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Court of Appeal, Second District,
Division 8.
The PEOPLE, Plaintiff and Respondent,
v.
Mark Wayne RATHBUN, Defendant and Appellant.
No. B178509.
(Los Angeles County Super. Ct. No. NA054905).
Aug. 23, 2007.

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Comparet-Cassani, Judge. Affirmed and remanded. Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.
Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson and Dane R. Gillette, Chief Assistant Attorneys General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, Susan Sullivan Pithey and Deborah J. Chuang, Deputy Attorneys General, for Plaintiff and Respondent.

COOPER, P.J.
*1 Appellant, Mark Wayne Rathbun, was convicted by jury of 14 counts of residential burglary (Pen.Code, § 459, undesignated section references are to that code) and 45 counts of forcible sex offenses, predominantly rape (§ 261, subd. (a)(2)) and oral copulation (§ 288a, subd. (c)(2)), involving 14 victims. With respect to 40 counts, the jury made "one-strike" findings under section 667.61, subdivisions (a), (b), (d)(4), and (e)(5). The court found appellant had a prior "strike" conviction (§§ 667, 1170.12), and two prior serious felony convictions (§ 667, subd. (a)(1)).

Appellant was sentenced to terms of 540 years plus 500 years to life. On appeal, he contends that the court erred in (1) declining to admit expert testimony about false confessions; (2) refusing to order discovery of DNA evidence from uncharged offenses; (3) admitting DNA evidence that did not qualify under *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); (4) admitting DNA evidence that was irrelevant and prejudicial; and (5)

refusing to treat appellant's apprehension as a "cold hit." In addition, appellant contends with respect to his sentence that; (6) the sentence violates the separation of powers; and (7) the sentence constitutes cruel and unusual punishment; and (8) the sentence must be modified in light of *Cunningham v. California* (2007) --- U.S. ---- [127 S .Ct. 856] (*Cunningham*) and its antecedents.

We find appellant's contentions unmeritorious, except that under *Cunningham* the sentence on one count must be vacated and remanded for resentencing, as provided for by *People v. Sandoval* (July 19, 2007, S148917) 41 Cal.4th 825 [2007 WL 2050897] (*Sandoval*). We so order, and otherwise affirm the judgment.

FACTS

Viewed in accordance with the governing rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence at trial showed that the offenses took place between January 1997 and November 2002. Ten of the 14 victims lived in Long Beach, while two each resided in the neighboring communities of Huntington Beach and Los Alamitos. About half of the victims were over age 60. In each instance, appellant entered the victim's home late at night or in early morning hours, and, often undressed, surprised or awakened her. The forcible sexual acts followed. While present, appellant generally kept his face, or the victim's, covered by an article of clothing, and also wore gloves. After reporting the attack, each victim had swabs professionally taken.

Appellant was initially apprehended after the last of his attacks, on J.A., early on November 7, 2002. J.A. had escaped appellant, in part by biting his gloved right index finger. Shortly after 1:00 a.m., Long Beach Police Officer Kevin Delorto was proceeding to J.A.'s address, having received a bulletin of the assault. About three blocks away, the officer encountered appellant, on a bicycle that was unlit. Officer Delorto stopped appellant and ordered him off the bicycle. The officer explained that the bicycle was without a light, and also that he needed to speak to appellant because of an incident in the neighborhood.

*2 Appellant told the officer his name, and stated he was en route from a male friend's house to appellant's residence. Appellant had a beanie cap in his waistband. Officer Delorto noticed that he had a cut near the front of his right index finger, which was bleeding; the same was true of the finger's opposite side. Appellant claimed to have gotten the cuts when he dismounted the bicycle. Long Beach Police Sergeant Patrick Burns arrived, and took a consensual swab of appellant's mouth. A crack pipe was found on appellant's person. Asked what he was doing, appellant told Sergeant Burns he was "out for a bike ride."

Over the following days, appellant was kept under surveillance by Long Beach Police, while his DNA was analyzed against findings from the swabs in various cases. On the evening of November 10, 2002, appellant was arrested in Oxnard. While being driven to Long Beach, he waived his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436). He spoke of having lived in the Seattle area, with which one of the victims had stated her

assailant appeared familiar.

Arriving at Long Beach at about 9:30 p.m., appellant was placed in custody of Detectives Katherine Kriskovic and William Collette, of the task force that had been investigating the crimes of the so-called Belmont Shore Rapist. Appellant was readvised of and again waived his *Miranda* rights. Detective Kriskovic showed appellant a chart listing 31 incidents of which he was suspected, and indicating whether there was DNA evidence supporting his complicity. There were 13 such cases; the most recent, from November 7, was not yet fully tested. Appellant acknowledged being the person the police had been seeking on November 7. After Detective Kriskovic explained that appellant would be charged in all the DNA evidence cases, appellant stated he could not undo what had been done, and he owed a debt to everyone, including the city, the detective, the police, and all of the residents. Aware that he had been termed the Belmont Shore Rapist, appellant again stated he owed a debt, for the hideous things he had done. Asked why he had so behaved, appellant replied he had made a lot of bad choices.

The questioning continued after appellant was given refreshments he requested. Appellant confirmed his onetime Seattle residence, and that he had returned to Long Beach by January 1997, when the first incident occurred. Referring to the chart, Detective Kriskovic asked whether appellant could have committed those crimes or if the the detectives were "off base." Appellant replied that they were not off base, judging from the facts. He also said that the only way he could repay his debt was to do as the court sentenced, but he could never repay the victims enough.

Appellant stated he wore a variety of gloves in his crimes, including socks. Their purpose was to prevent injury by the victims. Appellant sometimes covered his face with a beanie, in which slits had been cut for his eyes. Asked about the penultimate attack, on V .B. on August 15, 2002, appellant remembered it, and spoke of the victim's tenacity, her having attacked him as much as he attacked her. (Ms. B., whom appellant was charged with burglarizing and assaulting under section 220, testified she had scratched, kneed, and otherwise fought with appellant.) Regarding the November 7 incident, appellant stated he had worn latex gloves, and that J.A. had bitten his finger, both sides of which he showed. Appellant also recounted other elements of that incident, such as Ms. A.'s aged dog.

*3 Detective Kriskovic asked appellant about two assaults committed on May 11, 2002, at a trailer park in Los Alamitos. Appellant said he had been dropped off in the vicinity by a friend, and had entered one of the mobile home units and sexually assaulted the resident. He then entered another unit and attacked a second woman (the victims were ages 71 and 68), but did not have sex with her. Instead, he stole her car and departed the scene.

At about 12:40 a.m., appellant told the detectives he was getting tired, and they agreed to adjourn the interview until after he could sleep. Appellant was escorted to a cell, and returned to the detectives in the morning. The colloquy resumed at about 9:45 a.m., November 11, 2000. Appellant recalled his rights and was willing to continue.

Detective Kriskovic informed appellant that he would be charged in the DNA-connected cases, and if convicted he would face a long prison sentence, possibly the rest of his life. Appellant stated he wished that none of it had happened; he had known it was wrong as he did it. Appellant again referred to having made bad decisions and wrong choices. He said he knew that raping women was wrong.

Paralleling what many of the victims had reported, appellant said he usually would ask the victim to wait for 10 minutes, allowing him to dress and leave. Appellant also confirmed other aspects of his modus operandi. He recalled that in the June 2000 attack on R.M. at a Huntington Beach trailer park, as with the Los Alamitos attacks, he had been driven by a friend for a social activity, but instead went into the trailer park. Asked whether he had taken two louvered windows from the home of G.C. on August 21, 2000 (she testified they were missing after he left), appellant said it was possible. He also admitted wearing a ring on his penis during the incident of April 20, 2000 involving victim F.J. (as she testified).

When asked whether he had orally copulated any of victims, or forced them to do so, appellant first said no but then stated that maybe he had. Asked about the August 13, 2002 incident, in which he had encountered victim B.W. as she was calling 911, appellant practically quoted her account, stating that the phone had gone flying from her hands and her glasses fell off her face.

After a break, the interview resumed at 11:40 a.m. To summarize the previous sessions, Detectives Kristovic and Collette tape-recorded the next, final portion of the interview.[FN1]

FN1. The tape was transcribed and played at trial.

Appellant was asked leading questions, most of which restated things Detective Kriskovic testified appellant had said before. He generally answered, “Yes,” although at times he at first did not answer, on one occasion admitting that perhaps he was playing games with the detectives. The questions summarized appellant's recollection of details of various attacks; as to others, appellant reconfirmed he did not have such recollection. At one point, appellant protested that the detectives should read their own notes to get the answers. Appellant answered numerous questions reviewing details of the November 7, 2002 attack on J.A.

*4 Detective Collette asked appellant why he had cooperated, knowing he would be going to prison for a long time. Appellant replied, “It's the truth.” Acknowledging he was sorry and had apologized, appellant was now on the verge of crying, because he felt bad. He agreed he had been a good student, had never had mental health problems, and was not then on any medications. He had not used drugs during any of the attacks except the last one, when he had taken a hit of speed from his pipe. In the past he had used Ecstasy, mushroooms, and marijuana.

Appellant admitted he had probably done all of the crimes charged, even though he could not recall specifics of all of them. He repeated that if he could address the victims he would say, “I can't undo what I have done and I sincerely regret and I wish that it never

happened." Detective Collette reiterated that appellant was facing "several hundred years to life in prison." Appellant had still talked to the detectives, and he acknowledged they had not threatened him or spoken harshly to him.

Offered the opportunity to speak spontaneously or ask questions, appellant inquired if he could see his mother, so he could tell her personally that he might be gone for a long time. Detective Collette said that could be arranged. Appellant asked some questions about the legal proceedings to come. He then asked the detectives what they thought of him personally. Kriskovic gave a reply that was redacted; Collette turned the question away, and the interview ended.

Appellant's mother was brought to the police station, and she and he met alone for about 15 minutes. During that time, appellant told his mother, "I will pay for my sins." The detective who had brought the mother testified that both appellant and his mother said he had told her that he was the one responsible for the crimes. Appellant's mother testified she didn't think she had said that.

The remainder of the prosecution's case for the most part comprised testimony regarding the identification of appellant's DNA with that of the perpetrator, as well as the probabilities of another, random person displaying the same attributes. Before relating that testimony, we provide a summary of DNA analysis, taken from the

"DNA analysis (also called DNA fingerprinting or typing) is a process by which characteristics of a suspect's genetic structure are identified, are compared with samples taken from a crime scene [or victim], and, if there is a match, are subjected to statistical analysis to determine the frequency with which they occur in the general population.

"Every human cell that has a nucleus contains two sets of chromosomes-one set inherited from each parent. Each chromosome contains thousands of genes, each of which comprises a particular site on the chromosome. The molecular component of the chromosome and its genes is [deoxyribonucleic acid, or] DNA.

"The DNA molecule resembles a spiral staircase. It consists of two parallel spiral sides (i.e., a double helix) composed of repeated sequences of phosphate and sugar. The two sides are connected by a series of rungs, which constitute the steps in the staircase. Each rung consists of a pair of chemical components called bases. There are four types of bases-adenine (A), cytosine (C), guanine (G), and thymine (T). A will pair only with T, and C will pair only with G.

*5 "Thus, the DNA molecule consists of two parallel spiral sides connected by a series of A-T, T-A, C-G, and G-C rungs called base pairs. There are about three billion base pairs in a single DNA molecule.

"A person's individual genetic traits are determined by the sequence of base pairs in his or her DNA molecules. That sequence is the same in each molecule regardless of its source (e.g., hair, skin, blood, or semen) and is unique to the individual. Except for

identical twins, no two human beings have identical sequences of all base pairs.

"In most portions of DNA, the sequence of base pairs is the same for everyone. Those portions are responsible for shared traits such as arms and legs. In certain regions, however, the sequence of base pairs varies from person to person, resulting in individual traits. A region-or locus-that is variable is said to be polymorphic. In some polymorphic loci, at fragments called alleles, short sequences of base pairs repeat for varying numbers of times....

"This variance is what makes DNA analysis possible. In effect, the lengths of sets of multiple ... polymorphic fragments (or ... alleles) obtained from a suspect's DNA and from crime scene samples are compared to see if any sets match, and a match is accorded statistical significance."

In addition, a federal case (*U.S. v. Trala* (D.Del.2001) 162 F .Supp.2d 336, 340-341) explains as follows the principal typing technique employed and subject to partial challenge in this case-"[A] method of DNA typing known as PCR/STR typing. In PCR/STR typing, a process known as polymerase chain reaction, or PCR, is used to amplify targeted loci of the sample of DNA by replicating the process by which DNA duplicates itself naturally. Thus, the lab is able to produce a substantial number of specific, targeted segments of DNA which can then be typed and compared. Short Tandem Repeats, or STRs, are a group of loci which are used to type and compare the DNA. Finally, statistics are used to evaluate how likely it is that a similar match would occur if the DNA sample were drawn randomly from the population."

Returning to the evidence, in 1999, forensic serologist Thomas Fedor, of the Serological Research Institute (SERI), initially received and tested samples from the first five victims, or in one case DNA extracted from feces the perpetrator had left. In each instance, Fedor obtained a DNA profile of an unknown individual, and all of those profiles matched.

Subsequently, in 2003, Fedor retested these samples and also a blood sample taken from appellant. Fedor used the newer STR technology, which typed more than twice as many loci in the DNA molecule whose characteristics could differ among individuals as had the previous testing. There were correspondences and in some cases coincidences between appellant's profile and those of non-victim donors, reflected in the victims' or crime scene samples. Using the product rule (see *People v. Soto* (1999) 21 Cal.4th 512, 515, fn. 2), Fedor calculated the probabilities that another, random individual would have matched the samples as did appellant to be (depending on the sample assayed) between one in 7 trillion and one in 844 septillion.

*6 Samples from five further victims-including a fabric sample from a victim's residence and latex gloves found near J.A.'s residence-were analyzed by the Los Angeles County Sheriff's Department Crime Laboratory (LASD). That laboratory also received a sample of appellant's blood shortly after his arrest. The testing revealed male donor profiles on samples connected with each victim, most but not all of them being mixed samples,

which also included victims' DNA. The male components matched appellant's so as to render him a possible contributor. The computed probabilities of another, matching contributor once again were astronomical.

The final four victims' samples were analyzed by the Orange County Sheriff's Department Crime Laboratory (OCSD). Some of the testing occurred before OCSD received a swatch of appellant's blood, in 2003. In those instances, the laboratory, as had SERI, first determined correspondences between or among the male donor profiles detected. Comparison with the blood sample indicated that there was at most one in a trillion chance of another person randomly possessing the same profile. However, a swab from M.H., who had had her car stolen but hadn't been raped, yielded a minor component with a frequency of one in 11,000.

In his defense, appellant chiefly relied on two expert witnesses, who challenged certain aspects of the DNA evidence. The first, Dr. Elizabeth Johnson, a forensic DNA consultant, described the hazards of contamination of samples, both in laboratories and before their arrival there. She stated that the leading STR kits could not distinguish a base pair with a given sequence from another containing the same components but in different sequence (which would signify a different identity).

Dr. Johnson discussed the problem of stutter, which occurs when an artificial peak is mechanically interjected into the pattern of electronically induced peaks that disclose the DNA profile. Although stutter may be identified when the sample is single-source, with a reference sample to compare, in possibly mixed source samples stutter may be interpreted as part of, or showing, the mixture. Dr. Johnson discussed methods by which examining scientists could seek to distinguish a genuine peak from stutter, and she opined that expectations about the number of subjects presented (e.g., a victim and a perpetrator) could affect the interpretation. Moreover, even with genuine peaks it can be difficult properly to assign them to the correct donor. And examiner bias may precipitate erroneous identification.

Dr. Lawrence Mueller, a population geneticist from the University of California at Irvine, stated that his field comprised the basis for statistical analysis in DNA evaluation. Although not a forensic scientist, he was familiar with the various testing kits. He had reviewed evidentiary reports from SERI, LASD, and OCSD, as well as data from proficiency tests of those laboratories, and portions of their manuals, on statistical issues and interpretation of mixtures.

*7 Dr. Mueller explained that the random match probability numbers signify not that there would be only one person in, say, 844 septillion who would have the same profile, but rather the probability that a person randomly selected would so coincide.

Dr. Mueller opined that the three prosecution laboratories' manuals or protocols did not sufficiently define rules regarding the patterns that must appear in order to declare a match between a known sample and an evidence sample. He further stated that laboratories err up to 30 percent of the time in profiling minor contributors to mixed

samples. Because of the deficiencies in the prosecution's laboratories' methods, and other factors, the labs also did not pursue correct methods in calculating frequency statistics for mixed samples.

Using the results of the three labs' proficiency tests, and statistical methodology, Dr. Mueller estimated the following "error rates," or likelihood of declaring a match when there was not one. For LASD, which had reported no such errors, he was 95 percent certain the error rate was less than one in 120 samples. For OCSD, which also had reported zero errors, the doctor was 95 percent certain of a rate of less than one in 89 samples; and for Fedor of SERI, who had reported one error, the rate could be as small as one in 2,700 or as great as one in 13.

On cross-examination, Mueller was shown appellant's reference DNA profile and those in five of the profiles derived from the victims' evidence. In each instance he declared they matched.

DISCUSSION

1. False Confession Testimony.

Appellant first contends that the trial court erred in precluding testimony by Dr. Richard Leo, a professor of psychology and criminology, regarding the existence of false criminal confessions and the factors inducing them. Before trial, the prosecution objected to this proposed testimony on grounds of irrelevance. An Evidence Code section 402 hearing was held, at which Dr. Leo and Detective Kriskovic testified. Dr. Leo opined that the causes of false confessions included coercive measures in lengthy interrogations, specifically threats, promises, and deprivations. A low level of mental development also could be a cause. Having listened to the taped portion of appellant's interrogation, Dr. Leo did not perceive that any coercive techniques had been used, except possibly the reference to an enormous prison sentence, which might have reflected an earlier threat of more severe punishment if appellant did not confess.

The court ruled that Dr. Leo would not be permitted to testify, his testimony being irrelevant because, as acknowledged, none of the stated influences was present with regard to appellant's confession. The court also ruled based on Evidence Code sections 352 and 801, and *Kelly, supra,* 17 Cal.3d 24.

The testimony was properly excluded as irrelevant, because there was no evidence that the Long Beach detectives had engaged in the kind of coercive tactics Dr. Leo proposed to identify as causing false confessions. (Accord, *People v. Son* (2000) 79 Cal.App.4th 224, 241.) Appellant argues that the testimony would have served to educate the jury concerning the "counterintuitive" behavior of confessing falsely; but it still lacked probative value, given the absence from this case of the causative factors.

2. Denial of Discovery of DNA From Uncharged Cases.

*8 Appellant asserts reversible error in the court's denial of his requests to discover from the prosecution DNA evidence obtained regarding offenses the Long Beach Police had attributed to the "Belmont Shore Rapist," other than those with which appellant was charged. (There had been 31 cases overall, but appellant had been charged only in the 14 in which his DNA was found.) The trial court denied the discovery on grounds it would be irrelevant.[FN2]

FN2. Appellant's motion was made twice, first with respect to particular cases, in which the prosecution responsively represented no foreign DNA had been found, and again when it was ascertained that such DNA had been found in some of the uncharged cases.

Appellant claims that the DNA results from other cases were discoverable on two bases: as evidence favorable to appellant and material as to guilt or innocence, under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and under the criminal discovery statute, section 1054 et seq. (see § 1054.1, subd. (e) [exculpatory evidence]). Appellant's theory is that if DNA profiles similar to his were identified, they could either indicate that a different party committed the crimes, or cast doubt on the prosecution's interpretation of the samples adduced as appellant's.

The broad discovery that appellant requested did not qualify for disclosure as exculpatory, under *Brady* or the statute. Even assuming arguendo that appellant's hypothetical theory was tenable, there was no showing that the prosecution possessed evidence of the particular nature that would have been relevant, namely DNA results from other cases nearly matching appellant's. The trial court did not abuse its discretion in denying the discovery requests.

3. Admission of DNA Evidence Under Kelly *Principles.*

In *Kelly, supra,* 17 Cal.3d 24, the Supreme Court held that admissibility of expert evidence based on application of a new scientific technique requires a three-part showing: (1) the reliability of the method must be shown as generally accepted in the field (prong one); (2) the witness so showing must be qualified as an expert to opine about the subject (prong two); and (3) "the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case [prong three]." (*Id.* at p. 30) In the present case, on appellant's challenge, the court held a " *Kelly* hearing" on the subject of the principal DNA testing means used to identify appellant's match-analysis of mixed samples, using PCR and STR.

Appellant's expert Mueller testified at the hearing, as did representatives of the prosecution's three laboratories (SERI, LASD, and OCSD). Because of precedent, discussed below, the evidentiary hearing essentially involved prong three factors, including criticism of the statistical methods the laboratories used. The trial court ultimately ruled that the DNA evidence could be admitted.

With respect to prong one, the trial court found the issue of accepted reliability was governed by a decision by Division Five of this district, *People v. Smith* (2003) 107 Cal.App.4th 646 (*Smith*), which had appraised and approved the same DNA methodology for mixed samples. The trial court's embrace of *Smith* was not an exercise of garden variety stare decisis. It was required by a mandate of *Kelly* itself, that "once a trial court has admitted evidence based upon a new scientific technique, and that decision is affirmed on appeal by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community." (*Kelly, supra,* 17 Cal.3d at p. 32; see *People v. Venegas* (1998) 18 Cal.4th 47, 53 (*Venegas*); *People v. Pizarro* (2003) 110 Cal.App.4th 530, 560-561 & fn. 30 (*Pizarro*).)

*9 Appellant levels an intrinsic challenge to *Smith, supra,* 107 Cal.App.4th 646, contending that its conclusion is unfounded in the materials it cites. Even were this challenge well founded, the trial court was bound to follow *Smith,* and its doing so was not error. Moreover, insofar as appellant may seek to have us depart from *Smith,* we are not persuaded.

Continuing with prong one, appellant claims to show "evidence that the prevailing scientific opinion has materially changed." (*Venegas, supra,* 18 Cal.4th at p. 53, citing *Kelly, supra,* 17 Cal.3d at p. 32.) None of the scientific studies appellant cites either so characterizes general scientific opinion or declares PCR-STR analysis of mixed samples to be unamenable to accurate typing. Several of the studies do suggest that accuracy may be contingent on the size of the sample; and at least one other notes intrinsic problems such as stutter or "allelic dropout," which *Smith* itself acknowledged (107 Cal.App.4th at p. 666), but which have not condemned the technology or methodology. Appellant has not established grounds to invalidate the trial court's ruling on prong one of *Kelly.*

Appellant also seeks reversal of the court's adverse ruling under prong three of *Kelly, supra,* 17 Cal.3d 24, to the effect that correct scientific procedures were used by the laboratories. The scope of review on this issue is abuse of discretion. (*Pizarro, supra,* 110 Cal.App.4th at pp. 559-560.) We do not perceive one.

Appellant lists five categories of departure that allegedly took place with regard to the typing of DNA in several of the victims' instances.[FN3] But the first two faults, stutter and allelic dropout, are intrinsic to the technique, and do not constitute failures to follow it. (See *Venegas, supra,* 18 Cal.4th at p. 81 .) Appellant also complains of alleged instances of subtracting the minor from the major profile (a recognized technique) but assigning major and minor components within a sample inconsistently; finding of "non-matching DNA"; and contamination of two samples, which allegedly should have invalidated their tests.

FN3. Appellant's argument does not cite the record, concerning some of the most abstruse matter in appellant's 200-page opening brief, thereby rendering no assurance that all of the matter adduced was presented at the hearing. We credit counsel's representations for the sake of argument, in order that appellant receive merits review of his contentions.

These items, however, do not reflect the type of shortcoming with which prong three of *Kelly* is concerned. First, the Supreme Court has explained: "The *Kelly* test's third prong does not, of course, cover all derelictions.... Shortcomings such as mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination may well be amenable to evaluation by jurors without the assistance of expert testimony. Such readily apparent missteps involve ... '[c]areless testing affect[ing] the weight of the evidence and not its admissibility.' " (*Venegas, supra,* 18 Cal.4th at p. 81.) Like the contamination already mentioned in this quotation, the other two errors, if that is what they were, were subject to ready discernment and comprehension, and did not violate prong three.

*10 In fact, the thrust of appellant's entire argument regarding prong three is that the described discrepancies should have caused him to be exonerated of the counts that he cites. But this is not an argument under *Kelly.* The trial court did not abuse its discretion in ruling the prosecution's DNA evidence admissible under *Kelly.*

4. Allegedly Irrelevant DNA Evidence.

In Pizarro, supra, 110 Cal.App.4th 530, the court announced and applied a number of rules regarding DNA testing and identification. Appellant's present argument is based on three of these rules. The first is that the defendant's genetic profile may not be used to constitute or fill in the profile of the perpetrator; to do so offends the presumption of innocence and other principles. Second, the perpetrator's profile is a preliminary fact (Evid.Code, §§ 400, 403) for relevance and introduction of both evidence of matches with the defendant, and statistical evidence of the probability of another, random match. Third, and a corollary to the others, an ambiguous genotype or allele may not be clarified or resolved by postulating the several types that could be present. We consider appellant's claims that these rules were violated in the introduction of evidence at trial.[FN4]

FN4. Once again, appellant's counsel scarcely cites the record, and neither asserts nor references that the present objections were made below.

Although appellant summarily states that the perpetrator's profile was "repeatedly" deduced from appellant's profile, he cites no examples of this. Moreover, SERI's initial analysis discerned a repeatedly present profile of the perpetrator, without any knowledge of or access to appellant's profile. And although SERI's initial profile may or may not have been consulted after the three labs received samples from appellant, comparison of those samples to perpetrator evidence, single or mixed, was not improper.

Virtually all of appellant's claims of error involve the third *Pizarro* rule, regarding the consideration of cognate identifiers, and performance of statistical analysis using them as part of the perpetrator's profile.[FN5] *Pizarro* disapproved of this approach because (by definition) the perpetrator's profile had not yet been identified, and because pursuing matches and statistics using identifiers whose presence was unknown gave an incomplete and unfair picture. However, under this method almost all of the perpetrator's profile will have been established. Furthermore, any match between defendant and an incomplete

perpetrator profile would have to be identified as such in the evidence. Accordingly, we do not perceive any prejudicial error in the instances of using alternative genotypes that appellant has cited.

FN5. This technique was formerly endorsed by the National Research Council, author of leading works and standards on forensic DNA testing; but that endorsement later was qualified if not withdrawn. (*Pizarro, supra,* 110 Cal.App.4th p. 597, fn. 62.)

5. The "Cold Hit" Claim.

Appellant contends that the trial court abused its discretion by refusing to preclude the prosecution's statistical probability evidence on grounds this was a "cold hit" case. As contrasted with a normal case in which the defendant is charged based on individualized suspicion, a cold hit occurs when the authorities match and identify the defendant from a DNA database of possible offenders. Appellant argued that the statistical probability calculation for a random match is different in a cold hit case, but there was no scientific consensus about how that calculation should be made. Accordingly, on the premise that this was a cold hit case, appellant moved pretrial to exclude the prosecution's statistics. Finding that this was not such a case, the court denied the motion.

*11 We agree. There was no showing that appellant was identified as a member of a database, formally maintained or created ad hoc. Rather, appellant came under suspicion because he was discovered, minutes after his final attack, alone on the street in the immediate vicinity of that attack. That was what caused appellant's DNA to be tested and identified. The trial court correctly ruled that this was not a cold hit case.

6. Sentencing Issues.

Appellant's further three contentions concern his sentence. Before appraising these contentions, we first outline the sentence the court imposed, for the 59 counts of which appellant was convicted. In each instance, the number of years or months, as here restated, was twice the normal statutory amount, because the jury found that appellant had one prior strike conviction. (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)).

The base term, imposed for a count of section 220, was the upper term of 12 years. Next, for 10 counts against separate victims under section 667.61, appellant received 10 consecutive terms of 50 years to life. Next, under section 667.6, the court imposed 30 full and consecutive upper terms of 16 years, totaling 480 years. Finally, the court imposed 18 consecutive one-third midterms of 32 months, totaling 48 years. The total sentence constituted 540 years determinate plus 500 years to life indeterminate.

We turn to appellant's contentions.

A. Separation of Powers.

At the commencement of sentencing, the court stated what it had computed would be the total extent of the sentence, to allay any fears certain victims had expressed. The court then stated, "So the defendant will never get out of State Prison. [¶] I want the Court of Appeal to realize that I'm sentencing him with that hope in mind because it's my firm belief these acts reflect the acts of someone who should never walk the streets again." Based on these remarks and the extent of the sentence, appellant contends that his sentence violated the principle of separation of powers (e.g., Cal. Const. art. III, § 3), because the court structured the sentence to preclude the executive branch from exercising its right and authority to fix appellant's parole eligibility (e.g., § 3000, subd. (a)).

Appellant's argument does not strike a proper balance among the powers the Legislature has provided for. The sentence imposed was legislatively authorized. Moreover, under sections 667, subdivision (b)(6), and 1170.12, subdivision (a)(6), the court was required to sentence appellant consecutively on counts not committed on the same occasion or arising from the same set of operative facts. At the very least, this included the 10 counts of 50 years to life, each of which involved a different victim, on a different date. A parole preclusive sentence was thus compelled by the Legislature, and in imposing it the court cannot be charged with usurping that branch's authority.

B. Cruel and Unusual Punishment.

*12 Appellant contends that his sentence constitutes unconstitutionally cruel and unusual punishment, and prays that we reduce it, to a life term. We do not agree.

The touchstone of Eighth Amendment and corresponding California constitutional cruel-or-unusual analysis is a degree of disproportionality between the punishment and the offense(s) and offender. Here, appellant burglarized the homes of 14 different women, and committed a total of 40 acts of forcible rape, oral copulation, sodomy, or penetration with foreign object on most of them, while assaulting some with the intent to commit one or more of those crimes. Many of these women were in their 70's, and they suffered greatly, like the rest. For example, M.G., age 70, not only underwent three rapes, which caused vaginal tears and blood to run down her legs, but also suffered a heart attack.

Precedent applying the constitutional tests supports and validates the legal permissibility of the present sentence. In *People v. Crooks* (1997) 55 Cal.App.4th 797, the defendant committed one home invasion rape, much in the manner of appellant here. He received a sentence of 25 years to life, under section 667 .61. In the course of rejecting his claim of cruel and unusual punishment, the court commented on the combined burglary and rape: "Moreover, the gravity of the two crimes committed by defendant (burglary and rape) is greater than the sum of their parts: being raped in her own home is a woman's worst nightmare." (*Crooks, supra,* 55 Cal.App.4th at p. 807.)

In *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1134-1137), the defendant was convicted for an episode of forcible sex acts with two prostitutes, whom he had

kidnapped and driven to an apartment. Subject to the three strikes laws, defendant was sentenced to 53 years determinate plus 375 years to life. In asserting that this punishment was cruel and unusual, defendant emphasized that the "crimes, although 19 in number, arose from 2 incidents and left no permanent physical injury." (*Id.* at p. 1136.) The court responded, in part, "Defendant grossly understates the seriousness of his brutal and degrading acts." (*Ibid.*)

Appellant takes note of Justice Stanley Mosk's denunciation, as cruel and unusual, of sentences incapable of being fully served (there, 100 years to life plus 11 years). (*People v. Deloza* (1998) 18 Cal.4th 585, 600-602 (conc.opn.)). Justice Mosk's view has not been further adopted. On the other hand, sentences of the type imposed in the present case are extremely rare. Yet here, the number of offenses committed and joined, their type, and the number of victims combine to make the lengthy sentence not disproportionate .[FN6] Accordingly, although we consider a sentence of this length unseemly and at the far end of discretion, appellant's claim of cruel and unusual punishment fails.

FN6. Justice Mosk suggested that "In a particularly egregious case involving exceptionally numerous victims, the maximum could conceivably be life imprisonment without possiblility of parole." (*Deloza, supra,* 18 Cal.4th at p. 602.) That would be the functional equivalent of the present sentence.

C. Upper Term and Consecutive Sentencing.

Appellant urges that his upper-term sentences were improperly imposed in light of *Cunningham, supra,* 127 S.Ct. 856, which applied to this state's three-tier determinate sentencing law (DSL) the Sixth Amendment principle that, with one exception, the sentencing court may not impose an elevated sentence based on a fact not found by the jury. (See *Cunningham, supra,* 127 S.Ct. at p. 860.) Appellant also asserts that *Cunningham* should apply to consecutive sentencing for separate offenses, as was imposed under section 667.1 and under the DSL.[FN7] Not only do we disagree with this contention, but our Supreme Court has rejected it, in a recent decision applying *Cunningham.* (*People v. Black* (July 19, 2007, S126182) 41 Cal.4th 799 [2007 WL 2050875] (*Black*).) In view of *Black's* holding, we do not further discuss appellant's challenges to his consecutive sentences. We apply *Cunningham,* as construed by *Black* and the companion case of *Sandoval, supra,* 2007 WL 2050897, to the contentions appellant makes regarding his upper term sentences.

FN7. As previously noted, consecutive sentencing of the life sentences under section 661.61 was mandatory in light of appellant's one-strike status.

*13 The trial court imposed an upper term for the base term, on count 6, giving as a reason that the victim was very vulnerable (cf. Cal. Rules of Court (hereafter rules), rule 4.421(a)(3)). Under *Cunningham,* the court's making this factual finding to elevate the statutory maximum sentence based on the verdict was improper. Because, as in *Sandoval, supra,* no other aggravating factors were available (other than a recidivism factor used elsewhere), and the error was not harmless beyond a reasonable doubt, this count must be

remanded for resentencing, at which the trial court will have discretion to impose the low, middle, or upper term.

The court also imposed upper term sentences for the counts sentenced under section 667.6. The expressed reason was that "the defendant has a prior history of criminal activity and it escalated in nature...." (Cf. rule 4.421(b)(2).) This sentencing did not run afoul of *Cunningham.* Following its predecessors, *Cunningham* reiterates that the requirement of jury not judicial findings to impose an elevated sentence does not apply to the factor of a prior conviction. (*Cunningham, supra,* 127 S.Ct. at p. 868.) That exception encompasses the facts the trial court referred to here. (*Black, supra,* 2007 WL 2050875.) The court's use of appellant's criminal history to impose the upper term was permissible.

DISPOSITION

The sentence on count 6 is vacated, and the matter is remanded for resentencing. The judgment is otherwise affirmed.

We concur: BOLAND and FLIER, JJ.

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