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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM FRANCIS ARROYO,

Defendant and Appellant.

D059741

(Super. Ct. No. FSB051616)

APPEAL from a judgment of the Superior Court of San Bernardino County, Bryan F. Foster, Judge. Affirmed and remanded with directions.

A jury convicted William Francis Arroyo of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a); count 1) and forcible rape (§ 261, subd. (a)(2); count 2). As to count 1, the jury found true special circumstance allegations of murder during the course of rape and burglary (§ 190.2, subs. (a)(17)(C), (G)) as well as murder involving the infliction of torture (§ 190.2, subd. (a)(18)). As to count 2, the jury found true that Arroyo personally inflicted great bodily injury on the victim, who was 70 years of age or older (§ 12022.7,

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

subd. (c)). The trial court found true that Arroyo had a prior serious and violent felony conviction (§§ 667, subds. (a)(1) & (b)-(i), 1170.12, subds. (a)-(d)). It sentenced Arroyo to life without the possibility of parole for the count 1 first degree and special circumstance murder plus a consecutive determinate term of 26 years, consisting of 16 years on count 2 plus five-year enhancements each for the infliction of violent injury on an elderly person and prior serious felony conviction.

Arroyo contends: (1) the trial court prejudicially erred by admitting assertedly inadmissible opinion testimony by a police officer concerning evidence of a struggle, requiring reversal of all his convictions; (2) there is insufficient evidence of death by criminal agency to support the count 1 murder; (3) there is insufficient evidence of either penetration or penetration while the victim was alive to support the count 2 rape; (4) the trial court prejudicially erred by failing to instruct the jury on the lesser included offense of attempted rape and (5) these asserted errors cumulatively require reversal of all of his convictions. Arroyo lastly argues his rape conviction must be stayed under section 654 and the double jeopardy clause. We affirm the judgment. However, we remand the matter for correction of the abstract of judgment to reflect that Arroyo was convicted by a jury, not by the court.

## FACTUAL AND PROCEDURAL BACKGROUND

### *Prosecution Evidence*

On December 1, 1999, a caregiver to 83-year-old Dorothy Roquet found Roquet's deceased body in the bathroom of her home, where she lived alone. Parts of Roquet's head and body were burned; her robe was above her waist and melted into her legs, her

underwear was down around her ankle, her "private" was red and swollen, and there were matches all around her body. Roquet's wedding ring and crucifix necklace that she normally wore were the only items missing from the house.

City of Colton Police Department Detective Jack Morenberg and a forensic specialist were called out to the scene. The forensic specialist observed Roquet face down on the floor, with her clothing partially burned and her underpants and pantyhose down around one of her ankles. There was a pool of blood underneath her head and a large amount of liquid dish soap on the floor. A towel was on top of Roquet's head and right hand. A towel rack above Roquet's head was partially bent down and pulled out of the wall. There was an empty match box and burnt matches scattered on the floor and also stuck to the skin of Roquet's vaginal opening. A burnt and melted bottle of liquid dish soap was resting on the back of Roquet's right knee between her legs.

The forensic specialist took vaginal, rectal and oral swabs from Roquet's body and collected the burnt clothing from her back. She took the vaginal swabs by inserting the swabs as far inside the vaginal canal as they would go, and was careful not to contaminate the swab on the outside of the vagina or legs. Testing on the vaginal swabs indicated the presence of Arroyo's sperm.

Detective Morenberg observed the above-described conditions and positioning of Roquet's body, the debris and soap surrounding it, and also saw the shower curtain was pulled out and seemingly disturbed. Roquet's eyeglasses were inside a small waste basket next to the toilet bowl. There was urine and toilet paper in the toilet. A pair of slippers were thrown or pushed off to the side. There was blood coming from Roquet's nose area.

The detective observed that the front left portion of Roquet's body did not sustain any burns, which he believed was the result of the fact her clothing was pulled open, exposing her breasts prior to the fire. He acknowledged Roquet's nylons and underpants were not torn and there was no indication her clothing was ripped off. Detective Morenberg nevertheless testified that based on everything he saw, "[t]here was a struggle in that bathroom and that's where a forcible rape had occurred."<sup>2</sup>

Dr. Frank Sheridan, the chief medical examiner for the County of San Bernardino, conducted Roquet's autopsy. At trial, he testified Roquet had burn injury around her nose area with blood in her nostrils. The inside of Roquet's eyelids showed distended and petechial hemorrhages, which he explained could occur when a person dies of a sudden heart attack or by pressure from the weight of something on the chest. Her right upper eyelid was bruised, and there was bruising on the front of her head, indicating some kind

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<sup>2</sup> When the prosecutor asked the detective if based on his education, training and experience it appeared there was any type of struggle, Arroyo's counsel interposed an objection as to lack of foundation. Without ruling on the objection, the trial court then asked Detective Morenberg whether he saw evidence of a struggle. The detective explained he had seen such evidence and the reason for his conclusion: "Well, I based that on everything I saw that day in that room. The towel around her head. The shoes. There were slippers being in two different areas spread out [*sic*]. The fact that the shower curtain was—wasn't laying straight. The fact that her glasses were in the trash can, in that trash can that led me to believe—plus the fact that there was urine and toilet, paper in the toilet, I came up with what I thought happened." Detective Morenberg also explained the significance of the location of Roquet's glasses: "Well, I thought the significance was that Mrs. Roquet was probably sitting on the toilet, urinating, when she was attacked. And then knocked her glasses off in the trash can because it's right next to the toilet. The way the slippers were knocked off or spread out on the floor. The way the shower curtain was pulled out. The towel around her head. The towel rack pulled out a little bit. You know if you look at a crime scene, it will usually tell you what happen[ed]. And I think [it was a] pretty good scene as far as telling us there was some type of struggle and some type of forced actions here."

of blunt force injury to her forehead area that could be consistent with Roquet having her head pressed onto the tile floor. Dr. Sheridan could not say specifically how the blunt force trauma happened; whether it was by her head being hit by something or her head hitting against a surface. Roquet's skull was not fractured, and he did not consider the bruising significant enough to have rendered her unconscious. However, he testified he believed Roquet was alive at the time she sustained those bruises. Dr. Sheridan also found scattered small areas of fresh bruising on Roquet's chest, possibly consistent with her being pushed down on the floor or some pressure being applied on top of her.

Roquet's skin in her vaginal area was partially charred and burned, and because of that condition, Dr. Sheridan was unable to see abrasions or lacerations. Dr. Sheridan conducted an internal vaginal exam and found no obvious trauma. He testified that a lubricant would diminish and possibly eliminate any trauma. He testified that the presence of semen inside the vagina was consistent with sexual penetration. Dr. Sheridan testified he could reasonably say that if there was sexual penetration prior to the fire, the charring in that area could cover up minor injuries such as abrasions or bruising.

Dr. Sheridan testified there was no indication Roquet was strangled. He noticed, however, the upper part of her airway was redder than normal, with a very faint graying color indicating possible soot, but he was not sure. He testified he was "confident" that the redness indicated that when the fire started, Roquet was alive and the redness was caused by her inhaling hot air. He explained that Roquet did not have the typical signs of being in a dense fire such as an obvious and dense deposit of soot, or the presence of carbon monoxide in her blood. He also noted that one might argue that lividity—changes

that occur after death when a body is positioned a certain way—caused the redness. However, he opined the observed discoloration in Roquet's airway was "redder than normal"; that the redness indicated she was inhaling hot air and died very rapidly of sudden cardiac arrest given the fire, pain and stress of the situation. He testified that the fabric on Roquet's face could have minimized particles of soot in her airway.

After he had examined Roquet both internally and externally, Dr. Sheridan listed her cause of death as thermocutaneous burns with cardiac disease as a contributing factor: "I believe that the inhaling of the hot air plus the pain, if she was conscious; and I have no reason to think she wasn't, sparked a cardiac [arrhythmia]." He testified Roquet's fatal abnormal arrhythmia led to death very quickly, explaining, "So by putting that as a contributing cause, what I'm saying is that had she not had the heart disease, she would possibly have lived longer, at least in that sequence of events. But she died rapidly because of the heart disease."

On redirect examination, Dr. Sheridan was asked whether, considering his opinion that Roquet was alive at the time of the fire, it would be reasonable to say Roquet was alive at the time of the rape given the presence of semen in her vaginal canal or vagina. He responded, "In general it is reasonable, yes. I mean there's not much more I can say according to common sense more than any particular pathology."

### *Defense Evidence*

Arroyo testified in his defense. He denied killing Roquet, claiming he went to her house thinking he saw his friend Matt, who was Roquet's grandson, and instead found Roquet lying face down on the bathroom floor with blood on the side of her face. Arroyo

turned Roquet over, and presumed she was dead. According to Arroyo, he was "high" at the time; the prior day he had been drinking, using methamphetamine and marijuana from noon until midnight. After finding Roquet, Arroyo heard a noise, panicked and shut himself in the bathroom with her, then eventually proceeded to grope her deceased body and laid on top of her in an attempt to have sex with her. According to Arroyo, he was unable to penetrate Roquet but ejaculated in her genital area, then tried to cover it up by cleaning her with soap and then setting Roquet on fire with matches. He denied using liquid soap as a lubricant. Arroyo admitted taking Roquet's ring and possibly her cross. He admitted trying to fake a mental illness in a previous case.

Certified sexual nurse examiner and registered nurse Cari Caruso testified that she had reviewed the coroner's documentation and photographs in the case, and there was no finding to confirm that penile penetration had occurred, nor was there any way for her to tell that such penetration had occurred. She acknowledged, however, that there could be penetration without leaving any findings, but the fragility of an elderly person's skin "takes the risk factor of injuring the external skin a little bit higher." She "couldn't comment" on whether there was any reason for Arroyo's DNA in Roquet's vaginal cavity, saying, "Of course penetration can cause that, but we don't have evidence for or against penetration." She could not say with 100 percent certainty that no penetration occurred, but she would expect to see more trauma on Roquet than on a younger person.

Forensic pathologist Dr. Harry Bonnell testified there was insufficient evidence to show any cause of death other than a cardiac event, and opined that the fires were set after Roquet was dead. He admitted, however, that the presence of sperm inside the vagina

would be reasonably consistent with sexual penetration, as well as with drainage of semen from another location of Roquet's body or contamination of the sample.

*Rebuttal*

Dr. Laura Mosqueda, a medical doctor and expert in geriatrics and elder abuse, testified she had conducted hundreds of pelvic examinations on elderly females, and disagreed that the skin in an elderly person's vaginal area was very delicate and fragile, or that the tissues could be easily abraded or disrupted even by using a towel or tissue. She very often used a speculum to do an examination, even on an 80-year-old woman, and did not cause cuts or abrasions of any type.

DISCUSSION

*I. Admission of Detective Morenberg's Testimony*

Arroyo contends the trial court allowed introduction of inadmissible opinion testimony, namely, the opinion of Detective Morenberg that based on the bathroom scene, a struggle and rape occurred there. According to Arroyo, the trial court erred by overruling his objection as to the absence of foundation for the detective's opinion; in particular, he argues there was no evidence establishing the detective had "knowledge of bathroom scene reconstruction or crime scene reconstruction." He further argues Detective Morenberg's opinions (1) were not about a subject sufficiently beyond the common experience of lay people and thus not necessary to assist the trier of fact; (2) were based on speculation and conjecture; and (3) exceeded the scope of proper expert opinion because he was allowed to "pronounce defendant guilty of rape."

Arroyo maintains the error was highly prejudicial, asserting his case was strong and the prosecution's weak. Specifically, Arroyo asserts his own testimony was corroborated by expert opinion testimony, but the prosecution relied on the "mere presence" of his semen that could be explained by other causes, as well as Dr. Sheridan's opinion that Roquet was alive before being set on fire, which could not be documented by autopsy photographs and was "substantially impeached" by Dr. Bonnell's expert testimony.

The contentions are without merit. "The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. [Citations.] That discretion is necessarily broad: "The competency of an expert 'is in every case a relative one, i.e. relative to the topic about which the person is asked to make his statement.' [Citation.]" [Citation.] Absent a manifest abuse, the court's determination will not be disturbed on appeal.'" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1336.)

Assuming Detective Morenberg testified as an expert, which the People dispute, Arroyo does not point to any record citation showing he objected at trial to the detective's general qualifications or knowledge of crime scene investigation, or that he objected on grounds the detective's opinions were speculative or within a lay person's common experience. The detective testified he had worked homicide crimes for 19 years and in the course of that work investigated five to six hundred death scenes and conducted "probably" two hundred homicide investigations. Along with experience that qualified him to give opinions concerning the appearance of a crime scene and factors indicative of a struggle, he had actually viewed the crime scene as part of his investigation. This provided ample foundation for his opinions, and thus the trial court did not abuse its

discretion by impliedly overruling Arroyo's objection as to foundation. For the same reason, Detective Morenberg's deduction that a struggle had occurred by the appearance of the scene, including the placement of Roquet's body and clothing, slippers and eyeglasses, as well as the condition of the towel rack and shower curtain, rested on his personal observations and his experience and knowledge, not on speculation, guesswork or conjecture.

We further conclude the trial court could reasonably find, and did implicitly find, the matters to which Detective Morenberg testified were " ' 'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' ' ' " (*People v. Loy* (2011) 52 Cal.4th 46, 69, italics added; *People v. McDonald* (1984) 37 Cal.3d 351, 367, overruled in part on other grounds by *People v. Mendoza* (2000) 23 Cal.4th 896, 914.) "[A]lthough expert testimony is generally inadmissible on topics 'so common' that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert, an expert may testify on a subject about which jurors are not completely ignorant. [Citations.] In determining the admissibility of expert testimony, 'the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury.' " (*People v. Lindberg* (2008) 45 Cal.4th 1, 45.) "The jury need not be wholly ignorant of the subject matter of the opinion in order to justify its admission . . . ." (*McDonald*, at p. 367.)

In this case involving an elderly woman living alone, the question of whether or not the appearance of the crime scene suggested a struggle had occurred required expert guidance, and was not necessarily a matter of such basic common knowledge as Arroyo

maintains. Arroyo cites various cases involving the proper subject of expert testimony, but none involve the scope of an investigating detective's opinion concerning whether the appearance of a crime scene is consistent with a fight or struggle. Accordingly, Arroyo has not demonstrated the trial court manifestly abused its discretion in admitting the detective's testimony as an expert opinion helpful to the trier of fact.

The People maintain nevertheless that Detective Morenberg did not testify as an expert or give an expert opinion; he was a responding officer and percipient witness. They point out Detective Morenberg's observations, description and characterization of the crime scene were based on his personal perceptions and his testimony "explained his conduct during his investigation at the scene." According to the People, Arroyo's arguments as to foundation, speculation and conjecture, and the admissibility and scope of expert opinion are misplaced. Based on our conclusion above, we need not resolve whether Detective Morenberg's opinions were expert or otherwise.

To the extent the detective usurped the jury's function by testifying that a "forcible rape" had occurred in the bathroom, we note the testimony was received without objection and thus the appellate contention is forfeited. (Evid. Code, § 353, subd. (a); *People v. Nelson* (2011) 51 Cal.4th 198, 223 [failure to make a timely and specific objection on the ground asserted on appeal makes that ground not cognizable].) But disregarding the forfeiture and assuming error, we would nevertheless conclude it is not reasonably probable a result more favorable to Arroyo would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818.) Arroyo characterizes the People's medical evidence relevant to Arroyo's guilt as "weak," citing his sufficiency of the

evidence arguments. Having rejected those arguments below (parts II (A) and (B), *post*), we disagree with the characterization.

Further, the detective's comment on redirect examination was fleeting, and it was not repeated or relied upon by the prosecutor in her closing argument to the jury. The jury viewed the crime scene photographs and was specifically instructed that it was the exclusive judge of the facts; that it alone was required to decide what the facts were in the case based on all of the evidence. Though Arroyo points out the jurors requested a read-back of his testimony we perceive from this that the jury carefully reviewed the record to determine any reasonable doubt as to Arroyo's guilt. Absent some indication otherwise, we presume the jury understood from the instructions it was to decide whether or not a struggle or forcible rape had occurred in the bathroom, and did so without influence from any improper opinion from Detective Morenberg.

## II. *Claims of Insufficiency of the Evidence*

### A. *Standard of Review*

Well settled standards apply to Arroyo's sufficiency of the evidence challenges. We determine " 'whether, after viewing the evidence " ' in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citation.] This standard applies

whether direct or circumstantial evidence is involved. "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." " " " " (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) Reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support' " the jury's verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

#### B. *Sufficiency of Evidence of Death by Criminal Agency*

Arroyo contends there is insufficient evidence of death by criminal agency—that Roquet's death was caused by the unlawful act of some person—to support both his murder conviction and all of the special circumstance findings. He urges us to conclude there is insufficient evidence of Roquet's homicide on grounds Dr. Sheridan's opinion is without supporting reasoning, and consists of "speculation, guesswork and conjecture" as to the cause of Roquet's death.

In a murder prosecution, the corpus delicti—i.e., death caused by criminal agency—must be established independently of the extrajudicial statements, confessions or admissions of the defendant. (*People v. Towler* (1982) 31 Cal.3d 105, 115.) It is settled, however, in establishing the corpus delicti, the prosecutor is not required to present proof as clear and convincing as is necessary to establish the fact of guilt; " 'rather slight or

prima facie proof is sufficient for such purpose.' " (*Ibid.*) " "To meet the foundational test the prosecution need not eliminate all inferences tending to show a noncriminal cause of death. Rather, the foundation may be laid by the introduction of evidence which creates a reasonable inference that the death could have been caused by a criminal agency [citation] even in the presence of an equally plausible noncriminal explanation of the event.

[Citations.]' . . . The authorities also make it clear that '[t]he corpus delicti may be established from circumstantial evidence, and by the reasonable inferences to be drawn from such evidence.' " (*Ibid.*, italics omitted.)

Here, Arroyo challenges the evidence by attacking Dr. Sheridan's opinion. He argues Dr. Sheridan's autopsy report described his redness finding as "equivocal" as to whether or not there was possible soot in Roquet's airway and Dr. Sheridan testified that the redness could be caused "solely" by lividity. He argues, without record citation, Dr. Sheridan's observation of redness "was not documented by autopsy photographs, even when those photographs were color enhanced." He points to the absence of carbon monoxide in Roquet's blood, which he asserts is "inconsistent with death by fire." Arroyo highlights the fact Dr. Sheridan was unable to say specifically how Roquet's bruising occurred. Arroyo argues that Dr. Sheridan's testimony was contradicted by defense expert Dr. Bonnell, who opined Roquet died of cardiac arrest and testified there was no evidence she inhaled products of combustion, establishing the fires were set after she died.

We are not convinced. Dr. Sheridan did not opine that Roquet died by fire or blunt force trauma. His testimony was that Roquet's death was caused by thermocutaneous burns with cardiac disease as a contributing factor; that Roquet had a sudden arrhythmia

very early on and died before she had time to inhale much gas. Nor did Dr. Sheridan testify that the redness "could have been solely the result of lividity" as Arroyo maintains. Rather, he explained but ruled out lividity as a possible explanation for the redness because the discoloration was "redder than normal."<sup>3</sup> Further, Dr. Sheridan may have questioned whether or not there was evidence of soot in Roquet's airway, but that did not diminish his testimony concerning his examination and dissection of Roquet's airway and the appearance of redness. That is, Dr. Sheridan testified, without objection, based on his examination and experience he was "confident about this redness here was indicative to me that when the fire started at least, this lady was alive. And . . . the redness was caused by inhaling hot air. It irritates the airway and it turns red." We conclude Dr. Sheridan's findings and conclusion as to Roquet's cause of death were not speculative or mere guesswork, but had a factual and reasoned basis in his expertise and examination of Roquet's body.

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<sup>3</sup> Arroyo does not insert a record citation for his characterization of Dr. Sheridan's comment. In fact, Dr. Sheridan's testimony was as follows: "Now I do have to mention she was found at the scene in facedown position. And there is something called lividity, . . . which is a postmortem change whereby parts of the body which are down, down meaning closest to the ground, and that would depend obviously on the position the body is in where it is. You expect to see some just discoloration in those parts that are dependant [*sic*] and lower. And that's normal[—]that will happen regardless of cause of death or anything else. So it might be argued that this redness here is just lividity and *that's not what I'm saying it is*, the effect of heat. [¶] But in my opinion this is redder than normal. And if you look further down here it's paler, so you know, that's—you can say that's lividity perhaps, but here it's a bit more red than normal. And as I said, I believe that the reason for that is that she inhaled some hot air from the fire and, therefore, she was alive but only previously I believe." (Italics added.) Dr. Sheridan was then asked, "That's . . . as she is breathing in that hot air that's what would cause that redness?" He answered, "Yes."

Any possible inconsistency or weakness in Dr. Sheridan's testimony goes to its weight, and not its sufficiency under applicable standard of review. It was up to the jury to determine the strength or weakness, and ultimately the credibility, of Dr. Sheridan's testimony. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181; *People v. Scott* (1978) 21 Cal.3d 284, 296.) If credited by the trier of fact, the testimony of a single witness, unless physically impossible or inherently improbable, is sufficient to sustain a conviction. (Evid. Code, § 411; *People v. Young*, at p. 1181.) Arroyo has not shown Dr. Sheridan's testimony was either physically impossible or inherently improbable. Dr. Sheridan's testimony, combined with the evidence of the state of Roquet's partially unclothed and burned body, was amply sufficient to permit the jury to find Roquet's death was caused by criminal agency.

### C. *Sufficiency of the Evidence of Rape*

Arroyo contends his rape conviction must be reversed because any finding that he penetrated Roquet while she was alive is based on speculation and conjecture. Pointing out his rape conviction is premised on the theory that Roquet was alive when she was set on fire—and therefore alive for all of the prior acts—he first maintains there is insufficient evidence of that theory for the reasons set forth above. Having rejected that contention (see part II (B), *ante*), this first point fails.

Arroyo next contends there is insufficient evidence to support a finding he penetrated Roquet. He argues that both the prosecution and defense experts conceded that other causes unrelated to penetration could reasonably account for or be consistent with finding semen in the vagina of a deceased woman. However, Arroyo cites only *defense*

*experts* Caruso and Bonnell for this statement. In fact, the People's experts did not express opinions as to possible other explanations for the presence of Arroyo's sperm inside Roquet's vagina. Rather, Dr. Sheridan testified that the use of lubricant would diminish or possibly eliminate any trauma, and the presence of sperm inside Roquet's vagina was consistent with sexual penetration.

Arroyo also asserts Drs. Mosqueda and Bonnell both agreed presence or absence of trauma "should be a factor" in considering whether penetration occurred. But Arroyo's characterization of Dr. Mosqueda's testimony is incorrect. At the cited pages, Dr. Mosqueda actually testified that if trauma was present in an 83-year-old rape victim, "that would be helpful. But if . . . *visual trauma is not present then that wouldn't rule it out at all.* Because you can have penetration. You can have sexual intercourse without having trauma. I know that with certainty. (Italics added.) Dr. Mosqueda continued to say that based on the literature, and her experience doing pelvic examinations, "you could often have no visible trauma with a rape." She testified that in a rape situation without the presence of lubricant, one would not necessarily see evidence of penetration that is expressed in terms of trauma; that the absence of trauma "doesn't tell you one way or the other."

In assessing for sufficiency of the evidence, we emphasize again that it is not our function to reweigh the evidence; the weight and credibility to be attached to it is a matter for the trier of fact. (*People v. Nazaroff* (1968) 266 Cal.App.2d 229, 239.) Where the evidence is in conflict, we defer to the determination of the trial court or jury as the finder of fact. (See *In re J.G.* (2008) 159 Cal.App.4th 1056, 1067; *People v. Gunn* (1959) 170

Cal.App.2d 234, 238.) Further, to uphold Arroyo's rape conviction, it is evidence of sexual penetration that is required, not vaginal penetration. " '[P]enetration of the external genital organs is sufficient to constitute sexual penetration and to complete the crime of rape even if the rapist does not thereafter succeed in penetrating into the vagina.' " (*People v. Quintana* (2001) 89 Cal.App.4th 1362, 1366; see also *People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097.) Sexual penetration may be proved by circumstantial evidence. (*People v. Stevenson* (1969) 275 Cal.App.2d 645, 650; *People v. Swanson* (1962) 204 Cal.App.2d 169, 174; *People v. Peters* (1957) 149 Cal.App.2d 94, 97-98.)

The jury considered Dr. Sheridan's and Dr. Mosqueda's expert testimony as well as evidence that a forensic specialist carefully inserted swabs inside Roquet's vagina taking care not to contaminate them on her outer skin, and that the swabs tested positive for Arroyo's sperm. This evidence, combined with the appearance of Roquet's body and clothing and the fact Dr. Sheridan was unable to perceive external bruising, abrasions or lacerations as a result of the burn injuries, permitted the jury to reasonably infer sexual penetration supporting Arroyo's rape conviction.

### III. *Failure to Instruct Jury on Attempted Rape*

Conceding his defense counsel expressly refused an attempted rape instruction, Arroyo contends the trial court nevertheless erred by failing to instruct the jury on attempted rape as a lesser included offense of forcible rape. He maintains the evidence, construed in his favor, including the absence of sex-related trauma to Roquet's exterior or internal vaginal areas, was sufficient to show he tried but failed to penetrate Roquet,

warranting the instruction. According to Arroyo, the People's theory of invited error does not apply because the record shows no tactical reason for defense counsel's decision to refuse an attempted rape instruction.

" The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal. . . . [I]t also must be clear that counsel acted for tactical reasons and not out of ignorance or mistake.' " (*People v. Coffman* (2004) 34 Cal.4th 1, 49.) In cases involving an action affirmatively taken by defense counsel, the California Supreme Court has found a clearly implied tactical purpose sufficient to invoke the invited error rule. (*Ibid.*, citing *People v. Catlin* (2001) 26 Cal.4th 81, 150, *People v. Wader* (1993) 5 Cal.4th 610, 657-658, *People v. Hardy* (1992) 2 Cal.4th 86, 152.)

Thus, in *Coffman*, where defense counsel "did not merely acquiesce, but affirmatively joined" in a challenge to a prospective juror, the defendant was barred from claiming the trial court erred by excusing her. (*People v. Coffman, supra*, 34 Cal.4th at p. 49.) In *People v. Catlin*, it was the "defendant's proposal, with which the prosecutor somewhat reluctantly agreed, to omit the definition of express malice from CALJIC No. 8.11." (*People v. Catlin*, 26 Cal.4th at p. 150.) The California Supreme Court stated that the decision appeared to be a " 'conscious, deliberate tactical choice' " sufficient to apply the invited error doctrine. (*Ibid.*) In *People v. Wader, supra*, 5 Cal.4th 610, the court explained that "[w]hen a defense attorney makes a 'conscious, deliberate tactical choice' to forego a particular instruction, the invited error doctrine bars an argument on

appeal that the instruction was omitted in error." (*Id.* at pp. 657-658.) In *People v. Horning* (2004) 34 Cal.4th 871, the California Supreme Court, addressing similar circumstances, stated, "[A] defendant may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence.'" (*Id.* at p. 905.)

Here, Arroyo's counsel did not merely acquiesce, but made a deliberate decision to omit the lesser included attempted rape instruction, affirmatively stating, "No, I don't want it" when the trial court inquired whether both counsel wished to stipulate to omit the instruction. The trial court confirmed: "That's fine both sides stipulate that . . . on Count 2 that the verdict form only be for rape and not for attempted rape; is that correct." Defense counsel responded, "Yes." Because Arroyo's defense theory was that Roquet was already deceased when he found her, and therefore could not legally have raped a deceased person, we conclude his counsel plainly had a tactical purpose in declining the instruction. That is, counsel refused the instruction on the lesser included offenses "because [it was] inconsistent with his defense that he did not commit the crime at all." (*People v. Horning, supra*, 34 Cal.4th at p. 905.) The invited error doctrine therefore bars Arroyo's claim.

The authorities relied upon by Arroyo do not convince us otherwise. Arroyo cites cases in which defense counsel either requested or acquiesced to standard jury instructions, with no reasonable tactical purpose apparent. (See *People v. Tate* (2010) 49 Cal.4th 635, 699; *People v. Moon* (2005) 37 Cal.4th 1, 28 [invited error not applicable

because record did not reveal trial counsel expressed a deliberate tactical purpose in jointly requesting standard jury instructions]; accord, *People v. Moore* (2011) 51 Cal.4th 386, 410 [defense counsel's inclusion of CALJIC Nos. 8.71 and 8.72, commonly used pattern instructions on application of the reasonable doubt principle to lesser included homicide offenses did not demonstrate tactical intent to induce the claimed error]; *People v. Famalaro* (2011) 52 Cal.4th 1, 41-42 [defense counsel's request to instruct with CALJIC No. 2.27 did not implicate invited error doctrine because the record failed to show counsel had a tactical reason for requesting or acquiescing in the instructions]; *People v. McKinnon* (2011) 52 Cal.4th 610, 677, fn. 41 [invited error not applicable because record did not reveal trial counsel expressed a deliberate tactical purpose in jointly requesting standard jury instructions].)

#### IV. *Cumulative Error*

Arroyo contends the cumulative effect of the court's errors was prejudicial, necessitating reversal. We have found one matter that was arguably evidentiary error, and as to that matter the claimed error was harmless. Otherwise, we have rejected Arroyo's contentions as to instructional error (as invited by Arroyo) and insufficiency of the evidence. The single instance of error did not affect the outcome in this case. There is no cumulative error or prejudice warranting reversal. (*People v. Geier* (2007) 41 Cal.4th 555, 620.)

#### V. *Claim of Improper Multiple Punishment*

At the sentencing hearing, the trial court ordered Arroyo's sentences be served consecutively, stating: "The court finds under [California Rules of Court, rule 4.425] that

the crimes and their objectives were predominantly independent of each other; that the objectives of the offenses as indicated by the information provided during the trial indicate that the two offenses occurred, not joined with each other but separate, the rape and the murder; that the crimes did involve separate acts of violence or threats of violence; that the crimes were not so far separated in time that they do not indicate a . . . single period of aberrant behavior, but I don't find that convincing in this matter. As such, I'm going to order that the sentence be concurrent [*sic*]." The court expressly stated, and the abstract of judgment reflects, that Arroyo's sentence and the enhancements on count 2 are to be served consecutively.

Arroyo contends the trial court violated section 654's prohibition on multiple punishment and his rights under the double jeopardy clause of the United States Constitution by imposing consecutive sentences for rape and felony-murder rape, and rape special circumstance murder. Citing cases for the proposition that section 654 bars multiple punishment for a felony and felony murder predicated on that theory, he argues, "When felony-murder becomes a special circumstance murder because intent to kill also exists during the underlying felony, . . . section 654 necessarily bars multiple punishment for both the special circumstance felony murder, which carries the punishment of life imprisonment without possibility of parole, and the underlying felony." He maintains that for purposes of double jeopardy analysis, felony murder and the underlying felony constitute the same offense. Arroyo asks this court to presume for purposes of the analysis under section 654 and double jeopardy that the jury or some jurors rested their first degree murder verdict on the less burdensome rape felony-murder theory, requiring a

conclusion that the jury found the rape and killing were committed during an indivisible course of conduct.

Acknowledging the trial court did not address the issue of multiple punishment, the People respond that the trial court in sentencing Arroyo to consecutive terms implicitly found he harbored separate intents and objectives for his offenses, which finding is supported by evidence that Arroyo raped Roquet on the bathroom floor using the dish soap from the kitchen, then sought to cover up his crime by setting her on fire and leaving her to die.

Section 654 provides in part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).) "[S]ection 654 applies not only where there was but one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute but nevertheless constituted an indivisible transaction. . . . If all the offenses were *incident to one objective*, the defendant may be punished for any *one* of such offenses but not for more than one.' [Citation.] Whether offenses are 'indivisible' for these purposes is determined by the 'defendant's intent and objective, not the temporal proximity of his offenses.' [Citation.] 'If [a] defendant harbored "multiple criminal objectives," which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, "even though the violations shared common acts or were parts of an otherwise indivisible course of conduct."' [Citation.] The application of section 654,

thus, 'turns on the *defendant's* objective in violating' multiple statutory provisions.

[Citation.] Where the commission of one offense is merely ' "a means toward the objective of the commission of the other," ' section 654 prohibits separate punishments for the two offenses." (*People v. Wynn* (2010) 184 Cal.App.4th 1210, 1214-1215; see also *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

" 'The determination of whether there was more than one objective is a factual determination, which will not be reversed on appeal unless unsupported by the evidence presented at trial.' " (*People v. Wynn, supra*, 184 Cal.App.4th at p. 1215; *People v. Osband* (1996) 13 Cal.4th 622, 730-731 [appellate court reviews trial court's finding under substantial evidence test].) We consider the evidence in the light most favorable to the People and presume the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Holly* (1976) 62 Cal.App.3d 797, 803.)

If, as here, the court makes no express section 654 finding, a finding that the crimes were divisible and thus subject to multiple punishments is implicit in the judgment and must be upheld if supported by substantial evidence. (*People v. Lopez* (2011) 198 Cal.App.4th 698, 717, citing *People v. Blake* (1998) 68 Cal.App.4th 509, 512.)

As a preliminary matter, Arroyo has not provided authority for the proposition that because the jury found he committed rape, this court must presume it reached its first degree murder conviction on a theory of rape felony murder, as opposed to a theory of premeditation and deliberation. The jury, after having been instructed on that theory, could have reached its general verdict on first degree murder by finding Arroyo had committed premeditated murder. Evidence that Arroyo procured matches and set Roquet

on fire, which ultimately caused her death, supports a theory that he acted with express malice aforethought formed after premeditation and deliberation. (§ 189; *People v. Gonzalez* (Jul. 5, 2012, No. S189856) \_\_\_ Cal.4th \_\_\_ [2012 WL 2580001].) Further, we observe the jury found true three special circumstance allegations—including that Roquet's murder involved the infliction of torture—and only one special circumstance finding was necessary to support Arroyo's sentence for life without the possibility of parole.

Given these preliminary observations, it was reasonable for the trial court to conclude in sentencing Arroyo the rape was not the act that made Roquet's homicide first degree murder. And the evidence is sufficient for the trial court to have found that Arroyo harbored different criminal objectives and intents in committing Roquet's rape and murder. The evidence recounted above supports a scenario where Arroyo entered Roquet's home and, upon finding Roquet in the bathroom, decided first to sexually assault her, then, having completed the rape, searched the house for matches in order to set her on fire. The trial court could reasonably find that the separate act was committed for the purpose of avoiding detection of the rape and his DNA. Accordingly, there is no basis to conclude the trial court erred by imposing consecutive sentences for the count 1 special circumstance murder and the count 2 rape.

Arroyo's cited authorities do not convince us to reach a different conclusion. In *People v. Meredith* (1981) 29 Cal.3d 682, a case involving a defendant convicted of both first degree murder and robbery (*id.* at pp. 685-686), the California Supreme Court stayed execution of sentence for the robbery, because "[t]he evidence reveal[ed] a single course

of conduct with one objective . . . ." (*Id.* at pp. 695-696.) In *People v. Boyd* (1990) 222 Cal.App.3d 541, a case in which the defendants were convicted of first degree murder and second degree robbery (but where the jury found not true special circumstance allegations that one of the defendants committed the murder during the commission of a robbery, *id.* at p. 548), the appellate court stayed the codefendant's one-year prison term for robbery, holding punishment for a robbery must be stayed when the act of robbery is the act that made the homicide first degree murder. (*Id.* at pp. 575-576.) The *Boyd* court relied upon *People v. Mulqueen* (1970) 9 Cal.App.3d 532, also cited by Arroyo, another case involving a robbery and first degree murder conviction where the appellate court found "there was but one act and that the act of robbery was the act which made the homicide first degree murder." (*Mulqueen*, at p. 547; see *Boyd*, at pp. 575-576.) Another case cited by Arroyo likewise involves a murder committed during the course of a robbery. (*People v. Magee* (1963) 217 Cal.App.2d 443, 450-451, 471 [victim's wallet was taken from him and then he was severely beaten and left on streetcar tracks, where he was killed by a streetcar; court held robbery was a necessary ingredient of the first degree murder].) These cases involve scenarios, unlike this case, where the act constituting the felony is the only act that makes the homicide first degree murder. None of these cases involves a defendant like Arroyo who was convicted of a felony (rape) that is not the sole theory supporting a first degree murder conviction, nor do they involve multiple other special circumstances justifying a sentence of life without the possibility of parole.

As for his double jeopardy argument, Arroyo contends for purposes of that analysis, "felony-murder and the underlying felony constitute the same offense." However, because Arroyo's life-without-the-possibility-of-parole sentence could be based on any one of the three special circumstances that the jury found to be true, the other two special circumstances were unnecessary in convicting Arroyo of first degree, special circumstance murder. We cannot conclude Arroyo's punishment for the count 2 rape was double punishment that violated the double jeopardy clause.

#### VI. *Correction of Abstract of Judgment*

The People point out in a footnote that Arroyo was convicted by a jury, but the abstract of judgment erroneously reflects Arroyo was convicted by the court. "'Courts may correct clerical errors at any time . . . .'" (*People v. High* (2004) 119 Cal.App.4th 1192, 1200, quoting *People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Appellate courts that have properly assumed jurisdiction of cases may order the correction of abstracts of judgment that do not accurately reflect the proceedings. (See *ibid.*) We order the abstract of judgment be corrected so as to accurately reflect that Arroyo was convicted by a jury, not by the court.

## DISPOSITION

We affirm the judgment but remand to the trial court with directions to amend the abstract of judgment to indicate that defendant was convicted by a jury, not by the court. The trial court shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.