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

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLAS CIMIENTOS,

Defendant and Appellant.

H036787

(Monterey County

Super. Ct. No. SS061993)

Defendant Nicolas Cimientos was convicted by a jury of seven counts of forcible rape in concert and one count of sodomy in concert. The charges arose out of a late-night incident in June 2006 involving four men and two female victims occurring in a remote agricultural field in Castroville. Defendant was sentenced to an aggregate prison term of 200 years to life.

Defendant contends that he was deprived of the effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution. His claims relate to three discrete matters occurring at trial. First, trial counsel entered into a stipulation presented to the jury that two of defendant's confederates had pleaded no contest to criminal charges arising out of the incident. Defendant argues that there was no strategic reason for agreeing to have the jury hear this otherwise inadmissible evidence, and that allowing it to be introduced constituted prejudicially ineffective assistance of counsel.

Second, defendant argues that trial counsel failed to assert meritorious objections to the testimony of a physician's assistant because she (1) was unqualified to offer the opinions she rendered, and (2) opined that the women's injuries were consistent with their claims of having been sexually assaulted, which was effectively opining on the issue of defendant's guilt. Third, defendant contends that testimony by a criminalist concerning the findings of his colleague was testimonial hearsay and thus violated defendant's Sixth Amendment right to confront witnesses, and trial counsel's failure to object constituted prejudicially ineffective assistance of counsel.

We reject each of defendant's ineffective assistance of counsel claims and will therefore affirm the judgment.

FACTUAL BACKGROUND¹

I. *Prosecution Evidence*

On the evening of June 3, 2006, Jane Doe 1 and Jane Doe 2 went together to the Fiesta Days celebration at Vosti Park in Soledad, arriving around 8:00 to 9:00 p.m. The event had live music, dancing, and a carnival. The two women drank some beer sold at a concession stand. About 45 minutes after they arrived, they met Armando Gonzalez, whom they had not met before, and another man he identified as his brother, Salvador.² Armando asked the women to dance and they declined. Jane Doe 2 asked Armando to take a picture of the two women, and he took three photos with a disposable camera they had brought to the park. Armando asked the women for their telephone numbers; they declined because they weren't interested. At some point after having run into Armando

¹ We present a summary of the evidence from the trial utilizing the applicable standard. We resolve factual conflicts in support of the judgment. (*People v. Holt* (1997) 15 Cal.4th 619, 667-668.)

² Two of the three codefendants, Armando Gonzalez and Salvador Gonzalez, have the same surname. For reasons of clarity and not out of disrespect, we therefore refer to the three codefendants by their forenames.

and Salvador several times, Jane Doe 2 told Salvador that they didn't want to dance and asked him to leave them alone.

Between 10:30 and 11:00, Jane Doe 1 and Jane Doe 2 decided to leave Vosti Park because the beer concession stand was closed. They started walking to a nearby convenience store to buy some beer. As they were leaving the park, Armando approached them, asked where they were going, and said he wanted to get to know them better. They responded that they were just going to the store and asked him to leave them alone. Armando followed the women to the store, which was about two blocks away. There was a truck parked at the front of the store, and the women saw three men other than Armando near it. According to Jane Doe 1, "[t]hey were kind of hiding . . . over . . . on the side [of] the truck." The three men were Armando's brother, Salvador, whom they had seen at the park; Felipe Perea, who was later a passenger in the front seat of the truck; and defendant, who was the driver. Jane Doe 1 and Jane Doe 2 testified that as they approached the truck, Salvador, armed with a knife, came up from behind, threatened Jane Doe 1, and told her to get into the truck. He also told her not to scream. Jane Doe 1 did not see the knife, but felt it pressed against her back. Jane Doe 2 got into the back seat of the truck first, entering from the passenger's side. Armando got in the back seat next, followed by Jane Doe 1. Salvador rode in the front with defendant and Felipe. Jane Doe 1 testified that she was scared for her life because the men had gotten the women into the truck "at knife point."

They stopped at a liquor store approximately one block from the convenience store. Armando, Salvador, and Felipe stayed in the truck with the women; the driver went inside and returned with a 12-pack of Corona beer. There were no handles on the rear door of the truck, so Jane Doe 1 and Jane Doe 2 could not exit it.

Defendant entered Highway 101 heading north. While they were on the highway, the men gave Jane Doe 1 and Jane Doe 2 beer, and they drank it. Salvador also passed around a marijuana cigarette and he and Armando asked Jane Doe 1 and Jane Doe 2 to

smoke it with them, and they did. Jane Doe 1 testified that she wanted to try to be friendly to the men “[s]o that, hopefully, eventually, they will just let us go home. Let us off somewhere.” The women asked where they were being taken. One of the men suggested going dancing at a club; Jane Doe 1 liked the idea because then she and her friend would be able to get away from the men. They drove from Soledad to Salinas. As they passed Chualar and approached Salinas, Jane Doe 1 asked Salvador, “ ‘What club are we going to?’ ” He said they were going to Los Arcos in Salinas.³ After passing all of the Salinas exits, the women “started freaking out,” asking repeatedly where they were going. Salvador and Felipe told them to be quiet. The truck exited the freeway north of Salinas and got onto Espinosa Road in Castroville. They drove ahead, turned off the paved road, and came to a field and stopped next to a shed where it was “pitch black.” Jane Doe 1 was “[s]cared, frightened, [and] screaming,” asking where they were, why they were there, and telling the men to take her back. One of the men told her to calm down, indicating that he needed to stop to use the restroom. Jane Doe 2 was also scared and yelled at the men and asked where she and her friend were being taken.⁴

The men directed the women to exit the truck. Salvador opened the rear door on the driver’s side, and Jane Doe 2 got out first, followed by Armando, and then Jane Doe 1.⁵ Jane Doe 2 was taken by Armando and defendant several feet away from the truck. As Jane Doe 1 got out, she saw Salvador had the knife in his hand; he was gesturing with it, and told her to get out. He placed the knife against her neck, took her to the side of the truck, and told her to be quiet. Jane Doe 1 yelled to Jane Doe 2, “ ‘Look. He has a knife, and he’s going to stab me with it.’ ” Jane Doe 2 saw Salvador restraining

³ Jane Doe 2 identified a different club, La Movida as being the club that was suggested by one of the men.

⁴ The remote location to which the women were taken was approximately 46 miles from Vosti Park in Soledad.

⁵ Jane Doe 2 testified that it was defendant who opened the rear door on the driver’s side and that Jane Doe 1 exited from the passenger’s side of the truck.

her friend and holding a knife to her neck; Jane Doe 2 asked Armando to tell Salvador “to calm down.” Armando and defendant were restraining Jane Doe 2, who was struggling to free herself, and they told her to calm down.

Felipe pulled Jane Doe 1 to the ground. Salvador pulled down her pants and underwear and raped her while Felipe held her down. Jane Doe 1 screamed and cried, and Salvador struck her in the ribs while he was raping her. Afterward, Felipe raped Jane Doe 1 while Salvador was near her with his knife and held her down. At some point Salvador left for a while. He returned after a while and sodomized Jane Doe 1. While she was being raped and sodomized, she heard Jane Doe 2 screaming, asking her assailant(s) to get off of her and to leave her alone.

While Jane Doe 1 was being assaulted, Armando pulled Jane Doe 2 to the ground. As she struggled to get up, defendant grabbed her legs. Defendant then pulled off her pants and underwear, ripping her underwear. Defendant then raped her while Armando restrained her arms. Afterwards, Armando raped Jane Doe 2 while defendant restrained her.

Salvador and Felipe then came over to where Jane Doe 2 was being assaulted. First Salvador raped her, and then Felipe raped her.

When Salvador and Felipe went over to Jane Doe 2, Armando approached Jane Doe 1, threw her in the back seat of the truck, and raped her. At some point, defendant approached Armando from behind and said, “ ‘Just leave her alone.’ ”⁶

Jane Doe 1 got out of the truck to look for her friend. She found Jane Doe 2 further out in the fields. The four men got into the truck and drove away. Jane Doe 1 and

⁶ The officer who interviewed Jane Doe 1 testified that she did not mention that defendant had told Armando to leave her alone. The officer also testified that Jane Doe 1 had said during his interviews of her in June 2006 that Salvador was the last person to rape her; she told the officer during an interview shortly before trial in August 2010 that Armando was the last person to rape her.

Jane Doe 2 went away—at first running, and later walking—in the opposite direction of where the truck had gone. Both were barefoot. Jane Doe 1 was without pants or underwear; Jane Doe 2 gave her a green shirt she had been wearing over a tank top, and Jane Doe 1 wore it as a makeshift skirt. They walked through muddy and rocky fields of uneven elevation; Jane Doe 1 testified that they traveled “for a long time” over an approximate distance of three miles. They ultimately saw lights and a house, and knocked on the door. The women asked the people in the house to call the police.

Jane Doe 1 and Jane Doe 2 were taken by Monterey County Deputy Sheriff David Worden to Natividad Medical Center in Salinas for sexual assault examinations.⁷ Jane Doe 1 had bruises on her torso caused by Salvador having struck her in the ribs. Based upon forensic evidence obtained from the victims (i.e., vaginal, cervical, and rectal swabs), it was determined that there was a match to Felipe’s DNA typing from the three swabs obtained from Jane Doe 1, and there was a match to Armando’s DNA typing from the three swabs obtained from Jane Doe 2.

After taking the women to the hospital, Deputy Worden surveyed the artichoke fields in Castroville and located the scene of the incident. Peace officers searching the scene located a cardboard container with Corona beer bottles, a disposable camera, jeans, women’s shoes, a sheath to a knife, torn women’s underwear, and a purse.

Officer Michael Rivera, a certified Spanish speaking officer with the Salinas Police Department, along with Sergeant Thomas Marchese of the Soledad Police Department, conducted an interview of defendant on June 23, 2006. After advising defendant of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), and after

⁷ Jane Doe 1 testified on cross-examination that she had told a person who had examined her at the hospital that she had been choked by Salvador, the assailant with the knife. She testified that this had in fact occurred even though she had not mentioned it in her earlier trial testimony because four years had passed and she had tried to forget the incident. She testified that Salvador had choked her as she got out of the truck and twice more when he raped her.

defendant indicated his willingness to be questioned, Officer Rivera interviewed him in Spanish. Defendant initially denied having attended Fiesta Days in June 2006. He later admitted that he and his friends, Armando, Salvador, and Felipe, had traveled in his truck from Salinas to the event. At the end of the evening, defendant said that two women had gotten into his truck with his friends, they had stopped at a liquor store for beer, and had driven toward Salinas. At Salvador's direction, they had driven to Castroville.

Defendant told the officers that he had pulled off to use the bathroom, and that when he returned to the truck, he saw Salvador threatening the women with a knife. During the interview, defendant said that he had held one of the women down while Armando raped her, and then defendant had raped her. (Later in the interview, defendant indicated that he had not actually raped the woman because he could not get an erection.) He told the officers that although he could not see the other woman while this was occurring, he could hear her screaming. Defendant also said that he had overheard Salvador threatening to kill one of the women if she did not be quiet. He indicated that after a while, Salvador came over and had sex with the woman defendant had previously restrained and then raped. Defendant also stated that the woman who had originally been with Salvador and Felipe was later raped inside the truck.

II. *Defense Evidence*

Defendant testified on his own behalf. On the evening of June 3, 2006, defendant, driving his truck, picked up his friends, Armando and Felipe, at their homes in Salinas. (Salvador invited himself along.) Defendant had known Armando, Salvador, and Felipe since they were in grade school in Mexico. They went to Fiesta Days in Soledad. They split up after arriving at Vosti Park. After receiving a call from his wife, defendant returned to his truck, which was parked in front of a store. He called his friends separately so that they could all go home. Armando and Salvador arrived first with two women. They got into the truck and Salvador and Armando introduced them to defendant. Defendant did not get out of the truck, and the women were not forced at

knifepoint into the truck. Felipe eventually arrived, defendant asked where the women lived, and one of them asked to be taken to the outskirts of Soledad. They drove to a store to buy beer at Jane Doe 2's request.

All of the passengers were drinking and smoking marijuana in the truck. They were going to go to La Movida in Salinas, but Salvador told defendant to go toward Castroville to another club, Franco's, and "one of the girls said that's fine, go that way." While they were driving on Espinosa Road, one of the women said they needed to turn back; defendant made a left turn, and got off on a side road because he needed to use the restroom. At Salvador's direction, defendant pulled up near an equipment shed.

Defendant and Felipe got out of the truck and walked a distance from the truck. When they returned, Salvador was behind the truck on the ground with Jane Doe 1, and Armando was behind the truck off to the right with Jane Doe 2. Defendant saw Armando and Jane Doe 2 kissing and overheard Armando asking her if she wanted to have sex; she replied, "[Y]es." Defendant testified that after Jane Doe 2 asked Armando to use a condom and he said he didn't have one, she "got all excited" and said, "no more, and then she began to yell." Salvador then approached Jane Doe 2, produced a knife, and said " 'Shut up or I'm going to kill you.' " Jane Doe 2 "calmed down" and Salvador, brandishing the knife and pointing it at defendant, directed defendant to help him.⁸ Armando also asked defendant to help him. Defendant grabbed Jane Doe 2's hands. He did so because he was afraid Salvador, Armando, and Felipe would harm him if he didn't help Salvador. He testified, "There's three [*sic*] of them. And then they were all drugged up_[s] too." Armando pulled off Jane Doe 2's pants and underwear and had sex with her.

⁸ During cross-examination, defendant acknowledged that when he was interviewed by the police, he had said that while he was helping Armando by restraining Jane Doe 2, Salvador and Felipe were about 20 feet away assaulting the other woman. Defendant also conceded that he had not told the police that Salvador had come close to him and threatened him with a knife.

At that point, defendant let go of her and backed away because he thought what he was doing was “not right.” At that time, defendant saw Salvador on top of Jane Doe 1 and Felipe was off to the side of her. Salvador told her not to scream. Defendant also saw Felipe having sex with Jane Doe 1.

Later, Salvador “came back” to Jane Doe 2 and took her further away, and Armando grabbed Jane Doe 1 and put her in the rear compartment of the truck. After some time passed, defendant told the other men to leave the women alone. Armando got out of the truck and defendant told Jane Doe 1 to find her friend.

Defendant got back in the truck; Salvador got in and told him they should leave. Defendant asked where the women were, and Salvador responded that they had “[taken] off running” because they “were very scared.” Defendant backed out and Armando and Felipe jumped into the truck bed. While they were driving back to Salinas, Salvador still had the knife and he said “if someone talks about this it’s going to go really bad for them or for their family. [*Sic.*]” Defendant didn’t go to the police because of this threat.

After being arrested, defendant told the police he had raped one of the women. He did so because Officer Rivera and Sergeant Marchese threatened him and told him if he didn’t plead guilty he would never see his parents again, but that if he pleaded guilty to one of the charges, he would be released and would be able to go to work the next day.⁹

PROCEDURAL BACKGROUND

Defendant was charged by third amended information¹⁰ with eight felonies, namely, forcible rape while acting in concert (Pen. Code, § 264.1; counts 1 through 4,

⁹ Both Officer Rivera and Sergeant Marchese denied having made any threat to defendant in connection with his admission during the interview that he had raped one of the women.

¹⁰ It is apparent from the record that the information and amended information filed in this case in September 2006 and January 2007, respectively, charged defendant and the three codefendants, Armando, Salvador, and Felipe, with 18 felonies. The second amended information filed shortly before trial and the third amended information filed during trial omitted the codefendants, who were apparently separately charged.

and 6 through 8),¹¹ and sodomy by acting in concert (§ 286, subd. (d); count 5). As to each of the eight counts, it was alleged further that defendant kidnapped the victim and the movement of the victim substantially increased the risk of harm to her over and above the risk necessarily inherent in the commission of the crime (§ 667.61, subd. (d)(2)); and committed the offense on more than one victim (§ 667.61, subd. (e)(5)).

After a trial that included eight days of testimony, on September 7, 2010, a jury found defendant guilty of seven counts of forcible rape while acting in concert and one count of sodomy by acting in concert. On April 1, 2011, the court sentenced defendant to eight consecutive prison terms of 25 years to life for an aggregate term of 200 years to life in prison. Defendant filed a timely notice of appeal.

DISCUSSION

I. *Contentions*

Defendant's challenge of the conviction is based upon the following contentions:

1. Defense counsel's act of permitting the jury to hear a stipulation that two of the codefendants had pleaded no contest, effectively pleading guilty to the charged crimes, constituted prejudicially ineffective assistance of counsel.

2. The failure to object to the qualifications of, and opinions offered by, a physician's assistant who examined the victims was deficient performance of counsel, and such omissions and the resulting admission of the evidence was prejudicial to defendant.

3. A criminalist's testimony concerning work performed by his colleague was testimonial hearsay and its admission was therefore violative of defendant's Sixth Amendment confrontation rights. Defense counsel's failure to object to the testimony constituted prejudicially ineffective assistance of counsel.

¹¹ Further statutory references are to the Penal Code unless otherwise stated.

II. *Ineffective Assistance of Counsel Claims*

In evaluating defendant's ineffective assistance contentions here, we first identify familiar applicable legal principles. A criminal defendant has the right to the assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This constitutional right to counsel entitles a defendant not simply to "bare assistance" but rather to effective assistance. (*People v. Jones* (1991) 53 Cal.3d 1115, 1134.) This constitutionally adequate assistance requires that the attorney diligently and actively participate in the complete preparation of the client's case, and investigate all defenses of law and fact. (*People v. Pope* (1979) 23 Cal.3d 412, 425 (*Pope*), overruled on another ground, *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

An ineffective assistance of counsel claim requires a showing that "counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial." (*People v. Seaton* (2001) 26 Cal.4th 598, 666, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) "[T]he burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *People v. Weaver* (2001) 26 Cal.4th 876, 961.) This means that the defendant "must show both that his counsel's performance was deficient when measured against the standard of a reasonably competent attorney and that counsel's deficient performance resulted in prejudice to [the] defendant in the sense that it 'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' [Citations.]" (*People v. Kipp* (1998) 18 Cal.4th 349, 366, quoting *Strickland, supra*, 466 U.S. at p. 686.)

The first element of an ineffective assistance claim "requires a showing that 'counsel's representation fell below an objective standard of reasonableness.'

[Citations.]” (*In re Marquez* (1992) 1 Cal.4th 584, 602-603, quoting *Strickland, supra*, 466 U.S. at p. 688.) “ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny . . .’ and must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212; see also *People v. Holt* (1997) 15 Cal.4th 619, 703 [appellate court “must in hindsight give great deference to counsel’s tactical decisions”].) “[T]here is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 437 (*Lucas*), quoting *Strickland, supra*, 466 U.S. at p. 689; see also *People v. Vines* (2011) 51 Cal.4th 830, 876.) The failure of counsel to object to certain evidence is rarely a successful basis for reversal of a conviction on ineffective assistance grounds. (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) And the Supreme Court has noted that if “the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged,” we must reject the claim on appeal “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.” (*Pope, supra*, 23 Cal.3d at p. 426.)

The “prejudice” element requires a showing that “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome.” (*In re Ross* (1995) 10 Cal.4th 184, 201.) Prejudice requires a showing of “a ‘demonstrable reality,’ not simply speculation.” [Citations.]” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

The defendant bears the burden of establishing an ineffective assistance claim. (*Lucas, supra*, 12 Cal.4th at p. 436; *Pope, supra*, 23 Cal.3d at p. 425.) “Surmounting *Strickland*’s high bar is never an easy task. [Citations.]” (*Padilla v. Kentucky* (2010)

___ U.S. ___ [130 S.Ct. 1473, 1485].) And in deciding an ineffective assistance claim, the reviewing court need not inquire into the two components (deficient performance and prejudice) in any particular order; in the event the defendant’s showing on one component is insufficient, the court need not address the remaining component. (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.) “The object of an ineffectiveness claim is not to grade counsel’s performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

III. *Evidence of No Contest Pleas Entered by Co-Defendants*

A. *Background*

Defense counsel, Kimberly Barnett, included certain motions in limine in her trial brief filed August 16, 2010. One of those motions was a request that the court take judicial notice of the pleas entered on August 12, 2010, by codefendants Salvador Gonzalez and Armando Gonzalez in Monterey County Superior Court case numbers SS061993A and SS061993B, respectively. In Barnett’s accompanying declaration, she “requested [that] the Court take judicial notice of these pleas and that fact [*sic*] be known to the jury.”

At the beginning of trial, the court advised the jury, pursuant to a stipulation between the prosecution and defense, that there were four individuals, including defendant, who had been charged by the People in this case; two of the four, Salvador and Armando, had pleaded no contest, which was of the same effect as a guilty plea; and the matter was still pending against the fourth person, Felipe.

B. *Analysis of Claim*

Defense counsel Barnett noted in her declaration submitted at the beginning of trial that the then-recent development of the no contest pleas by Armando and Salvador was “a significant factor to Mr. Cimientos[’s] defense” and that “[i]t is material to his defense that the jury be able to know that they have plead[ed no contest] in this case.”

On appeal, defendant acknowledges these statements, but argues that Barnett never made clear at trial the significance of the no contest pleas. He asserts that “[t]he admission of the stipulation regarding the co[defendants]’ pleas served no reasonable tactical purpose.” He contends that this evidence was harmful to the defense, and, indeed, that “it cast a pall over Appellant’s defense from the very beginning of the evidentiary phase of trial . . .” He therefore argues that Barnett’s action in permitting the jury to consider it was prejudicially ineffective assistance. We disagree.

It is apparent on the face of Barnett’s declaration that she believed that it would be strategically to her client’s benefit for the jury to know about the no contest pleas of Armando and Salvador. The record does not disclose further the reasoning behind this conclusion. And there is no indication Barnett was “asked for an explanation and failed to provide one.” (*Pope, supra*, 23 Cal.3d at p. 426.) Thus, unless “there simply could be no satisfactory explanation” (*ibid.*) for Barnett’s concluding that it was to defendant’s benefit to present evidence of the convictions of two of his codefendants, the ineffective assistance claim must fail.

It is true that, in general, “evidence regarding the guilty plea or conviction of a coparticipant in a crime is not admissible to prove guilt of a defendant. [Citations.]” (*People v. Neely* (2009) 176 Cal.App.4th 787, 795 (*Neely*); see also *United States v. Mitchell* (4th Cir. 1993) 1 F.3d 235, 240.) As our high court has noted, the probative value of a coparticipant’s guilty plea relative to a crime for which the defendant is on trial is “questionable at best” particularly when it “invites an inference of guilt by association.” (*People v. Leonard* (1983) 34 Cal.3d 183, 188 (*Leonard*); see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1322 [evidence of codefendant’s guilty pleas is per se more prejudicial than probative when offered to raise inference of defendant’s guilt by bolstering the credibility of another witness].) But the fact that the no contest pleas of Armando and Salvador here may have been inadmissible does not suggest that defense

counsel's agreement that the jury could hear such evidence necessarily constituted ineffective assistance.

We disagree with defendant's assertion that "[n]o reasonable attorney would have agreed to, let alone have been the proponent of, such a clearly harmful stipulation which destroyed Appellant's defense before it ever got started." The underlying premise of defendant's argument—that the stipulation was "clearly harmful"—is flawed. Defendant urges that the evidence "served to actively undermine Appellant's position that the [victims'] statements were unreliable because it told the jury that the others involved had, by inference, accepted the credibility of the [victims] without contesting their innocence by going to trial, and admitted their guilt." This is mere speculation. While it is true that the stipulation told the jury that Armando and Salvador had admitted their guilt, this evidence was entirely consistent with the victims' testimony. Both Jane Doe 1 and Jane Doe 2 clearly and without contradiction identified Armando and Salvador as two of the men participating in their kidnapping and sexual assault. Further, this evidence was consistent with defendant's own testimony, namely, that Armando and Salvador (who wielded a knife) sexually assaulted both victims. Thus, since defendant acknowledged that he was present when the assaults occurred, evidence of the no contest pleas of his two friends did nothing more than corroborate the testimony of both the victims and of defendant himself. (Cf. *Leonard, supra*, 34 Cal.3d at p. 188 [guilty plea of coparticipant prejudicial as an invitation to "an inference of guilt by association" where defendant's presence at time of commission of crime contested].)

Further, we disagree with defendant's assertion that there could have been no tactical reason for Barnett's stipulation. Defense counsel may have reasonably believed that permitting the jury to hear about the no contest pleas of Armando and Salvador was supportive of defendant's theory of the case that the two were the ones who actually committed the crimes, and that defendant had only briefly held down Jane Doe 2 for Armando and had failed to prevent the crimes out of fear for his safety.

Similar circumstances were presented in *Neely, supra*, 176 Cal.App.4th 787. There, after his arrest, the defendant admitted that he had been present with two confederates, M.W. and Meeks, at a store where a robbery and murder transpired; he claimed that the three had only intended to commit a robbery, that defendant was unarmed and merely the lookout, that M.W. and Meeks were armed, and that M.W. had shot the victim. (*Id.* at pp. 792-793.) Defense counsel did not object to testimony of a deputy sheriff that M.W. had confessed to participating in the crime, and defendant asserted an ineffective assistance claim on this basis on appeal. (*Id.* at pp. 795.) The court rejected the claim, concluding that “[b]ecause the evidence of Neely’s guilt was strong, trial counsel reasonably focused on minimizing Neely’s role in the crimes and shifting the blame onto M.W. and Meeks. Counsel reasonably could conclude that evidence of M.W.’s confession might have been beneficial to Neely’s defense because it identified another person who could be blamed for the actual shooting.” (*Id.* at p. 796; see also *People v. Hines* (1997) 15 Cal.4th 997, 1040 [rejecting ineffective assistance claim based on defense counsel’s stipulation that another party was convicted of unspecified offenses based on involvement in crimes defendant was charged with committing, finding stipulation a reasonable tactical decision based upon defense theory that other party was sole perpetrator].)

Moreover, even were we to conclude that there could have been no reasonable tactical reason for Barnett’s agreement to have the jury learn about the no contest pleas—a conclusion we do *not* reach here—the ineffective assistance claim necessarily fails because defendant cannot demonstrate prejudice. By defendant’s own testimony, Armando and Salvador *did commit* rape upon the two victims. Thus, evidence that they admitted their guilt simply confirmed defendant’s version of the events. Further, since defendant admitted he was present at the scene—but denied that he was a willing or active participant in the crimes—the no contest pleas did not present the jury with an improper inference that because two of his confederates admitted their guilt, defendant

was likewise guilty by his association with them. Stated otherwise, because identification (i.e., defendant's presence at the crime scene) was not an issue at all, the no contest pleas of Armando and Salvador were not crucial to the prosecution's case. We therefore conclude that defendant has not shown "a reasonable probability that, but for counsel's [assumed] unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome." (*In re Ross, supra*, 10 Cal.4th at p. 201.)

IV. *Opinion Testimony by Physician's Assistant*

A. *Background*

After Jane Doe 1 and Jane Doe 2 were taken by Deputy Warden to Navidad Medical Center, each woman was examined separately by Dawn Hartzog, a physician's assistant and a certified forensic examiner for the Sexual Assault Response Team (SART). With each patient, Hartzog (1) took a history by asking about any possible bodily injuries, including questions directed toward "reveal[ing] any sexual assault type findings"; (2) conducted an examination, which included a full vaginal, pelvic, and rectal examination, and obtaining a sexual assault kit (including obtaining vaginal, cervical, anal, oral, and [in the case of Jane Doe 1] rectal swabs); and (3) documented any injuries by using a standard form promulgated by the state Office of Emergency Services used for all sexual assault examinations.

Hartzog observed from her physical examination of Jane Doe 1 that she had bruises and mud on her feet; red blotches on her scapula; scratches on her face and above the tailbone; a bruise on her right knee; bruises on her ribcage; and black mud in or about her anus. She testified that these injuries and this condition were "consistent with" the history described by Jane Doe 1. Based upon her examination of Jane Doe 1, Hartzog did not find evidence of any injuries to the genitalia of Jane Doe 1; however, she testified that "[i]t is common to find no injury [to the genitalia]" in sexual assault cases.

From her physical examination of Jane Doe 2, Hartzog observed that she had scratches on the left side of her back in the coccyx area, on her left elbow, and on both thighs; injuries to her little and ring fingers; mud on her feet; and a possible abrasion to her labia majora. Hartzog testified that the latter injury was one that is frequently seen in instances of sexual assault and was “consistent with Jane Doe 2’s history.” Hartzog also testified that other injuries she observed were “consistent with” the history Jane Doe 2 had described.

Defendant contends that his trial counsel was prejudicially ineffective because of her failure to object to Hartzog’s testimony in two respects. First, defendant argues that Hartzog was not qualified to render medical opinions concerning whether the victims’ injuries were consistent with their reports of having been sexually assaulted. He argues: “There was no evidence that [Hartzog’s] training and experience included an evaluation of the cause of injuries. She was not a medical doctor. Her experience as a SART examiner at the time of the examinations in this case was limited.” Second, defendant contends that Hartzog’s testimony that the victims’ injuries were consistent with their reports of having been sexually assaulted “constituted improper opinion as to Appellant’s guilt or innocence.” Defendant argues that his counsel’s failure to object to Hartzog’s lack of qualifications and improper testimony was prejudicial: “Given that the case was in part a credibility contest between Appellant and the [victims], improper expert opinion as [to] the causation of their injuries could only have tipped the balance in favor of conviction and in favor of the jury’s rejection of Appellant’s testimony.”

B. *Analysis of Claim*

1. *Law*

“The requirements for expert testimony are that it relate to a subject sufficiently beyond common experience as to assist the trier of fact and be based on matter that is reasonably relied upon by an expert in forming an opinion on the subject to which his or her testimony relates. [Citations.] Such evidence is admissible even though it

encompasses the ultimate issue in the case. [Citations.]” (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371; accord *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.) “A person is qualified to testify as an expert if he [or she] has special knowledge, skill, experience, training, or education sufficient to qualify him [or her] as an expert on the subject to which his [or her] testimony relates.” (Evid. Code, § 720, subd. (a).) “A trial court has broad discretion in determining whether to admit expert testimony and its ruling will be reversed on appeal only where the record reveals an abuse of discretion. [Citations.]” (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205; see also *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) Similarly, an appellate court must “ ‘uphold the trial judge’s ruling on the question of an expert’s qualifications absent an abuse of discretion. [Citation.] Such abuse of discretion will be found only where “ ‘the evidence shows that a witness *clearly lacks* qualification as an expert’ ” [Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1062-1063 (*Wallace*), quoting *People v. Chavez* (1985) 39 Cal.3d 823, 828; see also *People v. Castaneda* (2011) 51 Cal.4th 1292, 1336.)

Defense counsel did not object to the qualifications of Hartzog or to the substance of her opinions to the effect that the victims’ physical injuries were consistent with the assaults which they reported. Accordingly, defendant forfeited his claims on appeal. (See *People v. Williams* (2000) 78 Cal.App.4th 1118, 1126 [failure to object to expert]; *People v. Newberry* (1962) 204 Cal.App.2d 4, 9 [failure to timely move to strike expert testimony].) Defendant nonetheless claims that counsel’s failure to object constituted ineffective assistance. We address the two matters of Hartzog’s qualifications and testimony below.

2. *Expert’s Qualifications*

Hartzog is a licensed family practice physician’s assistant. In that capacity, she is authorized “to take histories, do physical exams, treat and assess . . . people of all ages . . .” Prior to working as a SART examiner, Hartzog worked (1) at Natividad

Medical Center, where 50 percent of her time concerned women’s health and obstetrics; (2) for the health department for five to six years also doing work in women’s health and obstetrics; and (3) at the student health center at California State University at Monterey Bay, where she was “a solo practitioner” in which about 50 percent of her work related to women’s health. She became a forensic SART examiner in 2005 and received specialized training in the area (for the examination of both adult and child victims) at University of California at Davis. Hartzog went through a “credentialing” process required for SART examinations performed at Natividad, where the examinations of the two victims in this case were performed. Before having performed the examinations of Jane Doe 1 and Jane Doe 2, Hartzog had conducted approximately 20 SART examinations. Overall, between 2005 and 2009, she had performed approximately 150 SART examinations and had testified as an expert witness in that field in Monterey County courts on five occasions.

Defense counsel did not object at the time the prosecution offered Hartzog as an expert witness in the field of forensic SART examinations. And the record does not reveal the reason for counsel’s failure to object. Given Hartzog’s extensive background in the field of women’s health and her more current training and experience in the field of SART examinations, defense counsel reasonably could have deemed an objection to Hartzog’s qualifications an idle act. (See *People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091 [“defense counsel is not required to make futile motions or to indulge in idle acts to appear competent”].) In light of Hartzog’s qualifications, it is likely that such an objection would have been overruled. And since a trial court is vested with broad discretion in ruling on an expert’s qualifications, and because this was certainly not an instance in which the “ ‘ ‘ ‘witness *clearly lacks* qualification as an expert’ ” ” (Wallace, *supra*, 44 Cal.4th at p. 1063), any such objection—had it been made and overruled—would not have preserved a meritorious claim of error in any event. (See *People v. Osband* (1996) 13 Cal.4th 622, 678 (*Osband*) [failure to make unmeritorious

objections does not constitute ineffective assistance]; *People v. Mendoza* (2000) 78 Cal.App.4th 918, 924 (*Mendoza*) [no ineffective assistance in failing to object when objection would have likely been overruled].) We therefore reject defendant’s claim that counsel’s failure to object to Hartzog’s testimony based upon her alleged lack of qualifications as a SART examiner constituted ineffective assistance.

3. *Expert’s Opinions*

Defendant argues that it was improper for Hartzog to opine that the physical injuries sustained by Jane Doe 1 and Jane Doe 2 were consistent with the histories that the victims reported. He claims that “it constituted improper opinion as to Appellant’s guilt or innocence.” Elsewhere in his opening brief—and apparently alternatively to the claim that Hartzog improperly opined on defendant’s guilt or innocence—he asserts that Hartzog’s testimony was improper because it was “nothing more than an opinion that the [victims] were truthful and credible witnesses.” Defendant’s ineffective assistance claim is without merit.

Defense counsel did not object to testimony from Hartzog to the effect that the injuries she observed on the victims were consistent with the respective histories that each woman provided to her. And the record does not disclose the reason for this omission. It is entirely proper for a qualified expert to render an opinion concerning the cause of the injury based upon the physical appearance of the injury itself. (*People v. Bledsoe* (1984) 36 Cal.3d 236, 249 (*Bledsoe*)). Thus, it is permissible to have a qualified expert opine that a patient’s injuries are consistent with a reported sexual assault. (See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 588 (*Taylor*); *People v. Stanley* (1984) 36 Cal.3d 253, 256 (*Stanley*); *People v. Robinson* (2000) 85 Cal.App.4th 434, 440.) Therefore, since it is likely that any objection to Hartzog’s testimony would have been overruled, deficient performance by defense counsel has not been shown here. (*Osband, supra*, 13 Cal.4th at p. 678; *Mendoza, supra*, 78 Cal.App.4th at p. 924.)

Further, we reject defendant's meritless contentions that Hartzog's testimony constituted improper opinions as to defendant's guilt or innocence, or, alternatively, as to the victims' veracity. It is certainly the case that expert testimony concerning the guilt or innocence of the defendant is improper. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.) Moreover, opinion testimony concerning the veracity of another witness is generally inadmissible. (*People v. Riggs* (2008) 44 Cal.4th 248, 299; *People v. Melton* (1988) 44 Cal.3d 713, 744.) But Hartzog's testimony ran afoul of neither principle. Her testimony that the physical injuries of Jane Doe 1 and Jane Doe 2 were consistent with their reported assaults was simply corroborative evidence that assaults on the two women occurred—a fact that was not in dispute. The expert's opinions did not directly implicate defendant in the commission of the crimes. Since by his own testimony, defendant conceded that his three companions had sexually assaulted the victims, Hartzog's testimony was equally as supportive of his theory of the case as it was of the prosecution's. It did not directly or indirectly present an opinion concerning defendant's guilt or innocence. Similarly, since the fact that Jane Doe 1 and Jane Doe 2 were sexually assaulted was not disputed by defendant, Hartzog's opinions that their injuries were consistent with their accounts of the assaults did not directly or inferentially corroborate their testimony that *defendant himself* assaulted them. Hartzog therefore did not offer an opinion concerning the veracity of either of the victims. Rather, she presented permissible testimony concerning whether the injuries presented were consistent with what the victims claimed had happened to them. (See *Taylor, supra*, 48 Cal.4th at p. 588; *Bledsoe, supra*, 36 Cal.3d at p. 249; *Stanley, supra*, 36 Cal.3d at p. 256.)

We therefore conclude that defense counsel's failure to object to Hartzog's qualifications or to her opinions did not constitute deficient performance that would support an ineffective assistance claim. Moreover, even were defense counsel's performance deficient—a conclusion we do not reach here—there was no prejudice.

Because Hartzog's testimony did not directly implicate defendant as having been one of the assailants, and, indeed, her testimony equally supported defendant's theory that his companions (but not he) sexually assaulted the two women, there is not "a reasonable probability that, but for counsel's [assumed] unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome." (*In re Ross, supra*, 10 Cal.4th at p. 201.)

V. *Testimony by Criminalist*

A. *Background*

Greg Avilez, a forensic scientist and the acting assistant laboratory director of the California Department of Justice laboratory in Freedom, testified concerning certain work performed in his laboratory on this case. He testified that Megan Kenny, assistant laboratory director at the same laboratory, prepared a report dated August 14, 2006, which report documented the work done by the lab on the case. Kenny, who at the time of trial was on maternity leave, received separate sexual assault kits from the two victims in this case. As part of her duties, Kenny identified the types of bodily fluids (e.g., semen) found in the sexual assault kits that would yield DNA. The presence of sperm was found by Kenny from vaginal and rectal swabs taken from both Jane Doe 1 and Jane Doe 2. After such identification, the cells were sent to a laboratory in Richmond where the DNA was extracted from the samples.

Defendant contends that it was error to admit the testimony of Avilez. He argues that it "was inadmissible hearsay and admitted in violation of his federal constitutional rights to confrontation, due process and a fair trial in violation of the 6th and 14th [A]mendments." In support of this position, he relies on several decisions of the United States Supreme Court, commencing with *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). He asserts further that his trial counsel's failure to lodge a proper objection to Avilez's testimony constituted ineffective assistance of counsel. He contends that the error was prejudicial, because "[i]t was Kenny's identification of sperm on the vaginal

and anal slides belonging to the [victims] that led to the DNA analysis by which Armando and Felipe were identified as having raped them. . . . Avilez’s testimony was thus critical to the case in terms of the chain of analysis of the physical evidence.”

B. *Analysis of Claim*

1. *Introduction*

Defendant concedes that trial counsel did not object to Avilez’s testimony on the ground that it violated defendant’s confrontation rights. Barnett’s objection below was that Avilez’s testimony was “outside the scope of being a custodian of records.” The requirement that a challenge to the admissibility of evidence be preserved by a timely and specific objection at the trial level applies to a claim based upon a defendant’s Sixth Amendment right of confrontation. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19; *People v. Alvarez* (1996) 14 Cal.4th 155, 186.) Defendant has forfeited his constitutional challenge.

We will nonetheless consider defendant’s claim because of his assertion that trial counsel’s failure to object constituted prejudicially ineffective assistance. This ineffective assistance claim requires that we determine whether an objection to Avilez’s testimony on the ground that it violated defendant’s confrontation rights would have had merit. We therefore will first discuss *Crawford, supra*, 541 U.S. 36 and its progeny, authorities relied on by defendant, as well as *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), relied on by the Attorney General in support of her assertion that admission of Avilez’s testimony did not abridge defendant’s confrontation rights.

2. *Law*

In *Crawford, supra*, 541 U.S. at page 38, the Supreme Court considered the admissibility at trial of a tape-recorded statement made by the defendant’s wife to the police. Because the witness did not testify at trial because of a state statute barring a spouse from testifying absent the other spouse’s consent, the defendant argued that admission of his wife’s out-of-court statement violated his federal constitutional right

under the Sixth Amendment to confront witnesses offering testimony against him. (*Id.* at p. 40.) The Supreme Court agreed; it held that, in keeping with the understanding of the Framers of our nation’s Constitution, “[t]estimonial statements of witnesses absent from trial [may be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.” (*Id.* at p. 59, fn. omitted.)

The two-prong *Crawford* test of witness unavailability and prior opportunity to cross-examine applies only to statements that are “testimonial.” As to nontestimonial hearsay, the Supreme Court observed that “it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law” because such statements are “exempted . . . from Confrontation Clause scrutiny altogether.” (*Crawford, supra*, 541 U.S. at p. 68.) The *Crawford* court declined to “spell out a comprehensive definition of ‘testimonial.’ ” (*Ibid.*, fn. omitted.) It, however, explained that “[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” (*Ibid.*)

In *Davis v. Washington* (2006) 547 U.S. 813, 817 (*Davis*), the Supreme Court considered whether “statements made to law enforcement personnel during a 911 call or at a crime scene are ‘testimonial’ and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause.” The court held that one of the victim’s initial statements made in response to the 911 operator’s questions was not testimonial, while the victim’s statements to officers responding to the scene of domestic violence were testimonial. It concluded: “Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing

emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” (*Id.* at p. 822, fn. omitted.)

In *Geier, supra*, 41 Cal.4th at pages 593 to 594, the defendant claimed that his confrontation rights were violated because the prosecution’s DNA expert was permitted to offer the opinion that there was a match between the defendant’s DNA and the DNA extracted from vaginal swabs taken from the victim, where the opinion was based in part upon scientific testing the expert had not personally conducted. Our Supreme Court concluded that, under *Crawford, supra*, 541 U.S. 36, and *Davis, supra*, 547 U.S. 813, “scientific evidence memorialized in routine forensic reports is not testimonial.” (*Geier*, at p. 606.) It reasoned that the “observations [of the nonwitness in her report] . . . constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events. . . . ‘Therefore, when [she] made these observations, [she]—like the declarant reporting an emergency in *Davis*—[was] “not acting as [a] witness[;],” and [was] “not testifying.”’ [Citation.]” (*Id.* at pp. 605-606.) The court held further that the statements in the DNA report were not testimonial because they constituted business records. (*Id.* at p. 606.) And the court explained further that “[r]ecords of laboratory protocols followed and the resulting raw data acquired are not accusatory. ‘Instead, they are neutral, having the power to exonerate as well as convict.’ [Citation.]” (*Id.* at p. 607.)

In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), the United States Supreme Court addressed whether notarized certificates by the lab analysts describing the existence and quantity of contraband (cocaine) in bags found in the defendant’s possession were “testimonial,” making their admission into evidence violative of the Confrontation Clause. The certificates were prepared nearly a week after the tests of the contraband were performed. (*Id.* at p. 315.) The court concluded that certificates, which constituted affidavits, fell within the “ ‘core class of testimonial statements’ ” proscribed by *Crawford* (*Melendez-Diaz*, at p. 310), and that they were

“functionally identical to live, in-court testimony, doing ‘precisely what a witness does on direct examination.’ [Citation.]” (*Id.* at pp. 310-311.) The court therefore held that “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to ‘be confronted with’ the analysts at trial. [Citation.]” (*Id.* at p. 311, quoting *Crawford, supra*, 541 U.S. at p. 54, fn. omitted.)

In June 2011 (10 months after the trial in this case), the United States Supreme Court decided *Bullcoming v. New Mexico* (2011) 564 U.S. ____ [131 S.Ct. 2705] (*Bullcoming*). That case concerned a laboratory report of a forensic analyst who tested the defendant’s blood sample and certified that the blood alcohol concentration (BAC) in the “sample was 0.21 grams per hundred milliliters, an inordinately high level” (*id.* at p. 2710), which report supported the defendant’s conviction of aggravated drunk driving (*id.* at p. 2711). Over objection, the trial court admitted the report as a business record. (*Id.* at p. 2712.) The Supreme Court held that the admission of the report violated the Confrontation Clause: “The accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.” (*Id.* at p. 2710.) In so holding, the court rejected the New Mexico Supreme Court’s conclusion that the live testimony of another analyst satisfied the constitutional requirement of confrontation. (*Id.* at pp. 2715-2716.) It observed that the testifying analyst, who “had neither participated in nor observed the test on Bullcoming’s blood sample” (*id.* at p. 2709), “could not convey what [the certifying tester] knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed.” (*Id.* at p. 2715, fn. omitted.) Neither could the testifying analyst “expose any lapses or lies on the certifying analyst’s part.” (*Ibid.*, fn. omitted.)

Most recently, in *Williams v. Illinois* (2012) 567 U.S. ____ [132 S.Ct. 2221] (*Williams*), the high court considered a forensic DNA expert’s testimony that included

her reliance on a DNA profile from a rape victim produced by an outside laboratory in the expert's matching of that profile to a DNA profile the state laboratory produced from the defendant's blood sample. Justice Alito writing with the concurrence of three justices and with Justice Thomas concurring in the judgment, concluded that the expert's testimony did not violate the defendant's confrontation rights. The plurality held that the outside laboratory report, which was not admitted into evidence (*id.* at pp. 2230, 2235), was "basis evidence" to explain the expert's opinion, was not offered for its truth, and therefore did not violate the Confrontation Clause. (*Id.* at 2239-2240.) The high court concluded further that even had the report been offered for its truth, its admission would not have violated the Confrontation Clause, because the report was not a formalized statement made primarily to accuse a targeted individual. (*Id.* at pp. 2242-2244.) Applying an objective test in which the court looks "for the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances" (*id.* at p. 2243), the Court found that the primary purpose of the outside lab report "was to catch a dangerous rapist who was still at large, not to obtain evidence for use against [the defendant], who was neither in custody nor under suspicion at that time." (*Ibid.*) Further, the Court found that no one at the outside laboratory could have possibly known that the profile that it generated would result in inculcating the defendant, and there was therefore no prospect for fabrication and no incentive for developing something other than a scientifically sound profile. (*Id.* at pp. 2243-2244.)

3. *Merits of Ineffective Assistance Claim*

We observe that, but for the United States Supreme Court's decisions in *Melendez-Diaz*, *supra*, 557 U.S. 305, and *Bullcoming*, *supra*, 564 U.S. ____ [131 S.Ct. 2705], we would reject defendant's ineffective assistance claim on the basis that any objection to the constitutionality of admitting Avilez's testimony was meritless. Following *Geier*, *supra*, 41 Cal.4th 555, Kenny's report and any information therein were

not testimonial, and therefore the introduction of the substance of the report through the testimony of Avilez did not deprive defendant of his confrontation rights.

But the United States Supreme Court's decisions in *Melendez-Diaz* and *Bullcoming* make the application of *Geier* to this case less clear. The underlying facts in *Melendez-Diaz* are distinguishable from those before us, a point defendant concedes. Defendant nonetheless relies on *Melendez-Diaz* and contends that it "largely abrogated" *Geier*. In *Melendez-Diaz*, the high court was concerned with the constitutionality of admitting a laboratory worker's notarized certificates indicating the presence and quantity of cocaine, evidence directly used to convict the defendant. Here, the court admitted testimony of a supervisor concerning the substance of a report from a lab worker to the effect that she had detected the presence of sperm in the swabs in the sexual assault kits of the two victims. Only in a very indirect way—i.e., the sperm samples detected by the nontestifying lab worker were sent to another lab, where another analyst matched certain DNA profiles to the DNA profiles of Armando and Felipe, which, in turn, corroborated the victims' and defendant's own testimony that the two codefendants sexually assaulted the two women—was this evidence used to convict defendant.

Defendant argues that the holding in *Bullcoming* mandates the conclusion that the admission of Avilez's testimony violated defendant's confrontation rights. But *Bullcoming*, like *Melendez-Diaz*, is distinguishable. There, unlike the circumstances here, the certificate of analyst, which showed that the defendant's blood sample contained a BAC of 0.21, was introduced without the analyst's testimony, and this evidence led directly to the defendant's conviction of aggravated drunk driving. And, unlike here, where the testifying witness was a supervisor in Kenny's laboratory and was familiar with the lab protocols used by her, in *Bullcoming*, the court repeatedly emphasized that the testifying witness had no connection with the report generated by the nontestifying analyst. (See *Bullcoming*, *supra*, 564 U.S. ____ [131 S.Ct. at pp. 2712, 2713, 2715].) Further, there is language in the concurring opinion of Justice Sotomayor "emphasiz[ing]

the limited reach of the Court’s opinion” (*id.* at p. 2719 [Sotomayor, J., conc.]) and suggesting that the result might have been different had the case been one—as is the case here—where “the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue” (*id.* at p. 2722).

Defendant’s contention also appears to have less forcefulness in light of the high court’s decision in *Williams, supra*, 567 U.S. ____ [132 S.Ct. 2221]. Were we to apply the objective test used in *Williams*, in which we would evaluate “the primary purpose that a reasonable person would have ascribed to the statement, taking into account all of the surrounding circumstances” (*id.* at p. 2243), it is dubious that the purpose of Kenny’s report or the information contained therein was “to accuse [defendant] or to create evidence for use at trial” (*ibid.*). Further, as was true in *Williams*, there is nothing to indicate that the nontestifying analyst, Kenny, could have possibly known that the sperm she identified from the swabs taken from the victims would ultimately inculcate defendant’s coparticipants, Armando and Felipe. (See *id.* at pp. 2243-2244.)

To be sure, the *Melendez-Diaz* and *Bullcoming* decisions raise concerns both as to the constitutional claim here and as to the continued vitality of *Geier*. A number of cases from other California appellate districts have addressed the latter question; some courts have concluded that *Melendez-Diaz* overruled *Geier*, while others have held that *Geier* is still good law. Our Supreme Court has granted review of a number of such cases. (See *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted December 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted December 2, 2009, S177046; see also *People v. Vargas* (2009) 178 Cal.App.4th

647, review den. Feb. 3, 2010, S178100.) Very recently, the high court decided three of those cases, two of which bear brief mention here.¹²

In *People v. Lopez* (Oct. 15, 2012, S177046) ___ Cal.4th ___ [2012 Cal. Lexis 9718], the defendant challenged on Confrontation Clause grounds the introduction of a nontestifying laboratory analyst's report indicating that the percentage of alcohol present in the defendant's blood sample drawn two hours after a fatal traffic accident; in admitting the evidence, the prosecution utilized the testimony of a colleague of the analyst who had prepared the report. (*Id.* at pp. ___ [*2-*3].) The high court distilled *Crawford, supra*, 541 U.S. 36 and its progeny as requiring the presence of "two critical components" in order for a statement to be " 'testimonial' " for purposes of the Confrontation Clause. (*Id.* at pp. ___ [*21-*22].) Those components are that (1) "the out-of-court statement must have been made with some degree of formality or solemnity" (*id.* at p. ___ [*22]), and (2) the statement's "primary purpose pertains in some fashion to a criminal prosecution" (*id.* at p. ___ [*23]). Because it concluded that the lab analyst's report did not have the required formality or solemnity, the court concluded that it was not testimonial. (*Id.* at pp. ___ [*24-*31].)

In *People v. Dungo* (Oct. 15, 2012, S176886) ___ Cal.4th ___ [2012 Cal. Lexis 9719], the high court addressed whether the defendant's confrontation rights were violated where a forensic pathologist testified concerning the cause of death of the victim

¹² The third case recently decided was *People v. Rutterschmidt* (Oct. 15, 2012, S176213) ___ Cal.4th ___ [2012 Cal. Lexis 9720]. There, the high court considered whether the defendant's confrontation rights were violated where a laboratory director, relying on reports he did not prepare but which were introduced into evidence, testified that the nontestifying analysts from his laboratory had concluded that the victim's blood samples contained the presence of various drugs that could have caused drowsiness. The high court did not decide the constitutional question, instead holding that, even assuming the court erred in admitting the laboratory director's testimony, any such error was harmless beyond a reasonable doubt based upon the overwhelming evidence supporting the defendant's guilt. (*Id.* at pp. ___ [*22-*23].)

(strangulation), where he utilized facts taken from an autopsy report prepared by a nontestifying pathologist and photographs of the victim. The court rejected the defendant's claim, holding that neither of the two requisite components of a testimonial statement was present. The court concluded that the statements contained in the autopsy report—which report was not introduced into evidence—were (1) “less formal than statements setting forth a pathologist’s expert conclusions” and were akin to a physician’s nontestimonial “observations of objective fact” in diagnosing a patient’s injury or malady and indicating the appropriate treatment for it (*id.* at p. ____ [*20]); and (2) “criminal investigation was not the *primary* purpose for the autopsy report’s description of the condition of [the victim’s] body” (*id.* at p. ____ [*23]).

Drawing upon our high court’s recent *Lopez* and *Dungo* decisions, it would appear that any statements made by the nontestifying analyst, Kenny, here were nontestimonial because they were not “made with some degree of formality or solemnity. [Citations]” (*People v. Lopez, supra*, ____ Cal.4th at p. ____ [2012 Cal. Lexis 9718, *22].) But we need not make a definitive determination here of whether Avilez’s testimony violated defendant’s confrontation rights. Even were there to have been a Confrontation Clause violation (and thus deficient performance by trial counsel in failing to object), any such assumed error was harmless; therefore, any ineffective assistance was nonprejudicial in any event.

Our Supreme Court has held that error under *Crawford* is evaluated under the *Chapman* standard (*Chapman v. California* (1967) 386 U.S. 18, 24), namely, “admission of the statements would require reversal unless we found beyond a reasonable doubt that the jury verdict would have been the same absent any error. [Citations.]” (*People v. Harrison* (2005) 35 Cal.4th 208, 239; see also *Geier, supra*, 41 Cal.4th at p. 608.) Under the *Chapman* standard, “an error is harmless only when, beyond a reasonable doubt, it did not contribute to the verdict.” (*People v. Williams* (1997) 16 Cal.4th 635, 689.)

Any assumed error here was harmless. The testimony of Avilez to the effect that the lab analyst Kenny had found the presence of sperm in the swabs obtained from the two victims was of minimal importance in defendant's ultimate conviction of the eight charged sex crimes. The Avilez testimony was linked to other forensic testimony that a certain DNA profile from the sperm sample obtained from Jane Doe 1 was a match to Felipe's DNA typing, and a DNA profile from the sperm sample obtained from Jane Doe 2 was a match to Armnando's profile. This scientific testimony did nothing more than establish what defendant admitted in his testimony: that Felipe and Armando sexually assaulted the victims. Therefore, assuming that it was error to have admitted Avilez's testimony, based upon a constitutional challenge not asserted below, it was harmless beyond a reasonable doubt. Therefore, since it is clear that defendant cannot establish the second element (prejudice), his ineffective assistance claim fails. (*In re Cox, supra*, 30 Cal.4th at pp. 1019-1020.)

DISPOSITION

The judgment is affirmed

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

RUSHING, P.J.

PREMO, J.