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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RUDOLFO HOPE BERGARA, Defendant and Appellant.	H030747 (Santa Clara County Super. Ct. No. CC585708)

A jury found appellant guilty of three counts of lewd act on a child under the age of 14, one count of dissuading a witness by threat of force, and three counts of furnishing a minor with a controlled substance. (Pen. Code, §§ 288, subd. (a), 136.1, subd. (a)(1), Health & Saf. Code, § 11380.) The jury found true various enhancing allegations including, as to two of the lewd act counts, enhancements for personally inflicting great bodily injury on the victim based on her two pregnancies and accompanying abortions. (Pen. Code, §§ 12022.7, 12022.8.) Appellant contends that the great bodily injury enhancements must be reversed for insufficiency of the evidence and instructional error. Appellant challenges two of his convictions for furnishing a controlled substance to a minor for insufficiency of the evidence and instructional error. Appellant contends that the trial court erred in failing to instruct on misdemeanor intimidation of a witness and on the law of admissions and in denying a defense request concerning cross-examination.

Appellant further contends that the trial court committed sentencing error. We reverse count five and strike the punishment for that count and otherwise affirm.

TRIAL COURT PROCEEDINGS

When Jane Doe was 12 years old, her mother's friend, whom Doe considered her aunt, was dating appellant, who was in his 30s. Doe later wrote, "The [first] day I met you it was like why is he with my aunt and not me." Doe and appellant began a dating relationship that became a sexual relationship. Sometimes they had sex in appellant's mini-van, sometimes they went to appellant's mother's house or his sister's house. Doe would tell her mother that she was going to soccer practice or to a friend's house and then appellant would pick her up around the corner. Doe did not mind that appellant was so much older than she was. She testified, "I felt like he understood me and that, like, I could talk to him. . . . It made me feel important and wanted. It made me feel like I was somebody." Appellant told her that age "was just a number."

In July 2003, Doe became pregnant and had an abortion in August 2003. Doe told her mother, Peggy A., that Doe's ex-boyfriend was the father of the baby but, because she was only having sex with appellant, she was certain that he was the father. The abortion caused Doe physical pain and she was sick and in pain for two days. Appellant was happy when Doe told him that she was pregnant and was upset when he learned of the abortion because he wanted Doe to have the baby.

Doe and appellant continued to spend time together and continued to have unprotected sex. In October 2003, the Milpitas Police received "a report of suspicious circumstances where an anonymous caller said there was a juvenile female on top of an adult male in a vehicle and both subjects had gone into the house." In response, the police went to appellant's mother's house. Appellant's mother told the police that she would check inside the house. The police did not see appellant. Doe came out of the house and was arrested for being under the influence of a controlled substance. Doe was very upset and was placed under a 24-hour psychiatric hold. When interviewed by the

police, Doe said that appellant was a "father figure" to her. The officer testified that Doe told him "that if she could not talk to [appellant], she said what was the point of living."

After Doe's arrest, Ms. A. called appellant and left him a message telling him to stay away from Doe. Appellant called Ms. A. Ms. A. testified, "He said something to the effect that he hasn't been around her. . . . I told him her age. He knows he could get in trouble. He said he was sorry. . . . He doesn't really see her that much."

From December 2003 until August 2004 Ms. A. was serving a jail sentence for felony grand theft and felony elder fraud. During this time, Doe stayed with her aunt, Annette H., and Doe's grandmother at a motel. Ms. H. testified that there were some nights that Doe did not come home and she did not know where Doe was.

In February 2004 Doe was taken into custody for assault with a deadly weapon. Doe was pregnant again, but when she spoke to a police officer who asked her about her relationship with appellant, she denied that it was appellant who had impregnated her. Doe testified that she felt that she had to protect appellant. Toward the "middle of the end" of their relationship, appellant would hit her and call her names such as "slut," "whore," and "bitch." Doe testified that appellant had told her that if the police questioned her about their relationship, "I was supposed to say I didn't know anything." Doe said that appellant said that if she "told on him" he would hurt her and hurt her family. Although he did not give her any details about this, she believed him and was scared. Ms. A. testified that she saw bruises on Doe's body.

Doe had an abortion in March 2004. She felt very sick during the pregnancy. Medical personnel testified that four seaweed pegs were inserted into Doe's cervix to open it, and that the procedure itself was painful and caused cramping. There is usually bleeding during the procedure and the patient is placed under a general anesthesia. Doe testified that since then her body has not been "back to normal." She said, "my whole body feels different." DNA typing analysis using fetal tissue obtained from this abortion,

an oral swab from appellant, and a blood sample from Doe showed that the probability that appellant was the father of the aborted fetus was greater than 99 percent.

Doe testified that sometimes appellant would give her methamphetamine, which was her "drug of choice." Other times she would use methamphetamine on her own or with other friends. Doe testified that appellant also furnished her with alcohol, marijuana, PCP, ecstasy, and "psychedelic mushrooms."

In the spring of 2005, Doe was no longer seeing appellant and told a police officer about their relationship. Several items that Ms. A. had found in Doe's backpack were introduced into evidence at trial. These included greeting cards and letters from appellant to Doe, drafts of messages from Doe to appellant, and photographs. Among the photographs was one taken by Doe of appellant with a hickey on his neck that Doe had just given him.

Appellant's niece testified that when the police came looking for Doe in October 2003 at appellant's mother's house Doe was hiding under a bed and appellant was not at the house. Appellant's sister testified that appellant did not have a key to her house, she kept her house locked and, to her knowledge, appellant was not there when she was not home.

The jury found appellant guilty of all charges and found all enhancements true. In a separate proceeding, the jury found true the allegation that appellant had been convicted of a prior serious or violent felony. (Pen. Code, §§ 667, subds. (a) and (b)-(i), 1170.12, 667.5, subd. (c), 1192.7, subd. (c).) Defense counsel brought a motion to dismiss the prior conviction allegation. In support, counsel submitted a report indicating that appellant had had a difficult childhood, had "a long history of mental health problems," and tested as "on the cusp of moderate to mild mental retardation." The trial court denied the motion. The trial court sentenced appellant to a determinate state prison term of 48 years and four months and a consecutive indeterminate term of 60 years to life.

GREAT BODILY INJURY ENHANCMENTS

Appellant contends, "The true finding on the great bodily injury enhancement as to counts [1] and [2] must be reversed for insufficient evidence, or, in the alternative, instructional error."

Background

As to counts 1 and 2, which charged lewd act with a child under 14, the information alleged enhancements for "personally inflict[ing] great bodily injury on the victim or another person in the commission of the present offense in violation of Section 12022.53, 12022.7, or 12022.8, within the meaning of Penal Code section 667.61(b) and 667.61(e)." Doe testified that during her pregnancy in 2003, she gained weight and vomited blood. She was in pain during and after the abortion and was sick for two days. On a scale of one to 10, her pain level was five or six. During her pregnancy in 2004, she was very sick and had pain in her stomach. Medical personnel testified that the abortion procedure caused cramping and bleeding and Doe testified that she had experienced pain. The trial court instructed the jury, " 'Great bodily injury' means a significant or substantial physical injury. The commission of the crime of lewd and lascivious act on a child under 14 [does] not by itself constitute great bodily injury. Minor, trivial or moderate injuries inherent in the crime of lewd and lascivious acts on a child under 14 do not constitute great bodily injury. However, if the amount of force used in the commission of the lewd and lascivious act on a child under 14 resulted in a significant or substantial injury to any part or portion of the body, that injury constitutes great bodily injury. [¶] A pregnancy or abortion may constitute great bodily injury." The jury found both of the great bodily injury enhancements true.

Sufficiency of the Evidence

Penal Code section 12022.7, subdivision (a) authorizes additional punishment for "[a]ny person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony . . . ." " '[G]reat bodily

injury' means a significant or substantial physical injury." (Pen. Code, § 12022.7, subd. (f).) Appellant contends that there is insufficient evidence to support the true findings on the great bodily injury enhancements attached to counts 1 and 2. Appellant argues, "neither a pregnancy nor a voluntary abortion are synonymous with great bodily injury." Respondent, citing *People v. Superior Court (Duval*) (1988) 198 Cal.App.3d 1121 and *People v. Sargent* (1978) 86 Cal.App.3d 150, argues that "case law holds that a victim's pregnancy, including one terminating in a therapeutic abortion, may be found a significant and substantial physical injury amounting to great bodily injury." Both parties acknowledge that the issue is pending before the California Supreme Court in *People v. Cross*, No. S139791, review granted March 1, 2006.[1]

In *People v. Sargent*, *supra*, 86 Cal.App.3d 148, the defendant forcibly raped a 17-year-old girl, who as a result became pregnant and had an abortion. The *Sargent* court held, "Pregnancy resulting from rape is great bodily injury." (*Id.* at p. 151.) The court explained that a pregnancy resulting from rape is not necessarily incidental to the rape itself and cannot be described as trivial or insignificant. And it does not involve merely psychological or emotional distress, but instead is a significant and substantial physical injury in that it involves major physical changes and bodily impairment which affect a woman's health and well being. (*Ibid.*) The possible results of a pregnancy--i.e., childbirth, abortion, and miscarriage--also involve additional traumatic physical experiences. (*Id.* at p. 152.) Thus, the court concluded there was "evidence of injury significantly and substantially beyond that necessarily present in the commission of rape." (*Ibid.*) The holding in *Sargent* was not based on the fact that the pregnancy

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[1] The California Supreme Court has granted review to address whether the trial court in *Cross* prejudicially erred in instructing the jury that the victim's pregnancy or subsequent abortion could constitute great bodily injury within the meaning of Penal Code section 12022.7 and in failing to instruct the jury on the meaning of "personal infliction."

resulted from a forcible act, but on the fact that pregnancy involves injuries not "necessarily incidental to an act of rape." (*Id.* at p. 151.)

In *People v. Superior Court (Duval), supra,* 198 Cal.App.3d 1121, a high school vice principal was charged with various sex crimes, including statutory rape of two students, one of whom, at age 15, became pregnant and had an abortion. The trial court dismissed the allegation that the defendant intentionally inflicted great bodily injury under a former version of Penal Code section 12022.7, and the People filed a petition for writ of mandate. The appellate court affirmed the trial court's dismissal based on a lack of specific intent as required under the former statute, but agreed with the holding in *Sargent, supra,* 86 Cal.App.3d 148, that the pregnancy constituted a great bodily injury. (*Duval, supra,* 198 Cal.App.3d at pp. 1132, 1134.) The court specifically held, "Pregnancy, abortion, or venereal disease constitute injury significantly and substantially beyond that necessarily present in the commission of an act of unlawful sexual intercourse." (*Id.* at p. 1131.)

Appellant points out that "it was Doe's choice to wait so long to have an abortion that it became a more complicated procedure. Appellant had no control over Doe's decision to have an abortion or when she would have the abortion." We would not expect appellant to have a say in what medical procedures Doe could choose to treat the injury that appellant inflicted on her. Appellant argues that he "is not suggesting that an abortion, and especially a late-term abortion, is not a significant or substantial physical injury; however, it is not an injury *personally inflicted* by the defendant, nor is it an injury that the defendant personally inflicted in the commission of the felony." Appellant states that "an abortion does not fit the paradigm of the great bodily injury enhancement."

As to both counts 1 and 2, appellant personally inflicted the injury by impregnating Doe during the commission of the lewd act on a child under the age of 14. The evidence concerning Doe's physical manifestations of the pregnancies and the medical procedures she endured to remedy the injury inflicted upon her by appellant

support the enhancement. We agree with the analyses of *Sargent* and *Duval* and conclude that pregnancy and abortion may fall within the definition of significant and substantial physical injury. Sufficient evidence supported the imposition of those enhancements here.

Personally Inflict/Proximately Cause

Appellant contends that the trial court erred when it failed to sua sponte instruct the jury on the meaning of the term "personally inflict." Appellant further contends that "[t]he trial court failed to instruct appellant's jury on the difference between 'personally inflicting' and 'proximately causing' great bodily injury."

In *People v. Cole* (1982) 31 Cal.3d 568, the defendant had directed another person to attack the victim. The Supreme Court held that an enhancement under section 12022.7 may be imposed "only on those principals who perform the act that directly inflicts the injury" and not on an aider and abettor. (*Id.* at p. 571.) "[T]he enhancement applies only to a person who himself inflicts the injury. . . . It is doubtful that the Legislature could have enacted the statute in question more tersely to express the intended limitation on the class of individuals who may be exposed to an enhanced sentence for inflicting great bodily injury. Among the several dictionary definitions of 'personally,' we find the relevant meaning clearly reflecting what the Legislature intended: 'done in person without the intervention of another; direct from one person to another.' (Webster's New Internat. Dict. (3d ed.1961).) No other expression could have more clearly and concisely expressed what we interpret to be the plain meaning of the Legislature: that the individual accused of inflicting great bodily injury must be the person who directly acted to cause the injury. The choice of the word 'personally' necessarily excludes those who may have aided or abetted the actor directly inflicting the injury." (*Id.* at p. 572.)

People v. Rodriguez (1999) 69 Cal.App.4th 341 specifically held that proximate cause is an insufficient basis for a great bodily injury enhancement. In *Rodriguez*, a police officer was injured when he hit his head on the ground or a lamppost while

tackling the defendant, who was attempting to escape from jail on a bicycle. The jury found this prior conviction for resisting a police officer was a "serious felony" because the defendant had personally inflicted great bodily injury upon the officer. *Rodriguez* reversed the jury's finding because the instructions it had been given erroneously equated "personally inflict" with "proximate cause." As *Rodriguez* explained, to " 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it. The instruction was wrong because it allowed the jury to find against Rodriguez if the officer's injury was a 'direct, natural and probable consequence' of Rodriguez's action, even if Rodriguez did not personally inflict the injury." (*Id.* at pp. 347-348.) *Rodriguez* reasoned that while *Cole* was concerned with application of a great bodily injury enhancement to an aider and abettor, the court addressed the issue of causation by requiring "that the defendant have acted personally and directly to inflict or cause the injury." (*Id.* at p. 349.) "To 'personally inflict' injury, . . . [t]he defendant must directly, personally, himself inflict the injury." (*Ibid.*)

In *People v. Bland* (2002) 28 Cal.4th 313, the defendant was prosecuted for murder and an enhancement was alleged under Penal Code section 12022.53, which provides additional punishment for a defendant who intentionally and personally discharges a firearm proximately causing great bodily injury or death. The Supreme Court held that it was error not to advise the jury that " '[a] proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred.' " (*Id*. at p. 335.) In so ruling, the court said, " 'To "personally inflict" an injury is to directly cause an injury, not just to proximately cause it.' " (*Id*. at p. 337.)

Appellant argues, citing *Bland*, that "to personally inflict an injury has a special legalized meaning which lay members of appellant's jury could not be expected to know in the absence of an instruction from the court."

Nothing in *Bland* suggests that this trial court was obliged to define the term "personally inflicts." In *Bland*, the issue was whether the court erred in failing to instruct sua sponte on the meaning of "proximate cause" when the defendant was prosecuted for charges that included an enhancement for one who intentionally and personally discharges a firearm proximately causing great bodily injury or death. The Supreme Court said that "proximate causation *does* have a meaning peculiar to the law, and that a jury would have difficulty understanding its meaning without guidance." (*Bland*, *supra*, 28 Cal.4th at p. 335.) The court approved the definition of proximate causation set forth in CALJIC No. 17.19.5. (*Id*. at p. 335.) The court found that the error in failing to define proximate cause was harmless.

Appellant argues that "[t]he jury could have subscribed to the generalized notion that a defendant is guilty for any injury caused by an act or actions that he set into motion; or, that the defendant is guilty for the direct, natural, and probable consequences of his actions or omissions." The instructions and argument here do not suggest to the jury that it should impose some vicarious or derivative liability on appellant. We do not share appellant's concern that this jury might have taken a term which is understandable to a layperson without further definition and broadened it to include concepts peculiar to the law. The trial court did not err in not instructing sua sponte the jury on the difference between personally inflicting and proximately causing great bodily.

Unanimity

Appellant contends that the trial court erred because it "did not give a unanimity instruction requiring the jury to agree on whether the pregnancy or the abortion was the injury."

"In a criminal case, a jury verdict must be unanimous. [Citation.] . . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must

require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) However, "[a] requirement of jury unanimity typically applies to acts that could have been charged as separate offenses." (*People v. Maury* (2003) 30 Cal.4th 342, 422.) Where "the evidence shows only a single discrete crime but leaves room for disagreement as to exactly how that crime was committed or what the defendant's precise role was, the jury need not unanimously agree on the basis or, as the cases often put it, the 'theory' whereby the defendant is guilty. [Citation.]" (*People v. Russo, supra,* 25 Cal.4th at p. 1132.)

Appellant complains, "Because there was more than one injury upon which the [great bodily injury] enhancement could have been based, and the prosecution clearly did not make an election as to which injury (the pregnancy or the abortion) on which the [great bodily injury] enhancement was predicated, the court had a sua sponte duty to give a unanimity instruction under CALJIC No. 17.01." However, this jury was not required to agree on a theory underlying the finding supporting either enhancement. For each of the great bodily injury enhancements, there was no room for disagreement that appellant's commission of a single lewd act by having sexual intercourse with Doe was the act by which he inflicted the injury. An individual juror could determine that Doe's pregnancy or the abortion, or both, sufficed to fulfill the requirement of the injury being substantial or significant. The unanimity requirement demands only that the jury unanimously find, as to each enhancement, that the injury sustained by Doe was significant or substantial. (*People v. Robbins* (1989) 209 Cal.App.3d 261.) Due process was served by the requirement that the jury render a unanimous verdict on each penalty enhancement provision, whether or not it agreed on the theory underlying that finding. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1184; *People v. Briscoe* (2001) 92 Cal.App.4th 568, 591-592.) The trial court had no sua sponte obligation to instruct the jury that it must be unanimous as to what condition constituted great bodily injury.

FURNISHING A MINOR WITH A CONTROLLED SUBSTANCE

Background

Appellant was convicted of three counts of furnishing a minor with a controlled substance in violation of Health and Safety Code section 11380. The controlled substances were described as methamphetamine in count 4, MDMA (ecstasy) in count 5, and psilocybin in count 6. These counts were each enhanced by an allegation that Doe was four years younger than appellant. (Health and Saf. Code, § 11380.1, subd. (a)(3).)

Doe testified that appellant gave her little white crystals of methamphetamine, which he called "shit" or "meth." The parties stipulated that "the defendant has knowledge of the nature and character of methamphetamine as a controlled substance." Doe testified that appellant gave her PCP once. Doe said that she knew what "psychedelic mushrooms" or "magic mushrooms" were, that appellant gave her those once, that he called them "shrooms" and "appeared to know what they were," and that they caused her to hallucinate. Doe also testified that she and appellant smoked marijuana together.

Count 5 originally charged that the controlled substance furnished was LSD. On direct examination, Doe testified that appellant gave her a pill that was "acid" or LSD and it made her feel "really weird." After cross-examination and a 10-minute recess, Doe testified on redirect examination that she had "mixed it up" and that the pill appellant gave her was ecstasy and that the street name for this was "E." She said that appellant never gave her "acid." After this testimony, the prosecutor moved to amend count 5 to allege that the controlled substance was MDMA stating, "On direct she said it was a pill. On redirect we brought out the fact that she was mistaken and that it was actually ecstasy that she took and he never gave her acid."

Milpitas Police Detective Sergeant Daryl Sequeira testified that he had "had training in the packaging and uses of various kinds of narcotics" including "methamphetamine, LSD, ecstasy and mushrooms." He had also received training in

"drug recognition." Sequeira testified about forms of methamphetamine and its effects on users. He testified about LSD, methods of usage, and effects on the user. He then testified as follows:

"Q. Let me move to – do you have any training and experience regarding the controlled substance know as 34 methylenedioxy amphetamine or MDMA?

A. Yes.

Q. Okay. What's the street name for that?

A. MDMA. The street name is ecstasy, more common you'll hear it referred to as X. I believe Jane Doe referred to it as E, real common, ecstasy, E. And I'm trying to think, a lot of the dealers who deal ecstasy actually will name their own – example will be if they have a little ecstasy pill it's got a little batman, they'll actually call it batman, as a way of identifying their own product.

Q. What form does it take? What does it look like?

A. They're little tiny pills, majority of the time they come in different colors, primarily they're small. And again different dealers might try to have their own specific identifier on it whether that is a pressed stamp of an animal like a dolphin or something, whether they have little insignias on it. You'll find them in various colors.

Q. What are some of the effects of taking ecstasy?

A. It's a drug – they call it a love drug. A lot of times it will lower your inhibitions. I've heard it increases your sensation. I have heard that people under the influence of ecstasy long-term will have hallucinations also. And there's been obviously, some people that have had very bad reactions that led to death."

Sequiera then testified about "the controlled substance psilocybin," that it was called "magic mushrooms" or "shrooms" by most users, and that it causes the user to experience "hallucinations and feelings of euphoria."

In closing argument, the prosecutor said, "The defense stipulated that the defendant knows what methamphetamine is. He knows that it's a controlled substance.

Did he give her ecstasy? Did he know what that was? Did he give her magic mushrooms? Did he know what they were? [¶] Under the circumstances how could he not know what ecstasy and mushrooms are? How could he not? What's the alternative, magic mushrooms? He's giving her these organic mushrooms, dried mushrooms, these little stems and pieces. How does he not know that that's going to get her high?"

The trial court instructed the jury as to count 5 in the language of CALJIC No. 12.15 that in order to be convicted of a violation of Health and Safety Code section 11380, subdivision (a), "each of the following elements must be proved: [¶] 1. A person furnished MDMA, a controlled substance, to Jane Doe; [¶] 2. At the time, Jane Doe was a person under 18 years of age; [¶] 3. That person specifically intended to furnish Jane Doe the MDMA; [¶] 4. The person who furnished the controlled substance was 18 years of age or older; [¶] 5. That person knew of the nature of MDMA as a controlled substance."

During deliberations, the jury asked to hear "Jane Doe's testimony (re-direct) on drug use and drug description of ecsta[s]y." After this testimony was read to the jury, the jury asked, "In regards to Count Five, does MDMA have to be agreed upon as the drug that was allegedly . . . furnished or offered or is all that matter[s] is that it was a controlled substance?" The trial court answered, "In order for the jury to find the defendant guilty as to Count 5, the jury must unanimously find that all the elements of the crime charged have been proved beyond a reasonable doubt. One element of the crime charged in Count 5 is that a person furnished MDMA, a controlled substance to Jane Doe."

Nature and Character of Substance Furnished

Appellant contends that his convictions on counts 5 and 6 "must be reversed for insufficient evidence because the evidence fails to establish that appellant knew of the nature and character of ecstasy as a controlled substance analog and of psilocybin as a controlled substance." During trial, the parties stipulated "the defendant has knowledge of the nature and character of methamphetamine as a controlled substance." Appellant

observes, "There was no similar stipulation that appellant knew of the nature and character of ecstasy or psilocybin as controlled substances[.]" Appellant argues, "the evidence is insufficient to establish that he knew that the substances he allegedly provided [Doe], MDMA and psilocybin, were controlled substances."

When the sufficiency of the evidence is challenged on appeal, the court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758.) We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, including reasonable inferences based on the evidence and excluding inferences based on speculation or conjecture. (*People v. Tran* (1996) 47 Cal.App.4th 759, 771-772.)

Although respondent argues that appellant "appears to be imputing" into Health and Safety Code section 11380 "a requirement that the defendant have actual knowledge of the legal status of the drug," respondent does acknowledge that in "the context of sales, transportation, or manufacturing a controlled substance, the California courts have imputed a *factual* scienter requirement to the relevant statute (i.e. knowledge of what the product is or category the product falls within) when the conduct that is involved can be done in a lawful manner. (See *People v. Coria* (1999) 21 Cal.4th 868, 877-878.)" (Fn. omitted.) It would seem, then, as the jury was instructed, that an element of violating Health and Safety Code section 11380 includes that the defendant knew the nature of the substance furnished as a controlled substance. Appellant argues, "[j]ust because appellant may have stipulated to knowing that methamphetamine was a controlled substance, to avoid having his prior drug conviction paraded in front of the jury, does not mean he knew that psilocybin was a controlled substance or that MDMA was a controlled substance analog."

Our examination of the record finds substantial evidence to support the inference that appellant had knowledge that the substance he furnished Doe in count 6 was psilocybin, but no substantial evidence that he knew the nature of the substance furnished in count 5 as a controlled substance. The sufficiency of the evidence for these two counts is in sharp contrast. Doe testified that when appellant furnished her with the mushrooms, he called them "shrooms" and Sequiera testified that psilocybin was called "magic mushrooms" or "shrooms" by most users. As for the MDMA count, when Doe was testifying that the substance furnished was LSD, she said, "He never told me a name." On redirect examination, she was asked, "When you talked about getting a pill from [appellant] and that you thought that was acid, is it possible that that was actually ecstasy that you took." She answered, "Yeah, I mixed it up. It was ecstasy." However, she did not testify that appellant called this substance by any name. Although Doe testified that as to the mushrooms, appellant appeared to know what they were, there is no such testimony about the MDMA count. Doe testified that the mushrooms in count 6 caused her to hallucinate and Sequiera testified psilocybin causes the user to experience "hallucinations and feelings of euphoria." Sequiera testified that MDMA will affect the user by lowering the user's inhibitions and increasing sensation. Doe testified, rather vaguely and during the part of her testimony when she was referring to the substance as LSD, that the substance furnished in count 5 caused her to feel "really weird."

As for count 4, furnishing methamphetamine to a minor, the stipulation that appellant had knowledge of the nature and character of methamphetamine as a controlled substance sufficed to prove, as CALJIC No. 12.15 requires, the element of a violation of Health and Safety Code section 11380 "that the person knew of the nature of [the substance furnished] as a controlled substance." As for count 6, sufficient evidence to support the inference that appellant knew the nature of the psilocybin furnished as a controlled substance is found in Doe's testimony that appellant called the mushrooms furnished "shrooms," her testimony that they caused her to hallucinate, and the expert

testimony that the controlled substance psilocybin is called "shrooms" by users and that the substance causes one to hallucinate.

In contrast to the evidence in support of counts 4 and 6, the evidence as to count 5, furnishing a minor with MDMA, does not justify any reasonable inference that appellant knew the character of the substance furnished. Respondent argues, "the jury could reasonably conclude that appellant had the knowledge appellant contends the law requires. The jury as a body could reasonably be expected to know that one who acquires MDMA and psilocybin will do so furtively, that such a person knows that such substances have the effects of controlled substances, and that such substances are not displayed openly in a pharmacy. The jury could draw the requisite inference from those facts." We must reject the inference respondent suggests because it is based on speculation and conjecture rather than evidence which is reasonable, credible, and of solid value. The evidence was insufficient to support the conviction in count 5.[2] Our conclusion bars retrial of that count. (*People v. Seel* (2004) 34 Cal.4th 535, 542.)

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[2] Because we conclude that there is insufficient evidence to support appellant's conviction in count 5, we do not resolve his contentions that: (1) "The evidence here failed to establish that MDMA meets the definition of a controlled substance analog set forth in subdivision (b) of Health and Safety Code section 11401. The People did not prove that the chemical structure of ecstasy is 'substantially similar to the chemical structure of a controlled substance classified in Section 11054 or 11055[]' (Health & Saf. Code, § 11401, subd. (b)(1)), because no chemist or other witness testified to the chemical composition of MDMA" and (2) "The court here had a sua sponte duty to correctly and completely instruct appellant's jury that they were required to find that MDMA is an analog of a listed controlled substance, such as methamphetamine. The trial court committed reversible error in identifying MDMA as a controlled substance, thereby removing from the jury the factual determination of whether MDMA is an analog of a listed controlled substance."

MISDEMEANOR DISSUADING A WITNESS

Background

Appellant was charged with a felony violation of Penal Code section 136.1, which prohibits dissuading a witness by threats of force. Appellant contends that he "was denied due process and a fair trial because the trial court failed to instruct the jury, sua sponte, with misdemeanor intimidation of a witness as a lesser-included offense of the felony charge. To the extent trial counsel dissuaded the court from so instructing the jury, appellant was denied his Sixth Amendment right to the effective assistance of counsel, reversal of count [7] is required."

When the court conferred with counsel about which jury instructions should be given, the court discussed whether CALJIC No. 9.00, which defines assault, should be given to define lesser included offenses for the lewd act counts. The court said, "And my understanding at [the] time the defendant had indicated to the Court it had elected, as a trial tactic, not to request any lessers in this case and therefore it was withdrawn." Defense counsel told the court, "[t]hat's correct, your Honor. The defense made a tactical decision not to ask for a 240, assault 240, instruction that it would be a lesser included of [the lewd act counts]." The court said, "And that was because of the state of the evidence was such that you felt you wouldn't have any credibility with the jury if you were to – well, maybe I shouldn't even ask – because of your tactics." Defense counsel responded, "Yes, your Honor. I wasn't planning on arguing a 240 lesser."

The court then went on to discuss CALJIC No. 7.14 which would define the lesser offense of misdemeanor intimidation of a witness. Defense counsel told the court, "Same basis, your Honor. As a trial tactic, I don't think there was any – he either hit her and used force or he didn't do it at all. That's our position." In closing argument, defense counsel said, "count seven, the dissuading a witness count is the outer layer of that snowball of lies that Jane Doe has told you in the case it gets more and more ridiculous as it goes. It should be rejected."

During deliberations, the jury requested "Jane Doe's testimony . . . regarding threats made by defendant." Ultimately, the jury convicted appellant of felony dissuading a witness.

Discussion

" 'It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] . . . .' [Citation.] That obligation has been held to include giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citation] . . . ." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, overruled on another point in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) Appellant, citing *People v. Brenner* (1992) 5 Cal.App.4th 335, argues that misdemeanor intimidation of a witness under Penal Code section 136.1, subdivision (b)(1) is a lesser included offense within the felony offense of intimidation by force or threat under Penal Code section 136.1, subdivision (c)(1). Respondent, citing *People v. McElroy* (2005) 126 Cal.App.4th 874, argues that "*Brenner* is no longer valid authority for this point."

Even if we were to agree with appellant that the misdemeanor is a lesser included offense of felony intimidation of a witness, any error was invited. The doctrine of invited error is explained in *People v. Wickersham* (1982) 32 Cal.3d 307, 330 (criticized on another point in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10): "The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. However, because the trial court is charged with instructing the jury correctly [fn. omitted], it must be clear from the record that defense counsel made an express objection to the relevant instructions. In addition, because important rights of the accused are at stake, it also must be clear that counsel acted for tactical reasons and not out of ignorance

or mistake." The *Wickersham* court did not apply the invited error rule because the record "was devoid of any expressed tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 830.) Here, defense counsel specifically told the court that he had made a tactical decision that instructions on lesser included offenses not be given.[3]

Appellant argues that "if this court finds that counsel invited the error in failing to instruct on the lesser included offense, then appellant contends he received ineffective assistance of counsel." Appellant argues, "the evidence did establish that appellant committed *some* offense and because the defense did not offer any alternative to a conviction on the greater offense, it was not reasonable to take the choice of a misdemeanor away from the jury." Appellant argues, "the jury could have discredited Doe's statement that appellant threatened force against her or her family while at the same time crediting her statement that appellant told her to deny their relationship." This is precisely the type of second-guessing of trial counsel that we must not do. "Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) We reverse " ' "convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." ' " (*Id.* at p. 437.) Here, trial counsel made a tactical decision that he did not want the jury instructed on any lesser included offenses, including that of misdemeanor intimidation of a witness. His argument was that Jane Doe was fabricating. There is nothing irrational about trial counsel choosing to argue that the jury should not believe the prosecution's witness, and,

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[3] Apparently defense counsel did request that the court instruct on "a lesser related offense" of a violation of Penal Code section 261.5, unlawful intercourse, presumably for the lewd act count for which there was DNA analysis of the aborted fetal tissue. However, the court denied that request.

as part of that strategy, forgo instructions on lesser included offenses, especially for less serious counts. Accordingly, because the apparent tactical explanation for the withdrawal of the requested instruction is not irrational, appellant's claim for ineffective assistance of counsel fails.

FAILURE TO INSTRUCT ON ADMISSIONS

Appellant contends that he "was denied due process and a fair trial because the court failed to instruct his jury on the law of admissions."

Peggy A., Jane Doe's mother, testified that after Doe was arrested for being under the influence of a controlled substance, she confronted Doe about Doe's relationship with appellant. She said that Doe was unwilling to talk to her about it. Ms. A. testified that she called appellant and "left him a message telling him to stay away from my daughter." Appellant called Ms. A. and she described their conversation. She said, "I'm not quite sure what he said. He said something to the effect that he hasn't been around her. I told him to stay away from her. I told him her age. He knows he could get in trouble. He said he was sorry. He wasn't really around – he doesn't really see her that much."

Appellant contends, "Because appellant's extra-judicial statements were admitted as evidence of his guilt at trial, the court had a sua sponte duty and should have instructed appellant's jury with CALJIC No. 2.71, defining an admission, and No. 2.71.1, instructing the jury that an admission must be viewed with caution." (Fns. omitted.)

Our Supreme Court has determined that "[w]hen evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution." (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1200.) The purpose of the cautionary instruction "is to assist the jury in determining if the statement was in fact made." (*People v. Beagle* (1972) 6 Cal.3d 441, 456, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301.) The cautionary instruction is required whether the defendant made an oral statement "before, during, or after the crime." (*People v. Carpenter* (1997) 15 Cal.4th

312, 393.) Appellant argues that his statements to Ms. A. "tended to establish that appellant knew what he was doing was wrong. . . . The apology could be viewed as a concession of guilt." We agree that the statement that Ms. A. testified about does, although rather obliquely, support an inference of guilt and that it was error to omit the instructions on admissions.

While it is error for a court to fail to give the cautionary instruction, "[t]he omission, however, does not constitute reversible error if upon a reweighing of the evidence it does not appear reasonably probable that a result more favorable to defendant would have been reached in the absence of the error." (*People v. Beagle, supra* 6 Cal.3d at p. 455.) The prejudice analysis focuses on whether "there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1268.) The prejudice attributable to the lack of a cautionary instruction is in proportion to the importance of the defendant's admission to the prosecution's case. (*People v. Deloney* (1953) 41 Cal.2d 832, 840; *People v. Lopez* (1975) 47 Cal.App.3d 8, 14.)

Ms. A. testified that she did not remember appellant's exact words. What she did remember was in the nature of an apology for seeing Doe and some downplaying of the extent of their relationship. We disagree with appellant's characterization of this testimony as "powerful evidence of appellant's guilt on both the sex-related charges and the drug offenses." The statement had so very little to do with the prosecution's case that neither side even mentioned this evidence in closing argument. That appellant had a relationship with Doe was established through her testimony, the numerous cards and love letters between the two, her arrest for being under the influence while hiding under a bed at appellant's mother's house, and his biological relationship to the aborted fetus. Furthermore, the jury was instructed that it could consider Ms. A.'s felony conviction in determining her believability. Given the strength of the prosecution's case as a whole, and the unimportance of appellant's statements to Ms. A. to it, it is not reasonably

probable that a result more favorable to appellant would have been reached had the jury been instructed on admissions.

WITNESSES' PROBATIONARY STATUS

Appellant contends, "The trial court committed reversible error by not allowing the defense to cross-examine prosecution witnesses about their probationary status, violating appellant's Sixth Amendment right to confrontation."

Background

Before trial, the court considered what evidence the defense would be permitted to introduce to impeach prosecution witnesses. The court said that it would permit Doe to be impeached with her admission of a misdemeanor violation of Penal Code section 245, subdivision (a)(1). The court said that it would permit impeachment of Ms. A. with her grand theft and elder fraud convictions, and Annette H. with her petty theft conviction. The court said, "There was a further request by [defense counsel] on behalf of the defendant that they would be permitted to impeach because of the fact that they're still on probation, Jane Doe, [Ms. A.], and [Ms. H.], and I indicated to [defense counsel] the Court would not permit that inquiry for purposes of credibility and impeachment. [Defense counsel] indicated he wanted additional time to review those cases that he cited, so I'll continue to take that under submission." The issue of impeachment by probation status was not raised again. Each witness was impeached in accordance with the court's ruling. Doe testified to her admission of misdemeanor assault with a deadly weapon.[4] The jury learned that Peggy A. had two felony convictions, for grand theft and elder fraud. Annette H. testified that she had been convicted of misdemeanor petty theft in 2002 and 2003. The trial court instructed the jury on the proper use of this impeachment evidence.

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[4] Doe actually did testify that she was on juvenile probation but the jury was not instructed to consider this in determining her credibility.

Discussion

The confrontation clause guarantees the right of a defendant to confront witnesses against him or her by cross-examination. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678.) The confrontation clause does not allow all questioning desired by the defense. Rather, trial judges maintain wide discretion in limiting cross-examination on the grounds of prejudice, harassment, or that the examination is repetitive, or of marginal relevance. " '[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citation.]" (*Id.* at p. 679.)

Appellant relies on *Davis v. Alaska* (1974) 415 U.S. 308. In *Davis*, a safe was removed from the Polar Bar in Anchorage, Alaska during the night. The next day, the police received a telephone call that reported that a safe, which turned out to be the stolen safe, had been found 26 miles outside Anchorage near the home of Jess Straight and his family. Richard Green, Straight's stepson, told the police that he had seen and spoken with two Black men standing alongside a Chevrolet near the spot where the safe was found. Green related the circumstances of his meeting with these two men in considerable detail. The following day Green picked Davis out of a photographic lineup as one of the two men he had seen near where the safe was found; Green confirmed his identification of Davis in a physical lineup after Davis's arrest. (*Davis v. Alaska, supra,* 415 U.S. at pp. 309-310.) It turned out that at the time of trial, as well as at the time of the events Green testified about, Green was on probation by order of a juvenile court after having been adjudicated a delinquent for burglarizing two cabins. Defense counsel sought to impeach Green with his juvenile adjudication, arguing that Green not only might have made a hasty and faulty identification of petitioner to shift suspicion away from himself as one who robbed the Polar Bar, but Green might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation.

The trial court in *Davis, supra,* 415 U.S. 308 believed the state policy governing confidentiality of juvenile proceedings barred any reference to the status of the witness. No weighing of the evidence to determine whether it was sufficiently probative to warrant admission was undertaken. (*Id.* at p. 311.) The United States Supreme Court held that the refusal to allow cross-examination about the defendant's probationary status denied the defendant his constitutional right to confront witnesses against him. (*Id.* at p. 318.)

There are important differences between *Davis* and this case. Surely no one would argue that Ms. A. or Ms. H. sought to shift suspicion away from themselves for these charges. There is no suggestion that Ms. A. or Ms. H. were subject to undue pressure from the police to testify against appellant. Appellant argues, "[Ms. A.] would have been especially motivated to assist the prosecution or the police, because she was scheduled to serve jail time for a felony conviction for grand theft and elder fraud and therefore she could have perceived that by cooperating with the authorities about her daughter's case, perhaps she could receive some favorable treatment on her own pending case(s)." To the contrary, the record reflects that Ms. A. was suspicious of appellant's behavior around Doe long before the authorities were involved. The motive to assist the prosecution here was the protection of Ms. A.'s daughter and Ms. H.'s niece, rather than fear of possible probation revocations. Furthermore, the witnesses were impeached with their actual convictions and admissions.

Nothing in the *Davis* opinion suggests that the court intended to abrogate the power of trial courts to restrict cross-examination, even that by defendants, under well-established principles such as those reflected in Evidence Code section 352, i.e., if the probative value of the evidence "is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." This court will not overturn a lower court's decision to exclude evidence offered for impeachment,

absent an abuse of discretion resulting in a miscarriage of justice. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) The lack of probative value of the proposed impeachment evidence supports the trial court's action and does not meet the requisite abuse of discretion standard. (*Ibid.*) Given the insignificance of the probationary status of these witnesses to their motivations and the admission of other impeachment evidence as to each witness, the trial court did not err in excluding this evidence and there was no Confrontation Clause violation.

SENTENCING

Use of Prior Conviction

Appellant contends, "The trial court erred in calculat[ing] appellant's sentence by imposing the five-year serious felony prior (§ 667, subd. (a)) three times, twice on appellant's indeterminate term under section 667.61, and again on his determinate sentence."

Background

The jury found true the allegations that appellant had previously been convicted of a prior serious felony within the meaning of Penal Code sections 667, subdivisions (a) and (b) through (i), and 1170.12. The trial court used this one prior serious felony conviction in adding five years to each of the indeterminate sentences on counts 1 and 2 and in adding five years to the determinate term imposed in count 7. The trial court sentenced appellant on count 1 to 30 years to life, which represents 15 years to life, the term prescribed by Penal Code section 667.61 for a lewd act on a minor with a great bodily injury enhancement, doubled under Penal Code section 667, subdivisions (b) through (i) because appellant was sentenced as a second-strike offender due to his prior serious felony conviction. The court ordered appellant to serve a five-year consecutive sentence for the prior serious felony conviction under Penal Code section 667, subdivision (a). The same sentence was imposed for count 2 and that was ordered to be served consecutively to the sentence on count 1. As for the determinate term part of the

sentence, the trial court sentenced appellant on count 4 (furnishing a minor with methamphetamine) to the doubled midterm of 12 years plus two years for the Health and Safety Code section 11380.1, subdivision (a)(3), enhancement (that the minor was four years younger than the defendant) for a total of 14 years. The trial court sentenced appellant on count 5 (furnishing a minor with MDMA) and count 6 (furnishing a minor with psilocybin) to four years and eight months for each count. For count 3 (lewd act) the trial court sentenced appellant to four years. For count 7 (dissuading a witness), the court selected the doubled midterm of six years and added five years for the prior serious felony conviction under Penal Code section 667, subdivision (a) for a term of 11 years to be served as a full term consecutive sentence. The total sentence imposed was an indeterminate state prison term of 60 years to life consecutive to determinate term of 48 years, four months. Appellant challenges the imposition of five years for each of the section 667, subdivision (a) enhancements alleged in counts 1, 2, and 7.

Discussion

Appellant contends that the trial court erred when it imposed the serious felony enhancement three times when it calculated appellant's sentence. The trial court imposed the five-year enhancements citing *People v. Williams* (2004) 34 Cal.4th 397. In *Williams*, the defendant was convicted of three sex offenses in one case, and burglary and auto theft in another. In both cases he was found to have suffered two serious felony convictions, each supporting a five-year enhancement under Penal Code section 667, subdivision (a)(1).[5] Pronouncing sentence in both cases, the trial court imposed (1) on the burglary charge, "a term of 25 years to life . . . plus an additional five-year term for

[5] Penal Code section 667, subdivision (a)(1) provides in pertinent part: "[A]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state . . . shall receive, in addition to the sentence imposed by the court for the present offense, a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively."

each of the prior serious felony convictions, for an aggregate sentence of 35 years to life," and (2) on the sex offenses, a consecutive 25-to-life sentence "plus five years for each of the two prior serious felony convictions . . . ." (*Id*. at pp. 400-401.) The court referred to the result as "an overall net sentence of 70 years to life" (*id*. at p. 401, fn. omitted), while acknowledging that it actually "consisted of a determinate term of 20 years to be followed by two consecutive indeterminate life sentences, each having a minimum term of 25 years." (*Id*. at p. 401, fn. 3.)

The court held that in a third-strike context, "a prior conviction enhancement may be added to the third strike sentence for each new offense." (*Williams, supra*, 34 Cal.4th at p. 400.) *Williams* acknowledged the holding in *People v. Tassell* (1984) 36 Cal.3d 77 (overruled on unrelated grounds in *People v. Ewoldt* (1994) 7 Cal.4th 380, 401). In *Tassell* the Supreme Court held that when imposing a determinate, consecutive sentence for two or more felonies under Penal Code section 1170.1 (relating to determinate sentencing), the enhancement for a prior serious felony conviction is applied only once to the aggregate term, and not separately to increase the principal or subordinate term imposed for each new offense. (*Tassell, supra*, 36 Cal.3d at pp. 90-92.) Appellant argues here that "his sentence was subject to *Tassell's* limitation on the imposition of a prior conviction enhancement to one per aggregate sentence."

The *Williams* court concluded that *Tassell* was "not controlling or even helpful" in a third-strike context. (*Williams, supra*, 34 Cal.4th at p. 402; see 400 ["not controlling"].) The imposition of multiple enhancements for the same prior offense, the court held, is "not inconsistent" with the voter's intent in enacting section 667(a), which was " 'to increase sentences for recidivist offenders.' " (*Williams, supra*, 34 Cal.4th at p. 404, quoting *People v. Jones* (1993) 5 Cal.4th 1142, 1147.) Moreover it was "consistent with the logic of the Three Strikes law," which "uses a defendant's status as a recidivist to *separately* increase the punishment for *each* new felony conviction." (*Williams, supra*, 34 Cal.4th at p. 404.)

As discussed in *Tassell* and *Williams, supra*, only one enhancement for a prior serious felony conviction can be imposed on the sentence of a defendant sentenced to a determinate term pursuant to section 1170.1, while one enhancement for a prior serious felony conviction is required for each count on which a defendant is being sentenced to an indeterminate term pursuant to section 667, subdivision (e)(2)(A). *People v. Misa* (2006) 140 Cal.App.4th 837 considered the situation when a defendant is sentenced in one proceeding to both an indeterminate term and a determinate term. In *Misa*, the defendant had one prior strike and was convicted of one count of torture and two counts of assault with a deadly weapon. The trial court imposed a double indeterminate sentence on the conviction of torture with a prior strike and consecutive determinate sentences on the assault with a deadly weapon convictions. It enhanced the indeterminate sentence for torture with two enhancements for prior serious felony convictions and enhanced the determinate sentences for the same prior serious felony convictions. On appeal, the defendant argued that the trial court erred in applying the principle expressed in *Williams* and refusing to follow *Tassell.* The court applied *Williams* to uphold imposition of a prior serious felony conviction enhancement on the defendant's second strike sentence for torture, an indeterminate term, even though a prior serious felony conviction enhancement was also added to a determinate term for assault. The Court acknowledged that *Williams* is not directly dispositive, but found the analysis applicable because of the defendant's status as a recidivist. (*People v. Misa, supra,* at pp. 844-847.)

Appellant argues "*Misa* is wrongly decided and *Williams* does not apply here." He contends "that his serious felony enhancement should not have been added more than once because the reasoning of *Tassell* applies[.]" Appellant argues that *Williams* does not apply to him because the defendant in *Williams* was sentenced under the three strikes law, Penal Code section 667, subdivisions (b) through (i), whereas appellant's indeterminate sentence is under the one strike law under Penal Code section 667.61, subdivisions (b) and (e). Appellant argues that "nothing in *Williams*, *Misa*, or section

667.61 *authorizes* a court to impose a five-year serious felony prior on each count of an indeterminate sentence imposed under the One Strike Law, and nothing in section 1170.1 *allows* the court to impose the five-year enhancement for both determinate and indeterminate terms." However, it is simply the fact a particular offense carries an indeterminate term that makes *Tassell* inapplicable, and this is true whether the indeterminate term results from operation of the three strikes law, or is just a function of the fact a new offense carries an indeterminate term. Here, appellant was subject to two indeterminate terms because two of his current offenses, lewd act on a minor with a great bodily injury enhancement, were punishable by life in prison. As the court in *Williams* pointed out, "*Tassell* relied on the language of section 1170.1, and not on the language or legislative history of section 667(a), in concluding that at sentencing a trial court must impose a sentence enhancement for a prior serious felony conviction-including a section 667(a) enhancement-only once, regardless of the number of new felony offenses. [¶] Section 1170.1, however, applies only to *determinate* sentences." (*People v. Williams, supra,* 34 Cal.4th at p. 402.) Because appellant was sentenced to one determinate sentence and two indeterminate sentences, the three section 667, subdivision (a), enhancements were properly imposed.

Restitution

Appellant contends, "The order to pay victim restitution should be stricken for insufficient evidence."

Background

The probation report, which was dated March 17, 2006, stated "this has been a very traumatic experience for [Doe]. She suffers from nightmares, depression, and is fearful." The report said that Doe "ha[d] recently begun to receive counseling as a result of this offense. All counseling services have been provided by the Victim Witness Assistance Center." The report recommended $180 in restitution because, "Steve Dippert of the District Attorney's Office reports a total of $180.00 has been paid out for mental

health services as of the date of this report." At the sentencing hearing on September 29, 2006, the prosecutor said that he had "a request from the victim compensation and government claims board. This relates to the restitution to be ordered in the probation report . . . the request is for $180. [¶] This has been changed because as time has gone by, the restitution amount has gone up and now the amount is $1,225, $1,225 to the victim's compensation and government claims board which paid out money on behalf of the victim. I believe it was for counseling expenses." The trial court ordered "restitution to the victim and compensation government claims board in the sum of $1,225."

Discussion

Appellant argues, "No evidence was submitted to support the amount of restitution awarded, and, according to the probation report, the victim had no out of pocket expenses for medical or counseling costs." "The Deputy District Attorney merely represented that he *thought* it was for counseling costs, however, he did not seem sure of himself."[6]

"A trial court 'is not required to determine what damages might be recoverable in a civil action but may instead use any rational method of fixing the amount of restitution which is reasonably calculated to make the victim whole . . .' [Citation.]" (*People v. Goulart* (1990) 224 Cal.App.3d 71, 83.) Sentencing judges have virtually unlimited discretion as to the source and kind of information they may consider in determining victim restitution. (*People v. Foster* (1993) 14 Cal.App.4th 939, 946.) The March probation report established that Doe was suffering psychologically from these offenses and had just begun receiving counseling that would be ongoing. The sentencing hearing took place over six months after that report had been prepared. The trial court could accept the statement of the prosecutor in reporting the updated cost of Doe's counseling. We do not consider the prosecutor's use of the rhetorical flourish "*I believe* it was for

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[6] Although there was no objection to the amount of the restitution award in the trial court, we reach this issue because it is a challenge to the sufficiency of the evidence. (See *People v. Viray* (2005) 134 Cal.App.4th 1186, 1214.)

counseling expenses" to undermine the trial court's reliance on this information. Sufficient evidence supported the trial court's award of restitution.

DISPOSITION

Appellant's conviction for furnishing a minor with MDMA in count 5 is reversed and the four year eight month term imposed on that count is stricken. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.