

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID EUGENE BOTELLO,

Defendant and Appellant.

D059714

(Super. Ct. No. RIF140429)

APPEAL from a judgment of the Superior Court of Riverside County, Craig G. Reimer, Judge. Affirmed in part, reversed in part and remanded with directions.

A jury convicted David Eugene Botello of first degree burglary (Pen. Code,¹ § 459; counts 1 & 4), forcible rape (§ 261, subd. (a)(2); count 2), oral copulation by force (§ 288a, subd. (c)(2); count 3), and assault with the intent to commit rape (§ 220; count 5). The jury found true knife-use allegations under sections 12022, subdivision (b) as to counts 1, 3, 4 and 5, and under 12022.3, subdivisions (a) and (b) as to counts 2 and 3. It

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

also found true allegations that Botello committed counts 2 and 3 during a residential burglary (§ 667.61, subd. (e)(2)), and that in the commission of those counts, he entered an inhabited dwelling house with intent to commit a violent sex offense (§ 667.61, subds. (c) & (d)(4)).

The trial court sentenced Botello to an indeterminate term of 26 years to life, consisting of 25 years to life on count 2, a concurrent 25-year-to-life term on count 3, and a consecutive term of life without the possibility of parole on count 5 plus one year for the knife allegation. It imposed a total determinate term of eight years eight months, consisting of a six-year upper term plus one year for the knife use on count 1 and a consecutive one-year four-month midterm plus four months for the knife use on count 4. The court then stayed under section 654 the sentences on counts 1 and 4 and their accompanying enhancements. It ordered that Botello pay restitution and imposed various fines and fees, including a \$110 jail "booking fee" under Government Code section 29550.

On appeal, Botello contends he was denied due process and a fair trial as a result of the trial court's "systematic pattern" of hostility and lack of judicial temperament, which he asserts undermined his counsel and gave the appearance of bias toward the prosecution. He contends his counsel was prejudicially ineffective because he exhibited erratic and forgetful behavior, made frivolous motions, failed to object to the trial court's untoward commentary, and acted unprofessionally. Botello further contends he was prejudiced, and his counsel rendered ineffective assistance, regarding admission of testimony by a Sexual Assault Response Team (SART) nurse. Botello maintains the

cumulative impact of these errors requires reversal of all of his convictions. Finally, Botello challenges his sentence on count 5 and imposition of the booking fee.

We agree Botello's sentence on count 5 must be vacated and the matter remanded for resentencing, as the factual predicate for a conviction under section 220, subdivision (b)—that the assault with the intent to commit rape was committed in the commission of a residential burglary—was neither alleged in the amended information nor found by the jury beyond a reasonable doubt. We otherwise affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Offenses Against Rebecca Doe

Early in the morning on June 21, 2007, Rebecca Doe² was in her Riverside apartment after picking up her six-year-old son from a babysitter's house. She was sitting on the floor applying makeup when she saw a man wearing a black hat, sunglasses, a black T-shirt and tan khaki shorts walking down her hallway. She had not locked the front door because she was planning to leave about ten minutes later to take her son to school. Rebecca asked the man what was up and who he was, then he put a hand over her mouth and told her to "shh." She saw that in his right hand he had a large pocket-type serrated knife with about a three-inch blade. The man motioned for her to get up, move over to her bed and turn around. The man pulled down her pants, had her turn around again to face him, orally copulated her, then raped her. When he was done, he got up, whispered for her to turn around again and he left.

² For clarity and intending no disrespect, at times we refer to Rebecca Doe and Norma Doe by their first names.

Rebecca went to check on her son in his room, and eventually saw the man had taken her wallet and cell phone from her purse. She took her son to school, went to work and entered her supervisor's office, hysterical. Her supervisor called police. Rebecca later went to the Riverside County Medical Center where they did a rape test. Though there was a police station next to her workplace, she did not go there.

On cross examination, Rebecca admitted that when she left her apartment, she asked someone, "Did you see anyone leave? He took my cell phone and he took my money." She testified she had become familiar with a place called Q Bonkers that was a pool hall on a street called Magnolia, though she had never been there. Rebecca learned of the place through her discussions with a representative from the District Attorney's office. She denied partying, drinking or smoking methamphetamine with Botello there. She denied being a methamphetamine user. When police spoke with her that day, she told them her son was in his bedroom playing video games when the rape happened. She agreed she had possibly testified earlier that she did not want her son to see her involved intimately with someone. On redirect examination, Rebecca denied exchanging numbers with or meeting Botello before that day, and recalled that as she left her apartment with her son, she mentioned "something had happened."

Rebecca's work supervisor testified that when Rebecca arrived that morning, she was "quite hysterical," disheveled, crying very loud and screaming that something just happened to her; that she had been raped. The supervisor asked Rebecca why she had not called police herself, and she told him it was because the assailant took her phone. He

called 911 and got a female manager to help console Rebecca. It took between 25 and 35 minutes, and three calls to 911, to finally get police out.

Offenses Against Norma Doe

On the morning of October 9, 2007, Norma Doe was cleaning her Fontana apartment where she lived with her husband and two children. Only she and her two-year-old son were home that morning as her husband was at work and she had already taken her other son to school. At about 9:00 a.m., she and her son started walking back and forth from the laundry room at the apartment complex to do laundry. The last time they went there, she saw Botello walk past her headed in the direction of her apartment. He was wearing light brown shorts and a black hat with a white T-shirt. Norma returned to her apartment at about 10:30 or 10:40 a.m. and closed but did not lock the front door. She started folding her clothes in the bedroom when she saw a shadow, turned around and saw Botello in the bathroom with a knife raised in his hand. The knife had about a four-inch blade. She started screaming and he came running at her, telling her not to scream. He told her to turn around on the bed and grabbed her with his left hand. Botello told her to do what he said, but according to Norma she did not listen. She started arguing and maneuvered so he would not put his hands on her and tried to push him away. While they struggled, her son came over, saw Botello, started screaming and returned to the living room.

Norma thought Botello, whom she had never met, was going to rape or kill her. She testified that he was grabbing her face, cheeks and chin, telling her not to scream, while he was pushing her toward the bed. Norma lied and told Botello her husband was

on his way back from work, but Botello did not respond. He finally told her to get her son so he would stop screaming, but she ran to the living room, covered her face and started screaming herself. Botello ran from the apartment. At 11:30 a.m., Norma called police. Afterwards, she called her sister and then her mother, but not her husband because he was at work. Norma identified Botello in a photographic lineup a couple of days later.

Norma did not know whether Botello was watching her that morning. She denied meeting him that morning and inviting him into her apartment for any reason. She denied that she made up her testimony in fear of telling her husband that she had invited Botello to her apartment. An investigating police officer who interviewed Norma that day described her as upset, distraught, disheveled and near tears.

Testimony of SART Nurse

Gloria Davis, a registered nurse and nurse practitioner at the Riverside County Regional Medical Center, testified that on June 21, 2007, she assisted in a SART examination of Rebecca. She had been conducting SART exams since 2004, and estimated she had conducted over 300. She conducted Rebecca's exam with a new examiner trainee. Davis obtained a history about what happened, asking whether Rebecca had intercourse within the past five days, whether she had ingested any drugs, and whether she had used the restroom. Rebecca reported that her attacker was unknown and had used a knife. She reported oral copulation and penile vaginal penetration.

Davis and the other examiner conducted a physical exam and took evidence via vaginal, cervical and other swabs. Rebecca had some external abrasions on her vaginal

entry that were visible using toluidine blue, which Davis testified based on her training and experience could be caused by both sexual assault and consensual sexual activity. They collected some whitish debris on Rebecca's vulvar area. They also collected blood and urine samples.

According to Davis, about 70 percent of her exams resulted in no physical findings, but Rebecca's exam was in the 30 percent with findings. She testified, based on her training and experience and handling of over 300 exams, that when a patient described an assault that did not turn very violent because they acquiesced, she would expect no physical findings. Davis concluded based on the exam and Rebecca's history, the history was consistent with the SART examination.

On cross-examination, Davis testified that she based her conclusion on the patient's history—what the patient told her—and her findings. She noted that Rebecca had urinated and wiped with toilet tissue, which was flushed. Rebecca reported she had no pain or bleeding at the time. The other examiner had noted Rebecca's clothing was intact when she arrived, and she was cooperative and calm during the exam. She wrote on the report as to the conduct of the physical exam that there were "no findings." She also wrote a notation that the exam was "within normal limits."

Davis explained that no blood or urine toxicology was performed on Rebecca because Rebecca had not reported any voluntary alcohol or drug use. Davis testified that in 2007, the County of Riverside's policy was not to perform toxicology in such a case, although the procedure had changed since that time to require examiners to routinely collect such samples regardless of the patient's report. Davis agreed the toxicology

procedure was dependent on Rebecca's history and what she reported. On redirect examination, Davis testified that as to cases in which there were no findings, that circumstance did not mean the patient was not raped or that it was consensual sexual activity.

A senior criminalist testified that DNA from a cheek swab taken from Botello matched the vaginal swab taken from Rebecca. Botello's palm print was found on the countertop in Norma's bathroom.

Defense Case

Botello testified in his defense. Around the time of the incident with Rebecca Doe, he was living on the streets and supporting himself by stealing and selling drugs. Botello claimed that his friend Raphael Woodard introduced him to Rebecca at the pool hall Q Bonkers in 2007, where he and she socialized and exchanged phone numbers. He testified he and Rebecca went back to her apartment for two or three hours, "fooled around," and smoked his methamphetamine that he agreed to share. At about 8:00 p.m. on the night of the incident, Rebecca had called him to ask if he could pick up a quarter ounce of methamphetamine for her. He entered her apartment complex at about 2:30 or 3:00 a.m. after following someone through the car gate, walked up to her apartment, knocked on the door and she let him in. Botello testified they hung out, had consensual sex, and at about 5:30 or 6:00 a.m. she gave him \$220 for him to pick up the drugs for her. He left with the money but did not return. Instead, he picked up his girlfriend. Botello denied raping Rebecca, brandishing a knife, sneaking into her apartment, hiding

in her complex, or stalking her. He stated he did not encounter anyone in the apartment complex when he left that morning.

Botello testified that he met Norma Doe in the laundry room at her apartment building. At the time, he was living with his mother after he had cleaned himself up and found a job. He had gone to the apartments to steal some tires for his car. He and Norma talked to each other for about 15 minutes, and Botello tried to "hit on her," though she told him she was married. They eventually went to her apartment and she invited him in. He denied assaulting her, brandishing a knife, engaging in a physical struggle, or trying to rape her. He went into her bathroom and drank out of the faucet. Botello testified they were kissing when she received a text from her husband, and she asked him to leave. She appeared upset about the text, and he left, jogging out the front door. He denied that Norma was screaming and yelling. Botello admitted he carried a multi-tool Swiss knife, but not a steak knife either on his person or in his car.

Botello testified that after he was interviewed at the Fontana Police Department, he willingly gave a cheek swab to police.

Woodard, who claimed to be best friends with Botello, testified that he and Botello frequented Q Bonkers to play pool and drink beer. Woodard testified that in June 2007, he and Botello met a "certain female." According to Woodard, she and Botello became friends and left together that night. He denied the woman and Botello were drinking or smoking methamphetamine that night. He stated that a private investigator, Shelly Carroll, showed him a series of photographs and he identified either person No. 6 or No. 3.

On cross-examination, Woodard agreed that his lifestyle involved crime and drugs while he was friends with Botello. They both used methamphetamine, and Woodard admitted he was a daily user of that drug for eight years, since age 18. As of the time of trial he had only been sober for two months. Woodard had been convicted of petty theft and of possession for sale of methamphetamine. He was convicted of grand theft auto in August 2007, pleaded guilty to stealing a vehicle in October 2007, and was convicted of receiving stolen property. After receiving his fifth felony conviction, he went to prison. Woodard admitted that the first time investigators talked to him, he told them he had "no idea what they were talking about." He agreed his recollection would have been fresher in 2008 than in 2009, and testified that between that time, the defense investigator told him that he and Botello were at the pool hall. Woodard then testified he introduced Botello to the female at a place called Joe's Bar and Grill; that he wasn't sure at which of the two establishments he introduced them. He admitted that when he was interviewed by Carroll in prison, he probably pointed to No. 4 on the photographic lineup, but that picture Nos. 3 and 6 looked familiar at the time. He also admitted he was scared the first time Carroll interviewed him, and when she interviewed him again a year later in 2009, she had to actually tell him he had introduced Rebecca to Botello. He then testified he could not remember whether Botello and the female left together on the night they met, and did not even know the year the event occurred. Woodard agreed that he and Botello met many women at both Joe's Bar and Grill and Q Bonkers. He also agreed it was fair to say that his trial testimony was conflicting, that he gave different statements to Carroll about what happened, and that he was uncertain about many things.

Linda Hernandez, an employee at Q Bonkers, testified that in December 2009, a defense investigator interviewed her and showed her one picture of a person. Hernandez told the investigator that the woman might have been a customer. On the morning of her trial testimony, defense counsel showed Hernandez a photographic lineup, and Hernandez chose No. 3, the same person whose picture had earlier been shown to her by the investigator. On cross-examination, Hernandez testified that thinking back, she felt her answer to the investigator was incorrect, and she did not know whether or not the person depicted in the photograph had ever been in Q Bonkers. Hernandez admitted she felt she had been pressured to name somebody in the photographic lineup, and to say something that wasn't true. Contrary to the defense investigator's report, she never said she was "confident" that the woman in No. 3 was the woman that was in Q Bonkers.

The parties stipulated that none of the phone numbers Botello used at or about that time matched Rebecca's telephone records; the records did not show any text messages or telephone calls sent by Rebecca to any of the numbers.

DISCUSSION

I. *Judicial Misconduct or Bias*

Botello contends the trial court engaged in a "systematic 'pattern of judicial hostility' " toward his defense counsel, giving the appearance of favoring the prosecution and thereby denying him his rights to due process, a fair trial, and effective assistance of counsel under the state and federal Constitutions. Acknowledging his counsel did not object, he maintains any such objection would have been futile and most likely done more harm to him, or, alternatively, his counsel was prejudicially ineffective for failing to

object to the trial court's comments.

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237; see also *People v. Snow* (2003) 30 Cal.4th 43, 78 [failure to object or seek jury admonition regarding alleged judicial bias waives issue on appeal].) Though as we discuss below, we do not see invidious bias or misconduct on this record, the trial court at several points nevertheless invited defense counsel to raise objections and protect his client if he believed the court's conduct was inappropriate. For that reason, we will not apply principles of futility. (See *People v. Geier* (2007) 41 Cal.4th 555, 613-614, overruled on another point by *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 as indicated in *People v. Houston* (2012) 54 Cal.4th 1186, 1220.) Because Botello asserts any failure to preserve the issue constituted ineffective assistance of his counsel, however, we will exercise our discretion to review his claim of judicial misconduct on the merits.

A. *Legal Principles*

"[I]t is 'the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.' However, 'a judge should be careful not to throw the weight of his judicial position into a case, either for or against the defendant.' [Citation.] [¶] Trial judges 'should be exceedingly discreet in what they say and do in the presence of a jury lest they seem to lean toward or lend their influence to one side or the other.' [Citation.]

A trial court commits misconduct if it "persists in making discourteous and disparaging remarks to a defendant's counsel and witnesses and utters frequent comment from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge." (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1237-1238; accord, *People v. McWhorter* (2009) 47 Cal.4th 318, 373.) These principles cannot be overemphasized, as it is settled that "[j]urors rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Mahoney* (1927) 201 Cal. 618, 626-627.) Only one instance of judicial misconduct may constitute prejudicial error if egregious, particularly when the judge exhibits bias directly toward the defendant. (See, e.g., *People v. Byrd* (1948) 88 Cal.App.2d 188, 192; see also *People v. Perkins* (2003) 109 Cal.App.4th 1562, 1571-1573 [repeated questions of defendant by court sought to develop and amplify prosecution evidence in the manner of partisan advocacy amounting to prejudicial misconduct].) Nevertheless, a "trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias or misconduct. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.)

Appellate courts "determine the propriety of judicial comment on a case-by-case basis in light of its content and the circumstances in which it occurs." (*People v. Cash* (2002) 28 Cal.4th 703, 730.) "The role of a reviewing court 'is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect,

trial.' " (*People v. Harris* (2005) 37 Cal.4th 310, 347, quoting *People v. Snow*, *supra*, 30 Cal.4th at p. 78.)

B. The Cited Instances Do Not Constitute Prejudicial Judicial Misconduct

Botello argues the trial court continually admonished his counsel in front of the jury after engaging in unnecessary and discourteous commentary when faced with objections. He maintains the commentary was "completely unnecessary and degrading" and tended to portray his counsel as ignorant of law and procedure. We summarize the claims.

Botello first complains about the court's interjections during opening statements. For example, his counsel in opening statements represented that a drug sample had been lost, stating, "Now, would you bet your life on that? Would you bet David's life?" The trial court told counsel, "Keep in mind that I told the jury that this was going to be a preview of the evidence, not a preview of your closing argument. Confine yourself to describing the evidence that the jury is going to hear." After comments a few minutes later about discrepancies in the police report and Norma's story, defense counsel said, "So, what do we have? We have a prosecution's case that factually is not complete." Following an objection, the court stated: "Mr. Small, describe the evidence, not your characterization of whether it is strong or weak. If you can't comply with that, your opening statement will end right now." Counsel apologized, but then after a few more remarks, said, "We know that the police are going to say nothing about Norma having fought. So we have got a reasonable doubt about that." The court then said, "No, don't

describe what the doubts are, Counsel. Tell the jury what the evidence is going to be and what it is not going to be. Do not make your closing argument at the beginning of trial."

During Rebecca's testimony, Botello's counsel interposed a hearsay objection when the prosecutor asked whether she thought reading from the police report would help her refresh her recollection. The court responded, "There was testimony that she did not recall. The evidence is not being introduced. It's simply being used to refresh her recollection, so hearsay doesn't apply. [¶] Overruled." When defense counsel objected on grounds of speculation to the prosecutor's question as to why Rebecca did not go to her neighbors, the court responded, "Speculation for that person to tell us why she did or didn't do certain things? [¶] Overruled."³ Later, when the prosecutor asked Rebecca what she had been told by his office to do, defense counsel objected that the question opened up a privilege between "[t]he government and their case and their witness." The court stated, "There is no evidentiary privilege between a prosecutor and a witness. [¶] Overruled." Shortly after that, defense counsel objected to the prosecutor's use of another person's statement to refresh Rebecca's recollection. The court responded: "Counsel, someone can refresh their recollection from a rock, from a photograph, from a statement

³ At times, the court engaged in the same sort of commentary with the prosecutor, responding to the prosecutor's speculation objection by saying, "He's simply asking whether she knows that. It's yes or no. Overruled." On another occasion, the prosecutor objected on relevance grounds to a question about whether an officer had ever taken a drink from a bathroom faucet. The court permitted defense counsel to explain the relevance, but the prosecutor began to argue. The court interjected: "Hold—hold—hold on. An offer of proof from one side does not— [¶] . . . [¶] —is not an invitation for an argument as to whether that particular proof should not be believed from the other." The prosecutor then apologized.

made by anyone on this planet. If it helps them to refresh their recollection, they may use it to refresh their recollection. [¶] Now, it may be that when she looks at this document, it is not helpful to her and it doesn't change or improve her recollection. But it doesn't have to be admissible evidence for somebody to use it to refresh her recollection. If it's going to be affirmatively admitted as a separate piece of evidence, yes, it does. But it doesn't have to meet any sort of evidentiary standard whatsoever in order for a witness to look at it to see if it helps them remember something. [¶] Overruled."

We see nothing improper about the trial court's admonishments. " [I]t is well within [a judge's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' " (*People v. Snow, supra*, 30 Cal.4th at p. 78.) And "the court may act swiftly and strongly in the presence of the jury to admonish an attorney if necessary to preserve the integrity of the judicial process." (*People v. Chong* (1999) 76 Cal.App.4th 232, 244.) The judge's comments did not constitute misconduct because they were appropriate responses to defense counsel's inappropriate actions and remarks, and they did not "discredit the defense theory or create an impression that the court was allying itself with the prosecution." (*Ibid*; compare, *People v. Fatone* (1985) 165 Cal.App.3d 1164, 1170 [trial court restricted cross-examination, belittled and scolded counsel, and admonished defense counsel's conduct as " 'improper and *unethical*' " in front of the jury; appellate court observed it was "completely improper for a judge to advise the jury of negative personal views concerning the competence, honesty or ethics of the attorneys in a trial"].) In our view, these were efforts by the trial judge to exercise

reasonable control of the trial to avoid frivolous objections and unduly prolonged testimony, not to ally itself with the prosecution. (Accord, *People v. Harris, supra*, 37 Cal.4th at p. 347.)

Botello points to another instance where the trial court engaged in commentary in response to defense counsel's questions as to how many apartment buildings were in Norma's complex; counsel explained it was to point out that it was unusual that Botello had picked just one. Without a relevance objection from the prosecutor, the court asked about the relevance of the questions, and after defense counsel tried to explain, said, "We don't know how many other apartments he was in. If you want to present evidence—if you want to present evidence from 250 other people that the defendant was not in their apartment that day, then we can go in that direction. But there's no evidence as to whether he was in one other apartment or six other apartments or zero other apartments. After counsel said, "Exactly," the court responded, "Next question." When counsel again asked how many buildings were in her row, the court said, "Counsel you're not understanding my point. Move on. It's irrelevant." Though the trial court could have conducted itself more prudently, we cannot say its remarks were a personal attack, or the sort of highly improper or prejudicial remarks reflecting obvious bias that constitute misconduct.

Botello points to other instances that occurred during sidebars, asserting the trial court's treatment of his counsel was "caustic." At one point, the trial court responded to counsel's objection as "Bullshit." During another sidebar, the court asked defense counsel whether he wanted a continuance due to assertedly new evidence, to which

counsel remarked, "This is turning into a fiasco," and again would not directly answer the court's renewed question. The court eventually said, "Counsel, just answer my goddamn question. Do you—is that what you want or not? Why do you have to go off on these tangents? Just tell me what you want."

After a break, the court advised counsel that the courtroom staff had informed it that the court's voice and others in the hallway were audible in the courtroom, and that the jurors may or may not have heard its intemperate remarks. When the court asked defense counsel if he had any issues with that, counsel responded: "What do you want me to say?" The court invited defense counsel to state whether he wanted a mistrial, whether he was requesting an admonishment, or whether he wanted the subject raised at all in the jury's presence, telling counsel the court wanted him "to act like a lawyer." Defense counsel responded that he wished to reserve comment, and mentioned that it was not the first time the court had raised its voice. The court pointed out that counsel "didn't bother to raise those concerns at any time." When counsel responded that he did not want to make the court "angrier," it emphasized: "I want you to suggest, if you think the jury can hear things through the wall, that you suggest we go into my chambers rather than having this discussion immediately outside the door in the hallway. I want you to again try to act like a lawyer trying to protect your client's interests. If you think the jury can hear our discussion, I expect you to raise that possibility and ask if there's a possibility we could move farther away from the door leading back into the courtroom. That is what I want you to do."

Later, defense counsel's commentary led the trial court to admonish him in front of the jury to not make editorial comments and avoid argument. The court also admonished defense counsel that he was repeating objections to certain evidence made and already overruled, telling counsel, "You've made that. I've overruled it three times. ¶ . . . ¶ If you make it again, I'll overrule it again." The court then said, "Jury, get out the door."

Thereafter, the court called a sidebar conference to discuss counsel's objections. Defense counsel raised the court's prior comment about protecting his client, stating it was not his responsibility to remind the court it was yelling and ask for it to stop. The court responded, "That is not what I told you yesterday, Counsel. ¶ I told you that if we were speaking outside the jury's presence, and you had concerns that one of us was speaking loudly enough so that the jury might hear it, that you were to raise that possibility and ask if we couldn't move farther away from the door to the courtroom. That is what I said." Counsel continued to protest, after which the court again reminded him to raise objections if necessary and eventually informed defense counsel that it believed he was not providing effective assistance. The court and defense counsel argued over his competence. Defense counsel invited the court to declare a mistrial, and accused it of "yelling" and engaging in a "tirade." The court responded that it would have declared a mistrial had the matter been a bench trial, but ultimately declined to do so, instead agreeing to admonish the jury.

Although the trial court may have been intemperate in its remarks toward defense counsel, it was reacting to counsel's unwarranted objections, editorializing and misbehavior, as well as counsel's reactions in making "hand noises, faces at the jury,

dropping his pen, and sighing" in front of the jury. Having reviewed the entire six days of trial testimony, spanning approximately 900 pages of transcript, we cannot say those instances "permeate[d] the record." (Contra, *People v. Fatone, supra*, 165 Cal.App.3d at p. 1176.)

In any event, the trial court's most egregious remarks were made during a sidebar conference, and thus they could not have prejudiced the jury. (See *People v. Burnett* (1993) 12 Cal.App.4th 469, 475 [alleged instances of "judicial misconduct or intemperance" which occurred "outside the presence of the jury . . . could not have prejudiced appellants"]; *People v. Kagan* (1968) 264 Cal.App.2d 648, 662 [trial court's comment possibly stating theory of prosecution's case was out of the jury's presence "and so could not constitute misconduct, nor could it have been prejudicial"]; see also *People v. Williams* (2009) 170 Cal.App.4th 587, 630 [defendant had not shown how prosecutor's alleged misconduct consisting of statement made outside the presence of the jury could have affected the outcome].)

When the jury returned, the court admonished it about the earlier incidents:
"Ladies and gentlemen, you left under unusual circumstances. My apologies for losing my temper.

"At the end of every trial, the jury is instructed in this language. 'It is not my role to tell you what your verdict should be. Do not take anything I said or did during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be.'

"Generally, that's a simple thing, because the judge has not done or said anything that gives you a hint one way or the other about what he or she thinks about any of those subjects.

"In this particular case, you have seen me on more than one occasion express, either by the tone of my voice or the volume of my voice, my displeasure with one or both of the attorneys.

"And my displeasure—a judge's displeasure or frustration is not unusual. I have certain interests in the trial. I want it to go as fast as possible. I want it to be as least disruptive to you as possible.

"The attorneys, because they represent different interests, have their own goals and their own needs—juggling witnesses and all of the rest. So conflicts between attorneys and judges is not unusual.

"However, my job is to keep those conflicts internal and not to express to you anything less than a calm, neutral, detached persona. I have not succeeded in that in this particular trial, and for that I apologize to you.

"But keep in mind that your job is to evaluate the strength of the evidence. Your job, as we emphasized during jury selection, is to decide whether the evidence presented at trial is sufficient to overcome that presumption of innocence as to any of those five charges that have been alleged against Mr. Botello.

"The evidence is your focus. My frustration is not evidence. And so when evaluating the strength of the evidence in this case, once you get back into the jury room—which will be this week, I believe—you are to disregard my expressions of

frustration, because my frustration not only is not evidence, it doesn't even have anything to do with the strength of the evidence in this case. It merely has to do with those inevitable conflicts that I have with lawyers.

"Now, that is easily said. That is easily understood. But as with that rule that we talked about, you know, if the defendant doesn't testify, can you ignore that fact? It's not necessarily easily followed, so I'm going to ask all of you.

"Is there anyone who thinks that they would have a difficult time disregarding whatever your inferences are from what you've heard me say, or how you've heard me say it, and focusing just on the evidence. [¶] Anybody? [¶] [No response.] [¶] I'm not seeing any affirmative nods. I'm seeing some affirmative shakes of the head. Let me just—let me go right down the row."

The court proceeded to ask each juror individually whether "that's going to be a problem for you." After two jurors said no, the court said, "And, let me emphasize, you're not going to be insulting me by saying, 'Yes, this is going to be an issue.' I want you to be as honest as you can here." Each juror responded no; juror No. 9 said, "Not at all."

C. The Trial Court Cured Any Prejudice Resulting from the Foregoing Instances of Alleged Misconduct with its Admonition

As to all of the foregoing instances of alleged judicial misconduct or bias, we conclude the trial court's lengthy, timely and thoughtful admonition, which highlighted

instructions that it would eventually give the jury, dispelled any prejudice.⁴ Each juror stated unequivocally that they would not be impacted by the court's comments, attitude and treatment of counsel. Jurors are presumed to understand and follow the court's instructions and admonishments, and we presume they did not penalize Botello for the court's remarks. (*People v. Chong, supra*, 76 Cal.App.4th at p. 245; see *People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Delgado* (1993) 5 Cal.4th 312, 331-332.) Under the circumstances, we disagree that any behavior by the court towards defense counsel had become "irreconcilable."

D. The Trial Court Did Not Disparage or Improperly Advocate for the Prosecution While Questioning Defense Investigator Carroll

Botello contends that the trial court again engaged in misconduct or bias toward the prosecution when it intervened in the questioning of defense investigator Carroll, who had interviewed Q Bonkers employee Linda Hernandez as to whether she recognized a picture of Rebecca Doe.

⁴ Botello raises another instance that occurred after the court's lengthy admonition during his redirect-examination, when the prosecutor was objecting to his counsel's questions as leading. The prosecutor stated, "Same objection" and after the court sustained it, defense counsel asked: "May I know what basis that is, because I am confused now." The prosecutor stated he objected on leading, and the court elaborated: "You are asking him leading questions. Instead of asking him, 'Who did you encounter in the complex,' or instead of asking him, 'Did you make any suggestions to the officers about how they might investigate these facts?' you ask him very specific questions that suggest the answer to be obtained." Counsel replied, "All right. Thank you." If any misconduct occurred in that exchange, it was invited by defense counsel. In any event, we disagree that the court's comment insinuated to the jury that counsel engaged in coaching of his client or any other unethical conduct.

During Carroll's testimony, the prosecutor inquired why Carroll had shown Hernandez a photographic lineup in a certain way, first bending it to conceal all of the pictures except that of Rebecca Doe, then showing the entire lineup of photographs to her before Hernandez's testimony. The prosecutor asked, "You showed her that and a photographic lineup with six other people—or five other people. Don't you think that's suggestive when you show somebody a picture and then include that same picture in a photographic lineup?" Carroll began to answer, "[M]y objective was to—" The trial court interrupted, saying, "No, he's not asking about your objective right now, ma'am. He's asking you about your opinion as to whether you think that technique suggests to the witness what person it is that they are to pick out of the six-pack. Do you have an opinion on that subject?"

Carroll began to explain again that her objective was not to have Hernandez pick out one photograph but to recognize a specific person, and the court asked her whether that was always the objective in any photo lineup: to have the witness determine whether they recognized any of the individuals. Carroll again said it was not her objective "in this case." The court again asked: "No, not—ma'am, I'm not asking about this case. I'm asking about in general. When an investigator shows either an in-person lineup or a photographic lineup to a witness, isn't the objective to determine whether that witness can pick out in that lineup who it is that—that is suspected of being involved in that event?" Carroll responded, "If you're having someone identify out of a lineup, yes. But that's not what I went there to do, sir. I went there to see if they knew a specific person." The court returned the questioning to the prosecutor, stating, "Your witness."

Setting aside the forfeiture for defense counsel's failure to object to these questions (*People v. Cook* (2006) 39 Cal.4th 566, 598; *People v. Harris, supra*, 37 Cal.4th at p. 350), the court's questioning was not misconduct. The trial court is authorized to control the examination of witnesses to ensure the efficient "ascertainment of the truth," and to examine witnesses on its own motion. (§ 1044 [judge's duty "to limit the introduction of evidence and [counsel's] argument"]; Evid. Code, §§ 765, subd. (a) [court to control "mode of interrogation"], 775.) These provisions permit the court to elicit admissible and material testimony from witnesses through direct questioning. (*People v. Mayfield* (1997) 14 Cal.4th 668, 739, 755 [" 'it is not merely the right but the duty of a trial judge to see that the evidence is fully developed before the trier of fact and to assure that ambiguities and conflicts in the evidence are resolved insofar as possible' "].) " [I]f a judge desires to be further informed on certain points mentioned in the testimony it is entirely proper for him to ask proper questions for the purpose of developing all the facts in regard to them. Considerable latitude is allowed the judge in this respect as long as a fair trial is indicated both to the accused and to the People. Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the judge.' " (*People v. Carlucci* (1979) 23 Cal.3d 249, 255.) Thus, "[a] trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony." (*People v. Cook*, 39 Cal.4th at p. 597.)

The court was plainly within its bounds in seeking a direct answer from Carroll to the prosecutor's and its own questions in order to explain her investigation and testimony.

Botello argues the court "undermined a material defense witness," and "tipped the credibility scale in favor of the prosecution," but the court's questions did not have such impact. It was the prosecutor who attacked Carroll repeatedly on discrepancies in her report and the adequacy of her investigation methods, both before and after the court's questions, and who inflicted a high level of damage on Carroll's credibility. The court's questions, on the other hand, were limited and not hostile, but impartial and tailored to have Carroll pay particular attention to the question, which she was evading. None of its questions improperly "assume[d] the role of either the prosecution or of the defense" (*People v. Cook, supra*, 39 Cal.4th at p. 597) and, in our view, the questioning was temperate and nonargumentative, without conveying to the jury any negative opinion of Carroll's credibility. (*Ibid.*) The court's remarks were entirely unlike those found improper, and possibly perceived by jurors as derogatory in connection with the credibility of defense witnesses. (See *People v. Geier, supra*, 41 Cal.4th at p. 614 [trial judge facetiously associated a defense witness with Forrest Gump, "a dim-witted fictional character," and made a reference to "Oprah" to suggest that the personal life of another defense witness "was the stuff of tabloid television"]; *People v. Mahoney, supra*, 201 Cal. at pp. 621-622, 626-627 [court engaged in "twenty-three utterances . . . and numerous instances where he took to himself the task of examining witnesses" including in which the judge termed defense objections "idiotic," without "a scintilla of sense" and "awful trivial"].)

Moreover, as in *People v. Cook, supra*, 39 Cal.4th 566, at the conclusion of the trial, the court instructed the jurors that they should not "take anything I said or did

during the trial as an indication of what I think about the facts, the witnesses, or what your verdict should be" and reminded the jury it was their role to decide the facts "based only on the evidence and stipulations that have been presented to you in this trial." (See CALCRIM Nos. 220, 222.) The instructions reminded the jury of the trial court's role as an impartial presiding officer whose occasional questions to witnesses were designed to clarify the evidence without favoring either side. (*People v. Cook*, at p. 598.)

III. *Claim of Ineffective Assistance of Counsel*

Botello contends his counsel was prejudicially ineffective during his trial in various ways. He asserts his counsel failed to object to the trial court's misconduct, repeatedly forgot basic rules of evidence, made frivolous objections, appeared to be forgetful, failed to make sound tactical decisions, claimed to have a head injury, acted unprofessionally, and undermined or contributed to undermining the defense in the jury's eyes. Botello particularly highlights as "the most egregious omission" his counsel's failure to ask that the court remove juror No. 6, who had disclosed during voir dire that about 25 years previously she had been a victim of date rape at age 22 and also of domestic violence for "probably over 10 years" involving two husbands, "knives up to [her] throat," and the summoning of police.

A. *Legal Standards*

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. [Citation.] Counsel's performance was deficient if the representation fell below an objective standard of reasonableness under prevailing

professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different."

(People v. Benavides (2005) 35 Cal.4th 69, 92-93; *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1101.)

B. Counsel Was Not Ineffective for Failing to Remove Juror No. 6

As to juror No. 6's participation in the trial, we conclude counsel was reasonable and was not prejudicially ineffective for not seeking her removal from the jury, given her thoughtful responses to counsel's and the court's questions during voir dire outside the jury venire's presence. At that time, she explained her history of date rape and domestic violence to counsel and the court but emphasized that she was "not a victim. I don't have that mentality, but it has happened to me." She was questioned by the court as follows:

"[The court:] Treating those episodes that you've described, both the date rape and the domestic violence as a whole, did you call law enforcement in response to any of those?"

"[Juror No. 6:] Domestic violence, yes. Back in the day when I was 22, date rape, there was more shame. There was more like being questioned out there in front of everybody. Embarrassment, because you accepted the date. It wasn't disclosed, except for—to one friend in trying to find out who it was. It didn't have anything to do with drinking or anyone else. I went to the movies and said, "Take me home." He didn't. He took me to a park, and that was it.

"[The court:] And any of these three experiences that you had, not three—"

"[Juror No. 6:] Several, yes.

"[The court:] The domestic violence was more than that? [¶] But any of these experiences, do you think that those, from what you know about yourself, do you think that's going to taint your view? Make it difficult for you to be objective when evaluating the strength of the evidence?

"[Juror No. 6:] I don't think so. But I also use wisdom. And knowing I'm human, I always try to, you know, look at the facts before I rush to judgment. [¶] Even with my kids. Because I've had kids put in jail when they were young. I have five children, two of which got rebellious. [¶] So I'm not quick to make a judgment. It's not something I want to go through, you know, a rape trial. But no one wants to go through it. [¶] So that's kind of where I'm at. I believe I can be fair. [¶] And I'm a counselor now, you know, to people who have been through domestic violence through my church, and stuff like that. So—

"[The court:] Do you think it will be difficult for you to be attentive during the trial—

"[Juror No. 6:] No.

"[The court:] —because of thinking back about your own experiences?

"[Juror No. 6:] No.

"[The court:] All right. In terms of your dealings with law enforcement or the criminal justice system, in regards to the domestic violence situations, do you think that the system worked?

"[Juror No. 6:] To the best of ability [*sic*], yeah. There's always going to be—it's not 100 percent.

"[The court:] Any bad feelings towards law enforcement? Towards prosecutors? Towards the courts? Anything like that?"

"[Juror No. 6:] No."

In response to defense counsel's questions, juror No. 6 explained she was a faith-based lay counselor at a church. Counsel asked a question about the circumstances of her rape and another as to whether she had pursued the domestic violence charges, then asked, "And you're going to follow the Court's instructions and all of that good stuff, and be open-minded and fair to both of us?" She answered, "Right. That's why I brought it up. That's not something you want to talk about. I want to be fair to the defense. I want to be fair to both sides—your side too." He asked, "You wouldn't want to talk about it out there too?" She responded, "I really don't. I don't want people looking at me like, 'poor thing.' "

Juror No. 6 also made it clear that she would not be influenced at all by her past in reaching a decision, and that she would not allow her faith to prevent her from making a judgment.

Defense counsel's decision to keep juror No. 6 on the panel was well within prevailing professional norms. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) And "the decision whether to accept the jury as constituted is inherently nuanced and tactical." (*People v. Bemore* (2000) 22 Cal.4th 809, 838; see also *People v.*

Hinton (2006) 37 Cal.4th 839, 860.) Juror No. 6, despite her unfortunate history, emphasized that she was not quick to make a judgment, could listen to the evidence carefully and render a judgment without letting her faith or past interfere, and expressed a desire to be fair to both sides. She also showed indications that she would be sympathetic to those in trouble with the law, given her children's experiences. It is reasonable to conclude defense counsel decided that given that history and her ability to reconcile her feelings and not rush to judgment, she would be an asset to Botello. There is no showing that defense counsel's choice to keep juror No. 6 on the jury was outside the realm of reasonable trial strategy based on the circumstances at the trial.

C. As to Counsel's Other Areas of Alleged Deficient Performance, Botello Has Not Demonstrated Prejudice

As indicated above, Botello complains of numerous other instances of his counsel's claimed errors and omissions constituting ineffective assistance. He argues his counsel made unnecessary pretrial motions (one to introduce the fact that Rebecca Doe worked as a stripper at a club) or motions that assertedly "bordered on the frivolous" (a suppression motion under *Miranda v. Arizona* (1966) 384 U.S. 436 for Botello's interview statements to detectives). He points out his counsel made irrelevant, frivolous or improper objections; led witnesses on direct examination; had frivolous reasons for admitting evidence; and editorialized or made talking objections, leading to repeated admonishments from the judge. Botello points out his counsel had the opportunity, but declined, to have the court strike Rebecca's testimony that the SART exam, in which she was required to remove all of her clothes and have her private parts photographed, was

uncomfortable and something she did not want to do. He argues that after the court excluded reference to a toxicology report on grounds of late discovery, his counsel failed to follow up and ask the court to strike the prosecutor's question about toxicology results and admonish the jurors they were not to consider it. He points out his counsel failed to have his five-hour interview with police transcribed to prepare him for his testimony on the stand; that it was unreasonable to have him review the transcript for the first time the night before he testified in his defense.

In many respects, defense counsel was far from model. Indeed, the trial court was compelled to remark at side bar that in its opinion, Botello was being represented in an "ineffective fashion." It explained its admonishments were "prompted by [defense counsel's] either inability or unwillingness to understand and comply with the Court's rulings, and [his] inability or unwillingness to comply with the law, and [his] gross ignorance regarding the Evidence Code." The court stated that out of 170 criminal jury trials, defense counsel was "the worst criminal defense attorney that has appeared in front of me. You are the most ignorant and you are the most annoying." But not all of counsel's conduct summarized above was deficient, and in many instances, we perceive tactical reasons for counsel's motions and decisions.

On this record, a careful prejudice analysis is warranted at the outset. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 697; *In re Cox* (2003) 30 Cal.4th 974, 1019-1020 [court may dispose of ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, without first addressing whether counsel was ineffective].) For his part, Botello argues his counsel's performance was prejudicial because, in his

view, the People's evidence was "not overwhelming." He maintains the case "came down to an issue of credibility" since his defense was that the sexual conduct was consensual, characterizing the record as presenting a "tenuous credibility mix." According to Botello, Hernandez's testimony tended to corroborate his story that he met Rebecca at Q Bonkers, and this, in turn, tended to corroborate Woodard's testimony, who recalled introducing Botello to a female either at Q Bonkers or at Joe's Bar and Grill. He argues his own testimony was not "wholly unbelievable," as Rebecca could have been upset over being ripped off as a result of a drug deal, and Norma could have accused him of the crimes to avoid marital discord. Botello asserts under these circumstances, any trial errors took on a "heightened emphasis."

As mentioned above, on a claim of constitutionally ineffective assistance of counsel, a defendant will establish prejudice when he or she demonstrates there is a " ' ' "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ' " [Citations.]' [Citation.] This second part of the *Strickland* test 'is not solely one of outcome determination. Instead, the question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." ' " (*In re Hardy* (2007) 41 Cal.4th 977, 1018-1019.) The test does not mean "more likely than not . . ." (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-688.)

We simply do not accept Botello's characterization of his defense evidence as creating a tenuous mix of credibility, or a meaningful credibility contest. Woodard, a

felon and long time daily methamphetamine user who eventually admitted he did not recall any of the events of the night in question without coaching, had extremely weak credibility. Hernandez conceded that she felt pressured by the defense investigator to pick a person from the lineup, and testified that the person she thought she initially knew when she first identified the single photograph was not the same person. The case did not present one of defense evidence directly contradicting the People's evidence, nor did any evidence tend to refute the People's case. There were no glaring inconsistencies in either Rebecca's or Norma's testimony, and all of the circumstances of their attacks were explored at trial, including the fact Rebecca did not call police right away and Norma did not call her husband (only her mother and sister) immediately after the attack. Furthermore, Rebecca's testimony was corroborated by both her supervisor and SART nurse Davis, who described Rebecca's reaction to the incident.

The jury carefully considered the evidence, asking questions as well as rereading portions of Norma Doe's testimony, and ultimately found both victims credible. Rebecca's and Norma's testimony was positive, direct and strong. The conclusory and subjective testimony of the defense witnesses did not reveal evidence that seriously undermined the People's case. Under the circumstances, Botello cannot show his counsel's deficient performance rendered the trial fundamentally unfair.

IV. SART Nurse Testimony

Botello contends he was denied due process and his right to a fair trial under the state and federal Constitutions by the admission of SART examiner Davis's testimony. He challenges as irrelevant and highly prejudicial her opinion that sparse findings, or the

absence of physical findings, are not unusual for women who make sexual assault claims, and he characterizes her testimony as "vouch[ing] for the credibility of a key prosecution witness," Rebecca, and usurping the jury's fact-finding role. Botello maintains his counsel was prejudicially ineffective for failing to object and move to strike her opinion on grounds of relevance, speculation and improper opinion; that his counsel had no tactical basis for his inaction.

"When a defendant on appeal makes a claim that his counsel was ineffective, the appellate court must consider whether the record contains any explanation for the challenged aspects of the representation provided by counsel. 'If the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention must be rejected.' " (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1058.) On this ground alone, we may reject Botello's ineffective assistance claim.

In any event, the record in fact provides a satisfactory explanation for counsel's failure to object: the fact that Davis's opinions were relevant and admissible, and did not improperly vouch for Rebecca's credibility. Counsel is not ineffective for failing to object to or strike admissible and relevant opinion testimony. (*People v. Majors* (1998) 18 Cal.4th 385, 403-404; *People v. Diaz* (1992) 3 Cal.4th 495, 560; *People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131; see also *People v. Frierson* (1979) 25 Cal.3d 142, 158 [failure to object to evidence is a matter that usually involves tactical decisions on counsel's part and seldom establish a counsel's incompetence].)

Evidence Code section 720, subdivision (a) provides: "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." As a general rule, expert opinion testimony is limited to an opinion that is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) Because admissibility of expert opinion is a question of degree, and a jury need not be wholly ignorant of the subject matter under the statutory rule, exclusion is only necessary where the opinion would add nothing at all to the jury's common fund of information. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300.) For example, courts have repeatedly recognized the appropriate use of expert testimony when an alleged victim's actions during or following a crime seem to contradict the victim's claims in cases of alleged molestation or abuse. (See *People v. Riggs* (2008) 44 Cal.4th 248, 293 [expert testimony addressing battered woman's syndrome]; *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744 [expert testimony concerning child sexual abuse accommodation syndrome].)

Davis's testimony was based on her training and years of experience as a SART nurse, and indeed, Botello does not challenge those qualifications. As he recognizes, "[I]t is settled by 'a long line of California decisions' that an expert medical witness is qualified 'to give an opinion of the cause of a particular injury on the basis of the expert's deduction from the appearance of the injury itself.' [Citation.] Such a diagnosis need not be based on certainty, but may be based on probability; the lack of absolute scientific certainty does not deprive the opinion of evidentiary value. [Citation.] Further, a

medical diagnosis based on medical literature will not be viewed as a new scientific technique, but simply the development of an opinion from studies of certain types of cases." (*People v. Mendibles* (1988) 199 Cal.App.3d 1277, 1293-1294 [dealing with examinations of sexual assault victims], disapproved on other grounds in *People v Soto* (2011) 51 Cal.4th 229, 248, fn. 12.)

However, Botello maintains because Rebecca had "no injuries, just some abrasions and debris on her vulva, . . . the fact that these findings were *consistent with* an act of rape had no more relevancy than testimony that the presence of the *same findings* was *consistent with* a consensual act of intercourse." He argues this rendered the testimony irrelevant: "The only issue for this jury to determine was whether the sexual acts which occurred were or were not by consent. This evidence had no tendency in reason to prove or disprove that an act of rape occurred and thus assist the factfinder." He recognizes "expert opinion is admissible to disabuse the jury of commonly held notions that physical injuries should be present if a sexual assault has occurred," pointing to cases involving rape trauma syndrome (*People v. Bledsoe* (1984) 36 Cal.3d 236; see also *People v. Coleman* (1989) 48 Cal.3d 112) and child sexual abuse accommodation syndrome (*People v. McAlpin, supra*, 53 Cal.3d 1289). He seeks to distinguish these cases, arguing the evidence must be "non-case-specific and must address only common misconceptions or myths relating to rape or rape victims" and that under them, "an expert should not be permitted to provide testimony that signals to the jury that, as a matter of scientific judgment, the defendant is guilty of the charged crime."

Here, Davis's testimony was not entirely case-specific; she explained that in the majority of her SART cases, there were no physical findings. It is permissible in a rape prosecution to admit expert testimony that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse. (See, e.g., *People v. Rowland* (1992) 4 Cal.4th 238, 265-267 [admitting expert medical opinion that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse over objection that evidence is not scientifically accepted].) In any event, we disagree that Davis testified Rebecca had no injuries. She testified she observed a vaginal abrasion during her specialized examination consistent with Rebecca's account. Davis's testimony is akin to testimony routinely admitted in the courts of this state. (See *People v. Proctor* (1992) 4 Cal.4th 499, 532 [expert testimony that abrasions were consistent with injuries observed in other cases of sexual assault]; *People v. Robinson* (2000) 85 Cal.App.4th 434 [the bruises on the legs and vulva were significant indicia of sexual assault].) As the People point out, the California Supreme Court implicitly endorses the notion that genital trauma can suggest lack of consent. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1084 [citing abrasions to pelvic region and blood cells found in vagina as evidence of lack of consent], overruled on other grounds as stated in *People v. Hill* (1998) 17 Cal.4th 800, 822-823.)

Nor did Davis at all suggest to the jury that Botello was guilty of the charged crimes or that Rebecca was in fact molested. She offered no opinion whatsoever, expressly or implicitly, as to his guilt or innocence. The circumstances are unlike *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1099-1100, where a prosecution psychiatrist

testified that the victim was in fact molested because he exhibited some symptoms of child molestation syndrome. Based on the discussion of rape trauma syndrome in *People v. Bledsoe, supra*, 36 Cal.3d 236, *Roscoe* held admission of the testimony was error, though harmless. (*Roscoe*, at p. 1101.) *Bledsoe* explained that rape trauma syndrome, unlike conditions based on relating specified criteria to a probable cause, was not developed to create standards to establish that a victim actually has been raped. (*People v. Bledsoe*, at pp. 250-251.) In addition, counselors and psychiatrists do not question credibility, but attempt to assist clients in coping with trauma. Unlike a counselor or psychiatrist, Davis was professionally trained to relate physical evidence to probable causes.

We reject Botello's assertion that Davis improperly vouched for Rebecca's credibility. "The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience" (*People v. Coffman* (2004) 34 Cal.4th 1, 82.) "[T]he trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt." (*People v. Torres* (1995) 33 Cal.App.4th 37, 47.) But that did not occur here; Davis plainly did not opine as to Rebecca's veracity or state of mind, or as to Botello's guilt. Davis's testimony that the minimal physical findings were consistent with Rebecca's report of the assault was not a conclusive assertion of causation. In fact, Davis admitted on cross-examination that consensual sexual activity could have caused the described injuries. Additionally, the trial judge instructed the jury that it was the sole judge of witnesses' credibility (see CALCRIM No. 226), and, absent a showing to the

contrary, we presume the jury followed the trial judge's instruction to make its own determination regarding the reliability of Davis's testimony. (*People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Because Davis's testimony was relevant and did not amount to an improper opinion as to Botello's guilt or a vouching for Rebecca's veracity, defense counsel was not prejudicially ineffective for failing to object or move to strike it.

V. *Life Sentence for Count 5 Assault with Intent to Commit Rape*

Botello contends his life sentence on the count 5 charge of assault with intent to commit rape must be reduced to a determinate term because he was never charged with, nor did the jury find beyond a reasonable doubt that he committed, an assault with the intent to commit rape in the commission of a residential burglary under section 220, subdivision (b).⁵ He points out that the amended information charged him with "a violation of Penal Code 220, a felony, in that on or about October 9, 2007 . . . he assaulted NORMA DOE with the intent to commit RAPE" and the jury's verdict states that it found him guilty of "a violation of section 220 . . . as charged under count 5 of the amended information." Botello argues that the jury was instructed on⁶ and returned a

⁵ Section 220, subdivision (b), provides: "Any person who, in the commission of a burglary of the first degree, . . . assaults another with intent to commit rape . . . shall be punished by imprisonment in the state prison for life with the possibility of parole." Section 220, subdivision (a)(1) provides: "Except as provided in subdivision (b), any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of [s]ection 264.1, 288, or 289 shall be punished by imprisonment in the state prison for two, four, or six years."

⁶ As to the Count 5 offense, the jury was instructed with a modified version of CALCRIM No. 890, which provides: "The defendant is charged in Count 5 with assault with intent to commit rape in violation of Penal Code section 220. To prove that the

general verdict in conformity with the section 220, subdivision (a)(1) offense, which calls for a determinate term, but the trial court sentenced him to a life term with the possibility of parole under section 220, subdivision (b). According to Botello, the sentence is unauthorized, violates his right to due process, and deprived him of his Sixth Amendment right to a jury trial.

The People respond that Botello had notice of a section 220, subdivision (b) enhanced punishment, and the jury found beyond a reasonable doubt that he committed an assault with the intent to commit rape in the commission of a residential burglary. They point out that the original information alleged a violation of section 220, subdivision (b), and that in the amended information, Botello was charged with residential burglary on the theory he entered Norma's apartment with the intent to commit theft and a felony. They argue the jury made all of the findings required for the increased punishment when it found true beyond a reasonable doubt that Botello committed first degree burglary based on intent to commit theft or rape, as charged in count 4.

defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant did an act that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; [¶] 4. When the defendant acted, he had the present ability to apply force to a person; [¶] AND [¶] 5. When the defendant acted, he intended to commit rape. [¶] Someone commits an act 'willfully' when he does it willingly or on purpose. [¶] The terms 'application of force' and 'apply force' mean to touch in a harmful or offensive manner. The slightest touching can be enough if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind. [¶] No one needs to actually have been injured by the defendant's act. [¶] To decide whether the defendant intended to commit rape, please refer to Instruction No. 1000m, above."

According to the People, "[t]his put [Botello] on notice that if he had a defense to the allegation assault [*sic*] with the intent to commit rape during commission of a burglary, he should present it" and that Botello "had the same incentive to defend the crime alleged in count four as he would have had [if it had] been alleged as part of count five."

We disagree with the People. "A defendant has a due process right to fair notice of the allegations that will be invoked to increase the punishment for his or her crimes." (*People v. Houston, supra*, 54 Cal.4th at p. 1227; see also *Department of California Highway Patrol v. Superior Court* (2008) 158 Cal.App.4th 726, 746 ["Notice is an aspect of the constitutional right to due process, which 'requires that a criminal defendant be given fair notice of the charges to provide an opportunity to prepare a defense and to avoid unfair surprise at trial' "]; *People v. Tardy* (2003) 112 Cal.App.4th 783, 786.) Though "it is clear that a valid accusatory pleading need not specify by number the statute under which the accused is being charged" (*People v. Thomas* (1987) 43 Cal.3d 818, 826), it must identify the *factual basis* for imposition of an enhanced penalty. (*People v. Flynn* (1995) 31 Cal.App.4th 1387, 1392-1395; *People v. Shoaff* (1993) 16 Cal.App.4th 1112, 1117-1118 ["It is the specific factual allegations of a pleading which determine what offenses are charged. [Citation.] An accusatory pleading must likewise allege each fact required for imposition of an enhanced term"].) Even citing the wrong statute is not necessarily fatal to the pleading of an offense or enhancement, as long as it is clear what offense has been factually defined, and that punishment will be sought on that basis. (See, e.g., *People v. Sok* (2010) 181 Cal.App.4th 88, 96, fn. 8.)

Though the People suggest that the section 220, subdivision (b) offense should be treated as an enhancement, we do not view it as providing for "an additional term of imprisonment" added to a base term. (See *People v. Jefferson* (1999) 21 Cal.4th 86, 101.) At least one court views the crime as a substantive offense. (*People v. Dyer* (2012) 202 Cal.App.4th 1015, 1021 [holding first degree burglary is a lesser included offense of assault with intent to commit rape during the commission of first degree burglary under section 220, subdivision (b), as is assault with intent to commit rape under section 220, subdivision (a)(1)].) Under that view, the subdivision (b) offense has additional statutory elements than the offense of assault with the intent to commit rape (§ 220, subd. (a)(1)), which is a lesser offense to the subdivision (b) offense. (See *People v. Reed* (2006) 38 Cal.4th 1224, 1227.)

We need not decide whether section 220, subdivision (b) is a substantive offense or sentence enhancement, because in either case, Botello did not have sufficient notice he would be subject to a life sentence. The amended information did not plead, and the jury did not find beyond a reasonable doubt, the underlying fact necessary to impose a life term under section 220, subdivision (b), namely, that when Botello engaged in assault with intent to commit rape, it was *in the commission of* a first degree burglary. Indeed the jury instructions omitted language provided by the CALCRIM instruction for this very element: that "[w]hen the defendant acted, (he/she) was committing a first degree

burglary." (CALCRIM No. 890.)⁷ The verdict form did not reflect that factual circumstance. The prosecutor did not argue or ask the jury to find that Botello's count 5 assault was committed during the commission of the burglary.⁸

Rather, the possibility of Botello being subjected to a life sentence for committing assault with intent to commit rape in the commission of a residential burglary was first mentioned in the probation officer's report. This was the flaw in *People v. Hernandez* (1988) 46 Cal.3d 194 (criticized on other grounds in *People v. King* (1993) 5 Cal.4th 59,

⁷ Notations to CALCRIM No. 890 provide: "<If the court concludes that the first degree burglary requirement in Pen. Code, § 220(b) is a penalty allegation and not an element of the offense, give the bracketed language below in place of element 6.> [¶] **[If you find the defendant guilty of the charged crime, you must then decide whether the People have proved the additional allegation that the crime was committed in the commission of a first degree burglary.]**" (CALCRIM No. 890.)

⁸ The circumstances here are unlike those in the California Supreme Court's recent case of *People v. Houston, supra*, 54 Cal.4th 1186, in which the charging indictment of a defendant charged with 10 counts of attempted murder failed to allege the murders were willful, deliberate and premeditated. (*Id.* at p. 1226.) The issue came up three times during trial: once during presentation of the defense case when the court presented the parties with a preliminary draft of the verdict forms indicating that the jury would be asked to decide if the attempted murders were willful, deliberate and premeditated; the second time about a week later when the court announced it would submit verdict forms on the theory of a premeditated attempted murder; the third time after the close of evidence when the court instructed the jury they were to decide, if they found the defendant had committed attempted murder, if it was willful, deliberate and premeditated. At none of these times did defense counsel object, and the jury found the attempted murders were willful, deliberate and premeditated. (*Ibid.*) The California Supreme Court held the defendant forfeited any claim that the indictment failed to comply with section 664. (*Id.* at p. 1227.) It acknowledged that the defendant had a due process right to fair notice of the allegations that would be invoked to increase the punishment for his crimes, but observed in that case, the trial court had expressly noted during the defense case that the defendant, if convicted, would be sentenced to life imprisonment. (*Ibid.*) Accordingly, the court held that under those facts, the defendant received adequate notice of the sentence he faced, and the jury made an express finding that the attempted murders were willful, deliberate and premeditated. (*Id.* at pp. 1227-1228.)

78, footnote 5) in which the California Supreme Court held an additional three-year sentence under former section 667.8 may not be imposed when the defendant's violation of that section was neither pleaded nor proven, and was only mentioned for the first time in a probation report. (*Hernandez*, at p. 208; see *People v. Mancebo* (2002) 27 Cal.4th 735, 746-747; see also *People v. Arias* (2010) 182 Cal.App.4th 1009, 1019 [involving failure to allege attempted murders were willful, deliberate and premeditated under section 664, subdivision (a), and guilty verdicts absent any such finding].) Under the circumstances, " 'such additional term may not be imposed, since a pleading and proof requirement should be implied as a matter of statutory interpretation and must be implied as a matter of due process.' " (*Hernandez*, at p. 208.) " ' "It is unnecessary to articulate a particular standard of review and engage in a harmless-error analysis when defendant's due process right to notice has been so completely violated." ' " (*Id.* at pp. 208-209; see also *Mancebo*, at p. 747.⁹)

⁹ *Mancebo* held unauthorized a sentence including 10-year gun-use enhancements based on a multiple victim circumstance (§ 667.61, subd. (e)(5)) that was not alleged in the information. (*Mancebo, supra*, 27 Cal.4th at p. 745.) The court observed that because the information "neither alleged multiple victim circumstances nor referenced subdivision (e)(5) of section 667.61 in connection with those counts[,] . . . no factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing under section 667.61, subdivision (a)." (*Mancebo*, at p. 745.) This violated the defendant's due process right to fair notice of the specific sentence enhancement allegations that would be invoked to increase his punishment. (*Id.* at p. 747.) Likewise, in *People v. Haskin* (1992) 4 Cal.App.4th 1434, the Court of Appeal held a trial court was without authority to impose a five-year enhancement under section 667 where the information neither "statutorily nor factually charged" that enhancement. (*Haskin*, at p 1440.)

Likewise, we will not apply a harmless error analysis. Because the People first expressly pleaded a section 220, subdivision (b) offense, then omitted it in the amended information, the doctrine of waiver and estoppel, rather than harmless error, apply. (Accord, *People v. Mancebo*, *supra*, 27 Cal.4th at page 749; see also *People v. Botello* (2010) 183 Cal.App.4th 1014, 1027-1028.) In *People v. Arias*, *supra*, 182 Cal.App.4th at page 1020, the court rejected the People's harmless error contention, stating, "This was no mere formal defect in the information. Rather, defendant was not given notice of the special sentencing enhancement that would be used to increase his punishment [for attempted murder] from a maximum of nine years to a life term. Nor is this error reviewable under the abuse of discretion or harmless error analysis applicable to situations in which the information was amended during trial. Defendant's charging document was never amended. Accordingly, this is not the kind of error that can be cured by resort to a harmless error analysis as to whether the jury must have found the two attempted murders were committed willfully and with deliberation and premeditation."

Under these circumstances, Botello's sentence on count 5 must be vacated and the matter remanded for resentencing under section 220, subdivision (a)(1).

VI. *Booking Fee*

At Botello's sentencing hearing, the trial court imposed a \$110 "criminal justice administration fee" pursuant to Government Code section 29550, also referred to as a booking fee. (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399-1400). Botello contends the booking fee is not supported by sufficient evidence of his ability to pay it,

and that we should consider his claim despite his counsel's failure to object to imposition of the fee.

The People respond that Botello forfeited the contention by failing to object and raise his inability to pay below with the trial court. They further argue that the trial court's finding of Botello's ability to pay may be implied, and an implied finding is supported by the record, which permits a reasonable inference that he has the ability to pay the \$110 fee with the opportunity for paid work within the prison system.

Appellate courts disagree as to whether the forfeiture doctrine applies in the context of challenges to the imposition of jail booking fees. (See *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [forfeiture applicable]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1467-1468 [forfeiture applicable]; *People v. Pacheco, supra*, 187 Cal.App.4th at p. 1397 [holding the forfeiture doctrine inapplicable].) The issue is currently pending review in the California Supreme Court. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513 [addressing whether defendant's failure to object to imposition of a jail booking fee under section 29550.2 forfeited an appellate challenge to the sufficiency of the evidence of defendant's ability to pay the fee].) Without the Supreme Court's decision on the matter, we follow the precedents holding that challenges to sentencing decisions must be made in the trial court. (*People v. Hodges, supra*, at p. 1357; *People v. Gibson, supra*, at pp. 1467-1468.) Because Botello failed to object to imposition of the booking fee, we conclude the forfeiture rule applies.

DISPOSITION

The sentence on Botello's count 5 conviction for assault with the intent to commit rape is reversed and the matter is remanded with directions that the trial court resentence Botello in count 5 to a determinate term under Penal Code section 220, subdivision (a)(1), plus any applicable enhancements. In all other respects, the judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.