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

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN JOSEPH FIDONE,

Defendant and Appellant.

H038080

(San Benito County

Super. Ct. No. CR-10-01324)

Defendant Jonathan Joseph Fidone was convicted by jury trial of sexual penetration (Pen. Code, § 289, subd. (a)(1)),¹ forcible lewd conduct on a child (§ 288, subd. (b)(1)), and aggravated sexual assault on a child (§ 269, subd. (a)(5)).² The trial court denied defendant's motion for a new trial based on juror misconduct. Defendant was committed to state prison to serve an indeterminate term of 15 years to life for the aggravated sexual assault count consecutive to an eight-year determinate term for the forcible lewd conduct count.

¹ Statutory references are to the Penal Code unless otherwise specified.

² Defendant had originally been charged also with felony child abuse (§ 273a, subd. (a)) and grand theft (§ 484g), and various special allegations had been alleged, but the child abuse and grand theft charges and the special allegations were not submitted to the jury.

On appeal, defendant challenges the sufficiency of the evidence, argues that the prosecutor committed prejudicial misconduct, claims that his trial counsel was prejudicially deficient, asserts that the court violated section 654 by imposing a separate sentence for the forcible lewd conduct count, and maintains that the trial court erred in denying his new trial motion.³ We reject his contentions and affirm the judgment.

I. Factual Background

In July 2010, T.P. (the mother) had a 19-month old daughter, Jane Doe (Jane). They lived with defendant, the mother's boyfriend, in Hollister. On July 16, 2010, defendant was taking care of Jane because the mother was with her mother, who was in the hospital in Santa Cruz. On the morning of July 17, the mother talked to defendant and asked him to bring Jane to her and pick her up in Santa Cruz. He said he would do so, but he did not. When the mother finally was able to reach him by telephone in the middle of the afternoon, he told her "that if I wanted my daughter, he would leave her in the car on the side of the road and I would have to come find her." She told him that she would "call the cops" if he did that, and he hung up on her. Although she thought that defendant was "just trying to piss me off" and would not actually act on his threat, the mother contacted the Santa Cruz County Sheriff's Department.

Defendant never brought Jane back or picked up the mother. Defendant purchased a pink dildo at 4:38 p.m. on July 17, 2010 at a store in Santa Cruz that was about an hour away from Hollister. Jimmy Reyna is defendant's cousin. Defendant, the mother, and Jane were living at Reyna's mother's home in Hollister. Defendant arrived at the Reyna home with Jane in the evening on July 17, 2010. Reyna was in front of the house, and he saw that defendant's eyes were bloodshot. Defendant took Jane into the room in the home's

³ Defendant also filed a petition for a writ of habeas corpus, which we dispose of by separate order.

garage where defendant, the mother, and Jane were living. Reyna was outside with his children. About 10 or 15 minutes after defendant went into the room, Reyna knocked on the door of the room. There was no response.

Reyna went around to the window on the side of the room and looked inside. He saw Jane lying naked on the bed. Reyna saw defendant's arm grab Jane's leg and pull her by the leg. Jane began to cry. The pulling stopped, and Jane stopped crying. Then Reyna saw Jane's body begin moving in a rhythmic motion up and down. Jane began screaming, and defendant covered Jane's mouth with his hand. Reyna saw Jane "getting thrust up and down or back and forth" This rhythmic up and down motion continued. Reyna could not see defendant through the window, so he ran back to the door of the room and tried to enter.

The door to the room was locked. Reyna got a screwdriver and used it to open the door. He saw the baby lying naked on the bed next to a pink dildo with a seven-inch shaft. Defendant was standing in a corner of the room with a blue and white towel in front of him, trying to hide his erect penis. Defendant's boxer shorts were around his ankles. "[P]orn magazines," including one that was open, were on the floor, and a "porn video" was playing on the television. Reyna's mother, who, having heard the baby crying, was now looking in the window, asked defendant what was going on. Defendant said he was "changing the baby." Reyna accused defendant of "molesting" the baby, and defendant denied it.

Reyna thought defendant had been having sexual intercourse with the baby based on the movement of the baby that he had observed. Reyna told defendant to put the baby's clothes on, and defendant put a diaper on the baby. Reyna told defendant to leave but not to take the baby. After defendant left, Reyna noticed that the dildo had been wrapped in porn magazines and hidden behind the television. Reyna's mother took the baby into the house, and she and Reyna's fiancée removed the baby's diaper and found blood in it. They bathed the baby and saw "blistering" in Jane's vaginal area. Jane was

crying and seemed to be in pain. They put a fresh diaper and clothes on her, and Reyna and his fiancée took Jane to the hospital.

Jane was first examined by a physician's assistant who found a rash in her vaginal and anal areas, tears in her rectum, and blood present. Jane had been treated for an infected rash on her abdomen and buttocks a few days earlier, but she had no history of constipation that might explain the tears in her rectum. The physician's assistant thought some of the rectal tears could have been caused by either trauma or an infection while the more significant ones could have been caused by either trauma or constipation. Because he believed that her condition was "potentially suspicious for abuse," he contacted the police.

The sexual assault response team (SART) examiner documented the rash on Jane's abdomen and buttocks. At a separate location in Jane's anal area, there was a one to two millimeter anal laceration with "active bleeding," and there was also redness between her anus and her vagina. The "acute anal fissures" were "consistent with penetrating anal trauma," which was "particularly true in the absence of prior history of constipation" or diarrhea. Constipation, leading to "large stools," which is common in toddlers, can cause anal fissures and bleeding. Diarrhea also can cause bleeding in the anal area. "Sometimes children that have diarrhea constantly, they end up with bleeding from the diarrhea" because "the stool sits on that area and the skin is already very fragile" and "it causes bleeding." Jane had had diarrhea five days before the incident when she had the flu. There was no evidence of penetrating hymenal trauma. The SART examiner concluded that, given the "limited and insufficient history," these findings "may be caused by sexual abuse or other mechanisms."

Sometime after midnight on July 18, 2010, defendant called the mother. She told him "what was being said that he did," and "he didn't really deny it, he didn't really seem surprised by it." When the mother returned to the room in the garage of Reyna's mother's home where she had been living with defendant, she found blood on the bed

sheets. During a subsequent recorded phone conversation between the mother and defendant, after defendant had repeatedly denied doing anything to Jane, the mother asked him: “And, you know, if you were drinking, do you think maybe you blacked out and you don’t remember what happened?” Defendant responded: “There’s no way I remember.” When she asked again, defendant responded: “I don’t know. Maybe I did. Maybe I - maybe I blacked out, but I’m pretty sure I didn’t.” “Well, maybe I did black out. You know, if I blacked out, I’m not going to remember. But I know I would not hurt a girl.” “[I]f I go and talk to [the police] and everything else, and what if I did black out and what if it actually happened? Do you know how horrible I’d feel about myself?” Defendant said that all he remembered was that he was “hella fucking tired” when he arrived at Reyna’s mother’s house. He went into the garage room “to go change, and that’s pretty much all I remember.” He claimed that he was “pretty fucking drunk when I got there.” “I don’t know if I did anything, because if I did I would know. . . . I just remember changing - getting ready to change her, and I saw that she was bleeding, so I left her diaper there. And then I started changing and then she screamed or some shit like that, so I went to go cover her mouth.” The mother said: “So you’re saying you - you don’t know if you did or not, because you don’t remember?” Defendant replied: “I sure fucking hope not.”

The police found a blue and white towel stuffed into the garbage can. Defendant told a police officer that if Jane’s DNA was found on the dildo he would apologize. Defendant’s sperm was found on Jane’s labia. A criminalist testified that “sperm don’t jump.” She opined that it was highly unlikely that sperm could be transferred from a towel to a body, but “[t]here would be maybe a few.”

II. Procedural Background

The defense opening statement asserted that defendant’s sperm had been transferred to the victim by a towel that defendant had used after masturbating and then

used to clean the baby while diapering her. Defendant’s trial counsel asserted that the evidence would show that the baby’s injuries were not a result of trauma. The defense presented evidence that defendant had been diagnosed as a child with attention deficit hyperactivity disorder (ADHD) and treated for it for a number of years. As a child, his teacher believed he had a learning disability that caused him to have “difficulty retaining information.” Defendant’s trial counsel argued to the jury that defendant had committed no offenses. He asserted that defendant’s sperm had been transferred to Jane when defendant used the towel he had masturbated on to wipe Jane. He maintained that Jane’s injuries were the result of diarrhea.

The jury found defendant guilty on all three counts. The court imposed an indeterminate term of 15 years to life for the aggravated sexual assault count and a consecutive term of eight years for the forcible lewd conduct count. Defendant timely filed a notice of appeal.

III. Discussion

A. Sufficiency of the Evidence

1. Sexual Penetration Count

Defendant claims that the jury’s verdict on the sexual penetration count cannot be upheld because there was insufficient evidence of a penetration.

“The role of an appellate court in reviewing the sufficiency of the evidence is limited. The court must ‘review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citations.] [¶] The same standard applies to the review of circumstantial evidence. [Citation.] The court must consider the evidence and all logical inferences from that evidence But it is the [factfinder], not the appellate court, which must be convinced of the defendant’s guilt

beyond a reasonable doubt. [Citation.] Therefore, an appellate court may not substitute its judgment for that of the [factfinder]. If the circumstances reasonably justify the [factfinder]'s findings, the reviewing court may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding.” (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.)

The evidence supports the jury's finding that there was a penetration. First, defendant was alone with Jane inside the locked room when Reyna saw defendant moving Jane's body, above himself and the bed, up and down in a rhythmic motion while Jane screamed. When Reyna entered the room, defendant had an erect penis, and a dildo was on the bed next to Jane. This evidence reflected that defendant had been engaged in sexual activity with Jane that involved either his erect penis, the dildo or both. Second, immediately after defendant engaged in this sexual activity with Jane, Jane had active anal bleeding from anal fissures that were consistent with anal penetration. While anal *bleeding* may be caused by diarrhea, and there was evidence that Jane had experienced diarrhea a week earlier, the SART examiner's testimony established that anal *fissures* are attributable to either penetration or constipation. There was no evidence that Jane had experienced any constipation prior to the appearance of the anal fissures. Since Jane had anal fissures consistent with anal penetration immediately after defendant engaged in some kind of sexual activity with her involving his penis, a dildo, or both, and there was no indication of any other source for these anal fissures, the jury could have found beyond a reasonable doubt that defendant had perpetrated an anal penetration on Jane.

2. Forcible Lewd Conduct Count

Defendant contends that it was improper for the jury to convict him of the forcible lewd conduct count because there was no evidence of an “act” separate from the anal penetration that supported the other two counts.

Defendant cites no authority for the proposition that the jury was required to find that the two counts were based on separate acts, and the jury was not instructed that any

such finding was necessary. Multiple convictions may be based on a single act so long as one offense is not a lesser included offense of the other. (*People v. Pearson* (1986) 42 Cal.3d 351, 354, 358 [defendant properly convicted of both sodomy and lewd conduct based on same act].) “A defendant who sexually assaults a child under age 14 can be convicted under section 288 and another applicable statute for the same criminal act. However, he cannot be separately punished for each such offense.” (*People v. Scott* (1994) 9 Cal.4th 331, 344, fn. 6.) Thus, the question of whether the two offenses were based on a single act concerns the validity of multiple punishments, not the validity of multiple convictions. We address that issue in section C, *post*.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor committed prejudicial misconduct by inviting the jury to speculate about what defendant had done to the victim. He claims that his trial counsel was prejudicially deficient in failing to object to this misconduct.

Before the attorneys argued to the jury, the court told the jurors: “[W]hat the attorneys say is not evidence. It’s simply his or her interpretation of what he or she believes the evidence to show.” The prosecutor argued in support of the sexual penetration count: “At a minimum, we know that [defendant] penetrated Jane Doe’s anus with a pink dildo and/or his penis. We don’t know, it could have been the pink dildo, it could have been his penis, it could have been both.” The prosecutor argued in support of the forcible lewd conduct count: “[T]his count 2 references the fact that we don’t know the extent of what happened in that room. We know based on Jane Doe’s injury that something very significant or serious occurred by force to her anal area. But keep in mind, that -- that is a minimum of what occurred. We have this individual coming home with this child with a plan to use this dildo, he’s got porn magazines in the room, a porn video being played on the TV. Goodness knows what else he’s doing with this child to satisfy his immediate sexual urges.” The prosecutor’s argument about the aggravated

sexual assault count was explicitly based solely on the sexual penetration offense. After arguments, the court instructed the jury: “If you believe that the attorney’s comments on the law conflict with my instructions, you must follow my instructions.” “[N]othing that the attorneys say is evidence. In their opening statements and closing arguments the attorneys discussed the case, but their remarks are not evidence.”

“When, as here, the claim focuses on comments made by the prosecutor before the jury, a court must determine at the threshold how the remarks would, or could, have been understood by a reasonable juror. [Citations.] If the remarks would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable.” (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Reversal is required only where the comments rendered the trial fundamentally unfair or it is reasonably probable that the defendant would have obtained a more favorable outcome in the absence of the comments. (*People v. Adanandus* (2007) 157 Cal.App.4th 496, 514-515; *People v. Breverman* (1998) 19 Cal.4th 142, 178.)

Here, the comments were not likely to have been taken by the jury as an exhortation to rely on speculation to support a guilty verdict. The prosecutor acknowledged in her argument that the jury was required to utilize a beyond-a-reasonable-doubt standard of proof, and she urged the jury to “look at the evidence.” The trial court explicitly instructed the jury that its decision had to be based “only on the evidence that has been presented to you in this trial” and repeatedly told the jury that the prosecutor bore the burden of proving that defendant, who was presumed innocent, was guilty beyond a reasonable doubt. And the court told the jury to follow these instructions even if the attorneys said something different.

Under these circumstances, we are persuaded that reasonable jurors would not have understood the prosecutor’s remarks as encouraging them to engage in speculation. Such an interpretation would have conflicted with the trial court’s instructions and with the prosecutor’s argument that the evidence established guilt beyond a reasonable doubt.

Furthermore, since the jury instructions did not require the jury to find separate acts in order to return convictions on all three counts, it is not reasonably probable that the prosecutor's remarks regarding the basis for the forcible lewd conduct count could have influenced the outcome.

C. Section 654

Defendant maintains that the trial court violated section 654 by imposing separate sentences for the aggravated sexual assault count and the forcible lewd conduct count.

The sentencing hearing was not before the trial judge. The prosecutor argued at the sentencing hearing: "Count 1 [the sexual penetration count] and Count 3 [the aggravated sexual assault count], the People would submit, are the same act. However, Count 2 [the forcible lewd conduct count] is a different and distinct act. You've got trauma, not only vaginal trauma, but you've also got anal trauma. You've got sperm that was recovered from the labia area. So you have not only anal but also vaginal. Those are two distinct and separate acts." The defense argued: "There was never by the jury a finding of separate acts in terms of what was defined. We are not really sure how the jury came to the conclusion that there was a . . . 289 [sexual penetration] and a 288(b) [forcible lewd conduct]. The jury could have made a finding that those were the same act, one meeting the 289, and 289 by definition is a 288(b)(1), your Honor." The prosecutor responded that there was evidence of not only rectal tears but also "redness around the victim's vagina."

The court selected the aggravated sexual assault count as the principal term and imposed an indeterminate term of 15 years to life for it. For the sexual penetration count, the court imposed an aggravated term and stayed it under section 654 because "it's subsumed within Count 3 [the aggravated sexual assault count]." The court imposed a consecutive eight-year aggravated term for the forcible lewd conduct count, explicitly finding that there were "multiple acts of sexual conduct."

“The initial inquiry in any section 654 application is to ascertain the defendant’s objective and intent. If he entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.” (*People v. Beamon* (1973) 8 Cal.3d 625, 639.) “The defendant’s intent and objective are factual questions for the trial court; . . . there must be evidence to support a finding the defendant formed a separate intent and objective for each offense for which he was sentenced. [Citation.]” (*People v. Coleman* (1989) 48 Cal.3d 112, 162.) “A trial court’s express or implied determination that two crimes were separate, involving separate objectives, must be upheld on appeal if supported by substantial evidence.” (*People v. Brents* (2012) 53 Cal.4th 599, 618.) “[W]here there is a basis for identifying the specific factual basis for a verdict, a trial court cannot find otherwise in applying section 654.” (*People v. McCoy* (2012) 208 Cal.App.4th 1333, 1339 (*McCoy*)). In the absence of a foundation for identifying the factual bases for the jury’s verdicts, “a trial court may base its decision under section 654 on *any* of the facts that are in evidence at trial, without regard to the verdicts.” (*McCoy*, at p. 1340.)

Here, there is no foundation for identifying the factual bases for the jury’s verdicts. The jury was not asked to decide whether there were multiple sex acts, and the verdicts do not disclose that it made any such determination. The question then is whether the sentencing judge’s express finding of “multiple acts of sexual conduct” is supported by substantial evidence. “Circumstances on which a trial court relies in making a sentencing choice must be established by a preponderance of the evidence.” (*People v. Lewis* (1991) 229 Cal.App.3d 259, 264.) The record provides adequate support for the sentencing judge’s implied finding that defendant had made contact with Jane’s vaginal area. Reyna’s mother and his fiancée saw “blistering” in Jane’s vaginal area when they bathed her immediately after the event. The SART examiner saw redness

between Jane's anus and vagina. Defendant's sperm was on Jane's labia, which is at the opening to the vagina, and there was evidence that sperm "don't jump." This evidence supported a finding that it was more likely than not that defendant not only anally penetrated Jane but also had some sort of sexual contact with her vaginal area. The redness and blistering in this area combined with the presence of defendant's sperm on Jane's labia suggested that he had committed some lewd act involving Jane's vaginal area that was distinct from the anal penetration. Section 654 was not violated.

D. Juror Misconduct

Defendant argues that the trial court erred in denying his motion for a new trial based on juror misconduct and that his trial counsel was ineffective in arguing this issue.

1. Background

The court's voir dire was guided by a list of nine questions that it had provided to the prospective jurors. The list does not appear in the record. The court's voir dire of Juror No. 10, which occurred on June 28, 2011, was exceedingly brief. She stated her profession and marital status, said that she had never been on a jury before or been a witness or testified, and said that she did not know anyone in law enforcement. She then stated: "Never been a victim of a crime and never been charged with a crime." The court asked if she had any questions or concerns, and she said "No." The court asked if she could be fair, and she said "Yes." That was the end of the court's voir dire of Juror No. 10.

During the prosecutor's voir dire, Juror No. 10 said: "I heard the allegations, and they are serious, but that doesn't mean he's guilty. It also doesn't mean he's innocent. But we're here to do that, that's our job." The defense's brief voir dire of Juror No. 10 concerned only her education.

On Friday, July 1, 2011, R., a 14-year-old girl, was sexually assaulted by a man (whom we will call A.) who resided at the home where Juror No. 10 lived. When this

girl told others, including Juror No. 10, about this assault that night, Juror No. 10 and one other female revealed that A. had “done similar things” to them. When the trial resumed on July 5, 2011, the court asked the jurors if “anything changed during the weekend.” Juror No. 10 did not reveal the events that had occurred over the weekend.

Jury deliberations began on July 5, 2011 at 10:45 a.m. The jury deliberated for about three and a half hours before returning guilty verdicts on all three counts. The jury was excused at 4:25 p.m. Juror No. 10 testified that she did not contact the Sheriff’s Department about A. until a couple of hours later. However, a Sheriff’s deputy’s report stated that the deputy had contacted Juror No. 10 around 11:00 a.m. on July 5, 2011. He stated that he asked her to meet with him the next day at 3:00 p.m., and she agreed to do so and did. On July 11, 2011, A. was charged, by the same prosecutor who prosecuted this case, with committing sexual penetration and three counts of sexual battery by restraint (§ 243.4, subd. (a)) on Juror No. 10. All but one of the charged counts occurred when Juror No. 10 was an adult; the remaining count occurred when she was 17 years old.

Defendant moved for a new trial based on juror misconduct by Juror No. 10. He claimed that she had lied during voir dire on June 28, 2011. His original points and authorities in support of his motion made no mention of her failure to disclose new information on July 5, 2011. Juror No. 10’s cell phone log, which was submitted by the defense in support of its motion, showed her call to the Sheriff’s Department at 6:32 p.m. on July 5, 2011. It did not show any usage of her cell phone on July 5 prior to the jury being excused after the verdicts were delivered.

At the evidentiary hearing, Juror No. 10 admitted that she remembered being asked if she had been the victim of a crime. She was somewhat unsure about whether she had been asked if she had ever known anybody who had committed a crime. Juror No. 10 lived in M.’s house. In November 2008, M.’s daughter C., who at times had lived at

the same house as Juror No. 10, had been charged with petty theft.⁴ Juror No. 10 testified that, when she was asked during voir dire whether she had been the victim of a crime, she gave a “passing thought” to what had happened to her with A., but she “did not consider myself a victim.” “I felt like what happened is something that if I had said something about it it wouldn’t have happened so I deserved it and I did not see myself as a victim.” “I didn’t say anything to stop it so I deserved it is my thought process there. And so at the time I did not consider myself a victim.” She did not think it was a crime because she “didn’t say no.” “I would have said that nothing had happened.” “Until R[.] came forward I realized I couldn’t shut up about it anymore because no one would believe her if I didn’t also add my testimony to that.” Juror No. 10 knew that both C. and M. had been victims of crime and that C. had been in jail, but she did not think of that when she was asked on voir dire whether she knew anyone who had committed a crime or been a victim of a crime.

Although on July 5, 2011 Juror No. 10 was coming to the realization that she had been the victim of a crime, she was “ashamed” and “was still kind of not . . . wanting to understand and realize the full severity of the situation.” She realized “now” that she should have disclosed information to the judge on July 5, 2011, but she did not do so because she “was not prepared to say anything.” When Juror No. 10 was asked to explain why she did not provide this information to the court at that time, Juror No. 10 testified: “I knew that despite everything that we -- that we now know that I have been through, I definitely knew that I could be impartial and that I could be fair. And I feel like I was impartial and I was fair. I made sure that we went through every piece of evidence. I had the testimony -- or I asked for the testimony to be read back for . . . one

⁴ Juror No. 10 explained that she had lived at M.’s house for three years and, since she turned 18 less than a year after coming to live there, had paid her rent by working for M. C. had lived at M.’s house off and on through the three years Juror No. 10 had lived there.

of the witness's testimony to be read back because it was questionable." "And I made sure that we didn't reach a snap decision, didn't go in there in fifteen minutes and say, well, he is guilty." "There was quite a bit of evidence in that trial which suggested that he wasn't guilty, but after consideration we decided that he was." She and one other juror "forced" the other jurors to carefully consider each piece of evidence before making a decision. Juror No. 10 testified that her experience with A. and that of his other victims had not played any role in her fulfillment of her duties as a juror.

Defendant's supplemental points and authorities after the evidentiary hearing discussed Juror No. 10's failure to disclose information prior to deliberations on July 5, 2011. The prosecution's supplemental points and authorities asserted that any presumption of prejudice had been rebutted.

The trial court found Juror No. 10 to be credible, "truthful and reasonable." "Juror No. 10 did not consider herself a victim of a crime so never believed that her prior experience was responsive to the court's voir dire. Her non-disclosure was not intentional. In many ways her experience was much different than the facts in the instant case. Clearly Juror No. 10 was a dedicated and conscientious juror in that she was not biased against defendant at any time during the trial and verdict. In fact she, with one other juror, forced the jurors to review slowly and meticulously all of the evidence to be sure that the verdict was the correct one. [¶] Further, even assuming *arguendo* that there was juror misconduct, the court finds, based on the record, that there is no substantial likelihood that any juror was actually biased against the defendant."

2. Analysis

Defendant does not contend on appeal that Juror No. 10 committed misconduct by giving inaccurate answers on voir dire. Instead, his contention on appeal is that Juror No. 10 committed misconduct by failing to provide "changed" information to the trial court on July 5, 2011 prior to deliberations. The Attorney General asserts that there was no

misconduct and, alternatively, there was no substantial likelihood of prejudice from any misconduct.

We review the trial court's finding that no misconduct occurred for substantial evidence. "We accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler* (1997) 16 Cal.4th 561, 582 (*Nesler*)). Where misconduct has occurred, there is a rebuttable presumption that it was prejudicial. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1108-1109, disapproved on a different point in *People v. Stansbury* (1995) 9 Cal.4th 824, 831, fn. 1.) "Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination." (*Nesler*, at p. 582.)

Defendant argues that we should not defer to the trial court's credibility determinations and factual findings as to the occurrence of misconduct because the trial court's written order did not make express factual findings regarding Juror No. 10's failure to notify the court on July 5, 2011. We find no basis for declining to accord the trial court the usual deference. The trial court's order did not explicitly distinguish between Juror No. 10's June 28, 2011 nondisclosure and her July 5, 2011 nondisclosure, but its findings were clearly intended to encompass both occasions. The trial court expressly found that Juror No. 10's "non-disclosure was not intentional" because she "did not consider herself a victim of a crime so *never* believed that her prior experience was responsive to the court's voir dire." (Italics added.) Juror No. 10's failure to disclose on July 5, 2011 was inextricably linked to the court's voir dire because her nondisclosure was a failure to update her earlier answers to the court's voir dire. If she "never believed that her prior experience was responsive to the court's voir dire," she would not have understood that she had an obligation to report on July 5, 2011 that something had "changed" since voir dire. As defendant cites no authority for his claim that deference is inappropriate simply because the court failed to explicitly individually address each of

the two occasions of nondisclosure, we accord the trial court's credibility and factual determinations the usual deference.

It was undisputed that Juror No. 10 did not disclose during voir dire or on July 5, 2011 that she had been a crime victim. She testified at the evidentiary hearing that she had not thought of herself as a crime victim at the time of voir dire because she had believed that her failure to "say no" meant that no crime had occurred. Even after R. disclosed that A. had assaulted her and Juror No. 10 "realized I couldn't shut up about it anymore," she felt ashamed and reluctant to reveal what had happened to her. It was only *after* the jury had returned its verdicts and been excused that she had the time to think about whether she could bear to disclose this information to the Sheriff's Department. She could not "understand why they would be able to prosecute because for most of what happened I was an adult."

We accept the trial court's credibility and factual findings. Juror No. 10's testimony at the evidentiary hearing, which the trial court expressly found was "truthful," supported the trial court's finding that Juror No. 10's "non-disclosure was not intentional" because she "never believed" that she had been a victim of a crime. "[A]n honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias." (*In re Hamilton* (1999) 20 Cal.4th 273, 300.) Juror No. 10's testimony established that, even on July 5, 2011, she did not "understand" that A.'s conduct was "prosecut[able]" because she was "an adult" who did not "say no." Thus, at the time of the July 5, 2011 non-disclosure, Juror No. 10 continued to believe that A.'s conduct with her was not a crime because, in her layperson's view, it could not be prosecuted. Hence, we agree with the trial court that Juror No. 10 made an honest mistake and acted in good faith when she failed to disclose information about her experience with A.

Defendant contends that Juror No. 10's testimony could not be credited because she lied about her first contact with the Sheriff's Department. This factual dispute was resolved by the trial court, and it found that Juror No. 10 was telling the truth. The mere fact that a sheriff's deputy's report conflicted with Juror No. 10's testimony did not mean that she was lying. The report could have been inaccurate. Indeed, the fact that Juror No. 10 was in deliberations at the time that the deputy said he contacted her strongly suggested that he was mistaken. Her cell phone records rebutted any suggestion that she had received a call from the deputy during the time she was in court on July 5, 2011. Our deference to the trial court's credibility and factual findings requires us to credit its finding since it was supported by substantial evidence.

The next question is whether Juror No. 10's nondisclosures reflected that she was actually biased. "Although juror misconduct raises a presumption of prejudice [citations], we determine whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the 'presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.' [Citation.]" (*In re Boyette* (2013) 56 Cal.4th 866, 889-890 (*Boyette*).

Juror No. 10 testified both on voir dire and at the evidentiary hearing that she was a fair, impartial, and unbiased juror. As her nondisclosures were due to an honest, good faith mistake that she admitted, and she credibly affirmed her impartiality, we are satisfied that there was not a substantial likelihood that Juror No. 10 was actually biased. Juror No. 10's status as a victim of sex crimes might have prompted defendant's trial counsel to exercise a peremptory challenge, but it did not support a conclusion that she was biased against defendant in this case. Juror No. 10's experience when she was an adult or near adult had little in common with the charges in this case involving a toddler.

“[T]he test asks not whether the juror would have been stricken by one of the parties, but whether the juror’s concealment (or nondisclosure) evidences bias.” (*Boyette, supra*, 56 Cal.4th at p. 890.) Juror No. 10’s honest mistake in failing to disclose information about her experience did not suggest that she was actually biased. The fact that she did report her experience to the Sheriff’s Department the day after the verdicts does not, as defendant suggests, reflect that she knew that she was a crime victim. Juror No. 10 explained that she came forward with information about her experience with A. to provide support for R.’s allegations. We see no basis for an inference that Juror No. 10 knew in advance that A. would be charged with offenses against her in addition to his offenses against R.

Finally, defendant claims that his trial counsel was prejudicially ineffective in failing to highlight the inconsistency between Juror No. 10’s testimony and the deputy’s report in his argument to the court and in failing to have the deputy available to testify at the evidentiary hearing to challenge Juror No. 10’s credibility.

When a defendant challenges his conviction based on a claim of ineffective assistance of counsel, he must prove that counsel’s performance was deficient and that his defense was prejudiced by those deficiencies. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218; *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*)). “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland*, at p. 694.) Whenever counsel’s conduct can be reasonably attributed to sound strategy, a reviewing court will presume that the conduct was the result of a competent tactical decision, and defendant must overcome that presumption to establish ineffective assistance. (*Strickland*, at p. 689)

Defendant cannot establish on the appellate record that his counsel was deficient in failing to call the deputy to testify at the hearing. Defendant’s trial counsel may have investigated the matter and determined that the deputy would state that his report was

inaccurate as to the time when he first contacted Juror No. 10. By choosing to rely on the report, rather than calling a witness who would contradict it, defendant's trial counsel may have made a reasonable strategic decision. We must presume that he did.

Nor can defendant establish on the appellate record that his trial counsel was prejudicially deficient in failing to further highlight the timing discrepancy in argument to the trial court. Defendant's trial counsel's supplemental points and authorities were filed a month after the evidentiary hearing. He highlighted therein that the deputy's report stated that he had contacted Juror No. 10 at 11:00 a.m. on July 5, 2011. No further highlighting of the report would have changed the trial court's decision on the new trial motion because Juror No. 10's cell phone records, which were also in the record, were consistent with Juror No. 10's testimony and inconsistent with the deputy's report.

The trial court did not err in denying defendant's new trial motion, and defendant's trial counsel was not prejudicially deficient in presenting the new trial motion.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Elia, Acting P. J.

Grover, J.