

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN MICAH GARDNER,

Defendant and Appellant.

A136453

(Alameda County
Super. Ct. No. 166002)

I. INTRODUCTION

In August 2012, a jury found defendant Jonathan Micah Gardner guilty of forcible oral copulation and rape, and found true allegations of kidnapping and personal use of a deadly weapon based on events that took place in 2002. On appeal, he contends the trial court erred in excluding evidence that the complaining witness, Jane Doe,¹ had been a prostitute from 2004 to 2006. He also argues that his counsel provided ineffective assistance for failing to object to the prosecutor's alleged misstatement of the evidence in the rebuttal closing argument. Finally, he asks this court to review a sealed transcript to determine whether the trial court erred in ruling the complaining witness's communications with her therapist were not discoverable. Finding no error, we will affirm.

¹ This witness was referred to as Jane Doe in the trial court. We will do the same.

II. FACTUAL AND PROCEDURAL BACKGROUND

In September 2008, Oakland Police Officer Herbert Webber became involved in the investigation of an alleged forcible rape against Jane Doe in January 2002. The case was assigned to Webber when defendant's DNA came up as a cold case hit for DNA collected from the condom at the scene of the alleged rape. Webber contacted Jane Doe and took a recorded statement from her in January 2010. Webber showed Jane Doe a photo lineup with six photographs and she identified defendant as the person who raped her. Webber also contacted defendant, who had been placed under arrest. In May 2011, defendant was charged in this matter.

On April 30, 2012, at the conclusion of trial, the jury was unable to reach a verdict, and the court declared a mistrial.

The case was retried in July 2012.

Jane Doe's Testimony

On the night of January 15, 2002, Jane Doe left home to meet two friends at a pizzeria on the corner of 35th Avenue and International Boulevard in Oakland. She was 15 years old. Around her neck she was wearing a Mickey Mouse pendant on a gold chain. She planned to take a bus with her friends to Jack London Square to see a movie. Jane Doe was running late because she had to wait until her mother was asleep so she could leave without her mother knowing.

By the time Jane Doe arrived, her friends were not there. She waited a few minutes, decided they must have left already, and got change to use the pay phone in front of the pizzeria. She called her brother's friend Marcus, who agreed to give her a ride home from the pizzeria. He estimated he would be there in about 10 to 15 minutes.

Defendant, who had been released from jail only the day before, asked Jane Doe for her phone number when she went into the pizzeria for change. She "brushed him off" and ignored him because she did not know him.

After calling Marcus, Jane Doe went back inside the pizzeria to wait. After 15 or 20 minutes, she called Marcus again from the pay phone; he confirmed he was on the way. While she was on the phone, defendant asked her more than once for the time.

Jane Doe was annoyed with him for interrupting her conversation. She hung up the phone, intending to go back into the pizzeria to wait.

As soon as the call was over, defendant grabbed her and forced her to walk along the side of the pizzeria up 35th Avenue. He told her not to run and not to make any noise. She felt something cold and hard pressed up against her side; she thought it was a gun. Defendant told her she was going to be his “bitch” and make him lots of money. Jane Doe tried to get away, but he pulled her back by her braids.

Defendant took her down an alleyway behind an apartment building. It was dark and she was afraid. A woman came to an upstairs window and looked out. Defendant told Jane Doe not to say anything, and because she was scared, she was quiet until the woman turned out the light and left the window.

Defendant gave Jane Doe a condom and told her to “give him head.” When she refused, he got aggressive and loud. He picked up a board and threatened to “beat [her] ass with it.” He demanded oral sex, but Jane Doe refused repeatedly and threw the condom on the ground. Defendant then pulled her hair, bringing Jane Doe to her knees. Jane Doe continued to protest, but defendant forced her to perform oral sex on him. This continued for a few minutes. Defendant did not ejaculate.

Defendant then told Jane Doe to take off her pants. She refused. Defendant was “extremely upset” and hit her on the left side of her face, but she still refused to take off her pants. He slapped her at least twice, then started pulling her pants down. She resisted but defendant eventually overpowered her. She felt defendant’s weight on her from behind as she was pushed up against some tires that were in the yard. He grabbed her by the throat and choked her, breaking the chain and pendant she was wearing. Defendant inserted his penis into her vagina against her will. While doing this, he also bit Jane Doe on her face or neck.

Jane Doe knew defendant wore a condom. She “begged” him to wear one. Jane Doe thought he ejaculated because “he made a noise, and then he pulled it out.” After he raped her, Jane Doe realized she no longer had the Mickey Mouse pendant or chain and did not know where they were.

At trial, Jane Doe identified the broken gold chain and the broken Mickey Mouse pendant she had been wearing that night. An evidence technician with the Oakland Police Department found the broken pendant when she was processing the crime scene. The evidence technician also found a used condom and a condom wrapper at the scene.

After defendant ejaculated, he pulled his pants up and told Jane Doe to pull hers up, too. He told Jane Doe that “for [her] age, [she] should have been better,” but he was still going to make her his prostitute and make money. With his arms around her and holding her tightly, defendant walked Jane Doe back to 35th Avenue and then north on 35th to a bus stop. Before getting on the bus, defendant warned her not to say anything or ask anyone for help.

While they were on the bus, defendant told Jane Doe they were going to see a friend of his who would pay \$500 for a “date” with her, which she understood to mean that the friend would pay to have sex with her. She told defendant she did not want to do that. When they got off the bus, they went into a liquor store because defendant wanted Jane Doe to buy him a beer. She told him she was not old enough to buy beer. While defendant waited at the front of the store, Jane Doe got the beer for defendant and a soda for herself; defendant paid for the drinks with her money. She did not say anything to the clerk working in the store because she did not believe he would help her.

As they left the store, Jane Doe saw a police officer sitting in a police car in the parking lot. Jane Doe was afraid and did not think she could get the officer’s attention.

They left the store and walked for several blocks, turning several times. It seemed to Jane Doe that defendant was lost. Defendant kept talking about the \$500 “date.” After about 20 to 30 minutes, they stopped at a house but defendant did not knock on the door. After sitting on the curb for 5 or 10 minutes, Jane Doe started crying. Defendant asked what was wrong with her, which she thought “was a pretty stupid question.” Jane Doe told him she “didn’t want to be there;” she “didn’t want to date;” she “just wanted to go home.”

Defendant was “silent for a moment,” just sitting there, and then said, “okay, you can leave.” Jane Doe was confused and scared to move. Defendant told her to “walk

across the street and not turn around.” Jane Doe was afraid he was going to shoot her. She started walking across the street, then started running. She looked back and defendant was running after her. She ran to the nearest house that had a porch light on, banged on the door and asked the occupants to call 911.

Law Enforcement and Medical Response

Jane Doe told the responding police officer what had happened. The officer took her back to the location where she was raped. The evidence technician who processed the crime scene spoke with Jane Doe and noticed minor swelling over her left eyebrow.

The police took Jane Doe to the hospital for a rape examination. She was uncomfortable because she had never been to the doctor without her mother. After the examination, the police took her home. It was after midnight. Jane Doe never told her mother or anyone else what happened that night. She did not want her mother to be mad at her for going out without permission, and she blamed herself and felt ashamed.

Jane Doe stopped following up with the police because they told her they could not talk to her about the case without talking to her mother. Jane Doe did not want her mother to know what had happened, so she told the police she did not want to pursue it. In the eight years that followed the incident, Jane Doe did not talk to anyone about the events of that night other than her therapist and her fiancé until she gave her statement to Officer Webber in 2010.

The physician’s assistant who examined Jane Doe at the hospital found injuries to her genital area that were consistent with sexual assault. He could not determine with “scientific certainty” that they were caused by a sexual assault, but it was his opinion that such injuries were much more common in a sexual assault than in consensual sex. The injuries were consistent with Jane Doe’s description of what had happened.

Defendant's Prior Sexual Offenses

Aaliyah Doe testified pursuant to Evidence Code section 1108² about sexual offenses that defendant committed in February 2002, one month after the alleged rape of Jane Doe. Aaliyah Doe met defendant on a telephone party chat line. She told him she was 15, but she was only 13 at the time. They arranged to meet, and then went back to the apartment that she lived in with her family. Aaliyah Doe was taking care of her young cousin that day; her aunt and grandmother were not at home. She did not want the boy to know she had company, which was not allowed, so she invited defendant into her bedroom. Aaliyah Doe testified that she had no intention of being with defendant sexually. She testified that, after some small talk, defendant touched her breast and pushed her down on the bed. She told him no and resisted him, trying to push him off of her. Defendant raped her twice, using condoms he carried in his back pocket. He finally left the apartment with two bottles of her grandmother's alcohol when someone making a delivery came to the door. Aaliyah Doe was afraid of being punished when her grandmother found the liquor bottles missing. She called 911 and told the police that defendant had forced his way into the apartment, tried to rape her, and stole some things, but that she just wanted to make a report; she did not want the police to come. She acknowledged that what she initially told the police when she called 911 was not true.

After Aaliyah Doe testified, the trial judge read a stipulation of counsel to the jury: "Back in the year 2002, based upon the allegations made by Aaliyah Doe, the defendant was charged with two counts of forcible rape and one count of committing a lewd and lascivious act with a child under the age of 14. He was formally charged. The case went to trial. The result of that trial was that the jury found the defendant guilty of the charge of committing a lewd and lascivious act on a child under the age of 14. The jury found

² Evidence Code section 1108 provides in part that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by [Evidence Code] Section 1101, if the evidence is not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 1108, subd. (a).) The trial judge instructed the jury regarding evidence of uncharged sex offenses pursuant to CALCRIM No. 1191.

him not guilty of one of the counts of forcible rape. And on the other count of forcible rape, the jury was unable to reach a verdict.” The trial judge told the jury the elements of the crime of committing a lewd or lascivious act with a child under the age of 14.

Defendant’s Testimony

Defendant testified at trial that he picked Jane Doe up in front of the pizzeria. She agreed to have sex with him for \$40, and took him to the backyard of the apartment building. Defendant supplied the condom, Jane Doe pulled down her pants, and defendant had vaginal intercourse with her from behind. There was no oral sex. When they were done, defendant claimed not to have the \$40 he owed her. Jane Doe was angry about not being paid, so defendant said a neighbor of his might pay her \$40 or \$50 for sex. Jane Doe rode the bus with him to find the neighbor. The broken pendant left at the scene was the result of Jane Doe angrily swinging her jacket and “getting loud.” At that time, a woman came to the window of the apartment building. Jane Doe and defendant left because they were trespassing and afraid the woman in the window would call the police.

Verdict and Sentence

The jury found defendant guilty of forcible oral copulation and forcible rape. It found the kidnap and deadly weapon allegations true as to both counts, and the allegation of firearm use not true.

Defendant was sentenced to 25 years to life in prison plus 18 years, calculated as the eight-year upper term on count 1, forcible oral copulation, plus a consecutive 10 years for the weapon enhancement (§ 12022.3, subd. (a)); and 25 years to life on count 2, forcible rape, to run consecutively to count 1.

Defendant filed a timely notice of appeal.

III. DISCUSSION

A. Exclusion of Evidence of Prostitution.

Defendant contends the trial court improperly excluded evidence of Jane Doe’s prostitution between 2004 and 2006. Defendant argues the evidence was admissible to impeach Jane Doe’s credibility under Evidence Code section 782, and the exclusion of

this evidence violated his constitutional rights to due process and to confront the witnesses against him.

Legal Principles

Under Evidence Code section 1103, subdivision (c)(1), a defendant charged with a sex offense cannot introduce opinion evidence, reputation evidence, or evidence of specific instances of the complaining witness's sexual conduct with persons other than the defendant "in order to prove consent by the complaining witness." (Evid. Code, § 1103, subd. (c)(1).) Here, the trial court ruled the evidence of Jane Doe's prostitution convictions inadmissible on the issue of consent. Defendant does not challenge this ruling.

Rather, defendant sought admission of the evidence to impeach Jane Doe's credibility. Evidence Code section 1103, subdivision (c)(5), provides that the rule barring evidence of a victim's sexual conduct with persons other than the defendant does not "make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in [Evidence Code] Section 782." (Evid. Code, § 1103, subd. (c)(5).)

Evidence Code section 782 establishes an ordered procedure to determine the admissibility of sexual conduct evidence that a defendant proposes to use to attack the credibility of a complaining witness. A defendant must file a written motion with an offer of proof of the "relevancy of evidence of the sexual conduct of the complaining witness" and "its relevancy in attacking the credibility of the complaining witness." (Evid. Code, § 782, subd. (a)(1).) The offer of proof must be stated in a written affidavit and filed under seal. (Evid. Code, § 782, subd. (a)(2).) If the court finds the offer of proof sufficient, it must order a hearing, outside the presence of the jury, and permit questioning of the complaining witness. (Evid. Code, § 782, subd. (a)(3).) The decision to admit the evidence regarding sexual conduct ultimately depends on the court determining both that the evidence is relevant to Evidence Code section 780, which pertains to credibility of witnesses generally, and that it is "not inadmissible pursuant to [Evidence Code] Section 352." (Evid. Code, § 782, subd. (a)(4).)

Evidence Code section 352 provides that “[t]he 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.”

The Evidence and the Trial Court’s Ruling

Because of the way this issue was raised in the trial court, our initial task is clarifying exactly what evidence defendant contends should have been admissible. Defendant apparently did not file an affidavit with an offer of proof, as required under Evidence Code section 782. Instead, the issue was raised by the prosecution’s motion in limine to exclude evidence of Jane Doe’s prior or subsequent sexual conduct with individuals other than defendant, including any prior convictions for prostitution.³ Neither party now raises the procedural context as an issue on appeal, and there appears to be no dispute regarding the substance or scope of the evidence. It appears from the briefing and the record that the evidence at issue is Jane Doe’s multiple arrests for prostitution between 2004 and October 2006, about which she testified at the preliminary hearing and the first trial, and six misdemeanor convictions for prostitution, which were confirmed by the prosecutor.

The substance of the evidence is as follows: Starting in 2004, after Jane Doe turned 18, until October 2006, she worked as a prostitute. She was arrested 15 times for prostitution in California, Nevada, Arizona, Washington, New York, and Washington D.C., and suffered six misdemeanor convictions.⁴ This included an arrest in 2005 that

³ Defense counsel stated at a pretrial motion hearing that he had filed a motion and a declaration under Evidence Code section 782, but the trial court did not have a copy of that filing and no such filing appears in the record. The trial court observed that the matter would have more appropriately been raised under Evidence Code section 782 and that statute’s procedures followed, but stated that the court would not “stand on the formalities of that particular statute.” The court also noted that “the burden [was] on the defense to persuade the Court that they should be allowed to use this evidence”

⁴ Jane Doe testified regarding these arrests at the preliminary hearing and at the first trial. She was not questioned about convictions. In discussions among the court and

resulted in a conviction in 2006 for prostitution in Oakland, not far from where Jane Doe encountered defendant on January 15, 2002. Jane Doe also testified at the first trial that, when she was 18, she and her child lived with her mother in Fresno. She had a seasonal job at Wal-Mart and was not doing well financially; she turned to prostitution to earn more money.

Following a hearing on July 11 and July 18, 2012, the trial court granted the prosecution request to exclude the evidence, and denied the defense request to offer it. The court observed the “strong public policy” to “exclude evidence of prior sexual conduct by a complaining witness,” as well as the exception when the evidence is offered to attack the complaining witness’s credibility, specifically the witness’s “character for honesty or veracity or their opposites.” The court also observed that prostitution is a crime of moral turpitude, but found that it did not “relate as strongly to honesty as committing crimes such as forgery, theft, impersonating another person, or identity theft, fraud, instances which evidence not only moral turpitude, but dishonesty.” “All things considered, I don’t consider this evidence to be particularly strong as it relates to the character trait of honesty or veracity, and particularly when you consider that its purpose would be to attack her credibility today, when she describes something that happened 10 years ago.”

The court noted that 10 years separated the alleged rape and the trial proceedings, but that Jane Doe’s basic allegations had not changed. Jane Doe’s credibility in 2002, when she reported the incident, and in 2012, when she testified at trial, were at issue, but “what we’re certainly not testing is her credibility in 2004 and 2006. A period that ended six years ago which I think also has a bearing on—well, it’s not necessarily determinative. I wouldn’t describe it as remote. But six years ago with no evidence that she’s done anything involving moral turpitude in the last six years, I think gives it even less weight on the issue of her credibility when she testifies here in this trial.”

counsel during the second trial, outside the presence of the jury, the prosecutor acknowledged that Jane Doe had suffered six misdemeanor prostitution convictions.

The court concluded that the prostitution evidence was not “particularly strong . . . on the issue of her honesty or veracity today” and expressed concern about the risk that the jury would consider the evidence for an improper purpose, “another factor to consider in the 352 weighing process. On balance, I’ve decided that it’s the appropriate thing to do to exclude the evidence. That’s my ruling.”

Analysis

Defendant claims this ruling was in error. He argues the evidence was highly relevant to Jane Doe’s credibility, particularly since the case boiled down to a credibility contest between defendant and Jane Doe. Excluding the evidence, defendant contends, allowed Jane Doe to testify “in a false aura of credibility.” Defendant contends the error violated his Sixth Amendment right to confront witnesses and his Fourteenth Amendment right to due process.

“A trial court’s ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion.” (*People v. Chandler* (1997) 56 Cal.App.4th 703, 711.) We find this to be a close case, but conclude that the trial court acted within its discretion in excluding the evidence. (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 420-421 [in reviewing a trial court’s exercise of discretion under Evidence Code section 352, “ ‘[r]elief is available only where the alleged abuse of discretion clearly constitutes a miscarriage of justice’ ”].)

Defendant argues that in a close credibility case where the defendant and the complaining witness are the only two percipient witnesses, it is reversible error to exclude sexual history relevant to the victim’s credibility. Defendant relies on *People v. Randle* (1982) 130 Cal.App.3d 286 and *People v. Varona* (1983) 143 Cal.App.3d 566. Both of these cases involved reversible error, but both holdings are narrower than defendant suggests.

People v. Randle was an appeal from a judgment and denial of a motion for new trial based on newly discovered evidence. Defendant had been convicted of forcible oral copulation, and the jury could not reach a verdict on counts of assault by means of force likely to produce great bodily injury and assault with intent to commit rape. (130

Cal.App.3d at pp. 289, 291.) The key dispute was whether the sex act was consensual or by force. (*Id.* at p. 293.) The complaining witness met defendant at a bar restaurant in San Francisco. They talked and danced, and then ended up in a men’s restroom. The complaining witness testified that she was forced into the bathroom and sexually assaulted. (*Id.* at p. 289.) According to the defendant, an act of oral copulation had occurred, but there was no force involved; the complaining witness had offered sex for money. (*Id.* at pp. 290-291.) The court in *Randle* held that the trial court erred in excluding testimony that on two prior occasions, at the same bar restaurant where the complaining witness met defendant, she had “falsely complained of being a victim of purse snatch and of having been kidnapped.” (*Id.* at p. 295.) This testimony was admissible character evidence “to show prior conduct of the victim in conformity with such character or trait of character.” (*Id.* at p. 296.) As to the new trial motion, the court in *Randle* described voluminous newly discovered evidence, consisting of 20 declarations made by 17 people in the “Burlingame area” that “divided into three evidentiary categories: (1) Complainant’s reputation for and instances of soliciting public sex acts in exchange for money, drugs, and drinks; (2) complainant’s accounts of the March 6 incident which contradicted her testimony at trial; and (3) complainant’s reputation for dishonesty and theft, including specific instances thereof.” (*Id.* at p. 292.) The court found that the newly discovered evidence did “more than merely impeach” the complaining witness; it “tend[ed] to destroy her testimony by raising grave doubts about her veracity and credibility.” (*Id.* at p. 293.) In *Randle*, the admissibility of evidence of sexual conduct by the complaining witness was not directly at issue. The court alluded to Evidence Code section 782 as providing the procedure that would be used in the new trial “for the offer of proof to attack such credibility and for the ruling thereon.” (*Id.* at p. 294.) In light of the “very unusual facts of this case,” the *Randle* court concluded it was an abuse of discretion not to have granted the motion for new trial. (*Id.* at p. 297.)

In *People v. Varona, supra*, 143 Cal.App.3d 566, two defendants were found guilty of rape, oral copulation and false imprisonment. The trial court excluded evidence that the complaining witness had previously pled guilty to prostitution and was still on

probation for the conviction at the time of trial. Defendants claimed the woman solicited them and agreed to engage in sex acts for money, but became angry when defendants did not pay her. (*Id.* at p. 568.) The *Varona* court held that “on the particular facts here involved,” the trial court’s denial of the Evidence Code section 782 motion was an abuse of discretion. (*Id.* at p. 569.) The court found the prostitution evidence highly probative, and emphasized the “special significance” of the evidence. First, the witness was working as a prostitute “in this very area” where she had met the defendants, which cast light on her story that the night she was attacked she was walking to the bus stop because a friend refused to drive her the last two blocks. Second, the “official records” showed that the complaining witness “not only engaged in normal intercourse, but that she specialized in oral copulation,” and that “tend[ed] to support the defense claim that the oral copulation . . . was voluntarily engaged in by the woman.” (*Id.* at pp. 569-570.)

Further, the court in *Varona* found the prosecutor had engaged in misconduct by arguing to the jury there was no proof that the complaining witness was a prostitute. “We agree that, in a proper case, a prosecutor may argue to a jury that a defendant has not brought forth evidence to corroborate an essential part of his defensive story. But we know of no case where such argument is permissible except where a defendant might reasonably be expected to produce such corroboration. Here the prosecutor not only argued the ‘lack’ of evidence where the defense was ready and willing to produce it, but he compounded that tactic by actually arguing that the woman was not a prostitute although he had seen the official records and knew that he was arguing a falsehood. The whole argument went beyond the bounds of any acceptable conduct.” (*People v. Varona, supra*, 143 Cal.App.3d at p. 570.)

In addition to limiting its holding to the “particular facts” of the case, the opinion in *Varona* focused exclusively on the probative value of the evidence, which the court found to be extraordinarily high. The opinion does not refer to the trial court weighing the evidence pursuant to Evidence Code 352.

In the case before us, the trial court acknowledged that prostitution is a crime of moral turpitude and evidence that a complaining witness engaged in prostitution is

conduct involving moral turpitude. (*People v. Chandler, supra*, 56 Cal.App.4th at pp. 708-709.) However, the court found that the evidence of Jane Doe’s prostitution from the ages of 18 to 20 was not highly probative on the issue of Jane Doe’s honesty and veracity, either at the time of the incident in 2002 when she was 15 years old, or when she testified at trial in 2012. The court expressly considered that engaging in prostitution is not as relevant to a witness’s honesty as a crime such as theft or forgery; the acts of prostitution occurred more than two years after the alleged rape in 2002 and concluded six years before trial in 2012; and there was no evidence of any conduct involving moral turpitude in the six years before trial. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 296 [“In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character of dishonesty than is a felony.”].)

Moreover, the court here was mindful of Evidence Code section 352. “[T]he latitude section 352 allows for exclusion of impeachment evidence in individual cases is broad.” (*People v. Wheeler, supra*, 4 Cal.4th at p. 296.) The trial judge had already ruled under Evidence Code section 1103, subdivision (c) that evidence that Jane Doe had been a prostitute from 2004 to 2006 was inadmissible as evidence that she consented to sex with defendant in 2002. The danger that the jury might use this evidence for an improper purpose was high. By contrast, the probative value for impeachment was limited in that there was no evidence that Jane Doe was a prostitute at the time of the incident in 2002 (or at the time of trial in 2012 or for six years preceding the trial), and the acts of moral turpitude themselves did not imply dishonesty. On all of these facts, we cannot say that it was an abuse of discretion for the trial judge to have excluded the evidence.

Defendant argues that Jane Doe’s history as a prostitute in Oakland was relevant not just as evidence of moral turpitude, but also, “as in *Varona*, as ‘highly significant’ evidence that would have allowed the jury to conclude that her labored tale of meeting friends at 35th and International even though they were going to the movies elsewhere was, in fact, a fabrication.” As we have stated, the factual situation in *Varona* was substantially different. There, the evidence showed the complaining witness was working as a prostitute not only in the same area where the alleged assault occurred, but

also in the same time period, i.e., contemporaneously, and she was on probation at the time of trial. Here, the evidence that Jane Doe was arrested in 2005 several blocks from where she encountered defendant in 2002, although certainly relevant on the issue of her credibility, was not as highly probative as the *Varona* evidence.

Next, defendant contends the trial court “appeared to mistake the scope of [Evidence Code] section 1103, subdivision (c)(4)” in discussing the “ ‘strong public policy’ ” to exclude evidence of sexual conduct by a complaining witness. This argument is without merit. The trial court understood the statutory scheme at issue and how to apply Evidence Code section 782. Upon submission of the issue, the trial court stated, “I’ve excluded this evidence for purposes of supporting a defense of consent under 1103. The remaining issue is under 782 of the Evidence Code, use of the evidence to attack her credibility.” The trial court expressly acknowledged the exception to the rule of exclusion of a complaining witness’s sexual conduct contained in Evidence Code section 1103, subdivision (b)(4), and conducted the analysis required under Evidence Code section 782.

Finally, defendant contends the trial court erroneously based its ruling on a finding that Jane Doe was credible by accepting as true her testimony that she worked as a prostitute from 2004 to 2006 and that she did it to support herself and her child. Defendant argues that the jury might have viewed her testimony differently and it was up to the jury to determine whether her testimony was credible. Defendant relies on *People v. Chandler, supra*, 56 Cal.App.4th 703.)

Defendant is correct that “[t]he rape shield statutes do not permit the trial judge to make a credibility determination at the in camera hearing.” (*People v. Chandler, supra*, 56 Cal.App.4th at p. 711.) Nor is credibility of the proffered witness one of the admissibility guidelines set forth in Evidence Code section 352. (*Ibid.*) Following an in camera hearing pursuant to Evidence Code section 782, the trial court in *Chandler* excluded the testimony of two witnesses after having “ ‘weighed their testimony and find[ing] each to be an unbelievable witness, not worthy of being placed before the court and before the jury’ ” (*Id.* at p. 710.) This court held it was error to exclude the two

witnesses “based on the sole criterion that they were unbelievable.” (*Id.* at p. 711.) Here, unlike *Chandler*, it is abundantly clear that the trial court was not making a credibility determination when it made its ruling: “I don’t have a declaration as required by 782 of the Evidence Code, which sets forth with specificity the expected testimony, but I do have her testimony at the preliminary examination. I have counsel’s representations to what she testified to in the first trial, and I’m considering there, not only the fact that she was working as a prostitute, she started working, according to her testimony, and that’s the evidence we have, that coupled with the arrest and convictions about three years after the alleged offense dates here, that lasted for a couple of years and ended six years ago. And she did it for basically socioeconomic reasons, according to her, and that is, she was a single parent working at [Wal-Mart], couldn’t pay the bills, turned to prostitution to make more money in order to do that.” The court was specifying the evidence it was considering under Evidence Code section 782, not endorsing Jane Doe’s version of the facts.

Because on this record we cannot conclude that the trial court abused its discretion in excluding the evidence, we necessarily find no violation of defendant’s constitutional rights to confrontation and due process. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 82 [“a state court’s application of ordinary rules of evidence—including the rule stated in Evidence Code section 352—generally does not infringe upon” the right to offer a defense], overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; accord, *People v. Fuiava* (2012) 53 Cal.4th 622, 665-666.)

B. *Ineffective Assistance of Counsel.*

Defendant contends the prosecutor committed misconduct in his rebuttal closing argument by misstating evidence. Defendant’s trial attorney failed to object to the asserted misstatement at the time it was made. Defendant now claims ineffective assistance of counsel, because failure to object to prosecutorial misconduct waives that claim. (See *People v. Stanley* (2006) 39 Cal.4th 913, 952 [“ ‘a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the

jury be admonished to disregard the impropriety' ”].) We find no prosecutorial misconduct, and therefore no ineffective assistance.

“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. 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 trial court or the jury. Furthermore, and particularly pertinent here, when 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. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.)” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Further, “[a]t closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]” (*Id.* at p. 44.)

At trial, both parties presented expert medical testimony about Jane Doe’s injuries. Martin Moran, a physician’s assistant who examined Jane Doe in 2002 as part of the hospital’s sexual assault response team, testified there was injury to her posterior fourchette, an area that is commonly injured during a sexual assault. Moran testified that although it could not be determined with scientific certainty whether a particular injury to that area was the result of consensual sex or sexual assault, this kind of injury is statistically much more common in a sexual assault than in consensual intercourse. Defendant called a medical doctor who was not a percipient witness and had not examined Jane Doe. He testified that the photographs from the exam of Jane Doe were of low quality and out of focus, and he could not tell from looking at the photographs whether the injury was caused by consensual or nonconsensual sexual contact. It could have been either.

Defendant complains that the prosecutor committed misconduct in arguing to the jury in his rebuttal closing argument, “If there was consensual sex, we wouldn’t expect to see injuries, but there just happens to be injuries that corroborate her story.” Defendant

contends the prosecutor’s remark was a “crucial misrepresentation of critical evidence,” because based on the medical testimony it was not possible to discern from the injuries whether the sex with defendant was consensual or nonconsensual.

We disagree. The prosecutor’s remarks were fair comment on the evidence. Moran testified that such injuries were “much more likely” to result from a sexual assault, but acknowledged that whether the injuries resulted from consensual or nonconsensual sexual activity could not be determined “conclusively” or to a “scientific certainty.”⁵ “A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 726.) Based on Moran’s testimony, the prosecutor could properly argue the inference that the injuries corroborated Jane Doe’s account.

C. *Cumulative Error.*

Defendant contends that the cumulative effect of the errors in this case violated his right to a fair trial and requires reversal, even if none of the errors is prejudicial individually. (See *People v. Hill* (1998) 17 Cal.4th 800, 844.) As we have rejected each

⁵ Further, in the prosecutor’s closing argument he discussed the same evidence, and acknowledged its limitations. He noted that the prosecution’s medical witness testified that this anatomical area “is the most common area where an injury will occur during a sexual assault. And fair is fair. It’s also the most common place where an injury would happen during a consensual sexual encounter. I’m not trying to say anything that’s unfair, but the reality is, that’s the most common place where injuries will occur. . . . [¶] Again I’m not arguing to you that there was significant tearing or ripping or bleeding or anything along those lines, but that doesn’t mean that what you saw was not evidence of a sexual assault.” In defense counsel’s closing argument, he countered, “Speaking of corroboration, Mr. Foley [the prosecutor] points to the SART exam evidence as corroborating her testimony. It does nothing of the sort. What it corroborates is that she probably had a sexual encounter within a short time of that SART exam. Mr. Moran said that he found some evidence of rubbing or chafing in the fourchette, and that could be indicative of forced sex. He did say that, but he also said it could be indicative of consensual sex. Both of those are reasonable possibilities. [¶] And Dr. Smith [defense expert] yesterday made it even more clear. He said those photos don’t even show evidence of rape.”

of the purported errors asserted by defendant, we also reject his cumulative prejudice argument.

D. *The Sealed Psychotherapist Testimony.*

Defendant sought discovery of Jane Doe's communications with her psychotherapist, who invoked the victim/sexual assault counselor privilege codified in Evidence Code section 1035.4. Evidence Code section 1035.4 allows a trial court to order disclosure of confidential communications between a sexual assault counselor and a victim only when the trial court determines that the probative value of the information outweighs the negative effect on the victim and the treatment relationship. Application of the statute involves balancing the privacy interest of "one who considers himself or herself the victim of a sexual assault" (*People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1391) against the defendant's right to a fair trial.

The court held an in camera hearing with the therapist under oath to determine whether Jane Doe's communications should be disclosed to the defense for possible impeachment purposes. Following the in camera hearing, the court ordered the transcript sealed and sustained the claim of privilege.

Defendant asks that we independently review the sealed transcript of the hearing to determine whether the trial court erred in ruling that Jane Doe's communications with her therapist were not discoverable. The Attorney General does not object.

Accordingly, we have reviewed the sealed in camera testimony and have determined that it contains no evidence that could have been helpful to the defense in impeaching Jane Doe's credibility. We find no error in the trial court's ruling.

IV. DISPOSITION

The judgment is affirmed.

Miller, J.

We concur:

Kline, P.J.

Stewart, J.

A136453, *People v. Gardner*