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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.

STEPHEN CHASE FINTA,

Defendant and Appellant.

A131248

(Contra Costa County  
Super. Ct. No. 05-090690-9)

A jury convicted defendant Stephen Chase Finta of battery causing serious bodily injury, and the trial court sentenced him to 60 days in jail and three years' probation. Defendant contends the trial court prejudicially erred by (1) allowing the prosecutor to exercise peremptory challenges on the basis of gender, (2) improperly limiting cross-examination of the battery victim, (3) responding inadequately to a jury question, and (4) conditioning his probation on payment of certain probation costs. We agree with the latter contention and will modify the probation order accordingly. In all other respects, we affirm the judgment.

**I. BACKGROUND**

Defendant was charged by information with one count of battery causing serious bodily injury (Pen. Code,<sup>1</sup> §§ 242, 243, subd. (d); count one) and one count of making criminal threats (§ 422; count two). Defendant's first trial ended with an acquittal on count two and a hung jury (10 to 2 for guilty) on count one. Following a second jury

<sup>1</sup> Unless otherwise specified, all further statutory references are to the Penal Code.

trial, defendant was found guilty as charged on count one. The trial court placed him on three years' probation, imposed a jail term of 60 days along with various fines and fees, and ordered him to pay the cost of probation supervision, not to exceed \$75 per month, as a condition of probation. Defendant timely appealed.

## **A. Facts**

### **1. Prosecution Case**

On February 26, 2008, Arthur Maxwell was riding his bicycle south from his work place in El Sobrante to his home in Berkeley, a trip he made five days per week. After entering Richmond on a two-way street, he noticed a broken desk drawer and some papers scattered in the center of the roadway. Fearing the debris could cause an accident, he stopped to see if he could determine who it belonged to. He took one foot out of the pedal toe clip, placed it on the ground, and leaned over to pick up a sealed envelope he noticed had a name printed on it. A few seconds after he picked up the envelope and turned it over to see if he could locate an address, he heard someone yelling at him from behind. He remembers hearing someone yelling, "What the fuck are you doing? Motherfucker, that's our shit. Put that down." The man yelling, later identified as Brennon Hedman, a friend of defendant, began walking toward Maxwell cursing at him and clenching his fist. He told Maxwell to put the envelope down. Maxwell tossed the envelope on the ground, said to Hedman he had not taken anything, and attempted to leave on his bicycle. As he rode off, he looked back and saw Hedman get into a pickup truck being driven by defendant.

About four blocks later, Maxwell noticed the truck had turned around and was following him at a high speed. He heard someone inside the truck cursing loudly at him. Afraid of being run over as the truck pulled up alongside of him, Maxwell veered off the road onto a sidewalk. Maxwell heard the driver yell, "You got my stuff," to which Maxwell responded, "I didn't take anything." The truck continued past him by a car length or two, traveling close to the sidewalk, before pulling over to the curb and parking. Defendant got out of the vehicle and Maxwell could see he was "very agitated." He began running toward Maxwell, who had pulled over to the right of the sidewalk and was

pedaling on a grass lawn. Defendant sprinted toward Maxwell, who was “in full panic mode” by this time. He again told defendant, “I don’t have any of your stuff.” Defendant shoved Maxwell from the side, and Maxwell fell off of the bicycle. He immediately felt a sharp pain in his right leg.

Defendant continued to curse at Maxwell as he lay on the ground, accusing him of taking papers from the drawer that had fallen on the road. Hedman was also present. After being threatened by defendant, and suffering tremendous pain from his injuries, Maxwell continued to insist he had taken nothing, and reluctantly told defendant and Hedman they could search him. They searched his jacket, backpack, and pockets, finding nothing. When they were done searching, Maxwell told the men he was injured and pleaded with them for the use of a cell phone to call for help. Defendant said, “Nope” in a derisive manner, and he and Hedman drove off and left Maxwell lying on the ground. Maxwell broke two bones in his right leg as a result of the fall, requiring two surgeries, and extensive physical therapy.

## ***2. Defense Case***

On the day of the incident, defendant and his fiancée were moving their household goods to a new apartment. Defendant had borrowed a friend’s pickup truck and brought Hedman along to help him with the move. A drawer filled with papers fell out of the truck during the move because defendant had loaded a dresser into the truck with the drawers facing rearward and had neglected to tape the drawers shut. The top drawer of the dresser contained an envelope with bank statements, some check stubs, and a Social Security statement. Defendant and Hedman both heard a crash as the drawer hit the road; defendant pulled over and Hedman went back to where the drawer had landed. He gathered up the papers, and got back into the truck, telling defendant he thought the bicyclist had retained some of defendant’s papers. Hedman had heard the bicyclist say something when he yelled at him, but could not hear what the bicyclist said. He was “very sure” Maxwell had taken something, but he was not “a hundred percent positive.”

Maxwell had ridden away at a high speed but defendant and Hedman caught up with him in a few blocks. When defendant got out of the truck, he told Maxwell to stop

but Maxwell did not stop. Defendant tried to stop him with his hands outstretched on the sidewalk, but instead he pushed Maxwell over on his bicycle. Defendant told Maxwell he wanted his property returned; Maxwell gave his backpack to defendant, but he did not find any of his property in the backpack or in Maxwell's pockets. Defendant never did recover a Wells Fargo Bank envelope containing several of his bank statements.

Three witnesses testified as to defendant's character for nonviolence.

## II. DISCUSSION

Defendant contends his conviction must be reversed due to trial court error in (1) denying his motion challenging the prosecutor's improper exercise of peremptory challenges on the basis of gender, (2) refusing to permit him to cross-examine Maxwell about Maxwell's civil suit against him, and (3) failing to respond adequately to a question from the jury regarding an element of the battery offense. In the alternative, in the event his conviction is affirmed by this court, defendant challenges the probation condition requiring him to pay costs of probation supervision.

### A. *Batson-Wheeler Error*

Defendant contends the prosecution deliberately used its peremptory challenges in order to keep males off of the jury, thereby depriving him of his constitutional right to a jury representing a fair cross-section of the community.<sup>2</sup> (See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).) Gender is one of the categories protected against challenges for group bias under *Wheeler* and *Batson*. (*J.E.B. v. Alabama ex rel T.B.* (1994) 511 U.S. 127; *People v. Dement* (2011) 53 Cal.4th 1, 19.)

#### 1. *Facts*

During jury selection on January 4, 2011, after the prosecutor had sought to exercise her fifth peremptory challenge against Mr. C., defense counsel made a *Wheeler* motion on the basis the prosecutor had used the majority of her peremptory challenges on

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<sup>2</sup> At defendant's first trial, 10 female jurors voted to convict defendant of battery, and both male jurors voted for acquittal on that count.

men. Defense counsel also cited the facts that (1) Mr. C. was “similarly situated to female jurors” the prosecutor had accepted and (2) the prosecutor had failed to question Mr. C. about any biases. At that point, defense counsel had used two of his challenges on men, and there were three men left in the box. In response to defendant’s motion the court stated: “Well, I think I’m not convinced that there’s a prima facie case made at this time of systematic exclusion of class of men. The prosecutor has—her second challenge was to a female, and all three cause challenges have been women, which has skewed the numbers a bit. [¶] However [addressing the prosecutor], just in case I’m wrong, would you state your reasons, for the record, for excluding Mr. [C.]”

At the prosecutor’s request, the court permitted her to explain the reasons for each of her four challenges to men. She stated she challenged Mr. A. because he expressed a prejudice against the police based on an incident in which police planted drugs on his wife. She challenged Mr. B-1 because he expressed the view that “people tend to make things larger than what they obviously are,” which she regarded as likely to be the main theme of the defense case. As to Mr. B-2, she explained his wife was employed as a paralegal, and even though she worked in a different field of law, the prosecutor was concerned about seating jurors who have legal knowledge. In addition, the prosecutor pointed to the fact Mr. B-2 was an auto racing mechanic, a “law enforcement friendly” profession, which she believed might make him more inclined to be sympathetic to the use of force to reclaim property. She believed Mr. C.—a sheet-metal worker and union member—would “fall[] into the same category” as Mr. B-2. The prosecutor stated no one seated in the jury box at that point was “similarly situated in those professions as those individuals.” Defense counsel argued the prosecutor’s stated reasons were specious, but the trial court reiterated no prima facie case of gender bias had been made out, adding it found the prosecutor’s reasons to be gender neutral and credible. The court denied the *Batson-Wheeler* motion, and jury selection resumed.

The prosecutor next used her sixth peremptory challenge to remove a female juror. Defense counsel renewed his motion after the prosecutor used her seventh challenge to remove Mr. B-3, a civil attorney. The prosecutor explained she challenged Mr. B-3 and

would also be challenging another male juror, Mr. W., and a female juror, Ms. R., because she did not want persons with legal knowledge on the jury. The court found that although a prima facie case had been made at that point based on the number of prosecution peremptory challenges against male prospective jurors, the prosecution's reason for excusing Mr. B-3 and other prospective jurors with legal training was a credible, good-faith, and legitimate reason. The court indicated it would change its view if the prosecutor did not follow through with her challenges to Mr. W. and Ms. R. on that basis. The prosecutor did subsequently challenge Ms. R. and, over the defense's objection, the trial court upheld her ensuing challenge to Mr. W.

### **B. Standard of Review**

The trial court evaluates a *Batson-Wheeler* motion in a three-step process. (*People v. Silva* (2001) 25 Cal.4th 345, 384.) “ [O]nce the opponent of a peremptory challenge has made out a prima facie case of [gender] discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a [gender-neutral] explanation (step two). If a [gender-neutral] explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful [gender] discrimination.’ ” (*Ibid.*, quoting *Purkett v. Elem* (1995) 514 U.S. 765, 767.)

The defendant satisfies his or her prima facie burden in step one by producing facts giving rise to an inference of discriminatory purpose. (*Johnson v. California* (2005) 545 U.S. 162, 170.) The determinations required by steps two and three are more complex: “In determining whether the defendant ultimately has carried his burden of proving purposeful [gender] discrimination, ‘the trial court “must make ‘a sincere and reasoned attempt to evaluate the prosecutor’s explanation in light of the circumstances of the case as then known, his knowledge of trial techniques, and his observations of the manner in which the prosecutor has examined members of the venire and has exercised challenges for cause or peremptorily . . . .’ ” ” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1100.) Implausible or fantastic justifications may be found to be pretexts for purposeful discrimination. (*Purkett v. Elem, supra*, 514 U.S. at p. 768.) Reasons contradicted by the record may be evidence of such discrimination. (*McClain v. Prunty*

(9th Cir. 2000) 217 F.3d 1209, 1221–1222; *Caldwell v. Maloney* (1st Cir. 1998) 159 F.3d 639, 651.) However, the justification offered need not be sufficient to support a challenge for cause, and even “ ‘trivial’ ” or “ ‘ ‘highly speculative’ ” reasons, if genuine and neutral, will suffice. (*People v. Arias* (1996) 13 Cal.4th 92, 136; *People v. Ervin* (2000) 22 Cal.4th 48, 77.) “The proper focus of a *Batson/Wheeler* inquiry . . . is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective *reasonableness* of those reasons.” (*People v. Reynoso* (2003) 31 Cal.4th 903, 924.)

“[T]he trial court is in the best position to determine whether a given explanation is genuine or sham.” (*People v. Fuentes* (1991) 54 Cal.3d 707, 720.) Therefore, when the trial court has engaged in a sincere and reasoned attempt to evaluate the stated reasons offered for the exclusion of each challenged juror, we accord great deference to its rulings that the prosecutor’s stated reasons are genuine, reviewing them under the substantial evidence standard. (*People v. Jurado* (2006) 38 Cal.4th 72, 104–105; *People v. Silva, supra*, 25 Cal.4th at pp. 385–386.)

### **1. Analysis**

We focus on defendant’s objections to the excusals of Mr. C., Mr. B-3, and Mr. W. (*People v. Avila* (2006) 38 Cal.4th 491, 549 [the issue on a *Wheeler* motion is whether a particular prospective juror has been challenged based on group bias]; *People v. Phillips* (2007) 147 Cal.App.4th 810, 815 [the focus of the court’s inquiry in considering a *Wheeler* motion is on the individual juror (or jurors) identified in the motion].)

With respect to Mr. C., defendant maintains the trial court *impliedly* found prima facie evidence of discrimination notwithstanding the court’s express statements that it found no prima facie case had been established. We are not persuaded. Immediately after defense counsel explained the basis for his motion as to Mr. C., the trial court stated, “I’m not convinced that there’s a prima facie case made at this time . . . .” The court then asked the prosecutor to state her reasons for excluding Mr. C. for the record “*just in case I’m wrong.*” (Italics added.) After hearing the prosecutor’s reasons and defense

counsel’s argument, the court confirmed it found no prima facie showing of gender discrimination. Merely asking the prosecutor to state her reasons does not mean the court impliedly found a prima facie case had been established. (*People v. Taylor* (2010) 48 Cal.4th 574, 612.) In fact, by asking the prosecutor to state her reasons, the court was merely following a practice specifically recommended to trial judges by the Supreme Court in cases where no prima facie showing has been made. (*People v. Bonilla* (2007) 41 Cal.4th 313, 343, fn. 13.)<sup>3</sup>

When a trial court denies a *Wheeler* motion based on its finding that no prima facie case of group bias was established, the reviewing court considers the record of the voir dire and affirms the ruling if it is supported by substantial evidence. (*People v. Jenkins* (2000) 22 Cal.4th 900, 993.) The reviewing court “accord[s] particular deference to the trial court as fact finder, because of its opportunity to observe the participants at first hand.” (*Id.* at pp. 993–994.) Moreover, we presume a prosecutor uses his or her peremptory challenges in a constitutional manner. (*People v. Ayala* (2000) 24 Cal.4th 243, 260.)

As an initial matter, defendant offers no argument on appeal that the trial court’s finding of no prima facie case as to the excusal of Mr. C. was unsupported by substantial evidence. He has therefore waived the point. In any event, substantial evidence does support the trial court’s determination. The prosecutor had exercised only four challenges at that point, three of whom were men. Her second challenge had been to a female juror. The defense had excused two male jurors itself. One of the three males previously challenged by the prosecution—Mr. A.—was an attorney who had stated rather emphatically during voir dire he would have trouble accepting the testimony of police officers, and also expressed doubt about his ability to put aside his knowledge of

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<sup>3</sup> “Though not strictly required, it is the better practice for the trial court to have the prosecution put on the record its race-neutral explanation for any contested peremptory challenge, even when the trial court may ultimately conclude no prima facie case has been made out. This may assist the trial court in evaluating the challenge and will certainly assist reviewing courts in fairly assessing whether any constitutional violation has been established.” (*People v. Bonilla, supra*, 41 Cal.4th at p. 343, fn. 13.)

the law. Defendant's own trial counsel admitted he had no argument regarding Mr. A. because he was "certainly someone that no rational district attorney wants on a jury panel." Another man previously excused by the prosecution—Mr. B-1—had stated in his jury questionnaire he had an opinion or attitude about the criminal justice system that would make it difficult to be fair. The court and the prosecutor both questioned him about that on voir dire. He explained he felt things were sometimes made out to be more than what they are in criminal cases—an obvious red flag for the prosecution in a case of this nature. Given the small number of prosecution challenges to male jurors that had occurred when Mr. C. was excused, and the obvious problems for the prosecution presented by at least two of those jurors, we find substantial evidence supports the trial court's initial determination of no prima facie showing. The exercise of a limited number of peremptory challenges, insufficient to establish a pattern of discriminatory use, do not support a prima facie case absent significant other supporting evidence. (*People v. Christopher* (1999) 1 Cal.App.4th 666, 673.) Defendant offered no such evidence in connection with the excusal of Mr. C.

In the cases of Mr. B-3 and Mr. W., where the trial court did find a cumulative numerical record of prosecution strikes sufficient to support an inference of discriminatory purpose, the burden shifted to the prosecution to offer a gender-neutral explanation for the strikes and we must analyze whether the trial court erred in finding those explanations sincere and credible. The prosecutor stated she challenged Mr. B-3 for one reason alone: he was a lawyer. She explained, "Having specialized legal knowledge . . . is not something that district attorneys particularly like in cases where there's going to be a gray area [as] in this particular case." She informed the court she intended to challenge Ms. R. and Mr. W.—both law students—for the same reason, and she later did so. In fact, defense counsel anticipated the prosecutor's explanation for excusing Mr. B-3 before she even offered it. Before the court turned to the prosecutor to hear her reasons for striking Mr. B-3, defense counsel argued Mr. B-3's profession as an attorney should not automatically disqualify him absent evidence of his bias or inability to hear evidence.

Defendant also argues the prosecutor's stated reasons for striking Mr. B-3 and Mr. W. were not sincere because (1) she challenged Mr. B-2 in part for the same ostensible reason—possible legal knowledge due to his wife being a paralegal—but had failed to challenge three female jurors who defendant claims had as much exposure to legal knowledge as Mr. B-2; (2) her questioning of Mr. W., Mr. B-2, and Mr. A. about possible bias was superficial; and (3) she failed to question Mr. B-3 at all.

The three female jurors referenced by defendant, Jurors Nos. 4, 28, and 38, are not in fact comparable to Mr. B-2. Juror No. 4's brother-in-law practiced in the legal field in the Philippines, and she had no idea what kind of law he practiced there. Juror No. 28's sister worked in the legal field and although she was not sure what her sister did, she believed it had to do with business law, not criminal law. Juror No. 38's sole connection to the legal field is that she was a registered process server and worked at Rapid Legal, a company that serves and files legal documents. She also reported having served on the juries in one civil and two criminal cases in which verdicts had been reached. In our view, Mr. B-2 and the female jurors in question were not similarly situated with regard to their exposure to legal knowledge. None of the female jurors were married to or lived in the same household with someone having legal expertise, and Juror No. 38's work in process serving would not have given the prosecutor any reason for concern she might have expertise relevant to the merits of a criminal case. In addition, Juror No. 38's prior service on criminal juries that reached verdicts would have made her more appealing to the prosecution than Mr. B-2.<sup>4</sup> Defendant's comparative analysis of Mr. B-2 and the female jurors fails to persuade us the trial court erred in finding the prosecutor's stated reasons for challenging attorney Mr. B-3 and law student Mr. W. were insincere.

We are also unable to find evidence of insincerity in the prosecutor's voir dire of Mr. W. or Mr. A. The prosecutor did question Mr. W. about his career plans in law and learned he wanted to do criminal defense work, and that he had worked as a "temp" in the

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<sup>4</sup> The voir dire record reflects that the prosecutor asked her about her prior jury service.

district attorney's office and for the courts in some capacity. It is not clear why the prosecutor would have needed to know any more about Mr. W. in order to substantiate her stated concern about his legal knowledge. Mr. A. was a practicing attorney, and made it abundantly clear in his voir dire by the court and both parties that he had doubts about his ability to keep his legal knowledge out of his deliberations, and doubts about the veracity of police testimony generally.<sup>5</sup> The prosecutor in particular questioned Mr. A. at length about both issues. We find no indication her voir dieres of Mr. A. and Mr. W. were inconsistent with her stated reasons for excusing these witnesses or probative of an ulterior motive.

In Mr. B-3's case, the court's voir dire established Mr. B-3 was a civil litigation attorney who had represented plaintiffs and defendants in class action lawsuits. When asked whether he could refrain from discussing things he remembered from his legal training and practice in the jury room, Mr. B-3 responded, "I will try very hard not to do that." He also expressed reservations whether he could follow the court's instructions if he believed there was a mistake in them that could affect the result in the case. No inference can be drawn from the prosecutor's failure to question Mr. B-3. There is nothing out of the ordinary about one side (or both) wanting to keep a lawyer out of the jury room, particularly a litigation attorney. The court questioned Mr. B-3 closely about his ability to set his legal knowledge aside, and his answers were not particularly reassuring. It is not surprising the prosecutor felt no need to plow that ground a second time.

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<sup>5</sup> As part of its case-in-chief, the prosecution offered the testimony of Richmond Police Officer Michael Rood about the investigation leading to defendant's arrest and his conversations with defendant. Although defendant minimizes the importance of Rood's testimony to the prosecution's case, the prosecutor had reason to be concerned that Mr. A.'s strong feelings about police veracity would prejudice his evaluation of the prosecution's entire case. Jury selection is a process of "risk assessment" based on very limited information. (*People v. Lenix* (2008) 44 Cal.4th 602, 624.) We are unwilling to say that Mr. A.'s attitudes about the police were irrelevant to the prosecution's assessment of the risk of allowing him on the jury.

In Mr. B-2's case, the court's voir dire established he was an auto racing technician who had recently become self-employed in that profession, and his spouse was an unemployed paralegal who had not worked in the criminal law field. The prosecutor asked Mr. B-2 a question she asked of most of the prospective jurors—how long he had lived in his current city of residence—but did not ask him any other questions. The prosecutor explained she challenged Mr. B-2 because he might have legal knowledge based on his spouse's work as a paralegal, and because she felt persons in professions involving hands-on, physical labor like Mr. B-2 and Mr. C. might be more inclined to sympathize with the defense theory the use of force was justified to reclaim property. While certainly speculative, the latter reason is not so far-fetched or implausible as to seem fabricated. (See *People v. Reynoso, supra*, 31 Cal.4th 903, 924–925, fn. 6 [prosecutor can lawfully challenge a potential juror whose occupation, in the prosecutor's subjective estimation, would not render him the best type of juror to sit on the case].) Based on the prosecutor's stated reasons, it was not necessary to know more about Mr. B-2 than had already been elicited by the court. Probing Mr. B-2 for his views on the defense theory would have needlessly run the risk of planting that theory in jurors' minds before they had heard the prosecution's case. The prosecutor's voir dire of Mr. B-2 was not in any event much shorter than many of her other voir direes in this case. Its brevity is simply not sufficient to sustain defendant's thesis of gender bias.

The trial court did not err in denying defendant's *Batson-Wheeler* motions.

### **C. Limiting Cross-examination of Maxwell**

Defendant contends the court erred in preventing him from cross-examining Maxwell for bias relating to his civil suit against defendant.

#### **1. Facts**

Maxwell filed a civil lawsuit for monetary damages against defendant that was pending at the time of defendant's first trial but in which Maxwell had secured a judgment against defendant by the time of the second trial. Before opening statements in the second trial, defense counsel sought court approval to cross-examine Maxwell about whether Maxwell's civil lawsuit gave him a motive to testify falsely against defendant in

the criminal trial. The court found that while such cross-examination clearly was permissible in the first trial when Maxwell had a financial motive to seek defendant's conviction, that incentive no longer existed since the civil suit had been resolved by a monetary judgment in Maxwell's favor. The court held evidence concerning the civil suit was therefore irrelevant. The court also expressed concern defendant would be prejudiced by evidence Maxwell had obtained a \$600,000 civil judgment, which the prosecution could properly put before the jury once the defense opened up the subject of the civil suit. The court emphasized defendant could nonetheless impeach Maxwell with any prior inconsistent statements he made in connection with the civil action. The court ruled cross-examination of Maxwell concerning the civil suit would be impermissible under Evidence Code section 352 unless Maxwell testified inconsistently with representations he made in the civil proceeding or the prosecution opened the door to this subject in its direct examination of Maxwell.

## ***2. Analysis***

Defendant argues he should have been allowed to impeach Maxwell at the second trial with the fact that Maxwell had filed a civil lawsuit against defendant, even though that lawsuit was no longer pending. He reasons that Maxwell's testimony at the second trial would inevitably be colored and influenced by trying to remain consistent with the testimony he had given in the first trial. Since the earlier testimony was subject to impeachment based on the pendency of Maxwell's civil lawsuit at the time it was given, his consistent testimony at the second trial should also be impeachable on the same basis.

We review a trial court's exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Hamilton* (2009) 45 Cal.4th 863, 929–930.) “A trial court abuses its discretion when its ruling ‘falls outside the bounds of reason.’ ” (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) We will not disturb the decision of the trial court to exclude evidence under Evidence Code section 352 absent a showing the court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437–438.) No such showing has been made here.

“ ‘Relevant evidence’ means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) It is not an abuse of discretion to exclude evidence that produces only speculative inferences. (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Once Maxwell had succeeded in obtaining a judgment against defendant, any arguable financial motive he had to lie or shade his testimony disappeared. Although defense counsel suggested Maxwell had a continuing motive to fabricate in order to maintain the consistency of his story, that theory is too attenuated and speculative to support his claim of error. If Maxwell’s financial interests were so probative as to his bias, it is at least equally plausible his motivation when he testified at the second trial would have been to try to minimize defendant’s criminal jeopardy in order to improve his own ability to collect on the judgment. Moreover, accepting defendant’s theory would have subjected Maxwell’s testimony to defense impeachment no matter how he testified. If he testified consistently with his former testimony, he could be attacked for the consistency; if he testified differently than before, the defense could make an issue of his inconsistency. Defendant was properly precluded from trying to have it both ways. We cannot say the trial court acted capriciously or irrationally in finding the scant probative value of opening up the subject of the civil suit was outweighed by the potential it would create prejudice, confuse the jury, or result in an undue consumption of trial time.

#### ***D. Response to Jury Question***

Defendant contends the court erred in responding to the jury’s request for examples of lawful versus unlawful touching.

##### ***1. Facts***

The jury was instructed under CALCRIM No. 925, that in order to prove defendant guilty of battery causing serious bodily injury the prosecution had to prove, among other elements, “defendant willfully and unlawfully touched Arthur Maxwell in a harmful or offensive manner.” A few hours after jury deliberations began, the jury sent

out a note requesting “[a]n example of lawfully touching in a harmful and offensive manner and [an] example of unlawfully touching in a harmful and offensive manner to help us understand the law more fully.”

The court proposed to counsel to respond as follows to the jury’s note: “We cannot give specific examples. The line between an unlawful and lawful touching in the circumstances of this case is answered by Instruction 3476.”<sup>6</sup> The prosecutor agreed with the proposed response. Defense counsel objected, and requested that the court provide a more pinpoint instruction along the lines of one the court had drafted previously stating in relevant part, a “touching, even if done in [a] harmful or offensive manner, is legal if it is done . . . [¶] . . . with an amount of force a reasonable person would believe is necessary to the same situation . . . [¶] . . . to protect property . . . [¶] . . . from imminent harm.” The court rejected the defense proposal and proceeded to respond as it first proposed, pointing out that CALCRIM No. 3476 already had all of the elements contained in defense counsel’s proposed instruction, but with definitions and nuances it omitted.

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<sup>6</sup> As already given to the jury, the instruction based on CALCRIM No. 3476 stated: “The owner of personal property may use reasonable force to protect that property from imminent harm. [¶] Reasonable force means the amount of force that a reasonable person in the same situation would believe is necessary to protect the property from imminent harm. [¶] When deciding whether the defendant used reasonable force, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant’s beliefs were reasonable, the danger does not need to have actually existed. [¶] Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed that there was imminent danger to his property. Defendant’s belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonably necessary, the defendant did not act in lawful defense of his property. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant used more force than was reasonable to protect property from imminent harm. If the People have not met this burden, you must find the defendant not guilty of Battery Causing Serious Bodily Injury and the lesser included crimes of Battery and Assault.”

## ***2. Analysis***

Defendant contends the court was required to “give further clarification of the law rather than merely referring to the effectively-inadequate instruction already given.” In defendant’s view, the jury’s use of the terms “harmful” and “offensive” show it was confused as to the elements of battery, not about the right to use force to defend property, since those terms appear in CALCRIM No. 925 but not in CALCRIM No. 3476. Since the court’s referral of the jury to the latter instruction—which had already been given—was demonstrably inadequate to resolve the confusion, this was the functional equivalent, defendant maintains, of a failure to instruct on an element of the offense.

In our view, the court properly determined from the note that jurors were attempting to distinguish between lawful and unlawful touching. They seemed to be confused about the circumstances in which touching could be harmful and offensive, yet lawful. Because even harmful and offensive touching is lawful when it is a reasonable use of force to defend property, the court correctly pointed the jury to the instruction defining the reasonable use of force. Defendant’s trial counsel evidently understood the query the same way and proposed what was simply an abbreviated and incomplete version of CALCRIM No. 3476. On appeal, defendant does not assert it was error for the trial court to reject his trial counsel’s proposal, nor does he offer any specific alternative response that would have avoided the asserted error. He maintains the court erred by not offering “further clarification of the law,” but never proposes any legally correct language responsive to the jury’s question and superior to that provided in CALCRIM No. 3476. He fails to meet his burden of demonstrating error.<sup>7</sup>

### ***E. Unlawful Probation Condition***

Defendant contends the trial court erred in making it a condition of his probation that he pay the cost of probation services not to exceed \$75 per month. He points out that although a probationer may be ordered to pay the cost of probation supervision such an

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<sup>7</sup> Because we have found no error to cumulate, we reject defendant’s claim that he is entitled to relief based on the cumulative effect of the errors he alleges.

order cannot be made a condition of probation, thereby subjecting the probationer to revocation for failure to pay. Respondent concedes the point and requests we modify the judgment to delete the requirement to pay probation costs as a condition of probation and clarify defendant is required to pay those costs as part of a separate order. (See *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1401, 1404; *People v. Flores* (2008) 169 Cal.App.4th 568, 578–579.)

We agree and will modify the judgment accordingly.

### **III. DISPOSITION**

The trial court's order of probation is modified to eliminate any requirement defendant pay the costs of probation as a condition of probation. We deem the requirement defendant pay such costs, not to exceed \$75 per month, to be a separate order, and affirm it as such. In all other respects, the judgment is affirmed.

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Margulies, Acting P.J.

We concur:

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Dondero, J.

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Banke, J.