1 Cal.4th 324, 447.) Such objections must be on specific grounds, especially in the misconduct context when the defense wants the curing of a specific harm. (See *People v. Stanley* (2006) 39 Cal.4th 913, 952 (*Stanley*).) And we do not believe a proper objection would have been futile or a specific admonition ineffective. (See *People v. Arias* (1996) 13 Cal.4th 92, 159.)

The issues fail on the merits in any case. By no means can the casual use of the third-person plural mean anything other than a reference to the defense team. It cannot be construed as a comment that defense counsel believed his client was guilty. The prosecutor's argument that the defense could have retested the evidence is a fair comment on the evidence. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 90−91 overruled in part

on unrelated grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) When Salmon revealed the existence of evidence in her testimony, the defense was perfectly capable of requesting a continuance, but did not do so. Moreover, the defense could have investigated the issue of existing evidence by contacting FAS before trial.

2. Comment About Defendant Believing Jane Doe 2 was a "little kid"

Later in his argument, in discussing the Jane Doe 2 case, the prosecutor commented: "She walks by him, . . . he's there playing with the side of his van, seeing what he probably thinks is a little girl. She's 42 years old when she testifies in this case, and you see she kind of looks like a girl at 42. When this happened to her at 24, she's five foot two [the same height as Jane Doe 1], she's got her little green, like, jumpsuit on, zip-up, lime green. She's walking up the street from where there is an elementary school, where his vantage point is. *He probably thinks she's a little kid.*"

Defense counsel objected that the argument assumed facts not in evidence. The trial court overruled the objection, saying, "This is argument."

Later, the prosecutor noted that in both the Jane Doe 1 and Jane Doe 2 cases defendant parked near an elementary school—a fact apparently not in dispute—and attacked a female who was five foot two. The prosecutor suggested it was not a coincidence: "[W]hat it points out is he's picking up little—what he thinks are little girls." The trial court overruled a defense objection. The prosecutor then argued, "He's picking small victims. . . . [¶] He uses his own hands to subdue the victims."

Defendant contends, with no citation to precedential authority, that the argument was improper because there was no basis in the evidence to show defendant believed Jane Doe 2 to be a child. We disagree. Defendant had parked near an elementary school. He attacked a diminutive 24-year-old woman who was the same height as 13-year-old Jane Doe 1, and weighed only 115 pounds, only 28 pounds more than Jane Doe 1. It is not speculation to conclude defendant believed he was attacking a child, and that he preyed upon children because they were smaller and easier to subdue. Moreover, the trial court admitted the evidence of the Jane Doe 2 sexual assault to show common scheme or plan, so it was permissible to comment on the similarities of the two victims. Finally, sexual

assaults on young, sexually immature girls are more likely to result in "extreme pain and suffering" than those on adult, sexually mature women. This distinction is pertinent to the torture charge. (Pen. Code, § 206.)

The arguments were fair comment on the evidence.

3. Comment that the Most Violent Sexual Offenders Use No Weapons

Immediately after his comment that defendant "uses his own hands to subdue the victims," the prosecutor elaborated on defendant's lack of weapon use: [¶] "I remember in [his] opening statement or something, [defense counsel] mentioning something about no weapon.[4] Let me just put that in perspective a little bit. *Before I started to do sexual assaults, I always thought of sexual assaults with weapons as the worst, like a guy who uses a knife, a guy who uses a gun, that those are the worst ones. And the law says they're the worst, really, because it's different when you use a gun or a knife in a crime. But the kind of guys who perform—who commit sexual assaults without a weapon are the most violent, and it's because—*"

Defense counsel interrupted with an objection, citing assumption of facts not in evidence and improper argument. The trial court responded, "[I]'m going to allow it," but admonished the prosecutor "to make sure you confine your argument to what you believe the evidence has shown."

Shortly thereafter the prosecutor argued: "*But a rapist and a guy who commits sexual assaults, the one who uses his hands is the most violent, because he's getting a high out of physically being violent above and beyond a sexual assault.* And you can see that in the defendant in this case. For example, Jane Doe . . . 3's case. He's waiting in her house for God knows how long. He could have just gone to the kitchen to get a knife, but he didn't want to. *He likes . . . that terror that he can inflict on them with his hands.*"

Defendant's objection to this comment was overruled.

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[4] In his opening statement, defense counsel argued, "The evidence will not show that there was any instrument of torture used. The evidence will not show, in fact, that any weapon was used in this case."

Defendant contends that the prosecutor improperly appealed to the jury's passions and fears, and improperly invoked his personal experience as a sex crimes prosecutor. The prosecutor's suggestion his argument was based on his experience may have been improper (see *People v. Huggins* (2006) 38 Cal.4th 175, 207), but beyond that the rest of that argument was, again, fair comment on the evidence. Defendant attacked physically vulnerable women. The evidence showed he inflicted severe violence with his hands, as opposed to simply forcing his victims to submit to sexual assault by displaying a gun or knife. The reference to Jane Doe 3's case was apt. Defendant had ample time to secure a kitchen knife or other weapon, but preferred to use his hands. Defendant also inflicted severe pain with his hands and fingers, such as forcibly inserting his fingers in the victim's vagina.

We also note the prosecutor was responding to the opening argument of defense counsel, who clearly attempted to minimize the severity of his client's assault on Jane Doe 1 by pointing out no weapon was used. This was proper responsive argument. (See *Stanley*, *supra*, 39 Cal.4th at pp. 952−953.)

4. Comment About the Similarities Between the Attacks on Jane Doe 1 and Jane Doe 3

At the outset of trial, the court tentatively ruled that both the Jane Doe 2 and Jane Doe 3 attacks would be admissible under Evidence Code section 1101, subdivision (b) on the issue of intent, but only the Jane Doe 2 attack would be admissible on the issue of common scheme or plan.

Shortly thereafter, the court appeared to change its ruling and allow both attacks to be admissible for both intent and common scheme or plan.

When the parties and the court discussed jury instructions, there was some confusion about whether the Jane Doe 3 attack could come in on the issue of common scheme or plan. Both the defense and the prosecution believed it could not; the court said, somewhat ambiguously, "I disagree, but fine."

During closing argument the prosecutor commented on the similarities of all three sexual assaults: "*All three of these victims*, . . . they all remember that this guy had something about wanting their legs in the air and they got to keep position in a certain

way and it's not good enough for him. He's got to push them farther apart. It's very distinctive how he has that fetish about their legs in the air and how he wants them to be when he's raping the victims. He sodomizes them. He forces both [*sic*] of them to orally copulate him . . . . He instructs both [*sic*] of them to kiss him. Jane Doe . . . 1 and Jane Doe . . . 3 distinctly remember him using his tongue, . . . [b]ut Jane Doe . . . 1 and 2, he instructs them to kiss him.

"[¶] He's the one who puts their clothes back on. He asks them all these kinds of personal questions, like what your name is, things about their background. Jane Doe . . . 2, asked her if she has a boyfriend, just as Jane Doe . . . 3, asked her if she's married. So he asks them personal questions about where they're from."

Defense counsel objected as to Jane Doe 3, arguing that the prosecutor was using that attack to show common scheme or plan while it was only admissible for intent. The prosecutor agreed, saying the assault "wasn't so distinctive" as the other two and noting it did not take place in a van. He claimed as he was reviewing the similarities between the Jane Doe 1 and Jane Doe 2 attacks, "I'm pointing out some of the similarities involving Jane Doe . . . 3 because—you can see, in addition to DNA, that there are enough similarities that we're talking about the same guy."

Defense counsel then objected. The trial court ruled, "If it goes to the intent—it's fine to talk about Jane Doe . . . 3 for intent."

Defendant contends the prosecutor committed misconduct by urging the use of evidence for purposes other than the limited purpose for which it was admitted. (See *People v. Lang* (1989) 49 Cal.3d 991, 1022.) He argues that the prosecutor, knowing the Jane Doe 3 attack was only admissible for intent, argued it showed common scheme or plan.

The trial court seemed to believe the prosecutor was only arguing the Jane Doe 3 attack showed intent. The court instructed the jury with CALCRIM No. 375, and made it clear that only the evidence of the Jane Doe 2 attack was admissible to show common scheme or plan. The jury is presumed to have followed that instruction. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*).) To the extent the prosecutor's argument

may have used the Jane Doe 3 attack for common scheme or plan, the instruction cured any error flowing from the prosecutor's argument.

5. Comment About "People Who Rape Children"

The prosecutor reminded the jury they were deciding the case of Jane Doe 1, and then said: "And we talk about the fact that you can only consider Jane Doe . . . 2 and Jane Doe . . . 3 for a limited purpose. *But beyond a limited purpose, they just are different cases, because they're not children. And we in society have a special place in the criminal justice system for people who rape children. It's different than adults.*"

Defense counsel objected. The trial court sustained the objection, and ordered the "people who rape children" comment stricken from the record.

The prosecutor continued: "Jane Doe . . . 2, you know, she's 24. She's an adult. Jane Doe . . . 3, she's 29. She's an adult. She's a professional. They have, as you can imagine, you know, *as adults who are matured, some ability to try and get through such a horrific event.*"

Defense counsel objected that the prosecutor was using the Jane Doe 2 and Jane Doe 3 attacks for a purpose beyond their limited admissibility. The trial court told the prosecutor, "I'm going to admonish you again to make sure that you keep on task in terms of what you're using Jane Doe . . . 2 and 3 for."

The prosecutor then said, "Jane Doe . . . 1 was a child." He proceeded to describe the "horrific" nature of the attack on her, referring to facts in evidence.

Defendant contends that the "people who rape children" comment was an improper appeal to the jury's passions, prejudices, and fears. (See, e.g., *People v. Fields* (1983) 35 Cal.3d 329, 362.) We are not sure it was, especially since it was clear from the evidence that Jane Doe 1 was raped and was a child. In any event, the remark was stricken from the record. The trial court instructed the jury with CALCRIM No. 222,

directing them to disregard stricken testimony. The jury is presumed to follow the court's instructions. (*Sanchez, supra,* 26 Cal.4th at p. 852.)[5]

6. Comment That The Jury Should Convict to Give Jane Doe 1 "Peace"

Immediately following his description of the "horrific" attack on Jane Doe 1 referenced above, the prosecutor argued: "That is the fear and the terror that he inflicted on her. [¶] It does make it different than any other cases involved here. And for 15 years, she's had to live with that fear until he was identified. And now you've identified him. You got DNA and all the other evidence you've heard in this case. *And that's why I'm confident she's going to finally get peace, because you're going to do the right thing and hold him accountable*."

The trial court overruled defense counsel's objection.

Defendant contends the italicized comment was an improper appeal to the jurors' sympathy for the victim. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057.) We tend to agree. The People claim on appeal that the comment "was geared toward meeting the elements of torture"—but we view the comment as a plea to convict on the basis of victim sympathy. However, given the DNA evidence, defendant was not prejudiced by the comment.

7. Comment Regarding the Elements of Torture

The crime of torture is defined as follows: "Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury as defined in Section 12022.7 upon the person of another, is guilty of torture." (Pen. Code, § 206.)

Thus, the crime of torture has two elements: " '(1) infliction of great bodily injury on another; and (2) the specific intent to cause cruel or extreme pain and suffering for

[5] Defendant's claim that the prosecutor persisted in this line of argument after the first admonition is not accurate. His subsequent argument, quoted in the text, simply pointed out that Jane Doe 2 and Jane Doe 3 were adults and Jane Doe 1 was a child. This is simple fact. He did not repeat his comment that there was a special place in the criminal justice system for child rapists.

revenge, extortion or persuasion or any sadistic purpose.' [Citation.]" (*People v. Burton* (2006) 143 Cal.App.4th 447, 451−452.)

In his closing argument, defendant conceded the first element, great bodily injury, but argued that he did not commit a sexual assault with the requisite second element of sadistic intent.

In his rebuttal argument, the prosecutor commented: "So I'm somewhat surprised that [defense counsel] got up here and conceded that great bodily injury was met in this case, although the evidence does more than show it. *But that's what makes this torture, not just a rape, not just any other sort of sexual assault. It's that first element. Because that second element of intent to inflict pain for personal pleasure, that's true, you're pretty much going to find that in any sexual assault.*"

Defense counsel objected that the italicized comment was "absolutely untrue and improper argument." The trial court responded: "All right. The jury will be instructed on the legal elements that they must find, and the jury's instructed to follow the Court's instructions on the law.

"[¶] Counsel, do be careful about overstating what needs to be shown, or understating it."

Despite the admonition, the prosecutor then compared Jane Doe 1's injuries with those of the other two victims, referred to the second element, and said "the difference is significant."

Defendant contends the prosecutor committed misconduct by misstating the law regarding the elements of torture. Defendant is correct. By defining torture in terms of the nature of the injury, the prosecutor improperly told the jury that the necessary element of specific sadistic intent is present in essentially every sexual assault—which is patently false. It appears the prosecutor engaged in an unworthy attempt to take advantage of the defense concession of great bodily injury and argue as if the defense had thus conceded the entire issue of guilt of the crime of torture.

The misconduct was cured by the trial court giving CALCRIM No. 810, which properly informed the jury of the elements of torture. As noted, the jury is presumed to follow the court's instructions. (*Sanchez, supra,* 26 Cal.4th at p. 852.)

8. Comment Regarding Reasonable Doubt

At the end of his rebuttal argument, the prosecutor argued that reasonable doubt was "a shield for the innocent . . . not a loophole for the guilty." The trial court overruled defendant's objection to this comment.

Defendant contends the comment is misconduct because it misstates the reasonable doubt standard in a way which lowers the People's burden of proof. We agree. Both the Second and Tenth Circuits have condemned this type of comment because it dilutes the standard of reasonable doubt and suggests the standard is a technicality, while in fact it benefits both the innocent and the guilty alike. (See *Floyd v. Meachum* (2nd Cir. 1990) 907 F.2d 347, 351, 354; *Mahorney v. Wallman* (10th Cir. 1990) 917 F.2d 469, 471, fn. 2, 472.)

The misconduct, however, was cured by the trial court's giving CALCRIM No. 220, the standard instruction on reasonable doubt. The jury is presumed to follow the court's instructions. (*Sanchez, supra,* 26 Cal.4th at p. 852.)

9. Mistrial Motion and Curative Instruction

Defendant moved for a mistrial on the basis of prosecutorial misconduct in closing argument. At the hearing on the motion, the trial court referred to the cited misconduct as "troubling." After oral argument, the court denied the mistrial motion, but again characterized some of the prosecutor's arguments as "troubling." The court noted that "no attorney should get so wrapped up in winning that they forget their professional obligations." The court concluded that, for the first time in 17 years on the bench, it felt the misconduct was sufficiently serious to warrant a curative instruction to the jury.

The court admonished the jury as follows: "Ladies and gentlemen of the jury, before I give you your final set of instructions, I need to clarify certain matters.

"[¶] As I told you before, statements that the attorneys make during argument [are] not evidence. Your decision must be based on the evidence. The attorneys may properly

comment on the evidence and suggest how you should view the evidence, but they must do so in an appropriate fashion.

"[¶] On several occasions, the District Attorney improperly attempted to appeal to your passions and sympathies. For example, the District Attorney . . . suggested to you that Jane Doe . . . 1 has lived with fear for 15 years and she would now finally get peace. The District Attorney also improperly suggested that we in society have a special place in the criminal justice system for people who rape children.

"[¶] Moreover, the attorneys may not knowingly misstate the law to you. The District Attorney improperly suggested that you should ignore the law regarding applying the standard of proof beyond a reasonable doubt, telling you that it is a shield for the innocent and not a loophole for the guilty. The determination of guilt must be based upon application of the reasonable-doubt standard, and you cannot separate your determination of guilt from that standard.

"[¶] As I also mentioned at the outset, this is an emotional case. Your job is to set aside your emotional reaction to the charges and, quite frankly, to set aside any conduct by the lawyers, to view the evidence objectively, to determine if the charge has been proved beyond a reasonable doubt, and then reach your decision regarding the defendant's guilt based upon your consideration of the evidence and the law."

10. Conclusion

We conclude the prosecutor committed misconduct by urging the jury to convict defendant to give Jane Doe 1 peace, by blatantly misstating the elements of the crime of torture, and by misrepresenting the concept of reasonable doubt. The misconduct was cured by jury instructions on torture and reasonable doubt and by the curative instruction just quoted. And given the overwhelming evidence of guilt, particularly the DNA evidence and the in-court identifications by Jane Doe 2 and Jane Doe 3, any error would be harmless.[6]

[6] We are not in any way condoning the prosecutor's misconduct discussed in Section C. The trial judge was rightfully troubled by the manner in which the prosecutor argued the case. She stated that for the first time in 17 years on the bench, she felt the

D. Sex Offender Registration

At sentencing, the trial court ordered defendant to register as a sex offender under Penal Code section 290. He notes, and the Attorney General concedes, that the crime of torture is not among the list of offenses in the statute requiring registration. He asks that the registration requirement be stricken; the Attorney General asks that we remand the matter to enable the trial court to decide whether to exercise its discretion to impose a registration requirement under Penal Code section 290.006. Defendant acknowledges he is under a lifetime registration requirement as a result of a 1993 conviction in Los Angeles County for rape and forcible oral copulation. Since he is already subject to a registration requirement, this contention is academic.

III. DISPOSITION

The judgment is affirmed.[7]

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misconduct was serious enough to warrant a curative admonition to the jury. In three prior appeals, of which we took judicial notice, the same prosecutor was criticized for improper conduct, including the observation in *People v. McKenzie* (Aug. 1, 2007, A112837) [nonpub. opn.], page 1 that the prosecutor had engaged "in a troubling and extensive pattern of misconduct." We direct the clerk of the court to send a copy of this opinion and the Request for Judicial Notice with copies of the three prior opinions of which we took judicial notice to the Alameda County District Attorney Nancy O'Malley so that she can personally address this matter with the prosecutor so that this type of misconduct does not reoccur.

[7] Defendant has filed a pro. per. petition for habeas corpus, in which he raises several arguments including ineffective assistance of counsel. He has failed to state a prima facie case for relief. By separate order filed this date, we deny the habeas corpus petition.

_____
Marchiano, P.J.

We concur:

_____
Margulies, J.

_____
Dondero, J.

TRIAL JUDGE: Honorable Brenda Harbin-Forte

TRIAL COURT: Alameda County Superior Court

ATTORNEYS:

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