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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY MORAN,

Defendant and Appellant.

A130327

(Alameda County
Super. Ct. No. H46677)

INTRODUCTION

Defendant Michael Anthony Moran took advantage of his wife's and children's temporary absence from home to sexually assault a teenage neighbor who stayed behind to play on the Morans' computer. When it appeared the wife and children were at the front door, defendant desisted, allowing the victim to run home and report the attack to her mother. Several days later, defendant's stepdaughter revealed he had been molesting her for years. A jury convicted defendant of two counts of sexual assault against the teenage neighbor, and one count of continuous sexual abuse against the stepdaughter. Defendant was sentenced, pursuant to the One Strike sex offender law, to two consecutive life terms of 15 years to life, and a concurrent determinate term of six years.

On appeal, defendant argues that the admission of his pre-arrest statements to police violated *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*), the trial court abused its discretion and violated his constitutional rights by excluding evidence that his stepdaughter had previously made a false report of a night time intruder who kissed her, and that the prosecutor committed misconduct during voir dire and in his rebuttal

argument. He argues that cumulatively the errors require reversal. He also argues that the court erred in its imposition of a fine under Penal Code section 290.3, and the Attorney General agrees. We reject defendant's substantive claims, but we will remand for modification of the abstracts of judgment. As modified, the judgment is affirmed.

STATEMENT OF THE CASE

By amended information, defendant was charged with six sexual offenses. Against Jessica Doe, the information alleged one count of sexual battery (count 1), one count of penetration by a foreign object (count 2), two counts of forcible oral copulation (counts 3 & 5), and one count of rape (count 4). (Pen. Code, §§ 243.4, subd. (a), 289, subd. (a)(1), 288a, subd. (c)(2), 261, subd. (a)(2).)¹ Against Andrea Doe, defendant was charged with one count of continuous sexual abuse of a child under the age of 14 (count 6). (§ 288.5, subd. (a).) As to counts two through six, the information alleged that the offenses occurred on separate occasions and involved multiple, separate victims. (§§ 667.6, subds. (c) & (d), 667.61, subds. (c) & (e)(5).)

On July 8, 2010, the jury returned guilty verdicts on counts four (rape), five (forcible oral copulation), and six (continuous sexual abuse of a child) only. The jury also found true the special allegations. The jury was unable to agree on counts one, two, and three. The court declared a mistrial as to those counts and dismissed them.

On counts four and six (rape of Jessica, and continuous sexual abuse of Andrea), the court sentenced defendant to two consecutive 15-year-to-life terms pursuant to subdivisions (b), (c), (e)(5), and (i) of section 667.61, the One Strike sex offender law. Pursuant to section 667.6, subdivision (c), the court exercised its discretion to impose a concurrent six-year sentence for count five (forcible oral copulation of Jessica). Among other fines and fees, the court imposed a \$3,000 sex offender fine pursuant to section 290.3. Defendant timely appeals.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

STATEMENT OF FACTS

Jessica Doe

In May 2008, Jessica Doe was 16 years old and lived with her family in the Baywood Apartments in Hayward. Defendant, his wife Melissa Moran, and their three children lived in the same apartment complex and Jessica was friendly with them. Jessica often went to their apartment to socialize with the family, play with their X-Box, or use their computer.

On May 23, 2008, Jessica went to the Morans' apartment to visit. While she was there, Melissa decided to take the children to Jack in the Box, which was "right around the corner." Jessica did not want to go, and stayed behind in the apartment, playing on the computer. Defendant did not go either. Melissa and the children were gone 15 to 17 minutes at most.

After Melissa left with the children, defendant told Jessica to "get up." Defendant pushed her onto the bed, falling on her and holding her wrists down over her head. Defendant weighed 300 pounds; Jessica weighed 120. Jessica tried unsuccessfully to wiggle out from under him. Defendant said if she tried to stop him, he would hurt her.

Defendant kissed Jessica's lips and cheek. Jessica kept her lips tightly closed, except when she yelled and screamed. Defendant kissed Jessica's neck while he moved her blouse and bra out of the way. Then he kissed Jessica's breasts. Defendant kissed Jessica's stomach, pulled down her clothes and put two fingers in Jessica's vagina and moved them in and out with "all of his might" about five times. It was painful and Jessica screamed loudly.² Next, defendant orally copulated Jessica for 10 to 15 seconds. Then defendant put his penis in Jessica's vagina, pulled it all the way out, and put it back in about five or six times. The pain of the first insertion caused Jessica to scream, but then defendant's threats and the pain caused her to stop resisting. Next, defendant gestured for Jessica to perform oral sex on him, and pushed Jessica's head down to make

² A neighbor testified that she heard "screaming, yelling, and a door slam."

her do it. About 10 seconds later, Jessica heard what sounded like the front door knob turning. Defendant went into the bathroom. Jessica got dressed and went home.

At home, Jessica urinated and saw blood on the toilet paper after she wiped herself. She told her mother that defendant had raped her. They decided to inform Melissa and then call the police.

When Melissa returned with the children, defendant was in the bedroom. She asked where Jessica was, and defendant replied that she had gone home. About 30 minutes later, Jessica and her mother came to the Morans' apartment. Jessica's mother told Melissa that defendant had raped Jessica. Melissa exclaimed, "What if he did this to one of my other kids?"

Jessica and her mother left, and Melissa went back into her house and told defendant something like, "I'm sure you know what this is about." He nodded affirmatively. Melissa then told defendant that Jessica and her mother were going to call the police.

After Jessica and her mother left, they went home and called the police. When the police arrived, they asked Jessica some basic questions and requested that she change her clothes. Jessica bagged the clothes she had been wearing and gave the bag to the police.

Hayward Police Officer Michael Carpenter then went to defendant's apartment with some other officers. As soon as defendant saw the police standing in the doorway, he said, "I knew you were coming." Carpenter asked defendant to accompany them outside and defendant complied. As they walked slowly to a nearby parking lot, defendant said, "I made a mistake," and said he was sorry several times. Jessica was brought to defendant's location in a police car from which she identified defendant. Defendant was then arrested.

Jessica was taken to a hospital where she was examined by a physician's assistant. She reported that defendant had digitally penetrated her for about 10 seconds, penetrated her vagina with his penis five times, orally copulated her twice, and made her orally copulate him once. She said she had vaginal pain and bleeding. Jessica was unable to tolerate a speculum exam due to the pain. The physician's assistant documented various

injuries to Jessica’s vaginal area and concluded that his observations were consistent with the history Jessica had given.

Andrea Doe

Andrea Doe is Melissa Moran’s daughter from a previous relationship and defendant’s stepdaughter. She was 12 years old when she testified at trial in June of 2010.

Approximately a week after defendant was arrested, Andrea first disclosed to her mother that defendant had molested her, because her mother kept asking her if defendant had done anything to her. She did not tell her mother everything at first, but she did disclose more details to her aunt Laura who worked in a courthouse. Two days later, Melissa called the police.

Andrea and Jessica were good friends, and she was aware of Jessica’s rape accusation against defendant.³ However, she was not accusing defendant of molesting her to help Jessica. She was adamant about telling what defendant did to her “[b]ecause he actually did that to me.”

Andrea testified that when she was eight or nine defendant first tried to put his “private” in her “private.”⁴ It “stung a little,” and Andrea said to defendant, “Wait.” Defendant didn’t stop, but said to her, “Hold on.” Andrea then said she needed to go to the bathroom although she really didn’t need to go. Defendant let her leave. She made up having to go to the bathroom because she didn’t want to be hurt anymore and wanted to clean herself off.

A second incident occurred, but Andrea could not recall when. It was the same as the first incident except that this time defendant wanted her to “lick his private,” but Andrea wouldn’t do it.

³ A couple of days after defendant’s arrest, Jessica told Andrea and some other friends that defendant had raped her. Jessica did not provide any specific details.

⁴ Referring to anatomical drawings of male and female bodies, Andrea described both the vaginal area and penis as “privates” and used that terminology in her testimony.

A third incident occurred when Andrea and her sister were watching television. Defendant told her sister to go into another room, which she did. Then defendant pulled down her pants and again tried to put his private in her private. Andrea made a noise because it hurt a little. Another time, defendant tried to put his private in her “butt” while she was on her stomach.

The last incident occurred a week or two before defendant’s arrest. He again attempted vaginal intercourse with her, and tried to make her lick his private. Andrea felt slimy, sticky stuff on her private. Defendant’s private was “long, hairy, and it had slimy stuff and it had a tiny hole.” The incidents occurred about three months apart.

The Defense Case

Melissa testified that Jessica and defendant did not have much contact, other than small talk. Melissa admitted that she frequently called Andrea “bitch” and other names, and hit Andrea. Melissa never saw any signs that would lead her to believe defendant was molesting Andrea, and she believed she would have been sensitive to such signs because she herself had been molested as a child. She thought defendant and Andrea “got along good.” According to Melissa, Andrea was “known to exaggerate” or fabricate things as when she falsely claimed to be a cheerleader, or play on a sports team.

Sometime after defendant’s arrest, Melissa had a conversation with Jessica about the rape. Jessica discussed it calmly and did not appear upset. According to Melissa, Jessica said defendant had put his mouth on her privates and then added, “Yeah, you know, he didn’t even know how to do that right. At least if you’re going to rape somebody, you should at least make it feel good.”

Defendant’s 17-year-old sister testified Jessica had once told her that defendant was handsome, or would be, if he were thinner.

A week after defendant’s arrest, Andrea talked to a female friend of defendant. Andrea was giggling and laughing. Andrea also said she had walked into her parents’ bedroom and seen them without clothes on. This friend described Andrea as clingy with adults “for a lot of attention.”

Defendant's mother testified that defendant, Melissa and Andrea had lived with her starting in 2003 for about 15 months. During that time, Andrea sometimes lied about whether she had gone to school that day. Andrea was strong-willed, and an attention-getter. Once, during a work day, defendant's mother saw defendant and Jessica sitting alone in defendant's car.

The defense also called Officer Kenneth Landreth, who had taken Jessica to the hospital and interviewed Jessica there. Except for a few omissions, Jessica's statement to Landreth was consistent with her trial testimony. For example, Jessica did not tell Landreth that defendant had kissed her lips, or that he inserted his fingers in her vagina five times.

DISCUSSION

The Trial Court Did Not Commit Miranda Error.

Defendant argues the trial court committed reversible error and violated his due process rights by admitting as evidence the statements he made to police at the time of his arrest. For the reasons explained below, we find that defendant's statements were volunteered rather than the product of interrogation, and thus find no error.

At a hearing held before trial on defendant's motion to exclude evidence of his statements to police, Officer Carpenter testified about the circumstances surrounding defendant's arrest. When he and Officer Troche arrived at the apartment complex, other officers were already in the parking lot speaking with Jessica Doe. Carpenter and Troche went to defendant's apartment and were met by defendant's wife, Melissa, who told them she knew why the officers were there. She said Jessica's mother had come over to her house and told her that her husband, Michael Moran, had just assaulted Jessica. Melissa said her husband was in their apartment and she led the police officers there. When Melissa unlocked the door, defendant was standing in the living room. Carpenter asked defendant " 'if he [could] come outside and talk to us.' " Carpenter "didn't want to talk to him in front of the kids," although Carpenter did not say that to defendant. "And

[defendant] said, ‘I know why you’re here,’ and he walked out with us.’⁵ Defendant was not handcuffed. “We were just walking.” At this point, Carpenter had not talked to Jessica and did not have any information about what had taken place.

They had walked about 20 feet, around the corner from the apartment into the parking lot when defendant said, without Carpenter asking him anything, “I made a mistake” and repeatedly said he was sorry. At that point, Carpenter asked defendant why he was sorry and defendant replied that he had kissed her. Carpenter asked a few questions to which defendant gave incriminating answers. Defendant was cooperative, emotional, weepy, and “there was a lot of silence” between defendant and Carpenter. Defendant and the officers were all waiting for Sergeant Krim to let them know the next step. After defendant finished telling Carpenter his story, Carpenter was advised by radio that the victim was being brought over to their location for an in-field show-up, and Carpenter advised defendant what was happening. Later, at the police station, defendant was *Mirandized*, waived his rights, and made more incriminating admissions.

Defendant also testified about his arrest at the hearing. His wife said the police were at their house and defendant made his way to the front door. At that time, defendant did not know anything about Jessica’s accusation; his wife had not told him anything.

Five officers were standing in the walkway. According to defendant, one of the officers “ordered me to come out because he needed to talk to me.” The officers then escorted him to the parking lot and ordered him to sit down on the curb. At this point, defendant did not feel free to leave, and Officer Carpenter started asking him questions about what had happened between him and Jessica Doe. He made some statements at that point. After the officer explained why he was there, defendant said he was sorry. He never said ‘I know why you’re here.’ Officer Carpenter did not advise him of his *Miranda* rights before questioning him.

The trial court ruled that whether defendant said, “I know why you’re here,” or “I knew you guys were coming,” was a jury question. Either statement was admissible

⁵ Officer Carpenter also testified that defendant said, “ ‘I knew you guys were coming.’ ”

because it did not appear to be the product of any interrogation, whether or not defendant was in custody. Defendant's statements that he had made a mistake and was sorry were also admissible because they were voluntarily made, there was no interrogation, and the totality of the circumstances were not so coercive as to render his statements involuntary. However, the court ruled that all the subsequent statements were the product of custodial interrogation and inadmissible. Finally, the court found that defendant's statement at the police department, made after advisement of rights, was admissible as a free, knowing, voluntary waiver of *Miranda*.⁶

On appeal, we “accept the trial court’s resolution of disputed facts and inferences, as well as its evaluation of the credibility of witnesses where supported by substantial evidence.” (*People v. Cruz* (2008) 44 Cal.4th 636, 667.) We will uphold the trial court’s findings as to the circumstances surrounding a confession if supported by substantial evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 411.) *Miranda, supra*, 384 U.S. 436 requires the exclusion of any statement made by a suspect during custodial interrogation, if the suspect has not been advised “prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” (*Id.* at p. 479.) “Interrogation” means “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) Spontaneous or volunteered statements are not made inadmissible by *Miranda*. (*Miranda, supra*, 384 U.S. at p. 478.)

Apparently relying on his own version of events—that “he was asked by Officer Carpenter what happened between him and Jessica prior to being advised of his rights. He then made statements”—defendant argues he “was asked his side of the story as he was being moved” He also asserts that the officers “ordered him to leave his home,

⁶ Despite the court’s ruling, the prosecutor did not introduce evidence of defendant’s *Mirandized* statement.

ordered him to sit down and wait for a lineup, and told him they came to get his side [of] a story on a fresh rape complaint.” Based on this scenario, he asserts, “it is clear” he was interrogated, or its functional equivalent, “and . . . the police should have known their actions were reasonably likely to elicit an incriminating response.”

Here, the trial court credited Officer Carpenter’s version of events over defendant’s version, a credibility determination which we are not at liberty to disregard. According to Officer Carpenter, defendant made the challenged admissions without any prompting or questioning. He made the first statement—which defendant denied making at all—while he was still in his living room, after Officer Carpenter asked if he would step outside to talk. He made the second statement, according to Carpenter, spontaneously, after walking to the parking lot, and before Carpenter asked him any questions at all. In fact, according to Carpenter, it was defendant’s volunteered statement that he was sorry that prompted Carpenter to ask defendant why he was sorry.

Defendant does not argue that, under Officer Carpenter’s version of events, the police engaged in interrogation or its functional equivalent. In our view, Officer Carpenter’s initial words to defendant— “ ‘if he could come outside and talk to us’ ”—were not such that the police “*should have known* [they] were reasonably likely to elicit an incriminating response.” (*Rhode Island v. Innis, supra*, 446 U.S. at p. 302.) On the contrary, it appears to us that the request to step outside was the type of words or actions that normally attend arrest and custody, and therefore, fall outside the ambit of *Rhode Island v. Innis, supra*, at page 301. Officer Carpenter’s testimony provides substantial evidence for the court’s factual findings. Those findings, in turn, establish defendant’s statements were not the product of interrogation or its functional equivalent. No error appears.

Exclusion of Ambiguous Evidence That Andrea Made a Prior False Report Of An Intruder Into Her Bedroom Was Not Error.

Defendant contends that the trial court abused its discretion by excluding evidence that Andrea Doe had previously reported to the police that a night time intruder had entered her bedroom and kissed her, and that the report may have been false. He argues

that the evidence was relevant to challenge Andrea's credibility and was admissible to show that she had a character trait for fantasizing. Essentially, defendant argues that there was enough evidence of a false report to warrant allowing the jury to decide whether the report was false, and the court erred by not allowing him to question Andrea about the report, or put on additional evidence to prove its falsity, if necessary. We conclude that the evidence was admissible under Evidence Code section 1103, subdivision (a)(1), but the trial court did not abuse its discretion in excluding the evidence under Evidence Code section 352.

Background

On the morning testimony was to begin, the prosecutor moved for an order preventing defense counsel from questioning Andrea about a prior report she made to police that an intruder had entered her bedroom in the middle of the night and kissed her on the face. The matter was discussed extensively. The next day, defense counsel filed a "Memorandum of Law Re: Admissibility of 2007 Prowling Incident Involving Andrea Doe." The memorandum included an offer of proof based on a Hayward Police Department report by Officer C. Olthoff which was attached as an exhibit. Citing Evidence Code section 1103, subdivision (a)(1), defense counsel sought a ruling from the court allowing him to introduce at trial evidence that Andrea Doe had made a prior false report of a burglar who entered her bedroom at night, kissed her, touched her hair, and whispered reassurances to her.

According to the police report, on August 25, 2007, at 3:21 a.m., Hayward police responded to a call from defendant's residence about a possible burglary in progress. Defendant had called the police after Andrea, then nine years old, woke up screaming that someone was inside her bedroom. Before calling the police, defendant had searched the house and found no one. He noticed that the patio sliding glass door was partially open. "[H]e did not recall the sliding glass door open prior to him going to bed and he usually closes it prior to going to his bedroom." "[A]ll of the other doors and windows of the residence were still secured and did not appear to have been tampered with."

Andrea told her mother that “she was sleeping when an unknown male walked into her room and began trying to kiss her.” Andrea described the intruder to her mother as a gum-chewing, spiky-haired Hispanic teenager wearing black pants.

Andrea told Officer Olthoff that she was sleeping on her stomach facing away from the bedroom door, when “she saw a male walk into her bedroom, pause by the bedroom door and then walk directly toward her. Once the male got next to her bed, [he] moved her hair from her face and began kissing the right side of her face as he told her that everything was going to be OK. [Andrea] said that she immediately woke up and told the male that she was going to tell her mom that he was there and immediately began crying out for her mom as she sat up and moved toward the other side of her bed. [Andrea] said that at that time, the unknown male ran out of her bedroom. Immediately after the unknown male ran out of her bedroom, [Andrea’s mother] ran into the bedroom to check on [her].” Andrea described the intruder to Olthoff as a Hispanic male, possibly in his late teens, wearing a black sweatshirt, black pants with white stripes on the legs, sporting spiky hair and chewing white gum.

Officer Olthoff was skeptical of Andrea’s account. He noted that the lights were off, and Andrea could not explain why she could see the color of the gum; there was a pile of plastic items and other miscellaneous clothing and paper lying next to the side of the bed, but Andrea did not hear the man step on the pile when he approached the bed. When Olthoff said he didn’t understand how the man could have knelt down without her hearing him step on the plastic items, she said she would show him exactly what happened and then “proceeded to walk to the entrance to her bedroom and act out how the male walked into her bedroom and approached the side of her bed as if she was acting out a movie she had just watched.” Andrea admitted that she had recently watched a movie called “Faces of Death” at a relative’s house that her parents would not usually allow her to watch. Asked if she was sure someone was inside her residence, Andrea “stated that it could have been just a dream.”

Olthoff reported that defendant and his wife “said that they also were suspicious of [Andrea’s] story and stated that [Andrea] has exaggerated stories before.” They thought

Andrea “was only having a dream until they noticed the sliding glass door was partially opened.” Neither of them thought they had left the door open, but were not sure. A search of the area by several officers failed to turn up any possible suspects.

The following summer, on July 17, 2008, Officer T. Decosta was assigned to do a followup investigation to show Andrea a photo line-up that included a Hispanic suspect in other similar burglaries.⁷ Decosta thought all the burglaries were related. However, no further action was taken because Andrea had moved out of the area and the suspect had been deported.

Another hearing on the admissibility of the prowler incident was held out of the presence of the jury. Defense counsel argued, “there’s evidence from which a jury could reasonably determine that the prowling incident was false.” The court responded, “Isn’t that a question of fact for the court to decide before it goes to the jury?” Defense counsel thought “some of the cases tend to indicate otherwise.” He maintained that in most cases involving prior accusations of sexual assault, “there is a dispute as to whether or not the prior accusation was true or false,” but the courts nevertheless allowed cross-examination and evidence of the prior false sexual assault accusation “even if the complaining witness insists and maintains that the . . . prior accusations were true.” The prosecutor maintained that the defense had to prove the evidence was relevant, and to be relevant, the defense had to “actually prove that what the witness is saying is false. Not could be false but is actually false.”

After reading and considering defendant’s moving papers, reviewing the cited case law, and re-reading the police report, the court concluded that *People v. Alvarez* (1996) 14 Cal.4th 155, 201, was controlling. “In that case [the Supreme Court] said that the trial court in that *Alvarez* case kept that information [of a belated rape complaint] from

⁷ According to the prosecutor, “there was an actual investigation of a person in the defendant’s complex prowling, looking through people’s windows. There was another little girl that accused someone of coming in her window and doing something to her. There was an investigation done. . . . The narrative with the little girl, the police don’t have it anymore, so I have to have someone go out and find this little girl to rebut . . . the questions that counsel is going to ask Andrea on the stand.”

coming into evidence in front of the jury because the trial court determined that . . . the theory of getting it before the jury was premised on the falseness of the complaint and if it's, in fact . . . false, then it bears on credibility. If the specific allegation of a prior rape was true, then . . . it would not be relevant to impeachment. [¶] And . . . , if it's not false and it's not true, the trial court in *Alvarez* found that it was . . . 'without sufficient support' [¶] . . . [¶] If it's without sufficient support in that we're speculating that the police might not have really felt it was a crime, that's deemed inadequate. . . ."

The court concluded: "It's not clear to me that this specific allegation is false. [¶] It seems to me we've got a ten-year-old girl. She describes what happens. The state of the house at the time the police get there is different than everybody remembered when they went to bed that night and it's consistent with her saying, well, a guy was in my room and ran out the door or left as soon as I started to make noise. [¶] And there's a sliding glass door that's open. That both the defendant and his wife say that the sliding glass door wasn't opened when they went to bed that night. [¶] [S]o it comes down to an opinion it seems to me or somebody has it in their mind that maybe she's not telling the truth, but that's not [] specific evidence that she wasn't telling the truth."

"[¶] Additionally, when then I think about where does this go It does seem to me that it does create an undue consumption of time because if we get into this we know the D.A. is going to have to bring in not only the officer but other additional witnesses will come in. He's going to want to bring in the officer that had the photo line-up where they had other indications that there was a person, in fact, doing this in the neighborhood. Then we get into the timing. [The defense is] going to want to get into that and say, well, that was X amount of time later that they did the photo line-ups and where did the guy go. It's going to create a great—the second part of 352 is: [i]s it going to create a substantial danger of confusing the issues or misleading the jury? [¶] And I find that under both *Alvarez* and 352 it would be unduly prejudicial and the prejudicial effect would outweigh the probative value as to the credibility of [Andrea] Doe."

Applicability of Evidence Code Sections 1103 and 352

Evidence Code section 1103 provides in pertinent part: “(a) In a criminal action, evidence of the character or trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if such evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with such character or trait of character.” Evidence that Andrea had falsely reported having a night time encounter with a burglar who kissed her would be admissible under Evidence Code section 1103 to prove that she had a character trait or tendency to fabricate or fantasize a romantic/sexual encounter. Such evidence would be relevant to prove that, having fantasized or fabricated a quasi-sexual scenario before, Andrea probably fantasized or fabricated her accusation against defendant. Put differently, evidence of a prior false accusation would tend to undermine the credibility of Andrea’s accusation against defendant. “ ‘[A] prior false accusation of sexual molestation is . . . relevant on the issue of the molest victim’s credibility.’ [Citation.] The same is true of a prior false rape complaint.” (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457.) Conversely, a witness’s prior reports that she had been sexually assaulted “would have no bearing on her credibility unless it was also established that those prior complaints were false.” (*Ibid.* See also *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097; *People v. Sully* (1991) 53 Cal.3d 1195, 1221; *People v. Alvarez, supra*, 14 Cal.4th at p. 201; *People v. Waldie* (2009) 173 Cal.App.4th 358, 363–364.) In other words, if Andrea accurately reported that a burglar entered her room in the middle of the night and kissed her, it would have no tendency in reason to show a character trait for fabricating sexually-tinged scenarios, nor would it undermine the credibility of her complaint against defendant.

Here, the trial court was presented with evidence that gave rise to conflicting inferences, some of which supported a preliminary finding that the prowling incident actually occurred, and some of which did not. We assume “ ‘the judge’s function on questions of this sort is merely to determine whether there is evidence sufficient to permit a jury to decide the question.’ ” (*People v. Lucas* (1995) 12 Cal.4th 415, 467; *People v.*

Marshall (1996) 13 Cal.4th 799, 832–833; *People v. Jones* (2003) 112 Cal.App.4th 341, 349–351.) But to say the proffered evidence was relevant under Evidence Code section 1103 to Andrea’s credibility, and sufficient to warrant submission to the jury, did not end the court’s inquiry into its admissibility.

Evidence Code section 352 provides: “The court in its discretion may exclude evidence if its probative value 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.” “A trial court’s exercise of discretion under section 352 ‘will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’” (*People v. Tidwell, supra*, 163 Cal.App.4th at p. 1457.)

In this case, the court expressly referenced its discretion under Evidence Code section 352 to exclude evidence which it found to be of marginal probative value, but highly likely to require an undue consumption of time to present and be prejudicially confusing to the jury. We conclude that, even though the evidence may have been relevant and admissible pursuant to Evidence Code section 1103, the trial court did not abuse its discretion by excluding the evidence under Evidence Code section 352.

People v. Tidwell, supra, 163 Cal.App.4th 1447, is particularly instructive. There, the defense wanted to present evidence that the complaining witness, R.C., had previously made two false rape complaints. As here, the evidence did not conclusively establish that the complaints were false. In upholding the trial court’s exercise of discretion under Evidence Code section 352 to exclude the evidence, the Court of Appeal explained: “Although there was some evidence that R.C. made inconsistent statements, there was no conclusive evidence that her prior rape complaints were false. The defense was unable to obtain evidence from the men that R.C. accused, and inferences could be drawn either way from the circumstances of the prior incidents and R.C.’s statements concerning the incidents. In addition to the weaknesses in the evidence concerning falsity of the rape complaints, admitting the evidence would have resulted in an undue

consumption of time as the defense attempted to bolster its view and the prosecution introduced evidence that Crawford had raped another female student. We, therefore, cannot say that the trial court abused its discretion in excluding the evidence based on the weak nature of the evidence of falsity of the complaints and the confusion of the jury and consumption of time it would have engendered for the parties to embark on the task of litigating the truthfulness of R.C.'s prior complaints." (*People v. Tidwell, supra*, 163 Cal.App.4th at p. 1458.)

The same is true in this case. While there may have been enough evidence to permit the jury to decide whether or not Andrea Doe had fabricated or fantasized an encounter with a night time intruder, it was not unreasonable for the trial court in exercising its discretion to conclude the potential for undue consumption of time, confusion of issues, and prejudice, outweighed the marginal probative value of ambiguous evidence. Under these circumstances, no abuse of discretion appears.

We also reject defendant's contention the trial court's ruling deprived him of the federal due process right to present a defense, and to confront and cross-examine witnesses. "As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense." (*People v. Hall* (1986) 41 Cal.3d 826, 834.) It is true that " "[E]vidence Code section 352 must bow to the due process right of a defendant to a fair trial and his right to present all relevant evidence of significant probative value to his defense.' " [Citations.] This does not mean that an unlimited inquiry may be made into collateral matters; the proffered evidence must have more than "slight-relevancy" to the issues presented. [Citation.] . . . [Citation.] The proffered evidence must be of some competent, substantial and significant value. [Citations.]' " (*People v. Tidwell, supra*, 163 Cal.App.4th at p. 1457.) The trial court did not err in concluding that the proffered evidence of falsity lacked significant probative value. Defendant's constitutional rights were not violated.

Defendant Was Not Prejudiced By The Prosecutor's Comments During Voir Dire.

Defendant assigns two instances of prosecutorial misconduct during voir dire. The first instance occurred practically at the beginning of the prosecutor's comments. After

giving an example of how attorneys' questions can lead to juror confusion, the prosecutor said, "One thing that I promise you during this trial if you're picked as jurors, I will never try to trick you. I will always be straightforward with you." The court immediately injected: Mr. [Prosecutor], can we get to the question part of the —." The prosecutor responded, "That's what I'm doing." The court then stated, "All right," and the prosecutor moved on to another topic.

A few moments later, the prosecutor engaged the jurors in a "give and take" discussion about one of the questions asked in the juror questionnaire: "A child may be called as a witness in this case. Would you accept or reject the believability of the testimony of a child based on the witness [sic] age alone?" In the course of this discussion, the following occurred:

PROSECUTOR: "Let me ask you this. Think about the worst thing, the most embarrassing thing that ever happened to you. You don't have to tell me what it is. I just want you to think about it. And think about having to sit in that chair, turn towards 12 strangers and explain that to them. How hard do you think that is?"

DEFENSE COUNSEL: "Judge, this is argument. I think it's improper. It's not going to cause.

THE COURT: "Sustained.

PROSECUTOR: "Do you think it would be difficult for a child to sit on the stand and talk about something that's embarrassing?"

JUROR #10: "Yes.

DEFENSE COUNSEL: "Same objection, Judge.

THE COURT: "Overruled.

JUROR #11X: "I one hundred percent agree. I wouldn't want to have to sit up there and testify knowing I was lying. I wouldn't want to put myself in that position. So age to me wouldn't matter."

During a break in voir dire, defense counsel stated his objection to the prosecutor's first comment as "improper for the prosecutor to insert into this process his personal credibility and honesty which I think is what he did . . . , and as we all know, statements

of attorneys are not evidence.” He asked the court to admonish the jury to disregard the prosecutor’s comment that he would never try to trick them and would always be straightforward. The court declined to specifically admonish the jury about that comment, stating: “[B]efore either party got up to begin their voir dire, I told them that whatever the attorneys say in court is not evidence. [S]o I’m going to leave it at that. I’m not going to make any admonition. I don’t think it’s necessarily an inappropriate comment. It does seem to be vouching for one’s own credibility, but I don’t know that—we’re going to give them the instruction again that what attorneys say is not evidence, so let’s proceed from there.”

We are not persuaded that the prosecutor committed prejudicial misconduct under either state or federal law. “ ‘ ‘ ‘ A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves “ ‘ ‘ ‘ the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” ’ ’ ” [Citation.]’ [Citation.] ‘[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ [Citation.]” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

We agree with the trial court that by his initial comment the prosecutor vouched for his own honesty and integrity, and the jury probably understood the comments in that way. Generally, attorneys should refrain from injecting themselves into the proceedings. However, the court’s swift intervention, coupled with its general admonitions that attorneys’ statements are not evidence, and its later intervention when defense counsel

raised the issue again in his voir dire, dissipated any residual aura of credibility that the prosecutor may have created around himself. Moreover, defense counsel had “ample opportunity to correct, clarify, or amplify the prosecutor’s remarks through his own voir dire questions and comments” (*People v. Medina* (1995) 11 Cal.4th 694, 741), and in fact, defense counsel did just that, drawing forth from the court the very admonition that the trial court at first declined to give.⁸

With respect to the prosecutor’s questions about child witnesses, defendant now argues that the comments appealed to the jurors’ sympathy or passions. He equates the prosecutor’s voir dire of prospective jurors with a closing argument which improperly invites the jurors to “view the crime through the eyes of the victim.” (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, overruled on another ground in *Stansbury v. California* (1994) 511 U.S. 318. See also *People v. Fields* (1983) 35 Cal.3d 329, 362; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250.) We disagree that the prosecutor’s comments were intended to have, or did have, the effect of inviting the jurors to vicariously experience the crime, or even of arousing the jurors’ sympathy for the children because of their experiences. Nor is there any basis in the record for inferring that the jurors interpreted the prosecutor’s comment in that way. In fact, Juror #11X’s comments suggest that s/he, at least, did not understand the prosecutor’s comments to be eliciting sympathy for the child victim. S/he felt that neither an adult nor a child witness would want to “sit up there and testify knowing [s/he] was lying.”

⁸ Defense counsel stated: “Now, Mr. [Prosecutor] stated to you in his voir dire that ‘I will never try to trick you and will always be straightforward with you.’ ” At that point, the court intervened: “Okay. Hang on. Nobody’s . . . questioning anybody’s integrity So let’s leave that aside. The evidence will speak for itself and that’s the basis on which the jury will make their determination. The arguments of counsel, the statements of counsel are not evidence. Defense counsel then added: “Would you all agree there’s no evidence of that. All right. And that’s not to be the focus in this case.”

Moreover, in finding the far more egregious comments in *People v. Stansbury* nonprejudicial,⁹ our Supreme Court observed, “The statement must be viewed in context; final argument extended over a period of four days, and this was but a single reference in a long, complex and otherwise scrupulous argument about the facts of the case.” (*People v. Stansbury, supra*, 4 Cal.4th at p. 1057.) The comments at issue here occurred not during closing argument but during voir dire, and they were not repeated. “ ‘[A]s a general matter, it is unlikely that errors or misconduct occurring during voir dire questioning will unduly influence the jury’s verdict in the case. Any such errors or misconduct “prior to the presentation of argument or evidence, obviously reach the jury panel at a much less critical phase of the proceedings. . . .” ’ ” (*People v. Thomas* (2012) 53 Cal.4th 771, 797.)

We find no reasonable probability that a result more favorable to defendant would have been reached in the absence of the prosecutor’s comments, assuming arguendo they amounted to misconduct. (*People v. Pensinger, supra*, 52 Cal.3d at p. 1250.) We also find that neither set of comments—the vouching, or the sympathy seeking—rises to the level of federal constitutional error. “ ‘A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.]” (*People v. Elliott* (2012) 53 Cal.4th 535, 555.) The comments challenged here fell far short of that standard.

Defendant Has Not Demonstrated That Trial Counsel Was Ineffective For Failing To Object To Prosecutorial Misconduct During Rebuttal Argument.

Next, defendant assigns two more instances of prosecutorial misconduct to comments the prosecutor made during his rebuttal argument. The prosecutor began his rebuttal argument by stating: “[I]t’s kind of strange we have so much time to think. You kind of start reflecting on information you received when you first start doing this job. I

⁹ “The prosecutor argued: ‘*Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried. All of those falling on deaf ears, deaf ears for one purpose and one purpose only, the pleasure of the perpetrator.*’ (Italics added.)” (*People v. Stansbury, supra*, 4 Cal.4th at p. 1057.)

remember I was doing my first trial and I was talking to an older prosecutor and we were talking about rebuttal argument and I asked him, how do you know what to rebut? How do you know what to rebut when the defense gets up and argues? And he told me look for the okie-doke. I said the okie what? What's the okie-doke? It's a trick. A slight [sic] of hand. It's the end or round, it's the reverse of everything you know. You just witnessed the okie-doke, ladies and gentlemen. That's exactly what that was."

Thereafter, throughout his entire rebuttal, usually when the prosecutor touched on something defense counsel had argued, the prosecutor labeled it "the okie-doke." In all, the prosecutor mentioned the "okie-doke" eight more times.¹⁰

¹⁰ (1) "Evidence is sworn testimony of the witnesses, the exhibits entered into evidence and anything else his honor tells you to consider as evidence. [Defense counsel] knows that. You decide this case based on the testimony, based on the evidence before you. You don't speculate, you don't guess, you examine the evidence as it was presented. You don't fall for the okie-doke"

(2) "It's funny how he talked about a possible romantic encounter between Jessica Doe and this 300-pound man at the time. Anybody in the neighborhood see them together? Anybody see a rendezvous, any evidence about a rendezvous?" Nothing at all. [W]hat did [defendant's] wife say? You can check the testimony yourself. She said Jessica and Michael had very little interaction . . . between them. The okie-doke, that is the okie-doke."

(3) "Then [defense counsel] tried to group Melissa with Jessica. . . . Absolutely no evidence of that. And [defense counsel] thinks just because he says it it's true. Where is the evidence? The okie-doke, it's straight-up okie-doke."

(4) "[Defense counsel] told you that the injuries to Jessica Doe were old. He had the nerve to get up here and tell you that when there's absolutely no evidence, no testimony that those injuries were old. It's the okie-doke."

(5) "[Defense counsel] described, when talking about Andrea, he said that, oh, you know, in this day and age there's HBO and there's all this stuff out there She described a sensation, a sensation. You don't get that from T.V. . . . HBO, Showtime? Use your common sense. Don't fall for the okie-doke; do not fall for it."

(6) "[I] asked Jessica, I said, counsel on cross said, oh, you didn't testify at the time of the preliminary hearing that he kissed you. You didn't tell Officer Landreth that he kissed you and I got up there and I said, did anyone ask you that. No. . . . Like she's lying. She's not lying. This young girl was raped. Don't fall for it. Don't fall for the okie-doke."

Defendant also argues that the prosecutor committed misconduct when he said of a defense witness: “ I *think* her testimony is suspect,” and for repeatedly asking the jury rhetorically, “What do we know?” “How do we know?” “How do we know?” It is defendant’s position that the “okie-doke” refrain disparaged defense counsel and the defense function, and that the use of the phrase “we know” amounted to “improperly . . . vouching for the truth of his evidence and his case, insinuating that he had inside information and knew the truth.” Defendant acknowledges that defense counsel did not object to any of these instances of alleged misconduct.

Ordinarily, claims of prosecutorial misconduct are forfeited by the failure to object, unless an admonition would not have cured the harm, or an objection would have been futile. (*People v. Boyette, supra*, 29 Cal.4th at p. 432.) Here, defendant notes the rule, but does not argue that his case comes within either of these exceptions. Rather, he argues that counsel was ineffective for failing to object. However, as our Supreme Court has “noted repeatedly, the mere failure to object rarely rises to a level implicating one’s constitutional right to effective legal counsel.” (*Id.* at p. 433.) To establish a claim of ineffective assistance of counsel, the defendant must show “both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel’s failings.” (*People v. Price* (1991) 1 Cal.4th 324, 440; *Strickland v. Washington* (1984) 466 U.S. 668, 687, 693.) However, when the defendant “has not satisfied the second part of the test, we need not consider whether trial counsel’s performance was deficient.” (*People v. Price, supra*, 1 Cal.4th at p. 440.) In addition, to prevail on direct appeal, the defendant must also show that “ ‘counsel was asked for an explanation and failed to provide one, or . . . there simply could be no satisfactory

(7) “Jessica said this about Michael. Jessica said that about Michael. It’s the okie-doke. It’s the okie-doke. Every chance Mr. [Defense counsel] got, he attacked Melissa. We all got it. We all got it. He’s trying to take the focus off of his client”

(8) “It is up to all of you alone to decide what happened based only on . . . the evidence that has been presented to you in this trial. That is the law. That’s the law. I’m not making this up. This ain’t the okie-doke. That’s the instruction.”

explanation’ ” for counsel’s failure to object. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

With respect to the “okie-doke” refrain, we note that “[i]f there is a reasonable likelihood that the jury would understand the prosecutor’s statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) In this case, we think there is a reasonable likelihood that the jury understood the prosecutor’s repetitive comments in that way, although we note that arguably more egregious comments have not been found to have crossed the line into misconduct. (See e.g., *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781–1782 [defense counsel had to “ ‘obscure the truth’ ”]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1216–1217; *People v. Breaux* (1991) 1 Cal.4th 281, 305–306.)

In any event, we need not decide whether the prosecutor’s remarks constituted misconduct because we are convinced the comments could not have affected the outcome of the trial. (*People v. Price, supra*, 1 Cal.4th at p. 440.)

With respect to the “we know” and “I think” comments, the record presents us with no basis to infer that the jurors likely understood the prosecutor to be referencing insider information, or to be asking them to find certain facts or disbelieve certain witnesses because of his personal integrity or superior knowledge. While it is the better practice for attorneys to refrain from personalizing the proceedings, we do not find any misconduct in this instance.

Finally, we are not convinced there can be no explanation for counsel’s failure to object. In our view, this is exactly the sort of situation in which competent counsel might make a tactical decision to refrain from objecting, if in his or her estimation the client had more to lose than to gain by challenging the prosecutor during rebuttal argument. For these reasons, we reject defendant’s ineffective assistance of counsel claim.

There is No Cumulative Prejudice

Defendant asks us to find that the prosecutor’s misconduct was pervasive and, whether considered singly or in combination, sufficient to undermine the reliability of the verdict. “[A] series of trial errors, though independently harmless, may in some

circumstances rise by accretion to the level of reversible and prejudicial error.” (*People v. Hill* (1998) 17 Cal.4th 800, 844–845.) However, we do not find a series of errors here. We have concluded that any possible prejudice accruing from the brief comments made at the start of voir dire was dissipated by the court’s instructions and cannot have affected the verdict. As for the comments made during rebuttal argument, we have not concluded there was misconduct, the direct appellate challenge is waived in any event, and ineffective assistance of counsel, which itself requires a showing of prejudice, has not been established. We, therefore, find defendant’s claim of cumulative prejudice from prosecutorial misconduct without merit. (*People v. Smithey, supra*, 20 Cal.4th at p. 1018.)

A Remand Is Required With Respect To The Court’s Imposition of the Sexual Offender Fine Under Penal Code Section 290.3.

Penal Code section 290.3, subdivision (a) provides: “Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars (\$300) upon the first conviction or a fine of five hundred dollars (\$500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine.” Defendant was convicted of three such offenses enumerated under section 290, subdivision (c): in count 4, forcible rape (§ 261); in count 5, forcible oral copulation (§ 288a); and in count 6, continuous sexual abuse of a child (§ 288.5).

At sentencing, the trial court pronounced: “There is a sex offender fine under 290.3 of \$3,000 that’s imposed.” No objection was made. The abstract of judgment for a determinate six-year concurrent prison commitment in count 5 does not list any fine. The abstract of judgment for the indeterminate terms in counts 4 and 6 lists a “\$3000 Sex Offender Fine” under “Other Orders.”¹¹

¹¹ The abstracts of judgment contain additional ambiguities. The determinate abstract shows that defendant was convicted in count 5 of a violation of “PC 261(a)(2),” described as “Sexual Penetration by Foreign Object.” However, in count 5, defendant

Defendant argues, and the People concede, that the order for a lump sum sex offender fine of \$3,000 is incorrect. We accept the concession. Under the statutory formulation, the fine cannot exceed \$1,300 for the three offenses of which defendant was convicted. However, both parties note, and we agree, imposition of the sex offender fine further requires imposition of certain mandatory penalty assessments and surcharges. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157.) However, case law is clear that “[a]ll fines and fees must be set forth in the abstract of judgment.” (*People v. High* (2004) 119 Cal.App.4th 1192, 1200, and cases cited therein.) Even assuming the lump sum of \$3,000 is a correct amount when all the penalties and surcharges are included, it is, nevertheless, erroneous for failing to set forth each of its component parts.

Defendant further argues the court should reduce the fee to \$300, inasmuch as “it cannot be determined” that the trial court found defendant to have the ability to pay fines on all three counts. The Attorney General disagrees.

We agree with the view expressed in *People v. McMahan* (2004) 3 Cal.App.4th 740, that the section 290.3 fine is mandatory and it is defendant’s burden to show inability to pay, or forfeit the objection. (*People v. McMahan, supra*, at p. 750. See also *People v. Burnett* (2004) 116 Cal.App.4th 257, 262.)

Nevertheless, the parties agree, and we concur, that the matter must be remanded, in any event, for recalculation and explanation of the fines, fees, and penalties imposed in this case under the general rubric of “Sex Offender Fine.” Inasmuch as “consideration of the defendant’s ability to pay is a factor to be considered in imposing the fine” (*People v. McMahan, supra*, 3 Cal.App.4th at p. 749), and “the trial court may consider all evidence

was charged with and convicted of forcible oral copulation (§ 289, subd. (a)(1)). Likewise, the indeterminate abstract shows that defendant was convicted in counts 4 and 6 of violations of “PC 261(a)(2),” described as “Sexual Penetration by Foreign Object,” when in fact he was charged with and convicted, in count 4, of forcible rape (§ 261, subd. (a)(2)) and, in count 6, of continuous sexual abuse of a child (§ 288.5). Finally, the sentence for count 5 is identified as concurrent, and the court did pronounce that “the sentence for count 5 will be concurrent with count 4” because “[both] occurred on the same date at the same time.” However, the court also stated, “If I neglected to say it, the stay on the sentence on count 5 will be completed when the other terms are served.”

relevant to ability to pay, including the amount of any fine or restitution ordered and the defendant's potential future income," defendant is not prevented from presenting evidence of inability to pay at the remand hearing. (*People v. Burnett, supra*, 116 Cal.App.4th at p. 261.) We stress "[t]here is no statutory requirement that the court state its findings on the record." (*Ibid.*)

CONCLUSION

Admission of defendant's volunteered incriminating statements did not violate *Miranda*. The trial court did not abuse its discretion by excluding evidence of a prior report by Andrea of a night time burglar kissing her, when there was conflicting evidence about whether the report was true or false. The prosecutor did not commit prejudicial misconduct during voir dire, and defendant has not shown that his trial counsel was ineffective for failing to object to comments made by the prosecutor during his rebuttal argument. The record does not demonstrate cumulative prejudice. A remand is required to allow the trial court to correct errors in the imposition of the sex offender fine, and the abstracts of judgment.

DISPOSITION

The matter is remanded and the trial court is directed to review the fines, fees and penalties related to the Sex Offender Fine prescribed by Penal Code section 290.3, and to modify the abstract of judgment accordingly. The trial court is also directed to

modify the abstracts of judgment with respect to the ambiguities in the Penal Code sections, crimes, and sentences described therein. As modified, the judgment is affirmed.

Marchiano, P.J.

We concur:

Margulies, J.

Banke, J.