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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

GERARDO CEBALLOS,

Defendant and Appellant.

H035340, H035718

(Santa Clara County
Super. Ct. No. FF826257)

Following two jury trials, defendant was convicted of two counts of forcible rape (Pen. Code, § 261, subd. (a)(2)),¹ and one count each of forcible oral copulation (§ 288a, subd. (c)(2)), assault to commit rape (§ 220), assault to commit sodomy (§ 220), and misdemeanor battery (§ 243, subd. (e)). The first jury also found true allegations that the forcible rape and forcible oral copulation offenses were committed against more than one victim. (§ 667.61, subs. (b) & (e).) The trial court sentenced defendant to the indeterminate term of 45 years to life, consecutive to the determinate term of six years.

On appeal, defendant contends that one of the forcible rape convictions must be reversed because he was denied his right to confrontation when the court permitted the prosecution to use the victim's preliminary examination testimony in lieu of her live testimony, and because his trial counsel rendered ineffective assistance by failing to make

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

meritorious objections to admission of evidence of his post-arrest, pre-*Miranda*² silence. Defendant further argues that the restitution order under section 1203.1h must be reversed due to the failure of the court to find an ability to pay, that the ordered restitution and parole revocation fines must be reduced to the statutory maximum of \$10,000, and that clerical errors in the abstract of judgment should be corrected.

We find no error requiring reversal of the judgment. However, we will strike the restitution order under section 1203.1h, reduce the restitution and parole revocation fines to \$10,000, and affirm the judgment as so modified. We will also order the correction of the clerical errors in the abstract of judgment.

BACKGROUND

Procedural History

Defendant was charged by second amended information with three counts of forcible rape (§ 261, subd. (a)(2); counts 1, 2 & 5), and one count each of forcible sodomy (§ 286, subd. (c)(2); count 3), kidnapping to commit rape (§ 209, subd. (b)(1); count 4), forcible oral copulation (§ 288a, subd. (c)(2); count 6), and inflicting corporal injury on a cohabitant (§ 273.5, subd. (a); count 7). The information further alleged as to counts 1, 2, 5, and 6, that the offenses were committed against more than one victim. (§ 667. 61, subds. (b) & (e).) The alleged victim of count 1 was Kimberlee Doe, the alleged victim of counts 2 and 3 was Anna Doe, and the alleged victim of counts 4 through 7 was Kristen Doe.

The prosecutor moved in limine to present Kimberlee's preliminary examination testimony in lieu of her live testimony if Kimberlee refused to testify. The court set the matter for a hearing. At the hearing, Kimberlee stated on the record that, were she called to testify about her alleged rape on April 23, 2008, she would refuse to answer any questions even if the court found her in contempt for her refusal. The court found her to

² *Miranda v. Arizona* (1966) 384 U.S. 436.

be an unavailable witness under Evidence Code section 240. Defense counsel moved to exclude Kimberlee's preliminary examination testimony under *Crawford v. Washington* (2004) 541 U.S. 36, "due to the fact we received extensive discovery after the preliminary hearing." The court found that defendant had "a full and fair opportunity" to cross-examine Kimberlee at the preliminary examination, and denied the defense motion to preclude the use of her prior testimony.

A jury heard testimony, including Kimberlee's preliminary examination testimony, beginning on September 28, 2009, and began their deliberations on October 7, 2009. On October 9, 2009, the jury found defendant guilty of counts 1 (forcible rape; § 261, subd. (a)(2)), 5 (forcible rape), and 6 (forcible oral copulation; § 288a, subd. (c)(2)), and found true the allegations as to those counts that defendant committed the offense against more than one victim (§ 667.61, subs. (b) & (e)). The jury found defendant guilty of the lesser offense of misdemeanor battery (§ 243, subd. (e)) on count 7. The jury was unable to reach verdicts on counts 2 through 4, so the court declared a mistrial as to those counts. The court sentenced defendant on counts 1, and 5 through 7 on January 29, 2010, but resentenced him on those counts following his retrial on the remaining counts.

On April 13, 2010, the prosecutor dismissed count 4 (kidnapping to commit rape; § 209, subd. (b)(1)) in the interest of justice. Defendant was retried on counts 2 (forcible rape) and 3 (forcible sodomy). A second jury heard testimony as to those counts beginning on April 15, 2010, and began their deliberations on April 19, 2010. On April 22, the jury informed the court that it was unable to reach a verdict. At the request of the prosecutor, and because the court had already instructed the jury on the lesser offenses at the request of defendant, the court allowed the prosecutor to file an amended information charging defendant in count 2 with assault to commit rape (§ 220), and in count 3 with assault to commit sodomy (§ 220). The jury was instructed on the amended information

and it resumed deliberations. The jury subsequently found defendant guilty of counts 2 and 3 as charged in the amended information.

On June 7, 2010, the court sentenced defendant to the upper term of six years on count 2 (assault to commit rape, § 220), and a concurrent term of six years on count 3 (assault to commit sodomy, § 220). On June 11, 2010, the court resentenced defendant to three consecutive terms of 15 years to life on counts 1, 5, and 6, with 14 days presentence credit, consecutive to the term imposed on counts 2 and 3. The one-year county jail sentence imposed on count 7 and the restitution ordered on January 29, 2010, were to remain in effect. Included in the January 29, 2010 restitution orders were an order to pay \$700 to the Gilroy Police Department for the cost of a SART exam pursuant to section 1203.1h, subdivision (b); a \$10,000 restitution fine “using the statutory formula”; and an additional \$10,000 suspended parole revocation restitution fine.

The Trial Evidence³

Count 1

Around 11:30 p.m. on April 22, 2008, Kimberlee, who was then 31 years old, went to the Blue Lagoon bar in Santa Cruz with her friend Sarah. There she had three drinks before she met defendant. Around 12:30 a.m., defendant starting talking to Kimberlee and Sarah, and he bought drinks for them and his friends. A few minutes later, Kimberlee left the bar to smoke a cigarette and defendant followed her. Because it was raining and defendant wanted to smoke marijuana, defendant invited her to sit with him in his car. They got into the back seat of defendant’s Toyota Solara, which was in the parking lot around the corner from the bar.

After defendant smoked “a couple hits” from a pipe, he kissed Kimberlee on the mouth. She did not resist. When he tried to undo her pants, she pushed his hand away. She said something like, “What are you doing; no.” She opened the car door to get out,

³ We recount the evidence as to counts 1, 5, 6, and 7 from the first trial, and as to counts 2 and 3 from the second trial.

but defendant leaned over her, grabbed the door, slammed it shut, and said something like, “What the f[***] are you doing[?]” He then pushed her face down onto the back seat of the car and told her not to move. He pulled down her pants and underwear while holding her down with his hand on her back. She said, “please, no.” “You don’t know what you’re doing.” She said this in part because she was in the middle of her menstrual period and was wearing a tampon.

Defendant penetrated Kimberlee’s vagina with his penis from behind her. She said no, and tried to get up, but he threw her back down, saying, “Stay the f[***] down.” After a few minutes, defendant stopped and said, “That felt great; now fix yourself.” Defendant quickly pulled on his pants, and then his friend and Sarah opened the car door. Kimberlee looked scared and confused, and she was fastening her pants when Sarah asked her what she was doing. Kimberlee responded, “Nothing; let’s go.” She did not tell Sarah what had happened because she was ashamed and embarrassed. Kimberlee was quiet and withdrawn when she returned to the bar with Sarah.

Later, after she left the bar, Kimberlee left her ex-boyfriend John a voice mail message and texted him about the incident. She went to work later that day, and then around 7:00 p.m., she went to the Santa Cruz Police Department to report the incident. After that she went with John to have a SART examination at Watsonville Hospital. On April 30, 2008, she went back to the Blue Lagoon with John in order to look for defendant. She saw defendant at the bar and informed the police of his presence.

Santa Cruz police officers contacted defendant inside the bar, and he agreed to speak to them. They informed him that they were conducting an investigation and he agreed to participate in a “show-up.” The officers escorted defendant outside, and he was cooperative. After Kimberlee identified defendant, he was arrested and taken into custody. He did not ask any questions about why he was being transported to the police station. The transporting officer informed defendant that they were conducting a criminal investigation, and defendant did not seem surprised. However, defendant was not very

cooperative at the station during the booking process; he would not answer all of the officer's questions relating to his personal history. He did agree to provide a buccal swab for DNA testing and to submit to a SART exam.

During his police interview, after waiving his *Miranda* rights, defendant admitted going to the Blue Lagoon a week earlier, meeting a woman, and having sex with her. He said that they "[j]ust walked to my friend's car and next thing you know, we were kissing and having sex" inside the car. "I didn't force her, she wanted to have sex, we had sex." "Did I say, hey, come here, come with me and I'm gonna have sex with you and I'm gonna do it against your will? No, I didn't." "It just happened. You don't plan for those things to happen."

Defendant had a key to a Toyota Solara, and the car was found in the bar's parking lot. The car was registered to a woman named Kristen, who informed officers that she was defendant's girlfriend and that defendant had her permission to use the car. Inside the center console of the car was a glass marijuana pipe. An officer contacted Kimberlee on May 6, 2008, regarding the text messages Kimberlee sent to her friend John on April 23, 2008. Kimberlee said that she was not able to provide the police a copy of the text messages because her phone had died and she had to get a new one. The police told her that they would get her records from her phone company.

Kimberlee's friend John testified that he did not understand Kimberlee's voice mail message but Kimberlee disclosed in the text messages that she sent him that she had been raped. Some of the text messages recovered from Kimberlee's telephone records were presented by defense counsel to the jury as exhibit No. 51. Sarah testified that Kimberlee told her two days later that she had been raped.

Connie Blackmore, a sexual assault nurse examiner, performed a SART exam on Kimberlee on April 23, 2008. Kimberlee reported pain on the left side of her face, on her upper left arm, on her left shin, on her back, and in her genital area. Blackmore found an abrasion and redness in Kimberlee's genital area, and she swabbed Kimberlee to check

for the presence of semen. In Blackmore's opinion, Kimberlee's injuries were consistent with nonconsensual sex with entry from behind, but they were also consistent with consensual sex.

Defendant testified that after he and Kimberlee were in his car for about 10 minutes, they kissed and touched each other's chests. Kimberlee then leaned over, unbuttoned his pants, and orally copulated him. He then assisted her in taking off her pants and they had consensual sex for about 10 minutes. She never told him no. While they were dressing afterwards, their friends approached the car and opened the door. They all stood outside the car and talked for a few minutes, and then defendant and his friend went back inside the bar.

Counts 2 & 3

Anna was 16 years old in the summer of 2008, when she got a job as a lifeguard and swim instructor at a gym. When she started her workday, she would have to get keys from defendant, who worked at the front desk. They had friendly conversations. At some point defendant asked Anna to text him and he entered his phone number into her phone. A few days later she sent him a text message at his request. At 3:00 a.m. the next day, June 21, 2008, defendant called her. He said that he was hanging out with friends and he asked if he could come by. Anna decided to meet defendant and she gave him directions to her house. She told her sister where she was going and she went outside to meet him. Defendant was sitting in a car about three houses away.

When Anna got to the car she was surprised to see that defendant was alone. He asked her to get inside the car and she sat in the front passenger seat. Defendant drove around the corner and parked in a dark spot. When he turned the engine off, Anna felt very uncomfortable and told him that she wanted to go home. Defendant did not say anything, and started kissing her on her neck. She told him no, and that she needed to go home. Defendant touched her breasts under her bra. Anna again told defendant no and that she needed to go home, and she pushed him away. Defendant got on top of her with

her legs between his, reclined her seat, and tried to put his penis into her mouth. She moved her head back and forth, told defendant that she needed to go home, and tried to push defendant off of her.

After a few minutes, defendant moved down the seat and pulled Anna's shorts off. He positioned himself between her legs and attempted to penetrate her vagina with his penis. She struggled with him. He rubbed the tip of his penis inside the lips of her vagina, but she was able to keep him from penetrating her completely. He grabbed her and flipped her over onto her stomach. He then penetrated her anus with the tip of his penis. Anna moved up the seat and crawled over it into the back of the car.

Defendant moved back into the driver's seat of the car, so Anna returned to the passenger seat and pulled on her pants. Defendant then grabbed the back of her head and forced it down into his crotch. She moved her head back and forth so that defendant could not get his penis into her mouth. Defendant let go of Anna's head after a few minutes, and just sat there. He said that he had a crush on her and she responded that she needed to go home. He drove her part of the way home. When she got out of the car, she asked defendant if he was going to go into work. She then went home and went back into her room. She was hysterically crying when she told her sister about the incident. Her sister persuaded her to call her boyfriend and to tell her parents, who called the police.

Defendant testified that when he called Anna Doe on June 21, 2008, he thought he was calling another woman named Anna that he had previously "hung out" with. When Anna Doe approached his car, he was surprised to see her. She got into his car and he drove to another location and parked. They talked for about 10 to 15 minutes, and he leaned over and kissed her on the cheek. He then moved over onto the passenger seat and sat beside her. He tried to kiss her again, but her mood changed and she said that she had a boyfriend, so he went back to his seat. He never exposed his penis to her, never tried to put his penis in her mouth, never put his penis in her vagina, and never put his penis in her anus. "Nothing of a sexual misconduct happened between me and Anna besides me

leaning over and kissing her and exchanging hugs with her.” She said that she need to go home, so he dropped her off and told her that he would see her at work.

Counts 5 - 7

Kristen met defendant when she was 17 years old and a junior in high school. He is about three and a half years older than she is. When an officer contacted Kristen on April 30, 2008, regarding defendant’s use of her Toyota, Kristen was 21 years old and going to school at Sonoma State. She told the Santa Cruz police officer who contacted her that she believed that defendant drove her car, but she could not say how often he drove it. The officer asked Kristen if defendant had ever forced sex against her will when he was drunk, and she responded no. A Gilroy police officer contacted Kristen sometime in June 2008, and asked her the same question. She told this officer the same thing she told the first officer because she was afraid.

During Kristen’s relationship with defendant, including while she was away at college, defendant tried to control her interactions with her family and friends. He also persuaded her to pay for his cell phone and to buy the Toyota Solara. He did not have a driver’s license and he had bad credit, but he told her that he needed to have a car. Their relationship turned violent; defendant hit her multiple times, and he forced sexual intercourse on her from behind. She did not end the relationship because she was afraid of what he would do to her.

On July 17, 2008, Kristen came to Gilroy from school to visit defendant. They had drinks and consensual sex, and then he drove them to a bar in Monterey in the Toyota around 10:30 or 11:00 p.m. Sometime after midnight, Kristen wanted to go home and she told defendant that she would wait for him in the car. Defendant was flirting and talking with other women. Kristen went to the car, waited for defendant, and texted him several times to try to get him to leave with her. After about 45 minutes, she decided to go home and drove away. While she was sitting at a stoplight, defendant jumped into the passenger seat of the car.

Defendant yelled at Kristen for leaving him, and hit her in the face. He told her to pull over so that he could drive. After they switched seats, and while defendant was driving them home, defendant continued to yell at Kristen and he hit her multiple times. He then grabbed her by the back of her head and tried to get her to perform oral sex on him. She started crying, and told him no. He told her that he would continue to hit her, and that he would take her up to the mountains and leave her there. He pulled his penis out of his pants and forced her mouth down toward his crotch. She tried to resist, but he was able to put his penis in her mouth.

After defendant parked in front of defendant's apartment, defendant grabbed Kristen by the back of her hair and forced her mouth onto his penis again. She protested and tried to prevent it. When defendant left the car to go inside, Kristen got out and ran. Defendant caught up with her before she reached the end of the driveway. He grabbed her by the arms and walked her back to his apartment. She was crying and defendant told her she had better be quiet. When they went inside the apartment, defendant's roommate Kevin and Kevin's girlfriend were sleeping in the living room, so defendant took Kristen into his bedroom. He again pulled her hair and forced her mouth down onto his penis.

Kristen asked defendant if she could use the bathroom. She went out to the living room, whispered to Kevin's girlfriend to call the police, and went to the bathroom. Defendant was waiting by the door when she came out and he escorted her back to his bedroom. He sat down on the bed, forced her down on her knees and pulled her hair. He said that he wanted to penetrate her, so he put her on her stomach on the bed and got on top of her. She tried to elbow him off of her but could not do it. He held her down and penetrated her vagina with his penis. After a few minutes, he ejaculated.

When defendant moved off Kristen, she was still crying. He lay down next to her with his arm around her and told her that she needed to be quiet. She asked him if she could take a shower. He went into the shower with her and told her that he was sorry for what he had done. Afterwards, they went back to defendant's bedroom. When Kristen

thought defendant was asleep, she tried to get up but he woke up and laid her back down. She fell asleep, but when she woke up in the morning she found her keys and drove to the police station. Her right eye was swollen shut and was black and blue, and she had bruising on her arms. An officer took her to a Gilroy hospital for a SART exam. Defendant was arrested later that day. At the time of his arrest, defendant had visible bruising on the knuckles of both of his hands.

Catherine Nelson-McDonald, a sexual assault nurse examiner, performed a SART exam on Kristen on July 18, 2008. Kristen had bruising on her right thigh, knee, and calf; scratch marks on her left shoulder; a swollen bruise on her left arm; bruising on her right arm and hand; her right eye was swollen shut and bruised; her right jaw, lips, and ear were swollen and bruised; and she had abrasions on her scalp. In addition, there was a laceration below the opening of her vagina and redness in the lower portion of her cervix. Nelson-McDonald took a swab of Kristen's vagina to check for the presence of sperm, but she did not observe any sperm on the slide she prepared from the swab.

Defendant testified that he dated Kristen for about four years. Although they were supposed to have an exclusive relationship, he cheated on her. On July 17, 2008, she came to visit him. They had some drinks and consensual intercourse, and then went to a bar in Monterey. Later, after he could not find her in the bar, he found out from her text messages to him that she was in the car waiting for him. He went out to the car but it was gone. He called her and she agreed to meet him. When he got into the car at a stoplight, he was very upset. He yelled at her for leaving him and he hit her. They switched seats, and Kristen started saying things to defendant that irritated him, so he slapped her again. She started crying and she struck him. He pulled her hair and the fighting stopped. He did not force her to orally copulate him. When he arrived at his apartment, he parked close to his front door. Kristen was still crying so he let her settle down. He then helped her out of the car and walked her into the apartment. She did not try to run. They went into his bedroom where they stayed for a while. Kristen left to go to the bathroom and

defendant followed her. When Kristen got out of the bathroom, they went back to his room for a while before going out to the car to get her some aspirin. When they returned, Kristen said that she wanted to take a shower, so they did. He apologized for hitting her, but he did not force her to orally copulate him.

DISCUSSION

Use of Kimberlee's Preliminary Examination Testimony

During the pretrial hearing, the prosecutor asked Kimberlee, "if you were called as a witness in the trial that we're currently conducting and asked questions about the alleged rape of you that took place on April 23, 2008, would you answer questions to that affect?" Kimberlee responded, "No." The court told Kimberlee that "witnesses who willfully refuse to testify and are not covered by a privilege can be held in contempt. . . . Do you think that would make a difference in your choice to testify?" Kimberlee responded, "No." The court asked her, "Do you think this is likely to change anytime in the future?" Kimberlee responded, "No, I don't." The court asked Kimberlee how long she held "the position that you choose not to testify in this case?" Kimberlee responded, "Um, for a while."

After Kimberlee left the courtroom, the court ruled: "At this point, a witness who refuses to testify, makes no claim of privilege or disability or illness, may be found unavailable if the Court takes reasonable steps to induce the witness to testify. In this case, I gave my best to see if holding the witness in contempt would change her resolution not to testify." "When I asked her about that, she indicated very clearly even being held in contempt wouldn't persuade her to testify. I couldn't think of any other reasonable steps to induce the witness to testify particularly given the circumstances that she described that resulted in her decision" "Accordingly, I am satisfied that we have done everything we reasonably can. She is physically available, but she refuses to testify. Accordingly, I find her unavailable as described in Evidence Code [section] 240."

Defendant objected to the use of Kimberlee’s preliminary examination testimony under *Crawford* because he “did not have a full right to cross-examine” at the preliminary examination “due to the fact we received extensive discovery after [that] hearing.” “There was extensive text messages by this witness done after the incident that talks about what happened And we received these text messages sometime after the preliminary hearing.” “It’s 125 pages of text messages, your Honor.” “What happened is the police officers attempted to get the phone from [Kimberlee]. She refused to give them the phone, and then the Santa Cruz [p]olice officers had to do a search warrant and a whole process before they were able to get the contents of the text messages and we were never able to get a copy of the voice mail that was left for the ex-boyfriend.”

The court ruled: “[T]he threshold issue here is whether there was full and fair cross-examination going to . . . this kind of area, at least in this case going to the credibility of the complaining witness, Kimberlee, and she was cross-examined moderately extensively on personal areas, drugs she was taking for her diagnosed condition, the disposition of the tampon, and even concerning, at least briefly, text messages and voice mails. [¶] It’s only a question or two or even part of a question but at least it was there and part of the basis and accordingly, I think there was a full and fair opportunity, and I will deny the defense motion to exclude the former testimony and allow it to be admitted if the foundations are otherwise laid. [¶] I do note, however, that I think it would be appropriate if the defense wanted to, that they could admit some or all of the text messages. I’m assuming there are no foundation problems. [¶] I also note that the defense also has the ability to call and examine the recipients or senders of the text messages”

Defendant now contends that the admission of Kimberlee’s preliminary examination testimony violated his state and Sixth Amendment rights to confront the witnesses against him. He does not contest the court’s finding that Kimberlee was an unavailable witness. He argues only that the text messages “provided evidence of her

motive to lie about what had happened in the car,” and that “[b]ecause the defense did not have the text messages at the preliminary hearing, the defense had no clue *why* Kimberlee would lie about being raped. Without the text messages at the preliminary hearing, [defendant] had no ‘opportunity for effective cross-examination’ of Kimberlee about her motive to lie or her credibility. Thus, allowing the prosecution to read Kimberlee’s preliminary hearing testimony into the record at trial violated [defendant’s] state and Sixth Amendment rights to confrontation.”

The People contend that “the record demonstrated that [defendant] had a sufficient opportunity to cross-examine Kimberlee Doe at the preliminary hearing, and therefore, admission of her prior testimony at trial did not violate [defendant’s] confrontation rights.” The People further contend that defendant was not prejudiced by the use of Kimberlee’s preliminary examination testimony because he “cannot show that further cross-examination about the text messages would have produced a significantly different impression of Kimberlee’s credibility.”

“A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him or her. (U.S. Const., 6th & 14th Amends.; [citation].) The right of confrontation is not absolute, however, and may ‘in appropriate cases’ bow to other legitimate interests in the criminal trial process. [Citations.] An exception to the confrontation requirement exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. (*Crawford*[, *supra*,] 541 U.S. [at p.] 59; [citations].) Further, the federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. [Citation.]” (*People v. Carter* (2005) 36 Cal.4th 1114, 1172 (*Carter*).)

“California permits the use of the prior testimony of a witness against a criminal defendant only when the unavailability of the witness and the reliability of the testimony are established. (§ 686; Evid. Code, § 1291, subd. (a)(2).)” (*Carter, supra*, 36 Cal.4th at

p. 1172.) A witness is deemed unavailable if he or she is “[p]ersistent in refusing to testify concerning the subject matter of the declarant’s statement despite having been found in contempt for refusal to testify.” (Evid. Code, § 240, subd. (a)(6).) “The testimony is deemed reliable if ‘[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing.’ (Evid. Code, § 1291, subd. (a)(2)).” (*Carter, supra*, 36 Cal.4th at p. 1172.)

“ ‘In *People v. Zapien* [(1993)] 4 Cal.4th 929, 975, [the] court recognized that the “[a]dmission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitution—not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of confrontation at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant’s right to effective cross-examination against the public’s interest in effective prosecution.” The court further determined that a defendant’s motive in cross-examining a witness at a preliminary hearing may differ somewhat from the motive at trial, but nevertheless the earlier testimony may be admissible at the trial under section 1291 because the “motives need not be identical, only ‘similar.’ ” [Citations.]’ ” (*Carter, supra*, 36 Cal.4th at pp. 1172-1173.)

“[A] defendant’s interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars.” (*People v. Harris* (2005) 37 Cal.4th 310, 333 (*Harris*); *People v. Valencia* (2008) 43 Cal.4th 268, 293-294 (*Valencia*)). “ ‘Both the United States Supreme Court and [the California Supreme Court] have concluded that “when a defendant has had an

opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the completeness of the earlier testimony.” ’ [Citations.]” (*Harris, supra*, at p. 333; *Valencia, supra*, at p. 294.)

In this case, defendant’s interest and motive in cross-examining Kimberlee at the preliminary hearing were similar to those at trial: to challenge her credibility and to discredit her account of what happened in the Toyota in the early morning hours of April 23, 2008. Defense counsel conducted an in-depth cross-examination of Kimberlee which was almost as long as the direct examination, during which counsel questioned Kimberlee about the voice mail and text messages she had sent to her friend John. Accordingly, defendant’s opportunity to cross-examine Kimberlee at the preliminary examination satisfied the confrontation clause, and defendant’s objection to the admission of Kimberlee’s preliminary examination testimony lacked merit. (*Harris, supra*, 37 Cal.4th at p. 333.) John testified at defendant’s trial, defendant was able to cross-examine him about the voice and text messages Kimberlee sent him, and the court permitted defendant to submit copies of some of the text messages to the jury in order to impeach both Kimberlee’s and John’s testimony. On this record, defendant cannot show a violation of his rights to confrontation and a fair trial. (*Valencia, supra*, 43 Cal.4th at p. 294.)

Ineffective Assistance of Counsel

During his cross-examination of Santa Cruz Police Officer Nathan Vasquez, defense counsel asked the officer whether defendant agreed to speak to the officers, to display his tattoos, and to participate in a show-up, when two officers approached defendant in the Blue Lagoon bar. The officer testified that defendant did agree to do so. Defense counsel asked whether defendant tried to run away when the officers escorted defendant outside, and the officer answered “Not at all.” Defense counsel asked whether

defendant was cooperative then and during the drive to the police station, and the officer answered yes. Defense counsel then asked whether defendant agreed to provide a buccal swab for DNA testing and whether he agree to a SART exam, and the officer answered affirmatively to both questions.

On redirect examination, the prosecutor asked Officer Vasquez whether he had told defendant why he was being arrested during the drive to the police station, and the officer responded that he had only said that they were conducting a criminal investigation. When the prosecutor asked the officer whether defendant “seem[ed] surprised,” defense counsel objected on relevancy grounds. The court overruled the objection, and the officer answered no. The prosecutor asked the officer whether defendant asked, “What the heck are you talking about?” The officer answered no. The officer also answered no when asked whether defendant had asked any questions about why he was being transported. The prosecutor later asked the officer whether he is “able to communicate with prisoners” he is transporting while the officer is driving “and they’re in the back,” and the officer answered yes. Defense counsel objected again on relevancy grounds, but the court overruled the objection. The prosecutor then asked the officer how defendant responded to basic personal history questions before he was interviewed, and the officer answered that defendant “was pretty evasive,” “[h]e didn’t answer all the questions that I asked him.”

Defendant now contends that his trial counsel rendered ineffective assistance by failing to make meritorious objections when the prosecutor “elicited evidence that [defendant] remained silent following his arrest and during this trip in the patrol car from the bar to the police station.” He argues that evidence of his silence “was inadmissible because its probative value was substantially outweighed by the probability that its admission would create a substantial danger of under prejudice,” and that the evidence was also inadmissible under the Fifth and Fourteenth Amendments, because it violated his privilege against self-incrimination. He further argues that counsel could have had no

conceivable tactical reason for failing to object on these grounds and that, had the court excluded the evidence, there was a reasonable probability of a more favorable outcome on count 1.

The People contend that trial counsel acted reasonably in not objecting on the grounds defendant now raises “because the prosecution’s questioning of Officer [Vasquez] was in response to defense inquiry into [defendant’s] cooperation with the police.” The People further contend that an objection on Evidence Code section 352 or on *Miranda*-violation grounds would have lacked merit.

“ ‘To establish ineffective assistance, defendant bears the burden of showing, first, that counsel’s performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel’s error, it is reasonably probable that the verdict would have been more favorable to him.’ [Citation.] ‘If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.’ [Citation.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052-1053 (*Hernandez*).

In evaluating whether trial counsel’s performance was deficient, we accord great deference to the tactical decisions of trial counsel. (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. (*Strickland v. Washington* (1984) 466 U.S. 668, 689; *People v. Maury* (2003) 30 Cal.4th 342, 389.) As to the failure to object to inadmissible evidence, “[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.” (*People v. Kelly* (1992) 1 Cal.4th 495, 540.) By the same token, “[d]efense counsel’s performance cannot be considered deficient if there was no error to object to.” (*People v. Eshelman* (1990) 225 Cal.App.3d 1513, 1520.)

“ ‘An assessment of whether the prosecutor made inappropriate use of defendant’s postarrest silence requires consideration of the context of the prosecutor’s inquiry or argument. [Citation.] A violation of due process does not occur where the prosecutor’s reference to defendant’s postarrest silence constitutes a fair response to defendant’s claim or a fair comment on the evidence. [Citations.] “*Griffin*[⁴] and *Doyle*’s[⁵] protection of the right to remain silent is a ‘shield,’ not a ‘sword’ that can be used to ‘cut off the prosecution’s “fair response” to the evidence or argument of the defendant.’ ” ’ [Citation.]” (*People v. Delgado* (2010) 181 Cal.App.4th 839, 853 (*Delgado*); *People v. Champion* (2005) 134 Cal.App.4th 1440, 1448 (*Champion*)). “The Fifth Amendment protects defendant’s right to remain silent. It does not protect his effort to exploit his silence by requiring the government also remain silent.” (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1612, disapproved on other grounds in *People v. Palmer* (2001) 24 Cal.4th 856, 861, 867.)

In this case, the prosecutor’s redirect examination of Officer Vasquez was a “ ‘fair response to defendant’s claim’ ” of full cooperation with the authorities. (*Delgado, supra*, 181 Cal.App.4th at p. 853.) Defendant opened the door to questioning about his postarrest silence by eliciting testimony from Officer Vasquez on cross-examination that defendant was fully cooperative with the officers from the time they approached him in the bar to when he agreed at the station to provide a buccal swab and to submit to a SART exam. Defense counsel specifically asked Officer Vasquez whether defendant was “cooperative” while being transported to the police station. Given defense counsel’s question, the prosecutor could properly ask Officer Vasquez how defendant responded while in the patrol car to being told that the officers were conducting a criminal

⁴ *Griffin v. California* (1965) 380 U.S. 609, 615 (the prosecution may not exploit a defendant’s failure to testify at trial).

⁵ *Doyle v. Ohio* (1976) 426 U.S. 610, 618 (the prosecution may not exploit a defendant’s post-*Miranda* silence).

investigation and whether defendant asked any questions. As the prosecutor's inquiry was focused on rebutting defendant's claim of full cooperation during the ride to the station and later at the station, the prosecutor's inquiry was a fair response to defendant's claim of full cooperation. Under the circumstances, the prosecutor was not taking unfair advantage of, or attempting to exploit, defendant's exercise of his postarrest right to remain silent. (*Champion, supra*, 134 Cal.App.4th at p. 1451.) Defense counsel could have made a reasonable tactical decision to not object to the prosecutor's questions on Fifth Amendment grounds since counsel had opened the door to the prosecutor's questions. And, as the prosecutor's questions did not constitute error under the Fifth Amendment, and were expected to elicit relevant and admissible evidence, defendant cannot show that he was prejudiced by counsel's failure to object to the questions on Evidence Code section 352 grounds. (*Hernandez, supra*, 33 Cal.4th at pp. 1052-1053.)

Forensic Examination Restitution Order

The probation report prepared for the January 29, 2010 sentencing hearing did not propose a restitution order pursuant to section 1203.1h. And, because defendant refused to be interviewed by the probation officer, no employment or financial information about him is included in the report. Nevertheless, the court ordered defendant to reimburse the Gilroy Police Department \$700 for a SART examination pursuant to section 1203.1h, subdivision (b), and the court carried the order over when resentencing defendant on June 11, 2010, following his retrial.

Defendant contends that before a sentencing court orders restitution under section 1203.1h, subdivision (b), the court must find that the defendant has the ability to pay the ordered restitution. Defendant further contends that the \$700 order in this case must be stricken because there is no evidence in the record to support an implicit finding by the trial court that he has the ability to pay that amount.

The People contend that defendant has forfeited his challenge to the order by failing to object below. The People further contend that the record supports an implied finding by the court that defendant has the ability to pay the ordered \$700.

Section 1203.1h, subdivision (b) provides in pertinent part: “In addition to any other costs which a court is authorized to require a defendant to pay, upon conviction of any offense involving sexual assault . . . the court may require that the defendant pay, to the law enforcement agency . . . incurring the cost, the cost of any medical examinations conducted on the victim for the collection and preservation of evidence. If the court determines that the defendant has the ability to pay all or part of the cost of the medical examination, the court may set the amount to be reimbursed and order the defendant to pay that sum to the law enforcement agency . . . in the manner in which the court believes reasonable and compatible with the defendant’s financial ability. In making the determination of whether a defendant has the ability to pay, the court shall take into account the amount of any fine imposed upon the defendant and any amount the defendant has been ordered to pay in restitution.”

In *People v. Wardlow* (1991) 227 Cal.App.3d 360, the defendant contended on appeal that the trial court improperly ordered him to pay restitution to the local sheriff’s department pursuant to section 1203.1h. (*Id.* at p. 371.) There was no evidence presented to the trial court as to what, if any, costs the local sheriff’s department incurred in obtaining an examination of the sexual assault victims, nor did the court determine whether the defendant had the ability to pay the costs. (*Id.* at pp. 371-372.) The appellate court ordered the restitution order stricken. “Nothing in the record suggests any excuse for the failure to determine the costs at the time of the sentencing here Nor is there any excuse for the court’s failure to determine whether [the defendant] had the ability to reimburse the sheriff’s department for the costs of examining [the victims].” (*Id.* at p. 372, fn. omitted.) Further, the court rejected the Attorney General’s argument that the lack of an express finding of the ability to pay did not defeat the order. “The

record in this case . . . does not support an inference the court made any sort of determination, express or implicit, on the issue. No evidence was presented on the issue nor inquiry made.” (*Id.* at fn. 7.)

In the case before us, no hearing was held and no findings were made either at the original sentencing hearing or at resentencing regarding the actual cost to the Gilroy Police Department of the SART exam or defendant’s ability to pay the ordered \$700 in restitution. In addition, there is no evidence in the record to support a conclusion that defendant had the ability to pay the ordered amount, a finding that is a necessary prerequisite to imposition of such an order under section 1203.1h. Under these circumstances, defendant did not waive his challenge to the \$700 restitution order. (See *People v. Stowell* (2003) 31 Cal.4th 1107, 1113; *People v. Butler* (2003) 31 Cal.4th 1119, 1123, 1126.) We will therefore strike that portion of the judgment ordering defendant to pay \$700 in restitution to the Gilroy Police Department.

The Restitution and Parole Revocation Fines

On June 7, 2010, the court imposed a \$2,400 restitution fine and a \$2,400 suspended parole revocation fine for counts 2 and 3. On June 11, 2010, when resentencing defendant on counts 1, 5, 6 and 7, the court reimposed the \$10,000 restitution fine and the \$10,000 suspended parole revocation fine it had originally imposed on January 29, 2010. Defendant contends that because the maximum the court can impose in restitution and parole revocation fines in one case is \$10,000 (see e.g., *People v. Rowland* (1997) 51 Cal.App.4th 1745, 1752; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534), the court erred in imposing \$12,400 in restitution and parole revocation fines in this case. The People concede the error and agree with defendant that the fines should be reduced to \$10,000 each.

Clerical Errors in the Abstract of Judgment

Defendant contends that two clerical errors in the abstract of judgment should be corrected and the People agree. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185

[courts may correct clerical errors at any time].) The abstract erroneously states that the date defendant was convicted of counts 1, 5, and 6 was April 22, 2010. We will order the abstract corrected to state that the date of conviction for those counts was October 9, 2009. The abstract also erroneously states that the convictions on both counts 2 and 3 were for assault to commit rape (§ 220). We will order the abstract corrected to state that the conviction on count 3 was for assault to commit sodomy (§ 220).

DISPOSITION

The judgment is ordered modified by striking the order to pay \$700 in restitution to the Gilroy Police Department under section 1203.1h, and by reducing the restitution and parole revocation fines to \$10,000 each. As so modified, the judgment is affirmed. The abstract of judgment is ordered corrected to state that the date defendant was convicted of counts 1, 5, and 6 was October 9, 2009, and to state that defendant was convicted on count 3 for assault to commit sodomy (§ 220). The clerk of the superior court is ordered to send a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

RUSHING, P.J.

PREMO, J.