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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 WAYNE DERRICK,

Defendant and Appellant.

A132036

(Solano County
Super. Ct. No. FCR271777)

A jury convicted defendant Michael Wayne Derrick of a forcible rape committed in 1998 after DNA evidence collected from him in 2009 linked him to the crime.

Defendant contends the trial court should have dismissed the case due to the disposal of certain physical evidence in 2008, including the original DNA sample collected from the victim. Defendant further contends the trial court erred by (1) allowing the nurse who examined the victim to testify as an expert, (2) denying a continuance to allow the defense to present its own expert, and (3) allowing testimony implying defendant had a criminal record. We find no prejudicial error, and affirm the judgment.

I. BACKGROUND

On January 28, 2010, defendant was charged by information with a forcible rape (Pen. Code,¹ § 261, subd. (a)(2)) committed in 1998. A jury found him guilty and found true that the prosecution was commenced within the limitations period allowed by

¹ All further statutory references are to the Penal Code unless otherwise stated.

section 803, subdivision (g)(1). The trial court sentenced defendant to the upper term of eight years in prison. Defendant timely appealed.

A. Trial Evidence

On the evening of June 9, 1998, 16-year-old Natalie W. was walking through Allan Witt Park near her house on Stephen Street. She had been raped in the same park in 1997, but was walking through the park again because it was the quickest route home. Two Black men approached her stating they wanted her to “hang out” with them by the benches. They seemed nice and she decided to go over to them “just to go see what was going on.” At 9:15 p.m., after talking with them for 20 or 30 minutes while they drank beer, and she had a couple of sips, Natalie started walking away up the driveway path to go home. She turned and saw one of the men, later identified as defendant, following her. He caught up with her and tried to get her to rejoin him and his friends. After she declined several times, defendant grabbed Natalie’s wrist and pulled her toward a bench in the middle of the park. She tried to free herself but neither screamed nor ran. She told him she wanted to go home. She was scared.

Defendant pushed her back onto a table. She tried to get up but he pushed her back down. When she tried to get away and fight him, he became more aggressive, pinning her arms above her head. Defendant was stronger than she was. He unbuttoned and pulled down her pants, had forcible intercourse with her, and ejaculated inside her. She kept yelling no, and that she did not want to do this and wanted to go home.

Afterward, when she started to speak, he put his hand over her mouth, stating he “wasn’t playing, that if [she] told anybody, whether it was a family [member] or police . . . he would kill [her].” She nodded and then he got up, turned, grinned at her, and walked back to his friends. Natalie ran across the street to a pay phone and called a friend to pick her up. Her friend’s mother answered, who connected the call to Natalie’s mother. Natalie told her mother what happened, and her mother called the police, who picked her up at the pay phone. The officer who responded to the scene described Natalie as crying and hysterical. He drove her to her mother’s house and then drove

Natalie and her mother to the medical center, where she was examined by a sexual assault response team (SART).

Dorene Racouillat worked as a SART nurse on June 10, 1998 and examined Natalie following the sexual assault. She documented her findings on the OCJP² form 923, which is used by all SART nurses, and she completed the form as she performed the examination. Racouillat examined Natalie from head to toe and noticed an abrasion on her upper back, below her shoulder; redness on her right shoulder and the back of her arm; redness on the upper part of her left arm; and bruising on her right outer arm near her elbow, approximately three and a half inches by one-quarter inch in size. Using a colposcope, Racouillat observed bruising on the posterior fourchette of Natalie's external genitalia.

Based on her training and experience, Racouillat opined that the physical findings were supportive of the complaint of rape. On cross-examination, she testified the bruising on the posterior fourchette was consistent with what Natalie told her, but she admitted she could not say that "the findings [were] distinguishable from somebody having consensual sex." She did not conclude the injuries were caused by rape, only that her findings were *consistent with the history provided by the victim*.

Racouillat took vaginal and oral swabs and collected fingernail scrapings as part of her SART examination in 1998, which were placed in a sealed box along with her report, and given to Officer Joel Orr. Officer Orr booked the box with the items into evidence. Officer Orr also collected beer bottles and a beer cap from the location where the men had been drinking beer.

In August 2001, criminalist Cara Gomes screened samples from Natalie's SART kit. Gomes detected spermatozoa in the vaginal slides and she submitted a reference blood stain and vaginal swab to the California Department of Justice's (DOJ) Berkeley laboratory for DNA testing. A DOJ expert, Sandy Chen, analyzed the samples in

² The acronym "OCJP" stands for Office of Criminal Justice Planning. (See *People v. Vargas* (2009) 178 Cal.App.4th 647, 654, fn. 4.)

January 2003. From the vaginal swab, Chen developed a full STR (short tandem repeat) DNA profile with 13 different locations. She submitted the results to CODIS (Combined DNA Index System), a searchable national database of DNA profiles.

Minnesota Probation Agent Terra Smith supervised defendant in 2009. She obtained an oral swab from him in June 2009, which she mailed to Minnesota's Bureau of Criminal Apprehension. On July 15, 2009, Minnesota forensic scientist, Julie Fox, analyzed the swabbing sample Smith took from defendant, obtained a full DNA profile for the sample, and entered the data into CODIS.

In September 2009, Fairfield Police Officer Rob Lenke received notice the DNA from defendant's cheek sample matched the DNA evidence collected from the victim in this case. A check of police records showed defendant had a local address next to Allan Witt Park in 1998. Police also obtained a booking photo of defendant taken within a few months of the rape reported by Natalie. Lenke showed Natalie a six-person photo lineup in September 2009, including the booking photo. She identified defendant as her assailant without hesitation or doubt.

In January 2010, Lenke obtained a new cheek swab from defendant and submitted it to the DOJ lab in Richmond. DOJ criminalist Lillian Tugado, an expert in DNA analysis, analyzed the cheek swab and obtained a DNA profile of defendant. Tugado compared the results of defendant's new swab to the sperm fraction of the vaginal swab obtained from Natalie. The two matched at 13 loci. The probability of a random unrelated person possessing the same DNA profile as that represented by the two matching profiles was one in 72 quadrillion African-Americans, one in 17 quintillion Caucasians, and one in 1.2 quintillion Hispanics. Based on these numbers, Tugado concluded it was "very unlikely" someone other than defendant could have the same profile and this constituted "strong evidence" defendant was the source of the semen on the vaginal swab.

Following the preliminary hearing in this case, while released on his own recognizance, defendant absconded. He was picked up in Marion, Ohio on December 12, 2010.

The defense presented one witness, Sergeant Chad Tigert, the officer who investigated Natalie's 1997 rape report. He testified about her description of the 1997 rape. In that incident, Natalie reported being confronted by a man who grabbed her arm and pulled her toward a picnic table. He pushed her onto the table and forced her to lie on her back. The assailant held her down with one hand while he removed her shorts and underwear and vaginally raped her. She described the assailant as an 18-year-old Black male, wearing all black clothing, with his hair pulled back into a ponytail. She did not tell her mother about the incident until two weeks later.³

II. DISCUSSION

Defendant contends the trial court prejudicially erred by (1) denying his pretrial motion to dismiss based on the destruction in 2008 of the victim's SART kit, the photographs from the SART exam, and the beer bottles; (2) refusing to strike the testimony of former SART nurse, Dorene Racouillat; (3) declining defendant's requests for a continuance to present his own expert witness; and (4) allowing testimony suggesting defendant had a prior criminal record.

A. *Motion to Dismiss*

The Fairfield Police Department, consistent with its policy of retaining evidence for 10 years, destroyed the SART kit from the victim's 1998 SART exam in 2008, as well as the beer bottles collected from the park. Consistent with its 10-year retention policy, the independent contractor for the SART nurses destroyed the photographs from Natalie's exam in 2008. Before trial, defendant moved to dismiss the information on the grounds his due process rights were violated by the destruction of the evidence, which

³ The defense argued to the jury that the 1997 incident was in fact a rape by an unknown assailant. According to the defense theory of the case, after having consensual sex with defendant in the park on June 9, 1998, Natalie lied to her mother and police to avoid punishment for coming home late by falsely claiming she had been raped again. She borrowed details from the actual rape in 1997 to fabricate her 1998 rape story. Afraid to admit she had lied about the serious accusation she made in 1998, Natalie felt she had no choice but to continue the lie after defendant was identified by his DNA in 2009.

precluded the defense from hiring its own expert or experts to retest the evidence collected from the victim in 1998, review the SART photographs, or see if defendant's prints were on the beer bottles.

1. *Due Process*

Defendant acknowledges the duty of law enforcement to preserve potentially exculpatory evidence under the due process clause of the Fourteenth Amendment is circumscribed. Due process is only implicated in the destruction of evidence when the evidence "might be expected to play a significant role in the suspect's defense." (*California v. Trombetta* (1984) 467 U.S. 479, 488 (*Trombetta*); accord *People v. Beeler* (1995) 9 Cal.4th 953, 976.) *Trombetta* explains that to meet this standard, the evidence "must both possess an exculpatory value that was apparent before [it] was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (*Id.* at pp. 488–489.) Further, in cases where no more can be said than that the evidence could have been subjected to tests, the results of which might have exonerated the defendant, the failure to preserve the evidence will not constitute a denial of due process, "unless a criminal defendant can show bad faith on the part of the police." (*Arizona v. Youngblood* (1988) 488 U.S. 51, 57–58 (*Youngblood*)). There can be no violation where police act in good faith in accordance with their normal practice, without animus toward the defendant or in a conscious effort to suppress exculpatory evidence. (*Trombetta*, at p. 488.)

The trial court found "nothing about the samples was apparently exculpatory at the time they were destroyed," and there was no bad faith because the evidence was destroyed as a matter of policy after 10 years when there was no known suspect for the crime. The court pointed out due process as interpreted in the case law had not been construed to "require lifetime retention of biological samples, photographs, or other things that were seized." As defendant acknowledges, we must accept a trial court's determination of the state's good or bad faith in preserving evidence as long as it is supported by substantial evidence. (*People v. Memro* (1995) 11 Cal.4th 786, 831.) Defendant contends the destruction of the evidence in this case cannot as a matter of law

be deemed to have been undertaken in good faith because section 1417.9, governing the retention of biological evidence, impliedly provides that biological material must be retained in all criminal cases until there is a conviction. We do not find defendant's rather expansive reading of the statute and its legal implications very persuasive.

Section 1417.9 provides in subdivision (a): "biological material that is secured in connection with a criminal case [must be retained in a condition suitable for DNA testing] *for the period of time that any person remains incarcerated in connection with that case.*" (Italics added.) Subdivision (b) permits disposal of the material before the time specified in subdivision (a) provided the agency holding the material notifies, among other specified persons, "any person, who as a result of a felony conviction in the case is currently serving a term of imprisonment and who remains incarcerated in connection with the case," and affords that person an opportunity to object to the disposal. Subdivision (b)(3) further provides: "No other provision of law requires that biological evidence be preserved or retained."

According to defendant, these provisions necessarily imply the police acted in bad faith by destroying the evidence in 2008 without at least notifying the Solano County Public Defender's Office in advance. He reasons that as long as a potential suspect or suspects are at large, and a future criminal prosecution is possible, evidence such as the DNA samples, the SART photographs, and the beer bottles should have been preserved. He cites *District Attorney's Office v. Osborne* (2009) 557 U.S. 52 (*Osborne*), which held there was no federal constitutional right to obtain postconviction access to DNA evidence because (1) a criminal defendant proved guilty after a fair trial does not have the same liberty interests or presumption of innocence as a free man, and (2) states therefore have more leeway in providing procedures for postconviction relief than for preconviction relief. (*Id.* at pp. 68–69.) From this, defendant concludes section 1417.9 must be construed to give him *more* protection against the destruction of biological evidence as an unidentified, uncharged potential defendant than it affords to convicted felons.

Defendant's reasoning is flawed. First, *Osborne* is concerned with the circumstances in which a criminal defendant must be allowed access to *existing* evidence.

It does not concern constitutional limits on the destruction of evidence. Those limits are defined in *Trombetta* and *Youngblood*. In particular, *Osborne* does not hold or imply that uncharged, unidentified suspects have a constitutional right to have evidence in unsolved cases preserved indefinitely because such persons might at some future point be identified, charged, and brought to trial. Second, defendant fails to establish the procedures created for convicted defendants by section 1417.9 are in fact constitutionally required, rather than exceeding anything required as a matter of postconviction due process. The statute was enacted several years before *Osborne* was decided and could not have been passed in response to it. (51A pt. 1 West's Ann. Pen. Code (2011 ed.) § 1417.9, p. 475.) If the notice procedures of section 1417.9 are not constitutionally required for convicted defendants, there is no legal basis for assuming unidentified potential defendants are constitutionally entitled to some equivalent form of protection against the destruction of evidence. Notice to the public defender's office would serve no useful purpose in any event. The public defender is or should be aware of local evidence retention policies, and should not need specific notice of when such policies are about to be carried out.

By its own terms, section 1417.9 imposes no obligation on law enforcement with respect to cases in which no defendant has been charged or convicted. The statute requires notice only in the case of persons convicted and incarcerated in connection with the crime for which the evidence was collected, and specifically provides that *no other provision of law* requires biological evidence to be preserved or retained. Such a statute would in no way put law enforcement on notice in a case like this one that following normal evidence retention practices would be improper. Statutes pertaining to the destruction of controlled substances such as Health and Safety Code section 11479 are equally irrelevant to the case at hand. Defendant's attempt to find a way around the absence of any evidence of bad faith in this case fails.

Due process claims indistinguishable from defendant's have been rejected by our Supreme Court. (See *People v. Farnam* (2002) 28 Cal.4th 107, 165–167 [no due process violation in failing to refrigerate or freeze SART kit evidence, carpet, blood, and semen

samples in order to keep them from degrading where there were no suspects in the crime and there was no routine policy at the time of refrigerating samples other than sexual assault kits and no freezer was available].) Moreover, as the trial court recognized, the rule for which defendant contends is entirely impractical. It would compel law enforcement agencies to preserve evidence collected in unsolved cases indefinitely as long as a future prosecution for the offense remains possible. Such extreme and impractical measures are not compelled as a matter of due process. (See *Youngblood*, *supra*, 488 U.S. at p. 58 [due process does not impose “an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution”].)

2. Equal Protection

For the first time on this appeal, defendant argues it would violate his right to equal protection under the law to afford convicted persons the absolute right to notice and a hearing before biological materials may be destroyed pursuant to section 1417.9, yet to deny these same rights to persons in his position who had not yet been tried or convicted when potentially exculpatory evidence was destroyed. He asserts equal protection required either that notice be given to the public defender’s office or alternatively that the biological materials not be destroyed at all given the possibility of a future prosecution.

We note as an initial matter that defendant forfeited his equal protection claim by not raising it in the trial court. (See *People v. Alexander* (2010) 49 Cal.4th 846, 880, fn. 14; *People v. Saunders* (1993) 5 Cal.4th 580, 589–590.) This claim would in any event fail on the merits even it was properly preserved for appeal. “ “[T]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated groups* in an unequal manner.” ’ ’ (*People v. Brown* (2012) 54 Cal.4th 314, 328.) “The ‘similarly situated’ prerequisite simply means that an equal protection claim cannot succeed, and does not require further analysis, unless there is some showing that the two groups are sufficiently similar with respect to the purpose of the law in question that some level of

scrutiny is required in order to determine whether the distinction is justified.” (*People v. Nguyen* (1997) 54 Cal.App.4th 705, 714.)

A convicted defendant is not similarly situated to a person who has not been identified, charged, or placed in custody. The latter individual has suffered no restraint on his liberty at the time the evidence is disposed of, and may never suffer such restraint. There is moreover no practical means of affording such an unidentified individual notice and a hearing, which is all that section 1417.9 provides for convicted persons. The public defender cannot effectively represent an unidentified person with whom it has no contact. Defendant’s alternative of requiring indefinite preservation of evidence would in fact grant him greater rights than the incarcerated defendant, who enjoys no guarantee biological evidence will be retained as a result of his objection to its destruction. The mere fact the state has legislatively extended certain limited rights with respect to the preservation of biological evidence to convicted persons does not mean law enforcement agencies must abandon their normal evidence retention practices and assume the costly obligation of indefinitely preserving such evidence on behalf of unknown individuals who are not in custody, may never be identified or apprehended, and may never seek access to the evidence even if they are apprehended.

3. Effect of Crawford

Defendant next contends *Trombetta* and *Youngblood* must be reexamined in light of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). The United States Supreme Court held in *Crawford* that the admission of testimonial out-of-court statements against a criminal defendant violates the defendant’s rights under the confrontation clause of the Sixth Amendment unless (1) the declarant is available to be cross-examined at trial, or (2) the declarant is unavailable as a witness, but the defendant had a prior opportunity to cross-examine him or her. (*Crawford*, at pp. 53–54, 59 & fn. 9.) Defendant asserts that although he did have the opportunity to cross-examine the criminalist who tested the DNA evidence in this case, he did not have the opportunity to test the DNA evidence itself, or to test the beer bottles or show the photographs of the victim’s injuries or her clothing to his expert. In his view, the holdings of *Trombetta* and *Youngblood* —to the

extent they make this state of affairs permissible—are inconsistent with the “absolute right to confrontation” recognized in *Crawford* and related cases.

Defendant reads *Crawford* too broadly. *Crawford* guarantees the right to confront out-of-court testimonial evidence via cross-examination of the declarant. It does not guarantee a right of access to every potential source of impeachment evidence that might assist in conducting an effective cross-examination, as defendant seems to assume. Here, the DNA report in issue was not admitted into evidence and did not function as the equivalent of live testimony. (Cf. *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 309–311 (*Melendez-Diaz*) [where the prosecution proved an element of cocaine trafficking by sworn certificates attesting that the substance seized was cocaine, rather than by live testimony at trial, the admission of *the certificates* was a confrontation clause violation under *Crawford*].)

DOJ criminalist Lillian Tugado, who performed the analysis of the DNA sample taken from defendant in 2010, testified in court as an expert. Utilizing the DNA profile prepared from the vaginal swab collected from the victim in 1998, Tugado’s own 2010 analysis of defendant’s DNA profile, and her computations of the probability another person could have the same DNA profile as defendant, Tugado testified there was “strong evidence” the DNA sample collected in 1998 came from defendant. Expert testimony may be “premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions.” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618.) This may include inadmissible matter as long as it “is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates.” (Evid. Code, § 801, subd. (b).) In fact, our Supreme Court has held that a DNA analysis like that used here is itself admissible at trial under *Crawford* because it is not testimonial in nature. (See *People v. Geier* (2007) 41 Cal.4th 555, 607.)

While we assume for purposes of analysis that access to the 1998 sample might have enabled defendant to more effectively cross-examine Tugado, we find nothing in *Crawford* or *Melendez-Diaz* to suggest the lack of such access, or Tugado’s reliance upon

the 1998 DNA profile, violated defendant's confrontation clause rights.⁴ As defendant concedes, his claim in this regard is novel and "not supported by substantive law currently in existence." Defendant's citation for the first time in his reply brief to cases involving the right to effective cross-examination serves only to underscore that the *Crawford* line of cases is inapposite. In the absence of any persuasive authority for doing so, we decline to construe either *Crawford* or cases involving the denial of information needed for effective cross-examination as grounds for disregarding or limiting *Trombetta* and *Youngblood*.

The trial court properly denied defendant's motion to dismiss.

B. Motion to Strike

1. Facts

Dorene Racouillat testified she had been a licensed registered nurse since 1977. She worked as a SART nurse from 1994 to 2001, during which time she performed close to 200 SART examinations and trained other nurses to perform them. She received 40 hours of training and completed 40 hours of preceptorship. She had been qualified as an expert six times to testify in court regarding her SART findings. Before the court qualified Racouillat to testify as an expert, defense counsel was asked whether she wanted to "voir dire or reserve." She declined.

Using the form she filled out during her examination of Natalie, Racouillat testified to redness and bruising she noticed on Natalie's back and arms, as well as bruising on her posterior fourchette. Without objection, she offered her opinion that her findings were "consistent with" and "supportive" of the history of rape Natalie gave to her. On cross-examination, Racouillat testified she was no longer a SART nurse and was not up to date on the field of forensic nursing. She stated her training in the 1990's

⁴ We focus on the DNA evidence because defendant's trial counsel emphasized the disposal of that evidence foreclosed him from defending on the basis that he was not the perpetrator. Such a defense would have rendered any potential photographic evidence arguably showing a lack of injury irrelevant. The possible absence of his fingerprints on the beer bottles would have had minimal value in confronting DNA evidence that he was the rapist.

taught her there would be injuries present in nonconsensual, but not consensual sex. She admitted she was not familiar with literature published since 1998 stating injuries could occur in both consensual and nonconsensual sex. She had not studied literature in this field since 2001.

During the morning recess, defense counsel moved to exclude Racouillat's testimony on the ground she would not qualify as an expert because she had not updated her knowledge of the field since 2001 and she lacked knowledge about how to distinguish between consensual and nonconsensual sex. The trial court denied the motion, finding these grounds went to the weight of the testimony, not its admissibility. The court also noted the witness was to a large extent a percipient witness testifying as to her observations and findings, and had only expressed a single opinion—one she was qualified to give by virtue of her training and experience—which went beyond common knowledge.

Defense counsel went on to conduct further cross-examination of Racouillat in which, among other things, she admitted (1) she had last testified as an expert in 1999, (2) she could not say the findings she made were distinguishable from somebody having consensual sex, (3) she had no knowledge of what happened to Natalie other than what Natalie told her, (4) her job was to determine whether the findings were consistent with the history provided by the patient, (5) she could not say Natalie's injuries were a result of what took place in the park or a result of events that happened earlier, (6) as an independent examiner, she assumed what Natalie told her was true, (7) a finding consistent with nonconsensual sex could be equally consistent with consensual sex, and (8) the history she referred to throughout her testimony was strictly Natalie's side about what happened.

2. *Analysis*

Defendant contends Racouillat “was not qualified to give an opinion on whether Natalie . . . was raped,” or was not qualified to offer an opinion “on the issue of consensual sex.” On that basis, he asserts the court erred in refusing to strike “this testimony.” We note first, Racouillat offered no opinion on whether Natalie was raped.

The sole opinion elicited from her by the prosecution was that her physical findings were consistent with the history of rape Natalie gave to her. While that testimony impliedly involves “the issue of consensual sex,” we reject defendant’s suggestion that Racouillat was allowed to offer an opinion on the ultimate issue of whether Natalie was raped. Second, the motion to strike before the trial court was a motion to strike Racouillat’s entire testimony, not a motion to strike the single opinion the prosecution elicited from her. On that ground alone, we believe defendant forfeited the issue on which he now seeks appellate review. We cannot find the court abused its discretion in allowing Racouillat’s *opinion* testimony when it was only asked to exercise its presumably narrower discretion to strike her *entire* testimony.

Had defendant moved to strike only Racouillat’s opinion testimony, and the court declined, we would find no abuse of discretion in any event. “A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.” (Evid. Code, § 720, subd (a).) Expert opinion testimony is permissible as long as it pertains to a subject “sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” (Evid. Code, § 801, subd. (a).) Racouillat was a trained and highly experienced SART examiner. Conducting such examinations and interpreting their results was a matter beyond the common experience of jurors. Opinion testimony of the type given here is routinely allowed in rape prosecutions. (See, e.g., *People v. Hatch* (2000) 22 Cal.4th 260, 265; *People v. Espinoza* (1992) 3 Cal.4th 806, 813, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800.) The sole opinion offered—that Natalie’s physical injuries were “consistent with” her report of rape—is a limited one that does not prejudge the ultimate issue in the case.

On this record, the fact Racouillat had not been a SART nurse since 2001, and had not stayed current with the literature in the field go to the weight, not the admissibility of Racouillat’s opinion. Trial counsel effectively neutralized Racouillat’s opinion testimony by establishing these facts on cross-examination and by getting Racouillat to admit she relied on information furnished to her by Natalie and her physical findings were as

consistent with consensual as nonconsensual sex. We perceive no abuse of discretion or prejudice stemming from the trial court's denial of the motion to strike.

C. Motions for Continuance

1. Facts

On February 28, 2011, three days before trial was to start, defendant sought an 11-day continuance of the trial until the week of March 14, to accommodate the schedule of his proposed rebuttal expert, Judy Malmgren, who was not available to testify until March 21. Defense counsel explained Malmgren would be testifying "about how you cannot tell by looking at injuries whether or not something is consensual or unconsensual, and with regard to the victim's statement and how it went down, and she'd be giving her opinion, or at least her expertise, on whether or not this was consensual." Counsel represented that the alternative of postponing the trial until after the week of March 14 would require defendant to waive time, which he was unwilling to do because the trial court's own schedule would have precluded a new trial date before sometime in late April, a delay he was not willing to accept. The trial court denied the motion without ruling out the possibility Malmgren's schedule could be accommodated depending on the progress of the trial.

On March 2, the day before trial commenced, defense counsel advised she was not going to call Malmgren as an expert. In response to the court's inquiry, counsel agreed the trial could most likely be concluded by Friday, March 11. On March 8, after Racouillat testified, defense counsel argued in the context of her motion to strike Racouillat's testimony that she had not called her own expert because she had assumed she would be able to get the information she needed from Racouillat, not realizing Racouillat had not updated her knowledge in the SART field since 2001. The prosecutor pointed out that defense counsel had been given a copy of Racouillat's curriculum vitae (CV) before the trial and could see she had not been a SART nurse for 10 years.

On the afternoon of Wednesday, March 9, with the defense about to put on its only witness, defense counsel moved for a continuance of the trial until at least the following Monday, March 14, to enable the defense to bring in an expert witness to testify about the

current research and literature in the area of sexual assault exams, and the inability of a SART nurse to determine whether injuries occur during consensual or nonconsensual sex. Counsel explained she needed a defense expert to (1) rebut Racouillat's asserted testimony on cross-examination that she "[didn't] know of any instances where [injuries can occur during consensual sex] or that injuries can occur by non-assaultive means or that the bruising could have preexisted the assault"; and (2) show the jury it was improper for Racouillat to have assertedly testified she "believed [Natalie] when she gave her statement, when [Racouillat] should have been just an independent person collecting the evidence and writing a report."⁵

The court denied the motion to continue the trial until the following week. It afforded the defense an opportunity for a one-day continuance if it could arrange for its expert to be brought in to testify the next day. Before jury instruction and argument were to begin later that day, defense counsel advised she was unable to find an expert who could testify before Monday the 14th, and renewed her motion for a continuance. The court denied the motion, and denied defendant's ensuing motion for a mistrial based on his asserted inability to present an affirmative defense.

2. Analysis

A continuance in a criminal case may be granted only for good cause. (§ 1050, subd. (e).) The granting or denial of a continuance during trial "rests within the sound discretion of the trial judge." (*People v. Howard* (1992) 1 Cal.4th 1132, 1171; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1548.) In weighing the request for a midtrial continuance, the trial court must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) "A reviewing court considers the circumstances of each case and

⁵ The court stated it did not interpret Racouillat's cross-examination testimony that way, although it could "see how somebody would." The court noted Racouillat did not express any such views during her direct testimony.

the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing of an abuse of discretion and prejudice, the trial court's denial does not warrant reversal."

(Ibid.)

"A showing of good cause requires a demonstration that counsel and the defendant have prepared for trial with due diligence. [Citations.] When a continuance is sought to secure the attendance of a witness, the defendant must establish 'he had exercised due diligence to secure the witness's attendance, that the witness's expected testimony was material and not cumulative, that the testimony could be obtained within a reasonable time, and that the facts to which the witness would testify could not otherwise be proven.' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037 (*Jenkins*).)

There are some obvious questions on this record about the defense side's diligence and tactical choices in securing the attendance of an expert witness. Defense counsel did not verify the availability of defendant's preferred expert, Judy Malmgren, when the case was originally set for trial, even though Malmgren had been retained by that time. When Malmgren turned out to be unavailable, defendant passed on the opportunity to waive time to secure Malmgren's attendance. Then, rather than seek to retain a different expert after defendant's first motion for a continuance was denied, defense counsel withdrew the defense expert on the first day of trial, and advised she would take the unusual step of relying on what the defense could elicit from the prosecution's expert. Although the defense had Racouillat's CV, which showed she had not been a SART nurse since 2001, it did not contact her to confirm she could provide the testimony the defense needed from her. Not until the 11th hour, with one witness left to testify and jurors expecting to get the case before the end of the week, did the defense seek a continuance until the following Monday to call its own expert. Given all of these factors, we cannot say the defense demonstrated "counsel and the defendant . . . prepared for trial with due diligence." (*Jenkins, supra*, 22 Cal.4th at p. 1037.)

We also find defendant has not established the materiality of the testimony for which he sought the continuance. On direct examination, Racouillat testified in

substance that Natalie's physical injuries were consistent with the account she gave of being raped. The defense argued it needed its own expert to rebut Racouillat's testimony on cross-examination that she was unaware of the possibility of injury occurring during consensual sex (or by other nonassaultive means), and to tell the jury it was "completely improper" for Racouillat to have allegedly believed the truth of Natalie's statements rather than just neutrally collecting the facts. Regarding possible causes of the observed injuries, Racouillat in fact conceded on cross-examination that she could not say her findings were distinguishable from somebody having consensual sex, and could not say Natalie's observed physical injuries were a result of what happened in the park. She further admitted she was not up to date in her field, and was not familiar with literature published since 1998 stating injuries could occur in consensual as well as nonconsensual sex, but that her training at the time was that there would not be injuries present in consensual, as opposed to nonconsensual sex. She did not know if injuries could be caused by consensual sex.

With regard to Racouillat's alleged bias in favor of the victim, counsel was apparently referring to the following testimony, which she elicited on cross-examination: "Q. I'm asking you, did you, as an independent, objective person examining [Natalie], assume that what she was telling you was the truth? [¶] A. Yes. [¶] Q. And because you assumed it was the truth, you conducted your exam and came up with a conclusion that's a history of what you believed to be true? [¶] A. Yes. [¶] Q. And your job as a forensic nurse is not to draw conclusions as to whether or not what that person is telling you is the truth, correct? [¶] A. Well, you don't draw a conclusion. They just take a history of what happened. And from the history, you draw the conclusion from the injuries. [¶] Q. But you just testified you assumed what she told you was true? [¶] A. Well, yes. [¶] Q. But you're supposed to be an independent examiner of [Natalie], correct? [¶] A. Yes. [¶] Q. You're not supposed to formulate an opinion as to whether or not she was raped? [¶] A. True. [¶] Q. But in this case, you did? [¶] A. Well, in this case, the history and the findings were the same. [¶] . . . [¶] Q. And the history that you've been referring to throughout your testimony is strictly [Natalie's] side about what happened? [¶] A. Yes."

In our view, the impression left by Racouillat's testimony was not so materially prejudicial to the defense that substantial justice required a continuance to allow the defense to obtain rebuttal testimony. The defense cross-examination clearly established that Racouillat's knowledge of the field was outdated and she just did not know if Natalie's injuries could have resulted from consensual sex and other, nonassaultive causes. This effectively impeached her testimony that she was unaware of the possibility of injury occurring except by rape. As to Racouillat's assertedly improper bias, it was clear in context Racouillat was merely saying that *for purposes of taking Natalie's history*, she assumed Natalie was telling her the truth. By her own account, she was not drawing any conclusions about that, she understood she was hearing only Natalie's story of what happened, and she had no knowledge of what occurred other than what Natalie told her. Although defense counsel artfully tried to lead her astray on that point, Racouillat clearly was not telling the jury her job was to take Natalie's reported history as the truth and arrange her findings to confirm it. Since Racouillat never asserted this was the method she followed, it was not necessary for the defense to call its own expert to explain why it would be improper to do so.

We find no abuse of discretion in the trial court's rulings on defendant's motions for continuances.⁶

D. Admission of Evidence Suggesting Criminal Record

1. Facts

Terra Smith, defendant's probation agent in Minnesota, testified she obtained an oral swab sample from defendant and described the procedures she followed in doing so and in forwarding the sample, along with his identifying information and a court order for the sample to be taken, to the Bureau of Criminal Apprehension. Smith also identified defendant in court as the person from whom she took the swab. The defense timely objected to the agent stating she was defendant's probation agent because it would imply

⁶ Defendant contends the cumulative effect of the alleged errors deprived him of a fair trial. Because we have rejected defendant's claims of error, there are no errors to cumulate.

he had been convicted of something that required him to be on probation and give a DNA sample.⁷ The court ruled the witness's status as defendant's probation agent was relevant, and indicated it would admonish the jury not to speculate about the defendant's criminal record. When the matter came up later at trial, defense counsel explained her major concern was the jury would assume defendant was convicted of a sex crime. The court and counsel agreed the admonishment should state he was not convicted of a sex offense.

Following Smith's testimony on direct, the court admonished the jury as follows: "Ladies and gentlemen, you've heard through this witness that Mr. Derrick reported to her as a probation agent. There was some type of court order. . . . [Y]ou are not to draw any inferences from those facts. They're not proof that [defendant] is disposed to commit any offense. You are not to use them for that purpose. [¶] And I can tell you that whatever was involved in Minnesota, it had nothing to do with any claim of sexual misconduct."

Officer Lenke testified without objection that he (1) was notified the DOJ had matched the DNA evidence in this case to "an offender out of Minnesota" and (2) used a "booking photo" of defendant taken near the time of the 1998 incident in the photo lineup shown to Natalie.

2. Analysis

Defendant contends the implied references to his criminal record in the testimony of Smith and Lenke were highly prejudicial in suggesting he must have had a disposition to commit crimes, and the testimony lacked any substantial probative value. He argues the trial court prejudicially abused its discretion in allowing this testimony.⁸ We are not persuaded.

⁷ The record is confusing because in Minnesota the word "parole" is apparently synonymous with "probation" as used in California.

⁸ Defendant concedes his trial counsel did not object to Lenke's testimony. If we find he waived his present objections to that testimony, defendant asks this court to

Smith's testimony was not offered or argued by the prosecution as propensity evidence. It was offered to explain how Smith knew the defendant and why she took a DNA sample from him. Smith made no mention of any crime defendant had committed. With defendant's approval, her testimony was accompanied by an instruction to the jury not to speculate on that subject or to infer defendant was disposed to commit any offense. Based on defense counsel's statement she was primarily concerned about jury speculation defendant had committed other sexual offenses, the admonition specifically dispelled that idea. We believe the jury instruction covered any potential prejudicial impact of this testimony, and we presume the jury followed it. (*People v. Frank* (1990) 51 Cal.3d 718, 728.)

Had defense counsel timely objected, Lenke's passing references suggesting defendant had committed other offenses could have been prevented or at least neutralized by limiting instructions. Assuming trial counsel's inaction resulted in a waiver, we nevertheless reject defendant's claim of ineffective assistance of counsel. The claim of ineffective assistance of counsel involves two components, a showing the counsel's performance was deficient and proof of actual prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.) Setting aside the issue of counsel's performance, defendant fails to make a convincing showing of actual prejudice. We find no reasonable probability defendant would have obtained a better result had Lenke's statements not been heard by the jury. Natalie's positive identification of defendant, the third party testimony concerning her conduct and emotional affect after the incident, her lack of motivation to lie so many years after it occurred, the DNA evidence against defendant, and his flight from California, all constituted such compelling evidence of his guilt that there can be little doubt the jury would have found defendant guilty of rape even if it had heard nothing to suggest he might have a criminal record.

consider his claim as being based on the ineffective assistance of his trial counsel for failing to object.

We find no prejudicial error or ineffective assistance of counsel in regard to the testimony of Smith and Lenke.

III. DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Banke, J.