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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIK JOHN FREUND,

Defendant and Appellant.

In re ERIK JOHN FREUND

on Habeas Corpus.

G044121

(Super. Ct. No. 08NF3205)

O P I N I O N

G045959

Appeal from a judgment of the Superior Court of Orange County, Lance Jensen, Judge. Affirmed as modified.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Petition denied.

Kristin A. Erickson for Defendant, Appellant and Petitioner.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

* * *

A jury found defendant Erik John Freund guilty of attempted rape (Pen. Code, §§ 664, subd. (a), 261, subd. (a)(2); all statutory references are to the Penal Code) and found that he used a deadly weapon, a stainless steel pan, during the commission of the crime (§ 12022.3, subd. (a)). The court sentenced defendant to an aggregate term of 14 years in state prison, consisting of a four-year term for the attempted rape and a consecutive 10-year term for the weapon use. Defendant contends on appeal: (1) the attempted rape conviction and true finding on the enhancement were not supported by sufficient evidence; (2) the court erred in instructing the jury; (3) the court erred in excluding defense evidence; (4) trial counsel was ineffective in failing to object to the trial court's answer to a jury question; (5) the court erred in denying defendant juror information after trial; and (6) the court miscalculated his presentence conduct credits. We agree with the Attorney General that the last issue has merit. We therefore order the abstract of judgment to be amended to reflect the correct conduct credits and otherwise affirm the judgment.

Defendant also filed a petition for a writ of habeas corpus, alleging trial counsel was ineffective for failing to adequately investigate potential defenses. We issued an order to show cause and consolidated the extraordinary proceeding with the appeal. We find defendant has failed to demonstrate he was prejudiced by what he alleges to have been ineffective assistance of counsel, and deny the petition.

I

FACTS

Prosecution Evidence

Dayna A.'s daughter, Michelle, met defendant in 1996, when she was a sophomore and defendant was a junior in the same high school. They were friends for the next two years. They went on two dates during Michelle's junior year. When they "hung out" together, it was usually with a group of friends. During their friendship, defendant went to Michelle's house where she lived with her mother and father, Alan A.,

about 10 times. Defendant and Michelle stopped seeing each other during Michelle's junior year of high school. There were no hard feelings involved.

On December 19, 2002, Michelle returned home from work between 4:00 and 5:00 p.m. She noticed the bedroom door to her parents' bedroom was open and clothing was scattered about the room. The bedding was "visibly disorganized" and a pillow on her mother's side of the bed was out of place.

Her own room was in complete disarray. Clothes were scattered all over the floor and about the room. Michelle's lingerie had been pulled out of her dresser and were on the floor. She found a black camisole of her mother's in her room. Michelle said it appeared as if some of the lingerie had been tried on. One of her bras was hooked and she puts them in her dresser unhooked. She noticed deodorant residue on one blouse and saw a pair of pantyhose rolled up on the floor. The sheets on her bed had been turned and it appeared someone had lain there. She found a frying pan belonging to her family under her bed. The police took possession of some of the items.

Dayna A. was asleep in the bed in the master bedroom in the early morning hours of Sunday, May 16, 2004, when she heard a sound at the foot of the bed. She said it sounded like someone taking off clothing. She thought it was her husband changing as he gets up early on Sunday mornings to golf. She did not open her eyes. The next thing she heard was someone to her right, breathing heavily. She no longer thought it was her husband. She said "no one" ever went to that side of the room. Thinking something was wrong, Dayna A. rolled over, opened her eyes, and saw the torso of a man in the dark room. He was standing "very close" to her. She explained that she sleeps very close to the edge of her side of the bed and the intruder was "directly next to the bed." She asked, "What are you doing here?" She saw some movement and felt something strike her head, across her left eyebrow. She "saw stars" and tried not to pass out. She heard another noise coming from the intruder and, thinking he would hit her again, she threw up her left arm. Something hit her arm with more force than the first blow and she heard something

crash against a wall. She jumped off the bed and went toward the master bedroom door. She tried to scream, but could not catch her breath.

The bedroom door was locked. Her husband never locks the door when he leaves in the morning. Dayna A. saw the intruder jump over the bed and head to the master bathroom. She screamed when she reached the hallway. She heard glass breaking and thought the sound came from the master bathroom.

Dayna A. went to the front door and ran outside to be in public. She continued to scream. She was bleeding, disoriented, and confused. She saw someone run past her. She thinks the male ran out the front door. She described the man as having a thin build, medium complexion, with short, spiky, frosted tipped hair. He ran out down the street and out of the cul-de-sac. Dayna A. said the last time defendant had been to her house was in 1996.

Dayna A.'s husband, Alan A., came out from the back of the house, "apparently from the backyard," and asked her what was wrong. She told him and he called the police.

Dayna A. went back into the house when the police arrived. She saw male clothing she did not recognize at the foot of her bed and a baseball hat that did not belong to anyone in her family on top of her clothes hamper. There were clothes about the room because Dayna A. had been sorting clothes after having recently returned from a trip. She said her clothing on the floor had been there before she went to bed and none of her clothing had been moved. Neither had any of her clothing been removed from the closet. No clothing or jewelry was missing.

Alan A. said he got up that morning about 4:00 a.m. to golf with friends. He started watching television in the family room while he got ready. He went to the guest house in the back where he has his office and a bathroom. He changed into his golf clothes in the guest house at about 4:30 or 4:40 a.m. He dresses there so as to not wake his wife. He left the back door to the house unlocked. He was in the guest house for

about five minutes when he heard glass breaking and a scream. He ran through the gate to the front of the house and found his wife in the middle of the cul-de-sac, bleeding from the head. She said someone tried to kill her. She had a laceration above her left eye and a bruise on her left forearm.

When he went back inside the house, Alan A. saw a stranger's clothing at the foot of the bed. He also saw part of a pan kept under the stove in the kitchen on his wife's side of the bed. The handle was in the room as well. The pan had broken into two pieces. He found the lid to the pan in the master bathroom.

The parties stipulated forensic technician Lynette Ruiz collected from the scene a gray baseball cap with a "P" on it, a pair of white tennis shoes, a pair of tan "Dickies" pants, a men's blue long sleeved shirt, a key chain, and a plastic bag from a company in Pittsburgh.

In September 2008, Officer Mark Sutter of the Anaheim Police Department received a letter from the Department of Justice stating defendant's DNA matched DNA on clothing left in Dayna A.'s residence. Officer Sutter contacted defendant and showed a photograph of the men's clothing found in Dayna A.'s bedroom. Defendant said he did not recognize the clothing and denied having been in her home. Sutter arrested defendant and a buccal swab of defendant's DNA was taken.

DNA obtained from items in the 2002 and 2004 incidents were tested and compared with defendant's DNA. Defendant could not be eliminated as the donor of DNA found on a dress obtained from Dayna A.'s residence after the December 2002 incident.¹ The cap, pants, shirt, and shoes left at the residence by the intruder on May 16, 2004 were also tested. Defendant could not be eliminated as the contributor of the DNA on those items. Dayna A. and Alan A. were eliminated as contributors. Defendant's DNA profile occurs in one person in a trillion.

¹ DNA from four individuals, at least one of whom is female, was found on the dress.

Defense Evidence

Defendant testified he lived “two streets over” from Dayna A. in 2004, and met Michelle when they were in high school. He became friends with Michelle and started “hanging out” with her during his junior and senior years, in 1995 and 1996. He went to her house about five to 10 times while they were friends. Defendant last saw Michelle the day he graduated from high school in June 1997.

Defendant said he started using drugs in September 2001. His drug of choice was cocaine. By May 2004, he was using cocaine and drinking daily. He said he “severely crippled” himself with drugs and admitted a 2007 conviction for grand theft and another felony offense he committed in August 2006.

Defendant said he was a cross-dresser, a man who wears women’s clothing. He started wearing women’s clothing in the summer or fall of 2002. He said he had been watching pornography and noticed the lingerie worn by the actresses. He went into his mother’s bedroom and took a white thong of hers, returned to his bedroom, rubbed it against his penis and then put it on. Defendant said he dressed in women’s clothing every time he did drugs. He liked to wear “lingerie, underwear, bras, nylons, high heels, clothing, dresses, [and] pants.” He liked the way women’s clothing felt against his body and how he looked in the mirror. He cross-dressed in private, locking himself in his room, and did not tell anyone about his cross-dressing, but his mother found out.

Defendant said he took his mother’s clothing, his sister’s clothing, he had clothing he took from Michelle’s house, and he had clothing he took from another female friend. He said he would put on women’s clothing on while doing drugs, and as the effect of the drugs wore off in the middle of the night or early morning, he would become disgusted with his actions and throw away the items he had worn. As a result, he constantly changed the items of women’s clothing he possessed and wore.

He obtained Michelle’s clothing in 2002, when he went into her house, the incident Michelle testified about. He said he went into her house twice before the

charged 2004 incident. The second time was in May 2003.

In 2002, defendant went into Michelle's house because Michelle was "into" fashion when she was in high school and he liked her clothes. He entered the house between 10:00 a.m. and 2:00 p.m. He was in Michelle's house 10 to 20 minutes that time. Defendant said Michelle and her mother were correct about their clothing having been tried on. He took some of Michelle's clothing in that incident. He said he got the frying pan in the 2002 incident because he was afraid. He thought that if he had it and someone came home, it would "buy [him] a couple of seconds to get out."

In May 2003, defendant went into Michelle's house again while on drugs. He again entered in the middle of the day. He went into Michelle's room and tried on some of her lingerie and a formal evening gown. He also tried on some of Dayna A.'s underwear. He left with some of Michelle's underwear and perhaps a dress.

Defendant said his mother, father, and his brother-in-law have caught him wearing women's clothing. He said he last wore women's clothing in 2007.

He admitted returning to Dayna A.'s residence on May 16, 2004. He said he was on drugs the night before and ran out. Knowing the kitchen door would be unlocked, he went there in hopes of finding "some keys and Dayna's purse or Alan's wallet and get some drugs." He said he was still high on cocaine, but he knew the family was home at the time. He wore the clothing left at the scene, including the Pittsburgh Pirates baseball cap.

Defendant saw Alan A. sleeping on the couch. He was afraid of Alan A., so he grabbed a pan from underneath the stove. He looked on top of the refrigerator, hoping to find keys or a wallet. Finding nothing,² he went to Michelle's room, but the door was locked, so he went to the hallway bathroom to look for Michelle's makeup or other "feminine-type products." (He said he sometimes wore makeup, took baths with

² On cross-examination, defendant was shown a photograph of the kitchen table. On the table were three keys and a wallet.

“smelling stuff,” and put on lotion to smell like a girl.)

Defendant said he left the bathroom and went to Dayna A.’s bedroom. He opened the door and entered, closing the door behind him. He said he went into her room because he was still looking for a purse or keys. He saw Dayna A. sleeping on the bed. He began looking on the ground for a purse, because his mother leaves her purse on the floor of her bedroom. However, he stopped looking for a purse when he saw Dayna A.’s clothing.

He took off his cap, put the pan on the floor, and took off his shirt, shoes, and pants.³ He “rummaged” through Dayna A.’s clothing stacked alongside the dresser and did not find anything he wanted to wear. He went to the clothes hamper where he found a black bra and put it on for a number of minutes. Dayna A. woke up as he was taking off the bra. She sat up and asked something along the line of, “What’s going on?” and “Who are you?” Defendant said he stepped forward and swung the pan, hitting her in the head. The handle from the pan broke. He said Dayna A. made the worst sound he had ever heard, “sound of some grunt of fear.”

Defendant said he was horrified and Dayna A. attempted to get away. He said he does not remember hitting her a second time, but if she said he did then he did. She ran to the door and he went to the master bathroom. He was terrified; he knew he hurt her and Alan A. was in the living room. He was in a panic and could not open the door to the outside, so he ran back into the master bedroom, down the hallway, and out the front door, wearing only his socks. He passed Dayna A. out in front of the house, and ran out of the cul-de-sac. It took him a minute to get back to his house. Defendant said he had no intention of raping Dayna A. and the thought never entered his mind.

On cross-examination, defendant admitted he first cross-dressed when he was 11 or 13 years old, not when he was 22 as he testified on direct examination. His

³ He did not wear underwear that night.

initial cross-dressing experience lasted about two years. He would put on his mother's lingerie and videotape himself masturbating. As a child, he never told anyone about his cross-dressing. His mother discovered his cross-dressing when he was 22 years old.

Defendant's father testified he discovered his son cross-dressed in 2001, when he and his wife returned from a weekend trip and discovered women's clothing all over defendant's room. He saw defendant dressed in women's clothing once. He had come home early from work and saw defendant run into a bathroom wearing red lingerie and red panties. He did not confront defendant about it because he was embarrassed, but he did tell his wife about the incident.

Defendant's mother testified she discovered defendant was cross-dressing when he was 22 years old, about a year after he started using drugs. She searched his room once looking for drugs and discovered a bra and panties in a pocket of defendant's coat. She found women's clothing ("bras, panties, teddies, negligees, sometimes shoes, sometimes wigs, makeup") in his room "many times." On occasion, she discovered defendant possessed her missing lingerie. His cross-dressing was a family secret.

William McFeggan is married to defendant's sister and has known defendant for about 19 years. McFeggan coached defendant's high school football team. Between 2002 and 2006, McFeggan found defendant in possession of women's clothing, including lingerie, tops, pantyhose, and teddies on at least five occasions.

McFeggan testified defendant does not have a reputation for violence. Janet Czapor and her daughter Jacque, who have each known defendant's family for more than 24 years, testified defendant is not violent.

Dr. Robert Flores de Apodaca, a forensic psychologist, read the reports in this matter and met with defendant twice in April 2008. The doctor performed a sexual interests assessment on defendant and spoke with defendant's father, mother, sister, and brother-in-law. Flores de Apodaca diagnosed defendant with transvestic fetishism and drug addiction. The timeframe of defendant's drug addiction covers the timeframe of the

charged offense. Dr. Flores de Apodaca said defendant dresses in women's clothing because it creates sexual arousal in him, not because he thinks he is a woman. The doctor said defendant's inability to transition into adulthood appears to have triggered both his substance abuse and his transvestic fetishism in his early 20's.

A jury found defendant guilty of attempted rape and found the weapon allegation true. The court sentenced defendant to the aggravated term of four years on the attempted rape and a consecutive 10-year term on the weapon enhancement, for an aggregate term of 14 years. The court gave defendant presentence credit for 393 actual days served and 59 conduct credits, for a total credit of 452 days.

The Petition for a Writ of Habeas Corpus

The petition for a writ of habeas corpus alleges defendant's trial counsel rendered ineffective assistance by failing to adequately investigate the case. It is alleged that had counsel conducted an adequate investigation he would have discovered exculpatory evidence. Attached as exhibits to the petition are a report prepared by a defense investigator detailing an interview with Sharon Patterson while the matter was in trial, and posttrial declarations of Patterson, her daughter Karen, her son Jeremy, and Katie Ibay, the mother of defendant's daughter. According to the declarations, defendant broke into the Patterson residence on at least three occasions in 2004-2005. Patterson also lived a couple of blocks away from defendant's family and knew defendant. A pair of Karen's favorite panties were taken during one of the break-ins.

The declarations of Karen and Jeremy Patteron, and Ibay also contained evidence of defendant's cocaine use. Additionally, Ibay's declaration included an incident where defendant broke into her car and stole women's bathing suits.

II DISCUSSION

A. *The Appeal*

1. *Sufficiency of the Evidence*

Defendant contends the evidence does not support his conviction for attempted rape and the true finding on the weapon enhancement. To prove an attempted rape,⁴ the prosecution must establish the defendant specifically intended to commit the rape and that he committed a direct, although ineffectual, act toward its commission. (*People v. Clark* (2011) 52 Cal.4th 856, 948; § 21a.) For purposes of this case, the prosecution was required to prove defendant specifically intended to accomplish sexual intercourse against the will of Dayna A. (*People v. Lee* (2011) 51 Cal.4th 620, 642.) “As for the requisite act, the evidence must establish the defendant’s activities went ‘beyond mere preparation’ and that they show the defendant was ‘putting his or her plan into action.’ [Citation.]” (*People v. Clark, supra*, 52 Cal.4th at p. 948.) Attempted rape does not, however, “require a physical sexual assault or other sexually “unambiguous[]” contact. [Citations.]” (*People v. DePriest* (2007) 42 Cal.4th 1, 48.)

The critical inquiry to be made in reviewing a sufficiency of evidence claim “is 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. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder’s role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be

⁴ Rape is an act of sexual intercourse with one who is not the perpetrator’s spouse and accomplished against the victim’s will by use of force or violence. (§ 261, subd. (a)(2).)

considered in the light most favorable to the prosecution.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, fn. omitted.)

To support the jury’s finding of guilt, the evidence must be “reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) ““Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. “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.”” [Citations.]” [Citation.]” (*Ibid.*)

In determining whether defendant possessed the requisite specific intent, the jury was entitled to draw reasonable inferences from his conduct. (*People v. Craig* (1994) 25 Cal.App.4th 1593, 1597.) Whether the defendant had the intent to rape “is one for the jury to determine from the conduct of the defendant and surrounding circumstances.” (*People v. Padilla* (1962) 210 Cal.App.2d 541, 544.) “[B]efore the judgment may be set aside on appeal, it must clearly appear that upon no hypothesis is there sufficient evidence to support the conclusion reached by the [fact finder]. The trier of fact is the sole judge of the weight and worth of the evidence. [Citations.]” (*People v. Hills* (1947) 30 Cal.2d 694, 701.)

A jury could reasonably have found defendant entered the residence that night to steal money to buy drugs, and only took off his clothing when he saw Dayna A.’s clothing stacked up next to the dresser and his cross-dressing fetish overcame him, at which point he wanted to put on her clothing as he has done on two other occasions when he broke into her residence. After all, there was evidence he had broken into her residence on two prior occasions and tried on women’s clothing and undergarments. But,

the jury was not required to find defendant's version of the incident true, or that he lacked a specific intent to rape the victim.

There was evidence suggesting this burglary was different from his prior burglaries. Defendant's prior burglaries of the victim's residence occurred during the middle of the day, when he knew nobody was home. The present incident occurred in the early morning hours, when the occupants would be expected to be at home, sleeping. In fact, defendant admitted he knew the family was home before he entered, a fact that was confirmed when defendant walked through the family room and saw Dayna A.'s husband asleep on the couch. Defendant then went into the kitchen and armed himself with a pan from underneath the stove. Although he said he went into the house to steal — he said he was looking for car keys, a wallet, or purse — and that he looked on top of the refrigerator for keys or a wallet when he was in the kitchen, he did not take the keys or the wallet on the kitchen table. He tried Michelle's room, but the door was locked. When he entered Dayna A.'s bedroom, he closed the door behind him *and locked it*. He knew she was in her bed. He took off all his clothes, save his socks. He approached Dayna A. in a tight space between the bed and the wall, next to her side of the bed, and was breathing heavily when she woke up. He immediately struck her with the pan and struck her a second time with enough force to break the pan. The jury could reasonably have inferred defendant would have pursued sexual intercourse had not Dayna A. gotten up from the bed and escaped despite being bloodied and bruised. (*People v. Craig, supra*, 25 Cal.App.4th at p. 1600.) He was inside her bedroom, uninvited, at 5:00 a.m., he locked the bedroom door behind him, stripped off his clothing, and approached Dayna A. in her bed before she woke up. These facts are consistent with an intent to rape. (*People v. Pendleton* (1979) 25 Cal.3d 371, 377 [reasonable to infer intent to rape “[w]hen a strange man enters a woman's bedroom, covers her mouth with his hand, grasps her wrist while she screams and kicks, releases her when she bites his hand, and makes no effort to take any property”]; *People v. Padilla, supra*, 210 Cal.App.2d 541,

542 [reasonable to infer an intent to commit rape when strange man entered woman's bedroom, pushed a handkerchief over her face when she attempted to get up, and ran out of the house without attempting to take any property when the victim struggled and screamed].)

Moreover, the jury was free to give credence to Dayna A.'s account of the events over defendant's version. Defendant admitted on cross-examination he had lied on direct examination about when he started cross-dressing. Defendant testified he took off his clothing that night and rummaged through the clothing stacked by the dresser, looking for something of the victim's to wear, but he did not find anything he liked. Then he went through the clothing in the hamper and, finding a smooth black bra he liked, put on for number of minutes, and dropped it to the ground when he was finished wearing it. Dayna A., on the other hand, testified that *all* the clothing on the floor of the bedroom had been there *before* she went to bed and had not been disturbed. A jury could reasonably conclude defendant did not try on any of Dayna A.'s clothing, including the black bra, and that defendant was not naked inside Dayna A.'s bedroom because he wanted to try on her clothing.

When there are different *reasonable* inferences that may be drawn from the evidence, it is "for the jury, not [this court], to draw them." (*People v. Craig, supra*, 25 Cal.App.4th at p. 1604.) Although it could be hypothesized defendant had any number of sexual intents as opposed to an intent to rape Dayna A. after he got naked inside her locked bedroom — perhaps an intent to sodomize her, force her to orally copulate him, or merely to masturbate while he stood over her sleeping — that his mind was set on rape and only Dayna A.'s refusal to become a victim prevented him from accomplishing that goal is *not* an unreasonable inference given the facts of this case. When an individual enters a residence in the early morning hours, arms himself, locks himself inside the bedroom of a sleeping woman, undresses, strikes her as soon as she wakes up, and never attempts to steal anything, it is a reasonable inference he intended to rape her. The fact

that she was able to escape the confines of her locked bedroom after twice being struck by the nude intruder says more about Dayna A.'s courage and determination than a lack of an intent to rape on defendant's part.

“The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact; it is not whether guilt is established beyond a reasonable doubt. [Citation.]” (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) In other words, the sufficiency of evidence test used on review “does not require a court to ‘ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.]” (*Jackson v. Virginia, supra*, 443 U.S. at pp. 318-319.) The jury's determination that defendant intended to rape Dayna A. may be found to be unsupported by the evidence “only when the facts afford *no* reasonable ground for an inference that the intent existed. [Citations.]” (*People v. Padilla, supra*, 210 Cal.App.2d at p. 544, italics added.) Because we cannot find “it . . . clearly appear[s] that under no hypothesis whatever is there sufficient evidence to support the [conviction],” we reject defendant's sufficiency of the evidence challenge. (*People v. Redmond, supra*, 71 Cal.2d at p. 755.)

The jury also found defendant used a deadly weapon in the commission of the attempted rape. (§ 12022.3, subd. (a.)) Defendant contends the evidence does not demonstrate he used the weapon “in the commission” of the attempted rape. The argument is without merit. Having found the conviction of attempted rape is supported by the evidence, the same evidence — defendant striking Dayna A. with the pan — supports the enhancement. The evidence permitted the jury to reasonably conclude defendant struck Dayna A. to overcome any resistance and as a means of accomplishing a rape. The fact that neither the first nor the second blow accomplished their goal and Dayna A. was able to escape is irrelevant.

In *People v. Masbruch* (1996) 13 Cal.4th 1001, the defendant entered the victim's apartment and pointed a gun at her face before tying her up, searching her apartment for money, returning to the victim, and raping her. (*Id.* at pp. 1004-1005.)

Although the victim did not see the gun again after it was initially pointed at her, the California Supreme Court upheld the jury's finding that Masbruch had used a firearm in the commission of the rape, as required by section 12022.3, subdivision (a). "We conclude the jury could have reasonably found that defendant utilized his initial display of the gun 'at least as an aid in completing an essential element of' the subsequent crimes of rape and sodomy. [Citations.]" (*Id.* at p. 1014.) Here, the jury was entitled to find defendant attempted to rape the victim and struck her with the pan in an effort to accomplish his goal.

2. *Jury Instruction Issues*

Without objection, the court instructed the jury pursuant to CALCRIM No. 3145, the instruction on personal use of a deadly weapon. Pertinent to defendant's challenge, it states: "If you find the defendant guilty of the crime charged in count 1, attempted rape, you must then decide whether the People have proved the additional allegation that the defendant personally used a deadly weapon during the commission or attempted commission of the crime." Defendant argues he was denied due process because reasonable jurors would not understand what constitutes "in the commission" of the crime, lightening the prosecution's burden to prove every element of the enhancement beyond a reasonable doubt. (*Sandstrom v. Montana* (1979) 442 U.S. 510.)

As noted, defendant did not object to the instruction. Neither did he request amplification of the instruction given. However, "even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary to the jury's understanding of the case. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

In *People v. Rowland* (1992) 4 Cal.4th 238, the Supreme Court rejected a similar challenge to the felony-murder instruction that required the jury to determine whether the charged murder was committed "while the defendant was engaged in . . . the

commission of, or attempted commission of . . .’ the felony rape. [Citation.]” (*Id.* at p. 270.) “When, as here, a phrase ‘is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.’ [Citation.]” (*Id.* at pp. 270-271.) “A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.]” (*People v. Estrada* (1995) 11 Cal.4th 568, 574.)

The words “in the commission of” the charged crime are commonly understood to mean while the crime is being committed. The complained of phrase does not have a meaning in the law different from that which a reasonable person untrained in the law would ascribe it. Defendant cites no authority to the contrary. The court did not err in instructing the jury pursuant to CALCRIM No. 3145.

During the course of jury deliberation, the jury sent the court a note that included the following question: “Are there any other pending/concluded charges related to this incident on May 16, 2004?” The court informed the attorneys of its intended answer and the attorneys stipulated the answer, “No” be given. Defendant now contends the court should have informed the jury it should not speculate about the possibility of other charges. Defendant in turn speculates that by asking whether he had any pending or resolved charges in connection with the May 16, 2004 incident, the jury indicated a difficulty in reaching a verdict on the charged offense and was concerned about whether he would, in effect, escape punishment if her were convicted only of the lesser charge of assault. Such sheer speculation will not justify a reversal.

A court’s failure to properly answer a jury question will result in a reversal only if the defendant demonstrates the answer given resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Eid* (2010) 187 Cal.App.4th 859, 882.) While the court would have correctly answered the jury’s question by instructing it that it may not speculate about the possibility of other charges,

we do not find the court's answer resulted in a reasonable probability of a less favorable outcome. (*People v. Roberts* (1992) 2 Cal.4th 271, 326.) We do not know why the jury asked the question it did. It had been informed defendant suffered a felony conviction in 2007, and was convicted in 2009 for a crime of moral turpitude. The trial judge thought the jury may have been thinking defendant had other prior convictions. Either way, there is no reason to believe the court's answer to the jury's question contributed to its verdict or that the question was asked because the jury was improperly considering the issue of defendant's punishment. (*People v. Holt* (1984) 37 Cal.3d 436, 458 ["possible punishment is not a proper matter for jury consideration"].)

We may summarily resolve defendant's contention that his trial attorney rendered ineffective assistance of counsel by not objecting to the court's proposed answer to the jury's question. Our finding that the court's answer to the question was harmless means defendant cannot prove prejudice even were we to assume the failure to object was the result of counsel's neglect. "If a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 366-367.)

In addition, "a conviction will be reversed for ineffective assistance of counsel [on direct appeal] only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. [Citations.]" (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1007-1008.) When "it cannot be determined from the record whether counsel had a reasonable strategic basis for acting or failing to act in the manner challenged, a claim of ineffective assistance 'is more appropriately decided in a habeas corpus proceeding.' [Citation.]" (*People v. Johnson* (2009) 47 Cal.4th 668, 684-685.)⁵ We cannot tell from this record whether counsel had a tactical reason for

⁵ This issue was not raised in defendant's habeas corpus petition.

wanting the jury to know defendant has not been found to be guilty of any offense arising out of the charged incident.

3. *Exclusion of Evidence*

“Except as otherwise provided by statute, all relevant evidence is admissible.” (Evid. Code, § 351.) Evidence is relevant if it has “any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) The admission or exclusion of evidence is left to the sound discretion of the trial court and an appellate court will not disturb the trial court’s decision absent a manifest abuse of discretion. (*People v. Moten* (1991) 229 Cal.App.3d 1318, 1325-1326.) The erroneous exclusion of evidence is generally subject to harmless error analysis under *People v. Watson, supra*, 46 Cal.2d at p. 836, but arguably is subject to the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, when it prevents a defendant from putting on a defense. (*People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249, fn. 7.)

Defendant maintains the court erred in precluding his father from testifying to his “heavy drug use around 2002,” the time defendant’s cross-dressing was discovered by his father, and in excluding defendant’s brother-in-law’s testimony regarding defendant’s drug use. Defendant’s father testified he and his wife searched defendant’s room for women’s clothing on a number of occasions after the incident in 2002 when he saw his son wearing lingerie. They found women’s clothing in defendant’s room “just so many times” defendant’s father could not remember them all. The court did not permit defendant’s father to testify to defendant’s drug use at any time other than the date of the charged incident. As his father did not recall seeing defendant the night before the incident or the morning after, he was unable to say defendant was using drugs at the time of the offense.

Defendant's brother-in-law, McFeggan, testified to finding women's clothing, including lingerie, in defendant's possession on at least five occasions, and to having known defendant before defendant started using drugs. He also testified as a character witness to defendant's character for nonviolence. McFeggan was not permitted to testify he saw a change in defendant's personality after defendant started using drugs. On redirect examination, defense counsel asked whether the facts recited by the prosecutor changed McFeggan's opinion about whether defendant was violent. McFeggan said it did not, and attempted to say the reason was because drugs changed defendant, but the court sustained the prosecutor's objections.

Even were we to assume the court erred in excluding evidence of defendant's past drug use, any error was harmless. The relevance of defendant's drug addiction was minimal, if any. Although Dr. Flores de Apodaca concluded defendant's drug abuse and transvestic fetishism co-morbidity occurred about the same time in defendant's life, he did not conclude the drugs caused the fetish. Rather, he stated, "I think that the substance abuse was one maladaptive way that [defendant] dealt with what was going on in his life at the time. And the transvestic fetishism was another way in which he did that. And one sort of lent to the other. So it was sort of they're interlinked cause and effect."

There was substantial evidence defendant dressed in women's clothing and that he broke into the victim's residence in the past, tried on her clothing, her daughter's clothing, and took some with him when he left. Lack of corroborating evidence of defendant's *past* drug use did not lessen the value of this evidence. Additionally, Dr. Flores de Apodaca testified to defendant's drug addiction, covering the years 2002 to 2006. That opinion was based on statements by defendant and his family members *and information contained in police reports*. Thus, testimony by others to the effect that defendant had a drug problem at the time of the charged offense was merely cumulative.

In so far as McFeggan's testimony was concerned, his answers were in response to questions about whether the facts of the case changed his opinion of defendant's character trait for nonviolence. As defendant admitted intentionally striking Dayna A. with the frying pan, whether he previously had a reputation for not being violent cannot be expected to carry much, if any, weight. Defendant testified to the violent act. His act of violence was not disputed, only the intent with which it was committed. Even though the court sustained objections preventing McFeggan from testifying to the changes defendant went through after he started using drugs, McFeggan did testify that he discussed defendant's drug issues with him.

Defendant also contends the trial court erred in excluding the testimony of Patterson. According to defense counsel's offer of proof at trial, in 2003 Patterson caught defendant in her house after he broke into the house and told him to leave. She did not see him with or wearing women's clothing. If Patterson had testified she caught defendant in her residence in 2003, that evidence would have corroborated defendant's testimony that he broke into her residence, but not the only possible relevance of the 2003 burglary — that defendant was looking for women's clothing. Accordingly, the trial court's evidentiary rulings did not prejudice defendant, even if erroneous.

4. Denial of Juror Information

Prior to sentencing, defense counsel filed a petition seeking release of juror contact information from the court. After a jury has returned a verdict and been excused, a defendant may file a petition with the court to obtain the names, addresses, and telephone numbers of jurors who served on the case. The petition must be supported by a declaration establishing a prima facie showing of good cause for the release of the information. The court must set a petition supported by a prima facie showing of good cause for a hearing, absent a showing on the record of a compelling interest against disclosure. If the court does not set the petition for hearing, it must set forth its reasons

and make an express finding the petition lacks a prima facie showing or good cause or the existence of a compelling interest against disclosure. (Code of Civ. Proc., § 237, subd. (b).)

Defense counsel's declaration stated the petition was filed because the jury question about whether defendant had any other pending or resolved charges arising out of the May 16, 2004 incident permitted a reasonable inference "that the jurors were struggling with the disparity in the substantive charge of attempted rape and the lesser included charge of misdemeanor assault." The court heard argument from counsel and then denied the petition without setting it for a hearing, finding the declaration did not establish a prima facie showing of good cause. We agree.

Counsel's declaration in support of the petition sought to establish good cause in a total of six sentences. In four of those sentences counsel set out the fact that during deliberations the jury asked whether defendant had any other pending or resolved cases arising out of the charged incident, that the attorneys did not have the opportunity to question the jury after it reached its verdict because the jurors did not wait in the hallway, and that if the jurors were interviewed, counsel "would learn that the jury decided the case based on the emotion and the disparity of the charges." The basis for that conclusion is purportedly contained in the two remaining sentences: "It is reasonable to infer that the jurors were struggling with the disparity in the substantive charge of attempted rape and lesser included charge of misdemeanor assault; [and] It is also foreseeable and reasonable that the jury would struggle with these charges and it was defense counsel's argument in the major issue in the case[.]"

The question asked by the jury does not suggest the verdict was reached as the result of jury misconduct. Defense counsel's declaration did not allege any type of misconduct and was "at best, speculation on the part of how the jurors might have arrived at their verdict." (*People v. Wilson* (1996) 43 Cal.App.4th 839, 852.) It amounted to an "unwarranted 'fishing expedition[.]'" made in an effort to uncover

information to invalidate the verdict in this matter. (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 552.) As such, the court did not err in finding the declaration failed to make a prima facie showing of good cause.

5. *Presentence Credits*

The court awarded defendant credit for 393 actual days served and 59 conduct credits, for a total credit of 452 days. It erroneously limited defendant's conduct credits to 15 percent of the days defendant was in custody awaiting trial and sentencing. Section 2933.1 places a 15 percent limit on the conduct credits a defendant convicted of a violent felony may receive. Defendant was not, however, convicted of a violent felony. Violent felonies are listed in subdivision (c) of section 667.5. Although rape is listed as a violent felony (§ 667.5, subd. (c)(3)), attempted rape is not, and the legislature knows how to include attempts in lists of crimes. (See § 1192.7, subd. (c)(39) [list of serious felonies includes "any attempt to commit a crime listed in this subdivision other than assault"].) The Attorney General agrees section 2933.1 does not apply in defendant's case. Defendant was entitled to 196 days conduct credit pursuant to section 4019. The abstract of judgment must therefore be amended to reflect credit for time served of 393 actual days and 196 conduct credit for a total of 589 days.

B. *The Petition for a Writ of Habeas Corpus*

The standard of review for an ineffective assistance of counsel claim is well settled. A criminal defendant has a federal and state constitutional right to the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, a defendant must establish both that counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-688, 694-695; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; see

U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; *People v. Benavides* (2005) 35 Cal.4th 69, 92-93.) ““A reasonable probability is a probability sufficient to undermine confidence in the outcome.”” (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218, quoting *Strickland v. Washington, supra*, 466 U.S. at pp. 693-694.) A defendant’s obligation is to establish counsel’s ineffectiveness by a preponderance of the evidence. (*People v. Ledesma, supra*, 43 Cal.3d at p. 218.)

Defendant argues his trial counsel was ineffective for failing to conduct an adequate investigation and present the exculpatory witnesses that would have otherwise been discovered. Attached to the petition are a report by a defense investigator of the pretrial interview of Patterson, and posttrial declarations of the mother of defendant’s child, Patterson, and her children Jeremy and Karen. Although the declarations of the three Pattersons contain inadmissible hearsay, they contain sufficient nonhearsay evidence to reasonably infer defendant burglarized the Patterson residence on three occasions. Patterson caught him inside the residence on one such occasion and it did not result in a violent confrontation. The items in Karen’s underwear drawer were disturbed on one occasion and her favorite pair of panties was missing. A skirt of hers was also missing. Jeremy, Karen, and Katie Ibay, the mother of defendant’s daughter, could also testify to defendant’s drug use.

Defense “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” (*Strickland v. Washington, supra*, 466 U.S. at p. 691.) Because the evidence defendant discovered was of the type trial counsel attempted to introduce at trial and, in fact, included information possessed by a witness defense counsel sought to call at trial (Patterson), it is evident counsel made no decision making unnecessary the investigation that would have uncovered the information possessed by the Pattersons. The failure to adequately investigate results in a Sixth Amendment violation when the failure has the effect of

withdrawing a crucial defense from the case. (*People v. Pope* (1979) 23 Cal.3d 412, 424-425.)

The evidence concerning the burglaries of the Patterson residence and the theft of women's bathing suits from Ibay's car was cumulative to other evidence that defendant committed burglaries to steal women's clothing. The prosecution's evidence showed he broke into the victim's residence before, and tried on and stole women's clothing.

Evidence of defendant committed other burglaries to satisfy his transvestic fetish was merely cumulative. The evidence of his drug use was cumulative of evidence offered but found inadmissible by the trial court. Evidence of defendant's drug use would have added nothing to his case. Defendant maintains his fetish is triggered by his drug use, he has a history of drug use and transvestic fetishism, and therefore he was in the victim's bedroom to try on her clothing, not to rape her. He testified he ran out of cocaine and broke into the victim's residence to find something to steal so he could buy more cocaine. The crux of the case was, however, what his intent was when he struck the victim in the head with the pan. Even were the jury to accept his version that he took off his clothing to put on the victim's bra or other items of clothing and he did so because he had cocaine in his system, there was evidence he becomes sexually aroused when he dresses in women's clothing. Whether he used cocaine in the past was not relevant to determining his intent at the point he was in an admitted state of sexual arousal.

Having found no prejudice in the rulings excluding the same type of evidence, we cannot say counsel's failure to discover more of the same was prejudicial. Defense counsel's failure to discover the evidence the Pattersons and Ibay could have provided did not prejudice defendant. We need not, therefore, consider whether counsel was ineffective for failing to discover this evidence in his investigation. (*People v. Kipp, supra*, 18 Cal.4th at pp. 366-367.) Accordingly, the petition for a writ of habeas corpus based upon trial counsel's alleged ineffectiveness is denied.

III

DISPOSITION

The judgment is modified to award defendant 196 days of presentence conduct credit pursuant to section 4019, for a total presentence award of 589 days. The clerk of the superior court is directed to prepare an amended abstract of judgment and send a certified copy to the Department of Corrections and Rehabilitation. In all other respects the judgment is affirmed.

The petition for a writ of habeas corpus is denied.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.