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

THE PEOPLE,

Plaintiff and Respondent,

v.

DOMINGO LAUREL,

Defendant and Appellant.

H036416

(Santa Clara County

Super. Ct. No. CC948611)

A jury found appellant Domingo Laurel guilty of one count of forcible rape (Pen. Code, § 261, subd. (a)(2), count one),¹ one count of kidnapping (§ 207, subd. (a), count two), one count of assault with a deadly weapon (§ 245, subd. (a), count three), and one count of criminal threat (§ 422, count four). As to count one, the jury found true the allegations that appellant kidnapped the victim and kidnapped the victim increasing the risk of harm.² As to counts two and three, the jury found true the allegation that appellant personally used a deadly or dangerous weapon during the commission of the offenses. The court sentenced appellant to 25 years to life in state prison.³

¹ All unspecified section references are to the Penal Code.

² The jury found not true the allegation that in the commission of the rape, appellant personally used a dangerous and deadly weapon.

³ The court sentenced appellant to 25 years to life on count one; on count two the court imposed the lower term of three years plus one year for the personal use of a deadly or dangerous weapon enhancement. However, the court stayed the sentence on this count pursuant to sections 667.61, subdivision (f) and 654. On count three the court imposed

Appellant filed a timely notice of appeal.

On appeal, appellant contends that his convictions should be reversed because he was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel in that his trial counsel failed to object to irrelevant and prejudicial expert testimony or to cross examine the expert witness. In addition, appellant contends that because the kidnapping, assault, rape and criminal threat counts were all part of an indivisible course of conduct, the sentences on the assault and criminal threats counts should have been stayed pursuant to section 654. For reasons that follow, we agree that the sentence on count three should have been stayed pursuant to section 654. However, we disagree with appellant that he was denied the effective assistance of counsel.

Facts and Proceedings Below

Evidence Adduced at Trial

M.,⁴ the victim in this case, refused to testify at trial. The court found her unavailable as a witness and allowed the following preliminary hearing testimony to be read into the record.

Preliminary Hearing Testimony—M.

M. lived with appellant for 16 years; they had two children together both of whom are teenagers. After their relationship ended, appellant lived in Madera, but would stay with the family on weekends. However, he and M. were no longer romantically involved.

On July 2, 2009, M. planned to go on a casual date with Abraham. Around 9:30 p.m., M. went to meet with him at a McDonalds restaurant next to the Honda dealership where Abraham worked. While she was waiting outside the restaurant talking

the lower term of two years; and for count four, a consecutive subordinate term of eight months (one third the midterm)—the determinate sentence on counts three and four to run concurrent with the indeterminate sentence on count one.

⁴ We refer to the victim only as M. to protect her anonymity.

to Abraham on her cellular telephone, appellant appeared in her car. Appellant was very upset; M. thought that appellant heard her talking on her cellular telephone to Abraham. While sitting in the front passenger seat, appellant told M. that he was very angry that she was dating someone else and that he wanted her back. According to M., they began to argue. Appellant grabbed her by her hair and told her that they should go home; M. was scared. M. explained that because appellant wanted to talk and there were people at her house, she drove to another location somewhere off the freeway. M. said that appellant had something in his hand; at first she refused to identify it as a knife. Appellant said that he wanted a second chance but she said no. Then, appellant asked her to have intercourse with him; at first she said no, but then said "okay." Appellant did not have what M. described as a piece of iron in his hand anymore.

M. had intercourse with appellant in the back seat of the car. She said that at first she did not want to have intercourse with appellant, but later it was "Okay, fine." After they had intercourse, M. cleaned herself with some towels she had in the car. M. said she got out of the car for a little while and then appellant told her, "Let's go home." She got back into the car and they went home. Later that night M. left and went to dinner with Abraham. She said that she stayed at the girlfriend's house that night.

M. recalled that about two days later she spoke to a police officer, but said she only understood part of what he was saying because they spoke in English. She said that she had gone to Abraham's work and appellant was there, but they did not speak. Abraham called the police. When the police arrived she told Officer Moggia that she had not had consensual intercourse with appellant for a year; that appellant had grabbed her by her hair and held a knife to her right cheek area.⁵ M. confirmed that she told Officer Moggia that appellant said she was a bitch for dating someone else. She explained that appellant was very angry. M. conceded that she told the officer that appellant jumped

⁵ M. still denied that it was a knife at the preliminary hearing.

into the front seat of her car and held a knife to her face. Further, M. agreed that she told the officer that appellant scratched her twice with the knife on the shoulder, but tried to excuse appellant's behavior by explaining that she had made him very angry and he lost control.

When asked if there was anything around the area where they stopped, M. said there was nothing. When asked if appellant said, "Okay, bitch, I hear you have another person" M. replied, "Yes, of course." M. confirmed that she told the officer that she did not want to be with appellant; that appellant said, "Since you don't want to be with me, I'll give you something you will never forget"; and that appellant pulled her into the back seat and pulled off her pants. When asked if that was what really happened, M. began to equivocate, saying "Not really. He didn't pull me. He grabbed me and he placed me there on the seat." When asked if appellant pulled off her pants, M. replied, "Before that, no. But he told me that . . . I had been his wife for so many years, asking why didn't I want to be with him, that if I really had something going with this guy. Said to him: No. Never. And then he said: Okay, I want to have sexual relations with you. And then on the one hand, I didn't want to, but then later: Okay, I give in."

When asked if she told the officer that she was pushing, kicking and yelling, no I don't want to, M. said, "Okay. At first, it's true, I said it: I didn't want to. But after we argued when I was trying, like, to get him off me, like pushing him, I said: Okay, fine. I haven't had anyone else in my life. And he's my children's father. So I . . . kept going. We kept going. And, okay. So we finished and that's it. But, yes, I won't deny that I was pushing him." M. confirmed that when she told appellant that she did not want to have sexual intercourse, he said, "I don't care." When asked if she just had intercourse with appellant so he would let her go, M. replied, "On the one hand, I won't deny it. On the other hand, I also wanted it. I repeat, otherwise, I would not have let him do it."

When asked if she told Officer Moggia that appellant pushed her out of the car and drove off, M. explained that she got out of the car to get some fresh air and relax and

appellant told her to get back in so they could leave. However, she did not want to, so appellant told her he was going to leave. She said appellant only acted as if he was leaving, but then came back. M. admitted that appellant lifted her and put her in the front seat and that she was "a little emotional." M. said that she did not call the police because she was scared the children would blame her. She did not deny that is what she told the officer.

M. testified that she told the sexual assault nurse that appellant cut her with what she thought was a knife. When asked if she told the nurse that appellant said "I want to kill you because you're a bitch" M. said that appellant said that when he was angry. When asked if she told the nurse that appellant said "If you call [the] police, I will kill your mother and father," M. said, "Well, not exactly. He got scared when he saw blood on me. Maybe he said that . . . maybe he thought that I was going to call the police." M. added that she knew that appellant was not really going to do it.

M. admitted that she sent a letter to appellant's defense attorney saying that she wanted all the charges against appellant dismissed because his children really needed him; that she said appellant "never did anything like this before and [she did] not want to cause him any harm"; and that in the letter she never said that appellant did not force her to have intercourse but rather that she did not want him to get into trouble.

While M. was testifying, the prosecutor produced a letter that M. had given to him that morning. The prosecutor pointed out that in the letter M. said that she had talked to the police because she thought that she would teach appellant a lesson; and that M. had written that she "never meant for this to happen. My husband is a good man and he is innocent." M. did not disagree. Thereafter, the prosecutor said, "But he did surprise you in the back of your car, grab your hair?" "With some sort of knife?" "And drove you to a remote location, you kicked and punched him and said, no, you didn't want to have sex with him. But he pulled your pants off and had sex with you anyway And all that makes you think he's innocent?" M. asked the prosecutor if he wanted her to answer that.

When he confirmed that he did, M. said "Of course, yes." When the prosecutor asked her if she was trying to protect her children, she replied, "Not exactly. Because my children -- we are human beings. We are human beings. We all make mistakes. But God gives all of us a second chance. And I've known him for 16 years. He had never done it before. And he doesn't deserve for that being here all this time."

Kathleen Stallworth—Sexual Assault Response Team (SART) Nurse

The SART nurse testified that she examined M. on July 4, 2009. She observed two superficial lacerations on M.'s right shoulder area and another superficial linear laceration on her right upper arm. However, she did not see any injuries to M.'s vaginal area, but her training and experience had taught her that in sexual assault cases there is a "large area of injury and non-injury in the genital area" depending on a number of factors; often a person can have non-consensual sex and have no injuries.

Jenny Adler—Rape Crisis and Domestic Violence Counselor

Jenny Adler testified as an expert on coping behaviors of women who have been battered, raped and sexually assaulted. Her expertise included knowledge of rape trauma syndrome and intimate partner battering. Ms. Adler testified that she did not know M. or appellant and had not read any police reports about the case. Her generic testimony was as follows.

As far as sexual assault is concerned she explained that there is a stigma associated with it in that society prefers to blame the victim and to assume that the victim "asked for it in some way."

Rape trauma syndrome explains the behavior of the typical victim of rape. There are three stages to the syndrome; the "crisis impact stage" when the assault happens initially in which the victim acts the same way she did before the assault happened. The victim does not break down, but instead goes through shock and denial as a "coping skill" or "survival technique"; it is easier to live life not being a rape victim.

Thereafter, from minutes to days after the assault, the shock and denial go away. In some cases, denial and shock can last a decade. At some point, however, the impact will hit and the victim will experience anxiety and depression; the coping skills are no longer sufficient. From there the victim enters the second stage—"the reorganization stage." The victim must reorganize his or her life and coping skills to figure out and survive what has happened. Some victims describe it as "being stuck on an emotional roller coaster." One minute the victim feels fine and the next the victim is in tears. The second stage lasts from months to years before the victim reaches some sort of a stable life.

When the victim becomes more stable he or she attains the "resolution stage." However, not all victims reach this stage; "trigger[s]" that remind the victim of the assault can send them back to the "reorganization stage." Some victims reach the same functioning level as they had before the assault, while others are the "walking wounded" reaching only a very low functioning stability.

Denial is a coping mechanism where the mind tricks the victim into thinking there was no assault because it is easier to go through life not being a rape survivor. Where the perpetrator is not a stranger and the victim knows the rapist, denial can lead to minimization of the sexual assault and even recantation of prior rape allegations. This happens quite frequently in both domestic violence and sexual assault cases. When the victim knows the perpetrator, the people in the victim's life also know the perpetrator and pressure the victim to recant.

During the sexual assault the victim has coping behaviors; shock makes them compliant and unable to make decisions. Victims will bargain, stall or make excuses for safety reasons; they will try to make the perpetrator happy and/or flatter the perpetrator to reduce the risk. When the victim knows the perpetrator, the victim tends not to fight back because of the "trust factor." People have a level of trust in people simply because they

know them. A combination of shock, denial, fear and inability to make decisions will make a victim not even think to scream or fight.

Only one-third of rapes are reported; victims do not always report sexual assault because of shame, embarrassment, humiliation and denial. It is very common for a victim to apologize or blame herself for the rape. Fear for children can cause a victim to keep quiet. Finally, if the perpetrator commits other crimes in addition to the rape, the victim will prefer to focus on the crime that does not make the victim feel damaged, dirty and ashamed.

As to intimate partner battering, "battered women's syndrome"⁶ describes a common set of reactions to physical, financial, or emotional abuse from a partner. Emotional abuse includes threats, manipulation, intimidation, and isolation. Victims of abusers often feel powerless, worthless, hopeless, violated and fearful.

An abuser keeps the victim helpless by threatening harm to the children; the abuser uses the children to deliver negative messages to the victim, or will gossip to the children about the victim and say negative things, name call, make accusations, or disclose personal information. This is called the "messenger effect." The abuser turns the children against the victim thereby further abusing the victim.

"Learned helplessness" occurs when the victim internalizes the abuse in order to stay as safe as possible in the relationship. The victim accepts the abuse and stays with the abuser because the victim feels worthless and believes they are to blame. Adler summarized the experimental evidence on learned helplessness in which laboratory dogs that had been locked in cages and subjected to random electric shocks did not try to leave their cages even when the cages were open.

⁶ The "more accurate and now preferred term" for battered women's syndrome is intimate partner battering and its effects. (*In re Walker* (2007) 147 Cal.App.4th 533, 536, fn. 1.)

"Traumatic bonding" is the term used to describe the psychological impact of being under the power and control of someone else for an extended period of time. It is another survival skill that the victim uses to stay as safe as possible in the relationship, even if safety is emotional rather than physical. Traumatic bonding is common in kidnapping and hostage situations. A type of post traumatic stress disorder occurs in a victim that has experienced trauma such as sexual assault or domestic violence manifesting itself in the victim being jumpy, on high alert with a really strong startle response. A person with this "exaggerated fear" might hear a small noise and have an exaggerated response to it. Such a person may see the abuser as more powerful than they really are.

There are three stages in the cycle of abuse. The first stage is the honeymoon stage, where the relationship is healthy and both parties present themselves in a positive light. The second stage is the tension stage, where stress builds up. Even healthy relationships experience the tension stage. However, in an abusive relationship there is a third stage—the explosive stage— where the abuser explodes and takes power and control from the victim; even if the abuse is emotional rather than physical the victim feels violated. After the explosive stage, the abuser apologizes to the victim and takes responsibility for his or her actions; the relationship returns to the honeymoon stage. Eventually, the tension and explosive stages recur. In time, the explosive stage occurs more frequently and more violently; the honeymoon stage disappears because the abuser blames the victim for provoking the abusive behavior. Adler explained that in her experience, "people have been severely beaten and bruised and battered and bleeding and had to go to the emergency room" and that one study showed that 33 percent of female murder victims were murdered by their intimate partners.

Sharing children with an abuser is the number one reason why abused victims do not leave the abuser; finances, fear and even love are other reasons. Statistics show that it takes seven tries for a victim to leave an abuser.

Similar to victims of sexual assault, denial, minimization and recantation are common coping skills for victims of intimate partner battering. A victim will have a different mindset immediately after the explosive stage—angry, violated, hurt—than he or she will have a few weeks later when the honeymoon stage returns—denial, self-blame, no anger. Victims of intimate partner battering commonly recant reports of abuse to the police after they receive pressure from family, blame themselves, minimize the abuse, or even deny it occurred.

Other Evidence Introduced

The jury listened to appellant's recorded police interview. During the interview, appellant admitted that he hid in the back of M.'s car when she left home because he wanted to see if she was meeting a man. Appellant said he listened while M. talked to her date on her cellular telephone. He scared her when he revealed himself. Appellant said he became angry, and very upset and nervous. He took M.'s telephone and would not give it back because he was afraid she would call the police. He made M. drive away from the parking lot at the McDonalds because he wanted to be alone with her and did not want the police to arrive. Appellant said he used a knife to scare M. and scratched her with it; he had the knife in his hand all the time. When they stopped and parked in a dark and remote location, appellant told M. that he wanted to have intercourse with her one last time and then they would never see each other again. It had been almost a year since they had intercourse and he "lost [his] senses due to everything that happened." Appellant said he felt angry and knew that probably he should not have had intercourse with M.,⁷ but he did not force her and she did not say no. However, she was afraid.

Trial counsel stipulated that appellant sent M. four text messages: the first message, which was sent on July 1, 2009 at 6:04 a.m., stated " . . . how pretty. I'm never

⁷ When asked if he knew that he did not have the right to "make love to her," appellant replied, "Ah, well truthfully it is right that I didn't because"

going to forget how good you smell, even when I'm dead.' " The second message sent at 6:29 a.m. the same day stated " 'I already know you don't love me. Lie to me or whatever, but at least answer.' " The third message sent on July 3, 2009, stated " 'Hello, my love. I'm waiting for you at McDonald's, whore.' " Finally, at 11:35 a.m. the same day, appellant sent M. a text message that stated " 'July 2nd, 2009, will be a day you'll never forget' "

The jury listened to M.'s recorded police interview. In the interview, M. told Officer Moggia that appellant jumped from the back seat of her car into the front, scaring her. Appellant grabbed her by her hair and held a knife to her throat. Appellant told her she was a bitch for having another boyfriend. Appellant told M. to drive while he held the knife to her throat; and he cut M. while she was driving.

M. said she was confused and ended up driving toward Morgan Hill and to a dark area off Bailey Road. Appellant told M. he wanted to have intercourse with her; when she said no, appellant said, " 'Ah, I don't care if you want [it] or not.' " M. explained that she told appellant that her new friend was " 'macho' " and appellant told her not to say that or "I kill you." M. told appellant that she did not want to be with him anymore; appellant told her " 'I give you something, and you never forget.' " Appellant grabbed M. and put her into the back seat of the car. M. told appellant " 'No, don't do that, don't do that.' " When M. said she did not want to have intercourse, appellant said " 'I don't care.' " Appellant took off M.'s pants as she was fighting with him. Appellant had intercourse with M.. Appellant put M. out of the car and started to drive away. However, he came back, picked up M. and put her into the car. M. told Officer Moggia that she did not call the police because of her children.

Discussion

Ineffective Assistance of Counsel

Appellant contends that his conviction must be reversed because his counsel was ineffective in failing to object to Jenny Adler's "irrelevant and prejudicial expert testimony" or to cross examine her.

Appellant asserts that much of Adler's testimony was irrelevant and highly prejudicial. Appellant argues that with respect to the rape charge, the only significant disputed issue was whether the sexual encounter was consensual. Since M. did not testify at trial and gave conflicting accounts of what happened, appellant concedes that some of Adler's testimony regarding recantation was relevant to show that M.'s initial statements to Officer Moggia were more likely to be accurate than her subsequent testimony at the preliminary hearing. However, appellant draws the line there. He avers that the testimony that rape victims frequently comply with their assailant's demands during the assault, that victims who are assaulted by known acquaintances tend not to fight back, and that victims blame themselves for what happened, was completely irrelevant to any disputed issue. At no time did the defense suggest that M.'s failure to call for help demonstrated that the encounter was consensual, M. did fight back and the question of whether M. blamed herself for what happened was not before the jury. Moreover, the testimony concerning the high incidence of rape victims reporting other crimes such as assault, but downplaying the rape, was irrelevant because M. did not do that.

With respect to Adler's testimony on intimate partner battering (IPB) appellant argues that it was almost entirely irrelevant because there was no evidence whatsoever that appellant had ever been physically or emotionally abusive to M.. Appellant concedes that expert testimony on IPB is admissible even in the absence of a history of abuse between the defendant and the complaining witness; however, he asserts that it must still be relevant. Appellant acknowledges that in *People v. Brown* (2004) 33 Cal.4th 892, the California Supreme Court held that an expert's explanation of why domestic

violence victims frequently recant and give conflicting statements was admissible despite a lack of evidence of prior abuse. (*Id.* at pp. 902, 908.) Nevertheless, he argues that this rule cannot be extrapolated to a rule that an IPB expert may testify to anything whatsoever including that IPB consists of both physical and emotional abuse, threats, intimidation and isolation of the victim, the messenger effect, that past behavior is predictive of future behavior, the phenomena of learned helplessness and traumatic bonding and the cycle of abuse. Appellant asserts that there was no evidence that he had ever engaged in any of these activities and telling the jury about them had no purpose other than to make them assume that if an expert was discussing them, he must have committed them. Further, M. had left the relationship almost a year before the events underlying the case and the "horrific" testimony regarding the dogs exposed to electric shocks served no legitimate purpose other than to arouse the juror's sympathy toward M. and their anger toward appellant. Moreover, the testimony on the cycle of abuse served no purpose since there was no evidence before the jury that any stage of this cycle had ever occurred in M.'s relationship with him. These gratuitous references to shocking and entirely irrelevant information served only to inflame the jurors' passions and prejudice them against him.

As a result, appellant claims that because the vast bulk of Adler's testimony was subject to exclusion on the ground that it was irrelevant and its prejudicial effect exceeded its probative value or was outside the scope of permissible testimony on rape trauma syndrome and IPB, there is a strong likelihood that virtually all her testimony would have been excluded or subject to being struck if trial counsel had objected on those grounds or even cross examined Adler. Thus, appellant argues, this failure on counsel's part constituted ineffective assistance.

It is well settled that to establish a claim of ineffective assistance of counsel, defendant must first demonstrate that trial counsel's representation fell below the standard of reasonableness under prevailing professional norms. In addition, appellant must show

that trial counsel's deficient representation subjected him to prejudice, i.e., that there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to him. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–217.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland, supra*, 466 U.S. at p. 694.)

"A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.) In sum, appellant "must show that counsel's action or inaction was not a reasonable tactical choice" (*People v. Jones* (2003) 30 Cal.4th 1084, 1105); and must do so based on the record before us, not an easy task.

In *People v. Bledsoe* (1984) 36 Cal.3d 236 (*Bledsoe*), the California Supreme Court held that evidence of rape trauma syndrome—"an 'umbrella terminology' which includes a very broad spectrum of physical, psychological, and emotional reactions" to rape (*id.* at p. 241, fn. 4)—is inadmissible to prove that rape did, in fact, occur. (*Id.* at p. 251). Where, however, "the alleged rapist has suggested to the jury that some conduct of the victim after the incident -- for example, a delay in reporting the sexual assault -- is inconsistent with her claim of having been raped" (*id.* at p. 247), some "expert testimony on rape trauma syndrome may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths. [Citations.]" (*Id.* at pp. 247-248, fn. omitted.)

In *Bledsoe*, the court held that the evidence of rape trauma syndrome was not admitted for a proper purpose because "the victim promptly reported the attack," immediately exhibited the type of emotional reaction that lay jurors associate with rape, and suffered physical injuries that corroborated her claim. (*Bledsoe, supra*, 36 Cal.3d at p. 248.)

Whether or not appellant explicitly suggested it, the evidence may well have suggested to the jury that M.'s behavior after the incident was inconsistent with her being raped. For instance, why did M. wait two days to report the rape? Only when Abraham called the police did she tell Officer Moggia what happened. Why did she partially recant at the preliminary hearing, and make excuses for appellant's behavior? Why did she diminish appellant's culpability and take the blame for some of appellant's actions? As can be seen *ante*, M. testified that appellant cut her with his knife because *she* made him lose control; that initially she did not want to have intercourse but *she* changed her mind; that *she* did not call the police because *she* did not want her children to blame *her*. All these things needed an explanation. Thus, the rape trauma evidence helped to disabuse the jury of any misconceptions they may have had about the behavior of rape victims, leaving them free to evaluate M.'s testimony and behavior in light of that knowledge.

As to the evidence regarding IPB, we find that much of it was cumulative on the issue of why M. failed to report the traumatic episode to the police immediately after it happened, her insistence that she consented to have sex with appellant and her attempt to get the charges dropped.⁸

⁸ "The discretion granted to courts by section 352 is not absolute or unlimited but requires that the trial judge balance the probative value of the proffered evidence against its prejudicial effect in the context of the case before the court. (*Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796; *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) The more substantial the probative value the greater must be the prejudice in order to justify exclusion. Among factors which should be considered are its materiality; the strength of

Nevertheless, "[t]he failure . . . to object to evidence are matters which usually involve tactical decisions on counsel's part and seldom establish a counsel's incompetence. . . ." "In the heat of a trial, defendant's counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel. . . ." [Citation.] (*People v. Barnett* (1998) 17 Cal.4th 1044, 1140.)

More importantly, even if this court assumed for the sake of argument that there was no rational tactical reason for counsel's failure to object to some of Adler's testimony, to succeed on a claim of ineffective assistance of counsel, appellant must show that he was prejudiced by counsel's deficient performance. If it is easier to dispose of an ineffective assistance of counsel claim on the ground of lack of sufficient prejudice, that course should be followed. (*Strickland, supra*, 466 U.S. at p. 697.)

We see no reasonable probability that the outcome of the case would have been different. (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217–218.) We reiterate that a reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Strickland, supra*, at p. 694.)

The evidence as presented does not undermine our confidence in the outcome. First, Adler told the jury that she knew nothing about the case; and the jury was instructed that it was not required to accept Adler's testimony as true or correct, and that

its relationship to the issue upon which it is offered; whether it goes to a main issue or merely to a collateral one; and, *whether it is necessary to prove proponent's case or merely cumulative to other available and sufficient proof.*" (*Burke v. Almaden Vineyards, Inc.* (1978) 86 Cal.App.3d 768, 774, italics added.) Here, the rape trauma syndrome evidence was more than sufficient to explain why M. failed to report the traumatic episode to the police, her insistence that she consented to have sex with appellant and her attempt to get the charges dropped. Further, since there was no evidence that there was a history of domestic violence in this case, the intimate partner battering evidence carried less evidentiary weight and probative value than the rape trauma evidence. Had defense counsel objected, it is likely the court would have excluded the evidence as cumulative on the issue of why M. partially recanted.

it could disregard any opinion that it found unbelievable, unreasonable, or unsupported by the evidence. We must presume that the jury meticulously followed this instruction. (*People v. Cruz* (2001) 93 Cal.App.4th 69, 73.) Second, as appellant concedes in his opening brief, M.'s "behavior after the assault was highly consistent with having been raped: within two days of the encounter with [him], she gave a police officer a highly detailed description of being assaulted, kidnapped, and raped." While Adler's testimony explained why thereafter M. partially recanted, it did not take away from that first report to Officer Moggia that appellant had grabbed her by the hair, held a knife to her cheek, made her drive to a remote location, and then picked her up and put her into the back of her car and had intercourse with her as she was pushing, kicking and yelling "no." There was simply no logical or rational reason for the jury to believe, as defense counsel argued to the jury, that M. gave the officer such a highly detailed description of what happened just because the interview was conducted at her boyfriend's place of employment and to an officer that was not Spanish speaking.⁹ Moreover, in his interview with the police, appellant admitted that he had scared M. and that he used his knife to scratch her; that he was angry; and that he had intercourse with M.. His statement that he "lost [his] senses due to everything that happened" and should not have had intercourse with her strongly suggests that their sexual encounter was not consensual.

By their very nature, because sex offenses are both serious and are committed in secret, trials involving sex offenses are primarily credibility contests between the victim and the defendant. (See *People v. Fitch* (1997) 55 Cal.App.4th 172, 182.) Nothing in the record suggests that M.'s account of the events that she gave to Officer Moggia was inherently improbable; and appellant's statements to the police detailing his actions

⁹ In essence, defense counsel argued that M.'s account of what happened given to Officer Moggia was not reliable because it was conducted "at her boyfriend's place of employment" by "an officer that was not Spanish speaking" and M. "struggle[d] with English."

during the incident strongly undermine his position at trial that he reasonably believed that M. consented to go with him and to have intercourse with him.¹⁰ Accordingly, given the state of the evidence we cannot say there is a reasonable probability that the result of the proceeding would have been different had defense counsel interposed specific and timely objections to some of Adler's testimony.

Finding no prejudice, we reject appellant's claim that he was denied the effective assistance of counsel. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126 [a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes that (1) counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails].)

Section 654

As noted, at sentencing, the trial court imposed the lower term of two years on count three (the assault) and a consecutive subordinate term of eight months (one third the middle term) on count four (the criminal threat) to run concurrent with the indeterminate sentence on count one.

Appellant contends that the kidnapping, rape, assault and criminal threat were indivisible parts of the same course of conduct. Therefore, he argues, the sentences on the assault and threat charges should have been stayed pursuant to section 654.

Certainly, section 654 prohibits punishment for two offenses arising from the same act or from a series of acts constituting an indivisible course of conduct. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1207–1208.) Thus, if a defendant is convicted of several

¹⁰ Basically, defense counsel argued that appellant actually and reasonably believed that M. went with him willingly and actually and reasonably believed that M. consented to have intercourse with him.

offenses that were incident to one objective, the defendant may be punished for any one of such offenses, but not more than one. (*People v. Perez* (1979) 23 Cal.3d 545, 551 (*Perez*).

To put it another way, section 654 has been applied not only where there is one "act" but also where there is a course of conduct that violates more than one statute, but nevertheless constitutes an indivisible transaction. (*Perez, supra*, 23 Cal.3d at p. 551.) Whether a course of conduct is divisible and thus gives rise to more than one act under section 654 depends on the defendant's intent and objective. (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) If all of a defendant's offenses were incident to one objective, he or she may be punished for any one of the offenses, but not more than one. (*Ibid.*) However, if a defendant entertains multiple criminal objectives independent of and not merely incidental to each other, he or she may be punished for the independent violations committed in pursuit of each objective even though the violations were part of an otherwise indivisible course of conduct. (*Perez, supra*, 23 Cal.3d at p. 551.) The purpose behind section 654 is to insure that a defendant's punishment will be commensurate with his culpability. (*Id.* at pp. 550-551.)

As a general rule, the sentencing court determines the defendant's "intent and objective" under section 654. (See, e.g., *People v. Coleman* (1989) 48 Cal.3d 112, 162.) We review the court's implied determination of a defendant's separate intents for sufficient evidence in a light most favorable to the judgment, and presume in support of the court's findings the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Green* (1996) 50 Cal.App.4th 1076, 1085.)

" 'Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.' [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

Here, the evidence showed that appellant held a knife to M.'s cheek during the drive away from McDonalds and cut her twice on the back causing superficial

lacerations. The prosecutor mentioned both acts during his argument to the jury. As for the criminal threat, the evidence shows that when M. said she was with Abraham because he was macho, appellant told M. don't say that or "I kill you" and when he saw blood on M., "If you call the police, I will kill your mother and father." Again, the prosecutor mentioned both acts during his argument to the jury.

Respondent argues that appellant cut M. with the knife as they argued during the drive; he did not cut her as part of the kidnapping because they had already left McDonalds. Respondent asserts that appellant cut M. because he was angry and wanted to hurt her. Respondent's position ignores the fact that "the crime of kidnapping continues until such time as the kidnapper releases or otherwise disposes of the victim and has reached a place of temporary safety" (*People v. Barnett, supra*, 17 Cal.4th at p. 1159.) The kidnapping started at the McDonalds and continued at a minimum until after the rape. Further, appellant's intent and objective—that he was angry and wanted to hurt M.— can be attributed to appellant for both the rape and the kidnapping.

This is not a case such as *People v. Nguyen* (1988) 204 Cal.App.3d 181 (*Nguyen*), in which the defendant and two accomplices robbed a store clerk. While the defendant remained at the store's cash register, one of his accomplices took the clerk into a back room, robbed him, forced him to lie on the floor, and then shot him. The defendant was convicted and sentenced for both robbery and murder. (*Id.* at pp. 185, 190.) The Court of Appeal found substantial evidence to support the trial court's finding of multiple criminal objectives. In response to the defendant's argument that section 654 barred multiple punishment because the clerk had been shot to eliminate him as a witness or to facilitate escape, the court said: "[A]t some point the means to achieve an objective may become so extreme they can no longer be termed 'incidental' and must be considered to express a different and a more sinister goal than mere successful commission of the original crime." (*Id.* at p. 191.) In essence, *Nguyen* held that gratuitous acts of violence, because

of the severity and the lack of resistance by the victim, demonstrate the defendant harbored intents above and beyond those necessary for the original crime.

The People have not pointed to and we have not found evidence suggesting that appellant had a separate intent and objective in assaulting M. that was not also the intent and objective of the kidnapping and rape—wanting to hurt M. for dating another man. Since we cannot reasonably find that appellant possessed two different intents and objectives during the kidnapping when he scratched M. with the knife, section 654 prohibits imposition of separate punishment for the assault and kidnapping that culminated in the rape. Section 654 does not allow multiple punishments, including concurrent sentences. (*People v. Deloza* (1998) 18 Cal.4th 585, 592.) Nevertheless, because the trial court selected count three as the principal term, we must remand the matter to the trial court for resentencing. (See Cal. Rules of Court, rule 4.424 [before determining whether to impose either concurrent or consecutive sentences the court must determine whether section 654 requires a stay of imposition of sentence on some of the counts]; see *People v. Miller* (2006) 145 Cal.App.4th 206 [trial court has discretion to choose which count will form the basis of the principal term in calculating aggregate sentence].)

As to the criminal threat count, as appellant concedes at least one of the threats—if you call the police I will kill your mother and father—had an objective that was not the same as the rape, but was to avoid detection and prosecution. Appellant asserts, however, that it is highly unlikely that this threat was the basis of the jury's guilty verdict on the threat charge because M. testified that she knew that appellant was not going to do it; thus, disproving one of the elements of the offense, the requirement that the threat " 'convey to the person threatened, a gravity of purpose an immediate prospect of execution of the threat.' (§ 422.)" Appellant forgets that the jury was free to discount M.'s preliminary hearing testimony that she knew that appellant was not going to hurt her

parents; and deduce from the fact that she did not report the rape until two days after it happened that she believed appellant would carry out his threat.

Alternatively, relying on this court's opinion in *People v. Coelho* (2001) 89 Cal.App.4th 861, 885-886 (*Coelho*), in accordance with the rule of lenity, appellant urges us to give him the benefit of the doubt concerning the factual bases for the verdicts. That is, appellant argues that because "respondent cannot establish by proof beyond a reasonable doubt that [he] was convicted of the criminal threat on the basis of the 'don't call the police or I'll harm your parents' threat, rather than the 'stop talking about [Abraham] or I'll kill you' threat," this court should give him the benefit of the doubt and interpret the guilty verdict on the criminal threat charge as being based on the latter.

Under the "rule of lenity," which the California Supreme Court has characterized as an "interpretive policy or guideline" for the interpretation of ambiguous penal statutes, courts "generally 'construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit'" (*People v. Garcia* (1999) 21 Cal.4th 1, 10.)

For several reasons, we reject appellant's request to apply the rule of lenity in this case. First, *Coelho* did not involve section 654; and does not have any bearing on appellate review of a record for the purpose of determining whether substantial evidence supports a trial court's imposition of multiple punishments. In *Coelho, supra*, 89 Cal.App.4th 861, the defendant was convicted of multiple sex crimes as to which the trial court could have imposed concurrent sentences, or discretionary consecutive sentences (§ 667.6, subd. (c)), or mandatory consecutive sentences (§ 667.6, subd. (d)), depending upon which one of the multiple acts the convictions were based. In this circumstance, we held that "if the jury could have based its verdicts upon a number of unlawful acts and the court cannot determine beyond a reasonable doubt the particular acts the jury selected, the court should assume that the verdicts were based on those acts that would give it the most discretion to impose concurrent terms." (*Id.* at p. 865.) We reasoned that the rule

of lenity should be applied "to resolve ambiguity concerning the factual bases for [the] conviction[]," particularly where the ambiguity was at least in part created by the prosecution and not the fault of the defendant. (*Id.* at p. 885-886.) With section 654, the issue is whether multiple punishment is proper at all. More importantly, "Section 654 . . . is a discretionary benefit provided by the Legislature to apply in those limited situations where one's culpability is less than the statutory penalty for one's crimes." (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1022.) Since the Legislature is not obligated to provide this benefit at all, it is not unfair to require that the court's findings on a section 654 determination be supported only by substantial evidence, and not additionally require the court to figure out, beyond a reasonable doubt, the act upon which the jury relied to convict.

Furthermore, given appellant's implicit concession on appeal that the jury could have convicted him on the basis of the "If you call the police I will kill your mother and father" threat, which is fully supported by the trial record, application of the rule-of-lenity presumption in this case would unreasonably conflict with the purpose of section 654, which as noted, is to ensure the appellant's punishment will be commensurate with his criminal culpability. (See *People v. Kramer* (2002) 29 Cal.4th 720, 723.) Since appellant's claim of sentencing error under section 654 on count four is based only on speculation, we hold he has not met his burden of showing that his punishment for this conviction should be stayed under that section. We will not second-guess the trial court's factual determination that appellant entertained separate objectives, on the basis of speculation alone.

Disposition

The judgment is reversed and the case is remanded for the limited purpose of resentencing appellant.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.