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

THE PEOPLE,

Plaintiff and Respondent,

v.

LIONEL BLANKS, JR.,

Defendant and Appellant.

H038580

(Santa Clara County  
Super. Ct. No. C1077967)

After a jury trial, defendant Lionel Blanks, Jr. was convicted of forcible rape (count 1; Pen. Code, § 261, subd. (a)(2)),<sup>1</sup> forcible penetration (count 2; § 289, subd. (a)(1)), attempted murder (count 3; §§ 664, 187), carjacking (count 4; § 215), second degree robbery (count 5; §§ 211, 212.5, subd. (c)), and criminal threats (count 6; § 422). As to the rape and penetration counts, the jury found that defendant kidnapped the victim prior to the offenses and that the movement substantially increased the risk of harm, that defendant tied and bound the victim, and that defendant personally inflicted great bodily injury on the victim. (Former § 667.61, subs. (a), (d), & (e); see Prop. 83, § 12, approved Nov. 7, 2006, eff. Nov. 8, 2006.) The trial court found that defendant had a prior serious felony conviction (§ 667, subd. (a)), which qualified as a strike (§§ 667, subs. (b)-(i), 1170.12). Defendant was sentenced to a determinate term of 39 years, eight months, with a consecutive indeterminate term of 100 years to life.

<sup>1</sup> All further statutory references are to the Penal Code unless stated otherwise.

Defendant contends the trial court erroneously denied his *Batson/Wheeler* motion, which contested the prosecutor's use of peremptory challenges to remove two African-American prospective jurors. (See *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*)). He also contends trial counsel was ineffective for failing to raise certain objections to the expert testimony of a sexual assault response team (SART) nurse. For the reasons stated below, we will affirm the judgment.

## **BACKGROUND**

On May 22, 2010, Jane Doe was assaulted in Palo Alto. The assailant drove her to an elementary school in Santa Clara, where he raped, robbed, threatened, and further assaulted her.

Defendant's DNA was found in Doe's vagina, so at trial defendant did not dispute that he had sexual intercourse with her. Defendant argued there was no evidence he had been involved in the assault, carjacking, or robbery, and no evidence that the sex had been non-consensual.

### ***A. Doe Goes Out With Friends***

On May 21, 2010, Doe got up at 4:35 a.m. and worked until 6:00 p.m. After work, Doe went to the Saratoga Country Club, where Doe's best friend was having a "food tasting." Doe stayed there for about two or three hours and consumed two glasses of wine.

Doe then went to Palo Alto to meet two girlfriends at a club. She arrived at the club at 10:07 p.m. and stayed until about 1:00 a.m. She drank two cocktails and a shot of whiskey, consuming her last drink at about 12:30 a.m. Doe knew she was not sober, but she believed she was able to drive safely when she left the club.

***B. Doe Is Pulled Over By Police***

Doe was not very familiar with the area near the club, and she drove around for a while, trying to find a main street. She had two cell phones with her, so she turned one on and tried to download some GPS software. Preoccupied with the phone, she swerved as she drove.

At 1:30 a.m. on May 22, 2010, Palo Alto Police Lieutenant Zach Perron saw Doe's vehicle swerving. He activated his "dash-cam" and initiated a stop. Lieutenant Perron performed an eye-tracking test on Doe and observed "some faint jerking," but nothing to cause him significant concern. Her eyes were not red or watery, and her speech was not slurred. Other than the swerving, her driving did not seem impaired. Doe told Lieutenant Perron that she had consumed two drinks at about 6:00 p.m. Lieutenant Perron did not think Doe was driving under the influence of alcohol, so he did not arrest her.

After Lieutenant Perron left, Doe obtained a route from the GPS software on her phone. The route took her through the Stanford University campus, but due to construction she kept getting re-routed. She became frustrated. As she was "really, really tired" from drinking and being awake for close to 24 hours, she decided to pull over and rest. She found a well-lit area on El Camino and parked. She removed the keys from her ignition, got into the passenger seat, and fell asleep. Her car doors were locked.

***C. Doe is Assaulted***

The next thing Doe noticed was being really cold and uncomfortable. She realized she was being poked by broken glass. She heard a voice shouting, " 'What are you doing here?' 'Why are you here?' 'Are you lost?' " She saw an arm come through the broken car window and open the door. She was put into a choke-hold and pulled out of the car. Doe could tell that the assailant was African-American, but "[n]ot super dark."

Doe next felt her head being bounced against the concrete sidewalk and noticed blood coming down her face. She was thrown to the ground and punched in the head

six or seven times. She felt that the assailant “was playing basketball with [her] head.” Her knees were on top of broken glass.

The assailant commanded Doe not to move or scream. He bound her wrists and blindfolded her, then threw her into the back of her car. He drove away. During the drive, the assailant said, “Don’t try anything,” and “Don’t move or I’m going to hurt you.” He mentioned that he had a weapon. The assailant also made sexual references, asking why she was wearing thong underwear and whether she was “a freak.” He told her, “I’m going to kill you if you try anything.” He reached back and touched her “every chance he got,” putting his finger into her vagina, groping her breast under her bra, and touching her buttocks.

The assailant asked where Doe was from. When she told him, “Cupertino Saratoga area,” he said, “Good. That’s where we’re going.” After the assailant mentioned that he had two daughters, Doe said that she had a daughter also. She told him, “Please, don’t hurt me. I have to get back to my daughter and my mom.”

Doe believed that they drove on city streets for about 15 minutes and then got onto the freeway for 20 to 30 minutes. At one point, the assailant got out of the car. Doe heard him open up a package of baby wipes, which she carried in the car, and wipe down the car. He then got back into the car and kept driving.

The assailant eventually parked the car at a school in Santa Clara, which was about 17.5 miles from where the assault had begun. He pulled Doe out. He told her to be quiet, and he said, “I’m going to kill you . . . if you try to run.” He also told her, “Shut up or else I’m going to kill you.”

Doe was dragged to a grass area, where the assailant put more ties on her. He hit her in the head again and forced her to the ground. He ripped her dress and bra and forced her legs open. He tried to “finger” her, then turned her onto her stomach. He put his finger inside her vagina twice, then raped her.

After the rape, the assailant hit Doe in the head again. He then choked her. As she realized she was losing breath, she decided to play dead. The assailant flipped her over and might have kicked her. She heard him run off with her keys jingling. When Doe believed it was safe, she got up and ran in the opposite direction. She freed herself from the blindfold and bindings, then used one of the items to cover herself.

Doe ran out to the street and tried to stop a car. She could see her assailant from afar and could tell he was holding her purse. She could see that he was African-American and that he was wearing a dark shirt with white writing on it.

Manuel Borgonia was driving down Saratoga Avenue when he saw Doe in front of the school. Doe flagged him down, approached his car, and said she had been raped. She was “half naked,” holding a sweater to cover herself. Her dress was torn and she had no underwear on. Her face was “all beat up” and she was bleeding from her knees and elbows.

Doe wanted to get into Borgonia’s car and leave the area. Borgonia was concerned about being “seen as a suspect,” so he did not allow her into his car, but he called 911. He told the dispatcher that Doe was scared and cold.

#### ***D. Investigation***

Officers were dispatched to the Saratoga Avenue location at 5:24 a.m. When officers arrived at the scene, Doe looked as if she had been “beat up.” Her clothing was torn, she was bruised, and she was scratched “from head to toe.” There was blood on her arms and face. She was distraught and seemed to be in disbelief. When an officer gave her a blanket to wrap around her body, she dropped several items she had been holding: a small sweatshirt, a knotted gray cloth, and a piece of used duct tape.

Doe did not appear to be intoxicated. She knew she needed to go to the hospital, “badly,” but was concerned about the cost of an ambulance, so she initially refused to be transported to the hospital. However, she allowed an officer to transport her in his patrol

car. A blood draw conducted at 9:30 a.m. revealed that Doe's blood alcohol level was 0.10 percent.

Nurse Julia Pinero conducted a sexual assault medical exam on Doe. She took photographs, interviewed Doe, and documented her injuries, which included a forehead gash, elbow and knee injuries, injuries to her buttocks, and abrasions on her hips.

Nurse Pinero conducted a vaginal exam. She found semen inside Doe's vagina. She noticed swelling and multiple lacerations on the interior of Doe's vagina. Nurse Pinero testified that Doe's vaginal injuries were caused by force. She testified that her findings were consistent with Doe's account of the assault, including the rape and penetration with a foreign objection. However, she could not say whether the sex had been consensual or non-consensual.

Physical evidence was located both at the school and in Palo Alto. An officer located Doe's blood-stained underwear behind a portable classroom at the school. Doe's shoes, some personal items, and a piece of duct tape were found at the Palo Alto location where the assault had begun. Doe's vehicle was found near the school. It contained blood and broken glass.

#### *E. Defendant's Arrest*

The semen found in Doe's vagina was subjected to DNA analysis. Defendant was identified as a suspect: the likelihood that another random person would have that same DNA was one in 73 quintillion in the African-American population. DNA from the steering wheel of Doe's vehicle provided only a "very partial low-level profile," such that it could not be said with certainty that defendant was the contributor. However, defendant was a possible contributor, and the chances that a random person would have the same partial DNA profile was approximately 1 in 300,000 in the African-American population.

Officers were sent to defendant's residence on May 26, 2010. They observed defendant exit his apartment and proceed towards the manager's office. When two

plainclothes officers exited the office, defendant turned and looked at them. One of the officers lifted his shirt to expose his badge. Defendant “immediately turned and ran.” Officers pursued defendant across a street, through a parking lot, over several fences, and through several yards. They found defendant hiding in bushes near a cemetery. When the officers tried to take defendant into custody, he physically resisted. Eventually, the officers were able to force defendant into handcuffs.

At the time of his arrest, defendant had an outstanding misdemeanor warrant from Washington State. During a search of defendant’s residence, police found a dark sweatshirt with white writing. No blood or glass was found on the sweatshirt, and none of the stolen items were found. At trial, the parties stipulated that defendant’s son attended the school where Doe was assaulted.

## **DISCUSSION**

### ***A. Batson/Wheeler Motion***

Defendant contends the trial court erroneously denied his *Batson/Wheeler* motion, which contested the prosecutor’s use of peremptory challenges to remove Prospective Juror No. 6 and Prospective Juror No. 15, both of whom were African-American.

#### **1. Prospective Juror No. 6**

On questioning from the court, Prospective Juror No. 6 stated that she worked as a “pharmacy tech” at a hospital, that she was single, and that she had no children. She had been living in Santa Clara County for 15 years. She had been charged with a crime eight years ago in Santa Clara County. Prospective Juror No. 6 indicated she was uncomfortable stating the nature of the crime in front of the other prospective jurors, so she approached the bench. During an unreported discussion, Prospective Juror No. 6 informed the court and parties that she had been charged with petty theft, but the offense had been reduced to an infraction.

The prosecutor later asked Prospective Juror No. 6 whether she had a degree. Prospective Juror No. 6 replied that she had “just a pharmacy tech degree.”

## **2. Prospective Juror No. 15**

On questioning from the court, Prospective Juror No. 15 stated that she worked for U.S. Airways, that she was unmarried, and that she had no children. She had lived in San Jose for 35 years. Her brother had been “convicted of a three-strike” in Santa Clara County within the last few years.

The prosecutor later asked Prospective Juror No. 15 about her brother’s conviction. Prospective Juror No. 15 confirmed that the conviction was in Santa Clara County and that he was “in for 12 years.” The prosecutor asked whether Prospective Juror No. 15 was “concerned about what penalty or punishment” defendant might receive. Prospective Juror No. 15 replied, “No. My brother got what he deserved.” The prosecutor asked, “So you’re able to look at what happened in this case and not wonder or worry about what the effect will be on the defendant?” Prospective Juror No. 15 replied, “Yes.”

## **3. Peremptory Challenges, Reasons, and Ruling**

The prosecutor used her second peremptory challenge on Prospective Juror No. 6. The defense then exercised two peremptory challenges while the prosecutor passed. After the defense exercised its third peremptory challenge, the prosecutor used her third peremptory challenge on Prospective Juror No. 15.

Defendant then made a *Batson/Wheeler* motion. Trial counsel stated, “The last two jurors that were excused by the prosecution were – appear to be of an African descent or African-American descent and the prosecution had only used essentially two out of the three challenges for women of African-American descent. And [defendant] is African-American.” The trial counsel clarified that the jurors in question were Prospective Juror No. 6 and Prospective Juror No. 15 and that both appeared to be “women of color,” “[p]ossibly Black.”

The trial court offered the prosecutor “the opportunity . . . to indicate race neutral reasons for the challenges” before making a “determination of whether the defense has made a prima facie showing.”

The prosecutor explained that her three challenges had “all been of single individuals who are not married and have no kids.” She explained that her first two challenges, which included Prospective Juror No. 6, were two jurors who were “younger jurors than I normally look for in my panel.” She noted that only one of the prospective jurors remaining on the panel (Trial Juror No. 6) was not married, did not have children, and was not over the age of 40.

The prosecutor provided two additional reasons why she exercised a peremptory challenge as to Prospective Juror No. 6: “Over the lunch hour I ran her rap sheet and determined that she has an additional conviction that she had not let us know about. She has a 2005 conviction for hit-and-run that she did not disclose to the court, so for that reason I was concerned about [her] ability to be truthful with this court. [¶] And, additionally, [Prospective Juror No. 6] arrived for court today at least 15 minutes late, if not later than that and that concerns me when we look for a panel, people who are going to get along together.”

The prosecutor next explained why she exercised a peremptory challenge to Prospective Juror No. 15: “I was concerned about the fact that her brother suffered – at one point she said it was three strikes and later she clarified that he served 12 years in prison and this is from Santa Clara County. [¶] While [Prospective Juror No. 15] said he got what he deserved, I always have concerns when close family members have suffered such severe convictions. [¶] No one else on the panel has any relationship with any other convicted parties with the exception of, again [Trial Juror No. 6], who has a DUI. [¶] [Prospective Juror No. 18] mentioned that she had a son who was arrested as a juvenile. Oh, and I believe [Trial Juror No. 10’s] husband had some – her husband had some convictions but they were over 20 years ago. [¶] So with regard to [Prospective Juror

No. 15] I had concerns that she may harbor some ill will toward my office as a result of her brother's conviction. [¶] And in light of the large amount of time that the defendant in this case is facing and the likelihood that the potential jurors are aware that in such a serious case he might be facing a lot of time so in an abundance of caution I attempted to challenge her.”

Trial counsel argued that Prospective Juror No. 15 appeared to be “within the ages” that the prosecutor wanted and questioned whether a single person would necessarily be “more defense inclined.” Trial counsel further remarked that Prospective Juror No. 15 said she had an “attenuated” relationship with her brother and “thought her brother got what he deserved.”

The trial court denied the *Batson/Wheeler* motion. It found that defendant had “made a prima facie showing,” but that the prosecutor had “shown race neutral justification” for both of the peremptory challenges.

#### **4. Analysis**

“Both the federal and state Constitutions prohibit any advocate’s use of peremptory challenges to exclude prospective jurors based on race. [Citations.]” (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*), citing *Batson, supra*, 476 U.S. 79, and *Wheeler, supra*, 22 Cal.3d 258.)

When the defense raises a challenge to the prosecutor’s conduct, “[t]he *Batson* three-step inquiry is well established. First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination.” (*Lenix, supra*, 44 Cal.4th at p. 612.)

“A prosecutor asked to explain his [or her] conduct must provide a ‘clear and reasonably specific’ explanation of his [or her] ‘legitimate reasons’ for exercising the

challenges.’ [Citation.] ‘The justification need not support a challenge for *cause*, and even a “trivial” reason, if genuine and neutral, will suffice.’ [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons. [Citations.]” (*Lenix, supra*, 44 Cal.4th at p. 613.)

“At the third stage of the *Wheeler/Batson* inquiry, ‘the issue comes down to whether the trial court finds the prosecutor’s race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor’s demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.’ [Citation.] In assessing credibility, the court draws upon its contemporaneous observations of the voir dire. It may also rely on the court’s own experiences as a lawyer and bench officer in the community, and even the common practices of the advocate and the office that employs him or her. [Citation.]” (*Lenix, supra*, 44 Cal.4th at p. 613, fn. omitted.)

“Review of a trial court’s denial of a *Wheeler/Batson* motion is deferential, examining only whether substantial evidence supports its conclusions. [Citation.] ‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “ ‘with great restraint.’ ” [Citation.] We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court’s ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]’ [Citation.]” (*Lenix, supra*, 44 Cal.4th at pp. 613-614, fn. omitted.)

Defendant contends that the prosecutor’s reasons for excusing Prospective Juror No. 6 and Prospective Juror No. 15 were not credible.

First, defendant contends that the prosecutor was not credible when she explained that she excused Prospective Juror No. 15 because her brother was serving a 12-year

sentence due to a conviction from Santa Clara County. Defendant notes that Prospective Juror No. 15 commented that her brother “got what he deserved” and affirmed that she would not consider the issue of punishment in deciding this case.

The California Supreme Court rejected a similar claim in *People v. Avila* (2006) 38 Cal.4th 491 (*Avila*). There, a prospective juror revealed that her brother had been convicted of manslaughter, but she said “she believed her brother had been fairly treated by the criminal justice system, and nothing about her brother’s experience would affect her ability to be fair and impartial . . . .” (*Id.* at p. 554.) The Supreme Court found that the prospective juror’s “experience with her brother’s involvement in the criminal justice system” was a race-neutral explanation, “notwithstanding [the prospective juror’s] assurances that her prior experiences would not carry over to this case if she were chosen as a juror.” (*Id.* at pp. 554-555.)

Here, the trial court was in the best position to evaluate the prosecutor’s credibility in stating that she excused Prospective Juror No. 15 because of her brother’s criminal history. *Avila* establishes that a sibling’s involvement in the criminal justice system can be a race-neutral explanation, even where the potential juror states that he or she could be fair and impartial. Thus, the record contains substantial evidence to support the trial court’s determination that Prospective Juror No. 15 was not excused based on her race.

Defendant also notes that the prosecutor did not exercise peremptory challenges to two other prospective jurors (neither of whom was African-American) who had family members with convictions. As the prosecutor noted, however, in both cases the convictions had occurred many years earlier. Prospective Juror No. 18 stated that her son had been arrested as a juvenile and that he was 30 years old at the time of trial. Trial Juror No. 10 stated that her husband had committed crimes before she met him. In contrast, Prospective Juror No. 15’s brother was currently serving his sentence.

Defendant similarly contends the prosecutor’s stated reasons for excusing Prospective Juror No. 6 – her youth and marital status, her tardiness, and her failure to

disclose a prior conviction – were not credible. Each of these stated justifications was race-neutral. (See *People v. Perez* (1994) 29 Cal.App.4th 1313, 1328 [“Limited life experience is a race-neutral explanation.”]; *People v. Davis* (2008) 164 Cal.App.4th 305, 313 [fact that prospective juror was “not punctual” was one of several “reasons for an attorney not to want her on the jury”]; *Greene v. Upton* (11th Cir. 2011) 644 F.3d 1145, 1156 [prospective juror’s failure to disclose a prior conviction on his juror questionnaire was a “racially neutral” reason for the prosecutor’s peremptory challenge].)

Defendant claims that the record fails to support a finding that Prospective Juror No. 6 lacked life experience, noting that Prospective Juror No. 6 was employed as a pharmacy tech and that she had obtained a degree for that work. Defendant further calculates that Prospective Juror No. 6 was at least 25 years old. As the Attorney General points out, however, the prosecutor indicated that most of the prospective jurors remaining on the panel appeared to be quite a bit older than 25 – as the prosecutor stated, “over the age of 40” – and the trial judge was in the best position to determine if that was true. Importantly, neither the trial court nor defendant challenged the prosecutor’s description of the other prospective jurors’ ages.

Moreover, although the prosecutor did not exercise a peremptory challenge to one juror who apparently was also under age 40, the record contains race-neutral factors that distinguish that juror from Prospective Juror No. 6: Prospective Juror No. 6’s tardiness and failure to disclose a prior conviction. Defendant does not dispute that Prospective Juror No. 6 was tardy or that she concealed a prior conviction, but he contends the prosecutor’s failure to ask Prospective Juror No. 6 about these topics indicates they were pretexts for discrimination.

“[A] party’s failure to engage in meaningful voir dire on a topic the party says is important *can* suggest the stated reason is pretextual.” (*People v. Lewis* (2008) 43 Cal.4th 415, 476 (*Lewis*), italics added, citing *Miller-El v. Dretke* (2005) 545 U.S. 231, 246, 250, fn. 8.) However, when the challenged juror is the only prospective juror who

has given a particular answer, the prosecutor's failure to explore the issue with the juror does not indicate the challenge is pretextual. (See *Lewis, supra*, at p. 476 [where no other prospective jurors expressed the same "level of hesitation about the death penalty" as the challenged juror, the prosecutor's failure to question that juror did not "undermine the trial court's conclusion that the prosecutor's stated reasons for striking her were not pretextual"].) Here, the record indicates Prospective Juror No. 6 was the only prospective juror to arrive late to the courtroom and was the only prospective juror to hide a prior conviction. Thus, the prosecutor's failure to ask her about those issues on voir dire does not indicate that they were pretextual reasons for the challenge.

Finally, defendant contends the trial court should not be accorded the usual deference because it failed to "probe the issues." He cites to *People v. Fuentes* (1991) 54 Cal.3d 707 at page 716, footnote 5, where the court emphasized that the trial court must make "an adequate record when dealing with a [*Batson/Wheeler*] motion," and stated that a reviewing court can only give deference "to a trial court's determinations of credibility and sincerity . . . when the court has clearly expressed its findings and rulings and the bases therefor."

Here, in denying defendant's *Batson/Wheeler* motion, the trial court simply stated that the prosecutor had "shown race neutral justification" for both of the peremptory challenges. The trial court did not make any explicit findings concerning each of the prosecutor's stated reasons for the challenges, but it was not required to do so under the circumstances.

The trial court's ruling in this case was similar to the one in *People v. Jackson* (1996) 13 Cal.4th 1164 (*Jackson*). In *Jackson*, after the prosecutor explained why he had challenged three prospective jurors, the trial court denied the defendant's *Batson/Wheeler* motion " 'on the basis of the representations of the People and the Court's own observations of the particular jurors.' " (*Id.* at p. 1197.) The California Supreme Court rejected the defendant's claim that the trial court's brief comment showed that it did not

make “ ‘a “sincere and reasoned effort” ’ ” to evaluate the credibility of the prosecutor’s stated justifications. (*Ibid.*) The court explained that a trial court is not required “to conduct further inquiry into the prosecutor’s race-neutral explanations if, as here, it is satisfied from its observations that any or all of them are proper. [Citation.]” (*Id.* at p. 1198.)

As in *Jackson*, the trial court here was not required to “probe the issues.” Its ruling on the *Batson/Wheeler* motion was brief, but that does not mean that the court failed to make “ ‘a “sincere and reasoned effort” ’ ” to evaluate the credibility of the prosecutor’s stated justifications. (*Jackson, supra*, 13 Cal.4th at p. 1197.) On this record, the court’s ruling indicates it was “satisfied from its observations” that the prosecutor’s explanations were all proper. (*Id.* at p. 1198.)

We conclude that substantial evidence supports the trial court’s finding that no *Batson/Wheeler* error occurred. (See *Lenix, supra*, 44 Cal.4th at pp. 613-614.)

### ***B. Ineffective Assistance of Counsel***

Defendant contends that Nurse Pinero was not qualified to offer the following opinions: (1) that Doe’s buttocks injuries could have been caused by gravel or glass, and that her hip injuries could have been caused by dragging; (2) that Doe’s injuries were consistent with a beating and non-consensual sex; and (3) that the results of Doe’s vaginal exam were consistent with digital penetration, penile penetration, and the use of force.

Defendant contends that trial counsel was ineffective for failing to properly object to these aspects of Nurse Pinero’s testimony. He contends trial counsel should have objected on the basis that these were matters beyond her qualifications, and on the basis that this testimony amounted to improper opinion on the ultimate question of guilt.

#### **1. Proceedings Below**

Nurse Pinero testified that she had been an “OB GYN Nurse Practitioner” for 36 years. Since 2008, she had worked as a SART forensic nurse. She had taken SART

training and had performed over 200 sexual assault exams. She had been trained to look for certain physical evidence during such exams, including body injuries such as lacerations, swelling, skin damage, and contusions. Part of her job was to assess whether the physical evidence was consistent with the reported history.

The trial court accepted Nurse Pinero as an expert “in the area of collection and preservation of evidence of sexual assault” and “in the interpretation of sexual assault findings.” The trial court gave cautionary instructions on the jury’s evaluation of expert testimony both prior to Nurse Pinero’s testimony and at the end of the case.<sup>2</sup>

In testifying about Doe’s injuries, Nurse Pinero referred to “punctations” on Doe’s buttocks, defining them as “deep marks in the skin caused by force or possibly something hard like gravel.” Nurse Pinero stated that the punctations could also have been caused by glass. She described the abrasions on Doe’s hip, saying that they could have been caused by dragging or scraping. At that point, trial counsel objected on grounds of relevance and lack of foundation. The objection was sustained.

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<sup>2</sup> Prior to Nurse Pinero’s testimony, the jury was instructed: “Folks, every so often, the attorneys call witnesses who have a special training, experience, education in an area pretty much outside everybody else’s experience and this is such a witness. [¶] All I’m doing by designating this witness as an expert is just recognizing that she has training, experience, [and] education in an area outside our experience, so she’s allowed to testify as an expert and render an expert opinion. [¶] The important thing to remember, just like any witness, you are the judges of her credibility. You can accept her opinions. You can reject them. You can give them whatever weight you think they deserve. You are still the ultimate judges as to the credibility of this witness.”

Later, the trial court instructed the jury pursuant to CALCRIM No. 332 as follows: “Witnesses were allowed to testify as experts and to give opinions. You must consider the opinions, but you are not required to accept them as true or correct. [¶] The meaning and the importance of any opinion are for you to decide. In evaluating the believability of an expert witness, follow the instructions about the believability of witness[es] generally. [¶] In addition, consider the expert’s knowledge, skill, experience, training, and education. The reasons the expert gave for any opinion and the facts or information on which the expert relied in reaching that opinion. [¶] You must decide whether information on which the expert relied was true and accurate. [¶] You may disregard any opinion that you find unbelievable, unreasonable, or unsupported by the evidence.”

Nurse Pinero testified that the lacerations in Doe's vagina were caused by force. She testified that her findings were consistent with Doe's account of the assault. Trial counsel objected on the basis that the answer went "to the ultimate issue" and on lack of foundation. The objection was overruled.

Nurse Pinero testified that her findings were consistent with forcible penetration by a penis and a finger. However, she could not say whether the force had been consensual or non-consensual.

## **2. Analysis**

"To prevail on a claim of ineffective assistance of counsel, the defendant must show counsel's performance fell below a standard of reasonable competence, and that prejudice resulted. [Citations.] When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.] Even where deficient performance appears, the conviction must be upheld unless the defendant demonstrates prejudice, i.e., that ' "but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " ' [Citations.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.)

Under the rules applicable to the scope of expert testimony, the SART nurse was qualified to give opinion testimony about Doe's injuries. "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 testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert." (Evid. Code, § 720, subd. (a).) " "Where a witness has disclosed sufficient knowledge of the subject to entitle his [or her] opinion to go to the jury, the question of the degree of his

[or her] knowledge goes more to the weight of the evidence than its admissibility.” ’  
[Citation.]” (*People v. Bolin* (1998) 18 Cal.4th 297, 322.)

Contrary to defendant’s claim, Nurse Pinero had extensive training and experience in performing SART examinations. The trial court properly found that she was qualified as an expert in the interpretation of sexual assault findings. Nurse Pinero was therefore qualified to provide an opinion, based on her training, experience, and her SART examination of Doe, as to the cause of Doe’s physical injuries and whether her examination findings were consistent with Doe’s reported history of sexual assault.

We do not agree with defendant’s contention that only a physician could properly provide an opinion as to whether an alleged victim’s injuries were caused by force or whether the alleged victim’s reported history of sexual assault was consistent with the findings on physical examination. As this court has previously observed, “There is a statutory scheme addressing the function of SART exams in connection with the criminal investigative process. By legislative enactment, one hospital training center in the state was established for the purpose of, inter alia, ‘train[ing] medical personnel on how to perform *medical evidentiary examinations* for victims of . . . sexual assault, . . . [and] shall provide training for investigative and court personnel involved in dependency and criminal proceedings, on how to interpret the findings of medical evidentiary examinations.’ (§ 13823.93, subd. (b), italics added.) Section 13823.93 was enacted in 1995 because of the Legislature’s recognition that adequate training of medical professionals was essential both to provide for the medical needs of victims of domestic violence, child abuse, elder abuse, and sexual assault ‘and to provide comprehensive, competent *evidentiary examinations for use by law enforcement agencies.*’ (Stats. 1995, ch. 860, § 1, p. 6541, italics added.)” (*People v. Uribe* (2008) 162 Cal.App.4th 1457, 1477, fns. omitted.) The statutory scheme further provides that the medical personnel who are qualified to perform SART examinations include nurses, and that “[t]o ‘perform a medical evidentiary examination’ means to evaluate, collect, preserve, and document

evidence, interpret findings, and document examination results.” (§ 13823.93, subd. (a)(2).)

Moreover, the California Supreme Court has stated that “[q]ualifications other than a license to practice medicine may serve to qualify a witness to give a medical opinion. (*People v. Villarreal* (1985) 173 Cal.App.3d 1136, 1142 [‘Because of the dramatic growth of diverse interdisciplinary studies in recent times, often individuals of different nonphysician professions are called upon to give medical opinions or at least opinions involving some medical expertise’]; see *People v. Fierro* (1991) 1 Cal.4th 173, 224; *Brown v. Colm* (1974) 11 Cal.3d 639, 645 [referring to an ‘unmistakable general trend in recent years . . . toward liberalizing the rules relating to the testimonial qualifications of medical experts’].)” (*People v. Catlin* (2001) 26 Cal.4th 81, 131-132.)

Defendant’s discussion of non-California cases involving biomechanical engineers does not convince us that Nurse Pinero was unqualified to render an opinion about the possible causes of Doe’s injuries. While a biomechanical engineer may not be qualified to render an opinion about the cause of a party’s injuries, in this case the opinion was rendered by a medical professional who was specifically trained to conduct sexual assault exams.

In light of the statutory scheme regarding SART exams and Nurse Pinero’s testimony about her training and experience, the trial court could reasonably determine that she was qualified to express an opinion that the injuries she observed were consistent with forcible penetration and that the other injuries she observed were consistent with the history Doe related. Trial counsel was therefore not ineffective for failing to object on the ground that the testimony was beyond the scope of her qualifications.

In addition, Nurse Pinero did not offer an opinion on the ultimate question of defendant’s guilt or an opinion about Doe’s credibility. She testified that her findings were consistent with the history that Doe reported *and* with consensual sex involving force. (Compare *People v. Torres* (1995) 33 Cal.App.4th 37, 44 [officer improperly

testified that “a robbery ‘is what happened in this particular case’ ”]; *People v. Sergill* (1982) 138 Cal.App.3d 34, 39 [improper for officers to render an opinion about whether child was telling the truth].) The trial court properly admitted this testimony, and trial counsel did not provide ineffective assistance by failing to object.

Accordingly, we find that trial counsel did not provide ineffective assistance by failing to object to the opinion testimony of Nurse Pinero, since that testimony was admissible.

### **DISPOSITION**

The judgment is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.