

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 FIVE

THE PEOPLE,

Plaintiff and Respondent,

A138853

v.

**(Contra Costa County
Super. Ct. No. 51114073)**

JEREMIAH LEE JONES,

Defendant and Appellant.

_____ /

A jury convicted Jeremiah Lee Jones of nine felonies, including kidnapping John Doe and sexually assaulting him. (Pen. Code, §§ 209, 269.) The trial court sentenced Jones to four consecutive terms of life in prison without parole. Jones appeals. He contends: (1) the court erred by denying his *Batson/Wheeler* motion;¹ (2) the court erroneously admitted evidence of two prior sexual batteries; (3) the admission of rebuttal testimony deprived him of a fair trial; (4) the prosecutor committed misconduct during closing argument; and (5) the court erred by imposing consecutive sentences on four counts.

We affirm.

¹ *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*), disapproved on another ground in *Johnson v. California* (2005) 545 U.S. 162 (*Johnson*).

FACTUAL AND PROCEDURAL BACKGROUND

We provide an overview of the facts here and additional factual and procedural details in the discussion of Jones's specific claims.

The Incident

In February 2011, then 13-year-old Doe lived with his father and his father's roommate. Doe was about 5'2" and weighed 100 pounds. At 9:30 p.m., Doe was skateboarding in the street in front of the house. A man — later identified as Jones — ran up to Doe and asked him where his parents were. Doe responded and Jones asked: "What are you doing out here[?] People are sometimes shooting around here[.]" Jones was standing "really close" to Doe and had money "bunched up" in his hand. Jones handed Doe the money, but then took it back and pulled Doe into the bushes. Jones weighed 75 pounds more than Doe and was approximately six inches taller.

Jones ordered Doe to take off his pants and lie on his back, threatening to hurt Doe if he did not comply. Doe pushed his pants and underwear down to his ankles. Then Jones removed his pants, crawled on top of Doe, and put his mouth on Doe's penis. Jones sucked on Doe's penis for one to two minutes. Next, Jones put his penis in Doe's face and instructed him to put it "all the way in[.]" He threatened: "Do it before I hurt you." Doe complied because he was afraid Jones would hurt or kill him. Jones grabbed Doe by the hair and moved Doe's head up and down. Doe felt like he was choking and thought he might throw up. Jones flipped Doe over, onto his stomach. Jones spit on his hand and on Doe's rectum and penetrated Doe's anus with his penis three or four times. Doe repeatedly said "ouch" but Jones refused to stop. Jones also put his finger in Doe's anus and ordered Doe to say, "Daddy, I like it." Doe did not yell because he was afraid Jones might kill him.

When he did not see Doe in front of the house, Doe's father became concerned and went outside to look for Doe. As he walked past shrubbery adjacent to a nearby building, he saw Jones pinning Doe down with his left arm. Doe was on his hands and knees and his pants were pulled down. Doe was "hysterical." Jones was holding his penis in his right hand, shaking it "[r]ight behind" Doe. Jones was not wearing a shirt

and his pants were around his ankles. Doe's father attacked Jones. Doe ran inside the house. On the verge of crying, Doe told his father's roommate "someone had tried to rape him" and the roommate called 911.

Richmond police officers arrived and arrested Jones. He was not wearing a shirt, his pants were around his ankles, and he had \$73. Doe looked like he had been crying. His clothes were "soiled" and had "debris, shrubbery, dirt on them." Crying, Doe told a police officer Jones had raped him and described the incident. When the officer asked Doe to sit in the back of the patrol car, Doe said he could not "sit down because his anus hurt."

Doe told a Sexual Assault Response Team (SART) nurse what happened. The nurse performed a SART examination and concluded Doe's injuries were consistent with his description of the incident. Child abuse pediatrician James B. Carpenter, M.D., reviewed photographs of Doe's SART examination. Dr. Carpenter "observed a number of severe anal injuries" and explained, "I have been doing this for 32 years. They were the worst anal injuries that I have seen." The injuries "included a dramatic huge, gaping laceration" in Doe's rectal area, several smaller lacerations, and extensive bruising, all of which were "consistent with penetration trauma." According to Dr. Carpenter, Doe's injuries suggested "the nature of the condition was forceful, penetrative and definitely induced pain," and that the incident was not "consensual or desired[.]" As Dr. Carpenter explained, "[m]inor injuries can happen with consensual anal intercourse" but "they tend to be in the form of little redness[.]" Dr. Carpenter testified the injuries made it "very clear that the anus was constricted against any attempted penetration."

Prior Sexual Batteries

In 2000, Jones was 13 and attended middle school with T.B., B.C., and S.S. Jones tried to grab T.B.'s breasts, prompting her to push his hand away and say "'No. No.'" Jones reached inside T.B.'s pants, put his hands inside her underwear, and rubbed her butt multiple times. Jones also came up behind T.B., grabbed her shoulders, and simulated having sex with her. Finally, Jones told her he was "going to rape her." T.B. tried to handle the situation by saying "no" and pushing Jones away, but she eventually

reported the abuse to her school's police officer because Jones refused to stop his "aggressive" behavior. The school's police officer took statements from T.B., B.C., and S.S. T.B. saw Jones try to grab B.C.'s breast area. She also saw Jones push S.S. up against a wall and tell her, "I'm going to kill you if you tell on me. I'm going to beat your ass."

Defense Evidence

Dr. Angela Rosas, M.D., "a pediatrician specializing in child abuse and neglect" testified as an expert on conducting and interpreting SART exams. She testified SART examination medical findings "do not indicate whether [a sexual act] was consensual or whether it was forcible sexual assault." Dr. Rosas conceded, however, that Doe's injuries were consistent with his description of the incident.

Jones testified the sexual acts were consensual. On the day of the incident, Jones asked Doe: "Where your parents at? . . . [¶] You should be careful people could be shooting around here." Doe replied, "I'm good. I'm grown. I could do what I want to do." Jones pulled out "[w]ell over a hundred dollars" from his pocket, "peeled off some bills[,] and asked Doe, "How grown are you?" Doe looked at the money and shook his head. Jones offered more money, which Doe accepted. Jones suggested he and Doe go toward a nearby building and extended his hand toward Doe. Doe grabbed Jones's hand and they walked there together. Jones put his mouth on Doe's penis, attempted three or four times to penetrate Doe's anus with his penis, and inserted his finger into Doe's anus. Doe also put his penis in Jones's mouth. Jones believed Doe willingly engaged in these sexual acts.

Jones admitted threatening T.P., his then girlfriend, in 2007. He also admitted resisting a police officer and giving false information to a police officer in 2008. In addition, Jones admitted grabbing T.B.'s breasts, groping her, gyrating his hips behind her in a sexual way, putting his hand in her pants, and telling her he was "going to rape her[.]" Finally, Jones admitted doing "similar things" with B.C. On cross-examination, Jones admitted he was angry at T.P. because she would not let him into her house, and

conceded he threatened to kill her and throw her out the window if she did not open the door. He denied kicking down T.P.'s front door.

Rebuttal

T.P. testified about the 2007 argument. She tried to keep Jones out of her apartment by blocking the front door with a couch. Jones, however, forced his way in and damaged the door. T.P. went into an interior room and closed the door, but Jones punched the door “continuously[,]” leaving a “big gaping hole.” Richmond Police Officer Eduardo Soto testified regarding the circumstances underlying Jones’s 2008 arrest. Jones gave police officers a fake name, refused to comply with their requests, and “flailed his arms with his elbows up[,] striking [Officer Soto] in the face” and bloodying his nose. Jones struck Officer Soto in the chest with his elbows, and kicked him.

Verdict and Sentencing

The jury convicted Jones of kidnapping for sexual purposes (Pen. Code, § 209, subd. (b)(1) (Count 1)); aggravated sexual assault on a child under age 14 by sodomy (Pen. Code, § 269, subd. (a)(3) (Count 2)); two counts of aggravated sexual assault on a child under age 14 by oral copulation (Pen. Code, § 269, subd. (a)(4) (Counts 3 & 4)); aggravated sexual assault on a child under age 14 by penetration of a foreign object (Pen. Code, § 269, subd. (a)(5) (Count 5)); and four counts of forcible lewd acts on a child (Pen. Code, § 288, subd. (b)(1) (Counts 6 through 9)). The jury found true the allegation Jones kidnapped Doe in connection with counts 6 through 9 (Pen. Code, § 667.61, subd. (j)(1)). The court sentenced Jones to four consecutive terms of life in prison without the possibility of parole.

DISCUSSION

I.

The Court Did Not Err by Denying Jones’s Batson/Wheeler Motion

Jones, an African-American, contends the prosecutor exercised peremptory challenges to remove two African-American prospective jurors because of their race, and the court erred by denying his *Batson/Wheeler* motion. “A party who excludes prospective jurors based on race violates the federal and state Constitutions. [Citation.]

When examining allegations of such misconduct, there ‘is a rebuttable presumption that a peremptory challenge is being exercised properly, and the burden is on the opposing party to demonstrate impermissible discrimination.’ [Citation.] When a defendant claims a prosecutor has challenged a prospective juror based on an impermissible ground, the following procedures apply: ‘First, the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citation.] Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion” by offering permissible race-neutral justifications for the strikes. [Citations.] Third, “[i]f a race-neutral explanation is tendered, the trial court must then decide . . . whether the opponent of the strike has proved purposeful racial discrimination.” [Citation.]’ (*People v. Hensley* (2014) 59 Cal.4th 788, 802 (*Hensley*), quoting *Johnson, supra*, 545 U.S. at p. 168.) “At this so-called third stage of the *Batson* inquiry, the trial court often bases its decision on whether it finds the prosecutor’s race-neutral explanations for exercising a peremptory challenge are credible. “Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.” [Citations.]” (*People v. Jones* (2013) 57 Cal.4th 899, 917.)

““Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] ‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “with great restraint.” [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal.’” [Citation.] ‘When the prosecutor’s stated reasons are both inherently plausible and supported by the record, the trial court need not question the

prosecutor or make detailed findings.’ [Citation.]” (*Hensley, supra*, 59 Cal.4th at pp. 802-803.)

A. Prospective Jurors Mr. H and Ms. E

There were five African-Americans on the jury panel and one African-American juror. During voir dire, Prospective Juror Mr. H stated he was unemployed and looking for a warehouse job. Mr. H responded to most voir dire questions with one word in a quiet voice. Mr. H admitted he was “sleepy” during voir dire and the judge warned him not to “go back to sleep” while other prospective jurors were being questioned. The prosecutor used her first peremptory challenge to excuse Mr. H and defense counsel made a *Batson/Wheeler* motion.

When the court asked the prosecutor to state her reasons for the challenge, she responded: “my concern with [Mr. H] was that he is extremely young. He’s 19 years old. He is single. He is unemployed. He is not married. In addition to being unemployed he did indicate that he worked for one month at a warehouse but currently he is still unemployed. And based on those reasons I did not think that [Mr. H] was the best fit for this jury. [¶] I just don’t think he has that much of a stake in this community.” The court denied Jones’s *Batson/Wheeler* motion, concluding the prosecutor’s explanation for excusing Mr. H was “plausible [and] race-neutral.”

Prospective Juror Ms. E, a grandmother, had served on a jury. She had been a special needs camp director and a board chair for a nonprofit organization. Posing a hypothetical about circumstantial evidence, the prosecutor asked Ms. E whether a man who walked into Target with a pair of scissors entered the store with the intent to steal. Ms. E responded, “No . . . not necessarily” and explained “people carry scissors for different reasons” and some men carry “manicure kits that contain scissors[.]” The prosecutor excused Ms. E and defense counsel made a *Batson* motion.

When asked to explain her reason for excusing Ms. E, the prosecutor stated: “I just want to make it very clear for the record that Count [1] in this case is a kidnapping for the purpose of rape or sodomy or for some sort of sexual purpose. In that crime, the People have to prove when the defendant took John Doe, that he had the intent at that point in

time, that he didn't then form the intent later on. [¶] And so the circumstantial evidence hypothetical that I have given to jurors is extremely important in my evaluation of their ability to evaluate evidence in this specific case. And any juror that I believed that either hesitated or came up with added facts to the hypothetical, anything like that, obviously caused me concern.”

The prosecutor noted Ms. E “was steadfast in her belief that . . . a man that walked into Target, it would be reasonable in her mind to conclude that he would carry scissors with him in sort of—sort of manicure kit in his pocket. And so based on her processing that example, I couldn't in good faith just keep her as a juror for my responsibilities to the People in this case and . . . that was my primary reason for excusing Ms. E[.]” The court denied the *Batson* motion as to Ms. E, explaining it “observed Ms. E[’s] answers and demeanor” and found “the challenge has a plausible non-racially motivated justification.”

B. Substantial Evidence Supports the Denial of Jones's *Batson/Wheeler* Motion as to Mr. H and Ms. E

The parties agree “this is a step three case,” requiring us to analyze “whether the trial court properly accepted the race-neutral reasons given by the prosecutor.” (*People v. Mai* (2013) 57 Cal.4th 986, 1050.) We conclude the prosecutor offered plausible and race-neutral reasons for excusing Mr. H. (*People v. Banks* (2014) 59 Cal.4th 1113, 1148.) Mr. H was young and unemployed, suggesting he lacked a stake in the community. “Youth and a corresponding lack of life experience can be a valid race-neutral basis for a peremptory challenge. [Citation.]” (*People v. Gonzales* (2008) 165 Cal.App.4th 620, 631; see also *People v. Trinh* (2014) 59 Cal.4th 216, 242 [prosecutor's decision to challenge prospective juror based on his occupation was not pretextual]; *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [“[l]imited life experience is a race-neutral explanation”]; *Stubbs v. Gomez* (9th Cir. 1999) 189 F.3d 1099, 1106 (*Gomez*) [“employment status and personal history are race-neutral reasons for striking a juror”].)²

² Mr. H slept during voir dire, seemed unenthusiastic about serving on a jury, and gave terse responses to the prosecutor's questions, all of which would have supported a peremptory challenge. (See *Gomez, supra*, 189 F.3d at p. 1105 [passivity and

We reach a similar conclusion regarding Ms. E. The prosecutor offered a plausible and race-neutral reason for excusing Ms. E: she appeared reluctant to use circumstantial evidence, which the prosecutor intended to offer to establish Jones’s intent to commit the charged crimes. (See *People v. Williams* (2013) 56 Cal.4th 630, 656.) We are not persuaded by Jones’s claim that the prosecutor’s reason was pretextual because she “did not even mention the hypothetical to at least five of the jurors who were selected.” The prosecutor discussed the use of circumstantial evidence with almost every juror she questioned, using a “rain” hypothetical or “Target” hypothetical.

Comparative juror analysis does not — as Jones contends — demonstrate the prosecutor’s reasons for challenging Mr. H and Ms. E were pretextual. (*Hensley, supra*, 59 Cal.4th at p. 803.) “[F]or a comparison to be probative, jurors need not be identical in all respects, [citation] but they must be materially similar in the respects significant to the prosecutor’s stated basis for the challenge.” (*People v. DeHoyos* (2013) 57 Cal.4th 79, 107.) Jones contends Juror No. 53 was seated on the jury despite being “single and unemployed[.]” Jones is correct, but any similarity between Mr. H and Juror No. 53 ends there. Juror No. 53 was 10 years older than Jones and had graduated from college and volunteered for a police-based after school program. Juror No. 53 also believed a police officer’s testimony had “more credibility” than the “testimony of an ordinary citizen[.]”

Nor are we persuaded by Jones’s claim that Juror No. 114 was “almost exactly the same” as Mr. H. Juror No. 114 was young and single, but had lived in Contra Costa County with his parents for his entire life, had worked for a family business, and played in a band with high school friends. Unlike Mr. H, Juror No. 114 had a stake in the community, making him a favorable juror for the prosecution. Jones’s proposed comparative juror analysis does not establish the prosecutor’s reasons for excusing Mr. H and Ms. E were pretextual. (*Ibid.*; *People v. Watson* (2008) 43 Cal.4th 652, 675-676.)

inattentiveness are “valid, race-neutral explanations for excluding jurors”]; *People v. Booker* (2014) 51 Cal.4th 141, 166 [denial of *Batson/Wheeler* motion upheld where prospective juror gave “less than forthcoming responses” on juror questionnaire and was reluctant to discuss certain matters during voir dire].)

We conclude the court properly denied Jones’s *Batson/Wheeler* motions as to Mr. H. and Ms. E.

II.

The Court Did Not Err by Admitting Jones’s Prior Sexual Batteries

Jones contends the court erred by admitting evidence of his sexual batteries of T.B. and B.C.

A. Background

Before trial, the prosecution moved in limine to call T.B. and B.C. as witnesses pursuant to Evidence Code section 1108.³ Defense counsel indicated she intended to argue Doe’s acts were voluntary, but claimed the evidence was more prejudicial than probative under section 352 because the prior sexual batteries were “extremely remote” and the “issues are quite different. . . . [T]his case . . . took place at night, in the dark, with a stranger[,]” whereas the incident with T.B. and B.C. “happen[ed] at school during the day with the same aged individuals.” Defense counsel also argued the gender of the victims was different.

The prosecution argued the prior sexual batteries were not “too remote” and there were “significant and pertinent similarities” between the incidents. According to the prosecutor, the incidents: (1) involved teenagers, showing Jones had “a propensity to violate young teenage victim[s;]” (2) the “area of the touching” was similar because Jones touched the buttocks of all three victims; (3) Jones came up from behind T.B. and simulated having sex from behind, the same type of conduct Jones engaged in with Doe; and (4) the victims were unwilling participants. The court admitted the prior sexual batteries pursuant to sections 1101 and 1108.

³ Unless noted, all further statutory references are to Evidence Code. Before a mistrial was declared in Jones’s first trial, the judge admitted evidence of Jones’s sexual batteries of T.B. and B.C., concluding the evidence was relevant and admissible because Jones claimed “this was a voluntary act by the victim[,]” rendering Doe’s credibility “the central issue in the case.” The trial judge in Jones’s second trial “deferred” to the first judge’s ruling and “adopt[ed]” it.

B. The Court Did Not Err by Admitting the Evidence Pursuant to Section 1108

Jones contends the court erred by admitting evidence of “decade-old incidents of sexual battery” pursuant to section 1108 because the prior incidents were remote and “totally dissimilar.” Section 1108 makes admissible any evidence of a defendant’s uncharged sexual misconduct if the evidence is admissible under section 352. (§ 1108, subd. (a); *People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.)⁴ To determine whether evidence is admissible pursuant to section 1108, the court must “consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission. . . .” (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.) We review the ruling admitting the prior sexual batteries pursuant to section 1108 for abuse of discretion. (*People v. Story* (2009) 45 Cal.4th 1282, 1295.)

Here, the court did not abuse its discretion by admitting the evidence pursuant to section 1108. The prior sex offenses were similar: the victims were the same age and the incidents involved Jones touching the victim’s private areas, including their buttocks, against their will. Jones also threatened all three victims. That the prior sex offenses took place in a different setting and against victims of a different gender does not demonstrate the court’s ruling was an abuse of discretion. As our high court has explained, similarity is a relevant — but “not dispositive” — factor under section 1108. (*People v. Merriman* (2014) 60 Cal.4th 1, 42 (*Merriman*).)

⁴ Section 352 provides: “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.”

We are not persuaded by Jones’s claim that the prior sexual batteries were too remote. “No specific time limits have been established for determining when an uncharged offense is so remote as to be inadmissible.” [Citation.] “[S]ubstantial similarities between the prior and the charged offenses balance out the remoteness of the prior offenses. [Citation.]” [Citation.]” (*People v. Robertson* (2012) 208 Cal.App.4th 965, 992 (*Robertson*)). We conclude 11 years not too remote. “Numerous cases have upheld admission pursuant to . . . section 1108 of prior sexual crimes that occurred decades before the current offenses.” (*Id.* at p. 992 [no error in admitting 34-year-old prior sexual assault conviction]; see also *People v. Pierce* (2002) 104 Cal.App.4th 893, 900 [sex crime committed 23 years before current crime was admissible]; *People v. Branch* (2001) 91 Cal.App.4th 274, 284 [upholding admission of a sex crime committed 30 years before charged offense]; *People v. Waples* (2000) 79 Cal.App.4th 1389, 1395 [“20 years is not too remote” under section 1108].)

We reject Jones’s claim that the evidence was unduly prejudicial under section 352. The evidence was harmful to Jones, but it was not prejudicial in the sense it would confuse the jury or cause it to decide the case on an improper basis. (See *People v. Walker* (2006) 139 Cal.App.4th 782, 806.) Jones’s reliance on *People v. Jandres* (2014) 226 Cal.App.4th 340 (*Jandres*) does not alter our conclusion. In that case, the defendant was charged with raping an 18-year-old woman. (*Id.* at p. 356.) The appellate court held the prejudicial value of evidence of a prior crime where the defendant placed his finger in the mouth of an 11-year-old girl substantially outweighed its “low probative value” under section 352 because of the “many differences” between the incidents, “including the circumstances (daytime attempted burglary in one case, possible stalking and attack at night in the other); the ages of the victims (11 and 18); and the nature of the conduct (inappropriate touching of the mouth in one case, rape in the other) . . .” (*Id.* at pp. 356-357.) *Jandres* does not assist Jones. Unlike the offenses in *Jandres*, the prior sexual batteries here were sufficiently similar in several respects to the charged offenses.

Jones “has failed to carry his burden of rebutting the strong presumption of admissibility of the sexual assault crimes evidence under . . . section 1108.” (*Merriman*,

supra, 60 Cal.4th at p. 42.) The admission of evidence of the sexual batteries on T.B. and B.C. pursuant to section 1108 was not an abuse of discretion. (*People v. Holford* (2012) 203 Cal.App.4th 155, 186.) We also reject Jones’s claim that the admission of the evidence violated his due process rights and rendered his trial fundamentally unfair. (*Robertson, supra*, 208 Cal.App.4th at p. 994.) Having concluded the court did not err by admitting evidence of the prior sexual batteries, we need not address the parties’ other arguments regarding the evidence.

III.

The Court Did Not Err by Admitting T.P. and Officer Soto’s Rebuttal Testimony

Jones contends the court erred by admitting “improper and prejudicial rebuttal testimony[.]”

A. Background

On direct examination, Jones admitted threatening T.P., his then girlfriend, in 2007. On cross-examination, Jones admitted he was angry at T.P. and threatened to kill her and throw her out the window if she did not open the door, but he denied kicking down her front door. On direct examination, Jones admitted resisting a police officer and giving false information to a police officer in 2008. On cross-examination, the prosecutor asked Jones whether he had assaulted two police officers in 2008 and the following colloquy occurred:

“[Jones]: When you say assaulted, it kind of makes—sounds like I’m trying to beat them up. I was just trying to deter him from handcuffing me.

“[Prosecutor]: You gave one a bloody nose and sent them to the hospital, would that fall within your definition of assault . . . ?

“[Jones]: I don’t recall giving him a bloody nose. I didn’t know he did that until the officers told me everything was done.

“[Prosecutor]: You don’t recall fighting police officers in 2008?

“[Jones]: I recall resisting. But when you say fighting, I see that as me and another man is going toe to toe.” When the prosecutor asked Jones whether he had

“caused injury to a second officer and landed him in the hospital,” Jones replied: “What do you mean by ‘caus[ing] him injury?’”

Outside the presence of the jury, the prosecutor requested permission to call T.P. as a rebuttal witness and made an offer of proof that “contrary to what Mr. Jones testified . . . to the jury, that [Jones] in fact did bash her front door down and then . . . the police were called and showed up.” The court overruled defense counsel’s objection and concluded the prosecution was entitled to impeach Jones’s testimony denying kicking down T.P.’s front door. The court also allowed the prosecutor to call Officer Soto as a rebuttal witness over defense counsel’s objection.

B. The Court Did Not Err by Admitting the Rebuttal Testimony

Jones contends the court erred by admitting T.P. and Officer Soto’s rebuttal testimony because it “did not rebut anything.” “Prosecution rebuttal evidence must tend to disprove a fact of consequence on which the defendant has introduced evidence. [Citation.] The scope of rebuttal evidence is within the trial court’s discretion, and on appeal its ruling will not be disturbed absent “‘palpable abuse.’” [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1088.)

T.P. and Soto’s testimony was proper rebuttal evidence. “[R]ebuttal testimony . . . may be proper when it is offered as impeachment to meet evidence on a point put in dispute, i.e., specific statements of fact to which the defense has testified.” [Citations.]” (*People v. Senior* (1992) 3 Cal.App.4th 765, 778 (*Senior*)). In *Senior*, the appellate court upheld the admission of rebuttal testimony where the defendant’s “answers on direct examination put in issue whether he had ever used force or threats.” The *Senior* court concluded it “was proper to impeach his categorical, blanket denials of threats with evidence of a threat made the same day he denied having threatened the victim with bashing her head and hurting her” (*Ibid.*) Here as in *Senior*, Jones admitted threatening T.P., but he denied kicking down her front door. This denial made evidence that Jones forced his way into T.P.’s apartment and damaged her front and interior doors relevant. (*People v. Mayfield* (1997) 14 Cal.4th 668, 762.) The same is true with respect to Officer Soto’s testimony. On direct and cross-examination, Jones admitted resisting

arrest but denied fighting with or assaulting the officers and claimed he could not recall bloodying Officer Soto's nose or injuring a second police officer. Officer Soto's rebuttal testimony was "made necessary" by Jones's purported inability to recall the circumstances of the altercation. (*People v. Young* (2005) 34 Cal.4th 1149, 1199; *Senior, supra*, 3 Cal.App.4th at p. 778.)

Additionally, the rebuttal testimony was relevant to assess Jones's credibility after he denied kicking down T.P.'s door and fighting with Officer Soto and bloodying his nose. (*People v. Morrison* (2011) 199 Cal.App.4th 158, 165 (*Morrison*).) A "defendant who chooses to introduce false or misleading evidence of his credibility risks prosecution rebuttal of that evidence by proof of relevant specific acts of his conduct." (*People v. Lankford* (1989) 210 Cal.App.3d 227, 240; *Senior, supra*, 3 Cal.App.4th at p. 779 [rebuttal evidence of the "defendant's threat was probative of his credibility as a witness"].)

Jones claims the court should have excluded the rebuttal evidence under section 352. We disagree. The rebuttal evidence here may have called Jones's credibility into question, but it did not "'uniquely tend[] to evoke an emotional bias against [him], while having only slight probative value with regard to the issues.' [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 124.) The circumstances of Jones's altercations with T.P. and Officer Soto were far less inflammatory than the current charges and were directly relevant to Jones's credibility. (*Morrison, supra*, 199 Cal.App.4th at p. 165.)

III.

Jones's Prosecutorial Misconduct Claim Fails

Jones contends his conviction should be reversed because the prosecutor committed misconduct by making five "misstatements of facts in her closing argument[.]" "[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666.)

“““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.’ [Citation.] When a claim of misconduct is based on the prosecutor’s comments before the jury . . . “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument. [Citation.]” [Citation.] A failure to timely object and request an admonition will be excused if doing either would have been futile, or if an admonition would not have cured the harm.’ [Citation.]” (*People v. Adams* (2014) 60 Cal.4th 541, 568-569 (*Adams*).

A. In Four of the Five Instances, the Prosecutor Did Not Err

(1) In her closing argument, the prosecutor described Dr. Carpenter’s testimony, claiming Dr. Carpenter testified he “had experience with thousands of SART exams and he’s had experience with thousands of forcible anal intercourse SART exams. [He’s] had experience with thousands of kids through his clinical work at juvenile hall.” Defense counsel objected, claiming Dr. Carpenter “never testified he did thousands of exams at juvenile hall.” In response, the court told the jury, “you will decide what the testimony was to the extent that counsel’s recitation of what the evidence shows is not what you individually or collectively remember, it’s your decision on that count. [¶] So this is a human endeavor here. Once in a while the attorney may misrecollect the precise evidence. And if they do, it’s your job to decide what the evidence was and then base your decision on that evidence, even if the human involved in the closing argument ha[s] made a mistake.”

On appeal, Jones contends the prosecutor misstated Dr. Carpenter’s testimony because Dr. Carpenter did not testify “all” of the SART examinations “involved forcible

anal intercourse.” Reviewing the prosecutor’s statements in context, we conclude the prosecutor did not err. (*People v. Dennis* (1998) 17 Cal.4th 468, 522 (*Dennis*).) “A prosecutor . . . enjoys wide latitude in commenting on the evidence, including urging the jury to make reasonable inferences and deductions therefrom.” (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 95.) Dr. Carpenter testified he had conducted thousands of SART examinations and had reviewed thousands of SART examinations performed by others. As a pediatrician, Dr. Carpenter had examined thousands of pubescent 13-year-old boys, and examined hundreds of teenagers at juvenile hall. Given the great number of exams Dr. Carpenter had conducted or reviewed, it is not unreasonable to infer those involving forcible anal intercourse could have reached the thousands. There was no prosecutorial error. (*People v. Hamilton* (2009) 45 Cal.4th 863, 941.)

(2) In rebuttal argument, the prosecutor argued Jones’s “credibility is extremely important” and noted Jones “denied that he caused any damages to [T.P.]’s door. Again, another small lie, but it’s a lie. He’s trying to distance himself.” The court overruled defense counsel’s objection that the prosecutor misstated the evidence, stating: “[t]he jury will decide what the facts are.” The prosecutor then argued Jones “lied about causing damage to the front door.” On appeal, Jones claims the prosecutor misstated his testimony because he did not lie — he merely claimed he did not kick in T.P.’s door, and was not asked if he slammed or punched a door. Although Jones denied kicking down T.P.’s front door, his testimony created the inference he had not damaged her door at all. T.P.’s rebuttal testimony demonstrated Jones *did* damage her front and interior apartment doors. Accordingly, the prosecutor’s remarks “constituted fair comment on the evidence and fell within the permissible bounds of argument.” (*Adams, supra*, 60 Cal.4th at p. 571; *People v. Stanley* (2006) 39 Cal.4th 913, 952-953.)

(3) In rebuttal argument, the prosecutor argued Jones was “not [] truthful on the stand” because he “tried to minimize or downplay his assault on two police officers. He said he did not know that he gave Officer Soto an injury. [¶] You heard what happened. Officer Soto said he deliberately was throwing elbows, took off running. . . . [W]hen he arrested him, Officer Soto ha[d] a bloody nose and he’s escorting the

defendant to a car. There is no way the defendant didn't see the blood coming down off of Officer Soto's face." On appeal, Jones contends the prosecutor misstated evidence because he "generally did admit to his prior conduct and accepted responsibility." This argument fails for two reasons. First, defense counsel did not object to this alleged misstatement, and "[n]othing suggests an objection would have been futile or an admonition inadequate to cure any harm." Thus, Jones has forfeited this claim of prosecutorial error. (*Adams, supra*, 60 Cal.4th at p. 569.) The argument also fails on the merits. The prosecutor's comments were an accurate description of the evidence because Jones refused to admit he fought with or assaulted the officers and testified he did not recall giving Officer Soto a bloody nose. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.)

(4) In rebuttal, the prosecutor argued Doe showered "[e]very other day." The court overruled defense counsel's objection that the prosecutor misstated the testimony and instructed the jury: "You are the ultimate fact finders here. You get to decide whether [the prosecutor] stated the evidence or misstated the evidence or they both have misstated the evidence on the same fact. [¶] . . . [Y]ou get to decide what the facts are to the extent that the attorneys have mischaracterized the fact, then you recognize that fact and you decide what the facts are and make your decision based on your determination of facts, not what the attorneys have [argued]." On appeal, Jones contends the prosecutor misstated testimony because Doe testified he showered "most days," not every other day. We are not persuaded. The prosecutor's statement that Doe showered "[e]very other day" was a permissible inference from Doe's testimony that he showered "most days." (*Dennis, supra*, 17 Cal.4th at p. 522.)

B. Jones Was Not Prejudiced by the Prosecutor's Single and Minor Misstatement of Fact

During closing argument, the prosecutor stated: "[B.C.] . . . told the police officer when she was 13-years old . . . the defendant threatened to . . . have sex with her [] in the bushes on the way home from school." The court overruled defense counsel's objection that the prosecutor referred to a matter not in evidence. On appeal, Jones contends the

prosecutor misstated testimony because “the officer did not testify to anything . . . [B.C.] may have told him.” We agree. There was no evidence in the record about what B.C. told a police officer. T.B. testified she saw Jones trying to grab B.C.’s breast area; Jones admitted he had groped T.B., told her that he was going to rape her, and had done “similar things” to B.C. “[C]ounsel may not . . . state facts not in evidence [citation] or mischaracterize the evidence. [Citation.]” (*People v. Tafoya* (2007) 42 Cal.4th 147, 181, quoting *People v. Valdez* (2004) 32 Cal.4th 73, 133.)

The prosecutor’s misstatement of this immaterial fact, however, did not prejudice Jones for two reasons. First, the evidence against Jones was overwhelming: Doe told his father’s roommate, the police, the SART nurse, and the jury that Jones sexually assaulted him and that he complied with Jones’s demands because he was afraid Jones might kill him if he did not. Doe’s father’s testimony corroborated Doe’s description of the incident. Additionally, the medical evidence was consistent with Doe’s report of forcible sexual assault and Dr. Carpenter testified Doe’s injuries — “the worst anal injuries” he had seen in his 32 years of practice — were consistent with forceful and nonconsensual penetration. Finally, the defense’s own expert, Dr. Rosas, conceded Doe’s injuries were consistent with his description of the incident.⁵ Jones’s testimony that the sexual acts were consensual was not persuasive, particularly in light of the evidence he had threatened and sexually battered other victims.

Second, there is not ““a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*People v. Friend* (2009) 47 Cal.4th 1, 29.) The court repeatedly instructed the jury that nothing the attorneys said — including during closing arguments — was evidence. (*People v. Montes* (2014) 58 Cal.4th 809, 870 (*Montes*); CALCRIM No. 222.) We presume the jury understood and followed these instructions. (*People v. Osband* (1996) 13 Cal.4th 622, 714.) Under the circumstances, any prosecutorial error was harmless because Jones

⁵ Although there was no trial testimony about what B.C. told a police officer, there was testimony B.C. spoke to a police officer and Jones’s admission that he had done “similar things” to B.C., i.e., threaten to rape her.

would not have received a more favorable outcome absent the prosecutor’s minor misstatement. (*Montes, supra*, 58 Cal.4th at p. 870 [defendant not prejudiced by “prosecutor’s brief reference to a fact outside the record”].)⁶

IV.

The Court Did Not Err by Imposing Consecutive Sentences on Counts 6 Through 9

Jones’s final contention is the court erred by imposing consecutive sentences on Counts 6 through 9, which alleged forcible lewd acts against a child in violation of Penal Code section 288, subdivision (b)(1). At the sentencing hearing, the court explained its decision to impose consecutive sentences: “The Court makes a finding specifically under the provisions of [Penal Code sections] 667.61 and 667.6,⁷ that these four offenses were, although in one sense close in time, separated sufficiently in time to indicate that Mr. Jones had the opportunity to reflect upon and consider his conduct and, nevertheless, decided that he was going to commit each of those four separate offenses which involved actual separate and distinct conduct committed upon the body of the victim here. [¶] So the Court’s view is that the incidents involved a decision making process of on Mr. Jones’ part which would then require that the sentences be consecutive.” Defense counsel did not object.

⁶ We reject Jones’s cumulative error claim. (*People v. Thomas* (2011) 51 Cal.4th 449, 508.)

⁷ Penal Code section 667.61 mandates an indeterminate sentence of either 25 years or 15 years to life when a defendant is convicted of certain forcible sex offenses committed under specific aggravating circumstances. (Pen. Code, § 667.61, subds. (a), (b).) Under Penal Code section 667.6, a defendant convicted of multiple sex offenses against the same victim on the same occasion must be sentenced to consecutive terms for each violation “if the crimes . . . involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.” (Pen. Code, § 667.6, subd. (d).)

Jones contends the court erred by declining to impose concurrent sentences on Counts 6 through 9 because his acts did not “occur on ‘separate occasions.’” We address the claim on the merits, and reject it. “Once a trial judge has found under [Penal Code] section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, [the reviewing court] may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his assaultive behavior. [Citations.]” (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092 (*Garza*).

The record supports the court’s conclusion that Jones had a reasonable opportunity to reflect after completing each sexual assault on Doe. “[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.” (*People v. Jones* (2001) 25 Cal.4th 98, 104.) First, Jones crawled on top of Doe and sucked Doe’s penis for one to two minutes. Next, Jones repositioned himself, put his penis in Doe’s face, and forced Doe to orally copulate him by pulling Doe’s head up and down and telling Doe to do it “before I hurt you.” After these two acts of forcible oral copulation, Jones stood up and flipped Doe onto his stomach. Jones spit on his hand and on Doe’s rectum and penetrated Doe’s rectum with his penis three to four times, despite Doe’s cries of pain. Finally, Jones digitally penetrated Doe’s anus, to “loosen [it] up.”

Here, the court reasonably concluded the two acts of forced oral copulation were separate and distinct acts requiring consecutive terms under Penal Code section 667.6, subdivision (d). Jones had a reasonable opportunity to reflect between the time he orally copulated Doe and then — after repositioning himself — compelled Doe to orally copulate him by threatening him and pulling his hair. In addition, the second act of forced oral copulation was not the same as the first and necessarily required more than a change of position: it was a separate and discrete act in which Jones shifted from committing the act to being the recipient of the physical act. The court could also reasonably conclude Jones had an opportunity to reflect before and after sodomizing Doe.

After the forced oral copulation, Jones stood up, flipped Doe onto his stomach, and penetrated Doe's anus. Then Jones digitally penetrated Doe's anus to "loosen [it] up."

Under the circumstances and in light of the deferential standard of review, we reject Jones's contention that the court erred by imposing consecutive sentences on Counts 6 through 9. (*Garza, supra*, 107 Cal.App.4th at p. 1092; *People v. Plaza* (1995) 41 Cal.App.4th 377, 384 [sexual assaults occurred on "separate occasions" although all of the acts took place in the victim's apartment, with no break in the defendant's control over the victim]; *People v. King* (2010) 183 Cal.App.4th 1281, 1325 [a "finding that the defendant committed the sex crimes on separate occasions 'does not require a change in location or an obvious break in the perpetrator's behavior'"].)

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.