Filed 7/27/18 P. v. Schenck CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(a). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115(a).

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROSS A. SCHENCK, Defendant and Appellant.	B280573 Los Angeles County Super. Ct. No. YA092158

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott T. Millington, Judge. Affirmed as modified with directions.

Mary Jo Strnad, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle, Steven E. Mercer, Michael C. Keller, and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Ross Schenck was convicted of hitting his girlfriend on the head with a jug of wine. He argues that the court erred by allowing a responding paramedic to testify to hearsay statements about which the paramedic lacked personal knowledge, in violation of state law and the confrontation clause, and that counsel provided ineffective assistance by failing to object to those errors and by failing to request a pinpoint instruction on inadvertence or mistake. We modify the judgment to strike an unauthorized $500 fee, order the court to correct a typographical error in the sentencing minute order, and affirm as modified.

PROCEDURAL BACKGROUND

By information filed May 14, 2015, defendant was charged with two counts of domestic violence causing a traumatic condition (Pen. Code,[1] § 273.5, subd. (a); counts 1 and 2). Count 1 was alleged to have occurred on or about March 16, 2015. Count 2 was alleged to have occurred on or about December 31, 2014. As to count 1, the information alleged defendant personally used a deadly or dangerous weapon—a wine bottle. (§ 12022, subd. (b)(1).) The information also alleged two prior felony convictions as both serious-felony priors (§ 667, subd. (a)(1)) and strike priors (§ 667, subd. (d); § 1170, subd. (b)). Defendant pled not guilty and denied the allegations.

After a bifurcated trial at which he testified in his own defense, the jury convicted defendant of count 1 and its related

[1] All undesignated statutory references are to the Penal Code.

enhancement but acquitted him of count 2. Defendant admitted the prior convictions.

After a contested hearing, the court granted defendant's motion to strike one of his prior strikes, denied his motion to strike the other prior strike, and sentenced him to an aggregate term of 14 years in state prison. The court imposed the low term of two years for count one (§ 273.5, subd. (a)), doubled for the strike prior (§ 667, subd. (b)–(i); § 1170.12, subd. (a)–(d)), plus five years for each of the two serious-felony priors (§ 667, subd. (a)(1)), to run consecutively. The court struck the deadly-weapon enhancement (§ 12022, subd. (b)(1)) for purposes of sentencing only, and imposed various fines and fees, including a $500 domestic violence fund payment (§ 1203.097, subd. (a)(5)(A)).

Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

1. The Prosecution Evidence[2]

1.1. Defendant was acquitted of beating Sharron on December 31, 3014—count 2

Sharron was defendant's girlfriend between 2010 and 2015, and they lived together for nearly four years in an apartment defendant paid for.

On December 31, 2014, Sharron returned to defendant's apartment from the hospital after receiving asthma treatment. She drank some beer and fell asleep. Defendant, who was drinking Courvoisier, woke her. She went to the bathroom, and

---

[2] Only two witnesses testified for the prosecution: victim Sharron D. and a paramedic who responded to the second incident.

when she came out, defendant was standing in front of the door. "He just went nuts" and began "pounding" her in the head with his fist four or five times.

Sharron remained at the apartment and drank some more beer. She told defendant she had called the police, which prompted him to get dressed and leave. In fact, Sharron did not call the police until four or five hours later. When she ultimately called 911, she told the dispatcher she did not need medical assistance; she just needed documentation. The blows caused bruising, a black eye, and swelling, which the police photographed at Sharron's request when they arrived. Although an officer gave Sharron information about how to contact her in the future, Sharron never followed up. She continued to live in defendant's apartment.

The jury acquitted defendant of this count.

1.2. Defendant hit Sharron with a jug of wine on March 16, 2015—count 1

On March 16, 2015, defendant woke Sharron up between 3:00 and 3:30 a.m. Defendant was ranting about an incident with his sister-in-law the previous evening. Sharron asked him to be quiet so she could get back to sleep.

Defendant left the bedroom, and Sharron went to the bathroom. When she emerged, she saw defendant coming out of the kitchen carrying a partially-full gallon jug of Carlo Rossi wine.[3] Sharron was headed back to bed when defendant suddenly

[3] A typical bottle of wine is 750 ml. The attorneys below referred to the jug as a 1.5 liter bottle. Sharron testified that it was a gallon jug, which is 3.8 liters. Whatever its volume, the jug was shorter and fatter than a typical wine bottle.

hit her in the back of the head with the jug. Sharron felt "dazed," and felt blood running down her neck. Back in the bedroom, defendant sat down next to her and said, "If I were you, I would lay down and go to sleep so I can make my doctor's appointment in the morning." Defendant went to the living room.

Sharron started to call 911, but defendant returned to the bedroom, and Sharron did not complete the call. She thought defendant "would have snatched the phone" from her if he heard her calling. Later, she called 911 and spoke to an operator.

At some point, the police arrived, spoke to Sharron, and photographed her head wound.[4] Los Angeles Fire Department firefighter/paramedics Marc Adams and Cole Alnes also arrived, but Sharron declined their offer to take her to the hospital because she had no one to care for her dog. Alnes examined Sharron while Adams "wrote down everything that [his] partner was seeing and doing to the patient."

1.3. Cross-examination of Sharron

Though she has asthma and diabetes, Sharron still smokes cigarettes and drinks regularly. She drinks a six-pack of beer on an average day, but does not drink that much every day. Sharron admitted meeting defendant at the Weingart Center, but denied she was there for drug or alcohol treatment. Sharron never fell down, passed out, or injured herself when she was drunk.

Sharron admitted that she frequently yelled at defendant and had hit him in the head "once or twice"—but denied ever hitting him when she was drunk. Though she admitted once throwing a fork at defendant, she claimed she did not see the fork

[4] None of the responding police officers testified at trial.

hit him. Sharron was arrested for the fork incident but was not charged. She denied ever threatening defendant with a knife and denied ever threatening to kill him or their dog.

2. Defendant's Testimony

Defendant met Sharron while he was a resident of a veteran's program and she was in drug rehabilitation downstairs. The two began a romantic relationship, and Sharron eventually moved into defendant's apartment. The two would drink alcohol together, but when Sharron was drunk it was like "Dr. [Jekyll], Mrs. Hyde. … She would go from sugar to crap." When she drank, Sharron sometimes got violent or fell down. Defendant also saw Sharron pass out from the combination of diabetes and alcohol. Defendant testified to several specific incidents of Sharron's alcohol abuse and violence.[5]

On April 6, 2013, Sharron was drinking and wanted more alcohol. She hit defendant in the head with a bottle of Courvoisier. Defendant called the police, but at his request, she was not prosecuted.

In January 2014, Sharron had been drinking and threatened to kill defendant and their dog. The police responded.

In July 2014, defendant returned to his apartment with an old phone a friend had given him. He showed the phone to Sharron, who had been drinking, and she asked him why he did

---

[5] The prosecution sought to exclude approximately 20 telephone calls to the police seeking assistance. Defendant had placed most of the calls because Sharron had assaulted him, threatened him, or was experiencing health problems. The court allowed the defense to ask about and present evidence of some incidents and excluded others. Defendant does not challenge the court's rulings on appeal.

not get her one. He told her he would, but she grabbed a fork and threw it at him. The fork hit him in the eye. The building manager called 911. Paramedics responded and took defendant to the hospital.[6]

On August 31, 2014, Sharron got extremely drunk. She walked through the apartment and broke the glass in every picture frame on the wall—particularly the photos of defendant's mother. She also grabbed a knife, said she was going to stab defendant, and came at him with it. To avoid being stabbed, defendant left the apartment.

On October 7, 2014, Sharron again threatened defendant with a knife. He called the police, who arrived and told Sharron to leave. The next day, Sharron returned to the apartment with defendant's permission; she promised to "get some help." Another time, Sharron pulled a knife from under a couch cushion. Defendant jumped up from the couch, grabbed Sharron's wrist, pushed her down on the couch, and took the knife from her. The police responded again.

In December 2014, defendant took his dog to be groomed, and he and Sharron got into another argument while she was drinking. She hit defendant with her fist and gave him a black eye. Defendant did not report this incident to the police.

On New Year's Eve in 2014, the day of the incident charged in count 2, Sharron confronted defendant about photographs of other women that she found on his mobile phone. She had been

---

[6] Inglewood Police Department Officer Nancy Ladner, who testified for the defense, responded to the apartment that day. When she arrived, she saw defendant standing outside the apartment with an injury to the face. Paramedics transported defendant to the hospital and Ladner arrested Sharron. Sharron was not prosecuted.

drinking and was "going crazy." Defendant tried to explain the photos then asked why she was looking through his phone. He asked her not to use it and got ready to leave the apartment. Defendant went to a friend's house and stayed there overnight. When he returned home the next evening, Sharron was angry because she thought he may have been with another woman; she had been drinking. No physical altercation followed. He did not punch her in the head.

On March 16, 2015, the day of the incident charged in count 1, defendant went to a funeral without Sharron. She was drinking and got upset. When defendant returned from the funeral, no physical altercation occurred. He did not hit her with a wine bottle. But defendant was arrested for suspicion of domestic violence because Sharron accused him of hitting her in the head with a wine bottle.

On April 1, 2015, while defendant was in custody, he spoke to his brother on the phone. He said: "I don't believe that I hit her with no damn bottle, I really do not believe that, you know, I don't believe that. If I did … blanked out, and I don't usually blank out like that. I would have remembered that, you know … ."

Defendant admitted that he had prior felony convictions for arson, attempted murder, and driving or taking a vehicle without consent. Three additional witnesses testified for the defense and corroborated various aspects of defendant's story.

DISCUSSION

Defendant contends the court erred by allowing Adams to testify to hearsay statements about which he lacked personal knowledge, in violation of state law and the confrontation clause. He also argues counsel provided ineffective assistance by failing

to object to those errors and by failing to request a pinpoint instruction on inadvertence or mistake.

1. Defendant has forfeited his challenges to Adams's testimony.

The rules of evidence are not self-executing. We may not reverse a judgment or verdict based on "the erroneous admission of evidence unless: (a) There appears of record an objection or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion." (Evid. Code, § 353, subd. (a).) This rule exists to give the trial court a concrete legal proposition to pass on, to allow the proponent of the evidence an opportunity to cure the defect, and to prevent abuse. (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

Defendant contends he preserved his evidentiary claims by objecting: "I will object as to what 'we' did and ask that he testify to what he did." We disagree. In response to counsel's objection, Adams testified that he took notes as Alnes examined Sharron—and that he was present to see everything Alnes did. The court repeatedly admonished Adams to testify only about his personal experiences and observations. There is no indication in the record before us that those admonishments were insufficient to satisfy counsel's concern. To the extent the objection was also based on additional legal issues, counsel was required to make those claims explicit.

Instead, once it became clear on cross-examination that Adams was testifying from his past observations—reflected in his written report—rather than from current memory, counsel did not object on personal knowledge, hearsay, or confrontation clause grounds and did not move to strike the testimony. (See *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 313–314,

fn. 3 [claim of error forfeited by failure to object at trial based on confrontation clause]; *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 421 [failure to object to hearsay admitted under Evid. Code, § 1237 forfeits the claim]; Evid. Code, § 702, subd. (a) [objection required to trigger requirement that proponent establish personal knowledge]; *People v. Lewis* (2001) 26 Cal.4th 334 [without an objection or motion to strike, the trial court was not required to determine whether witness had personal knowledge].)[7]

Defendant also suggests that his failure to object on confrontation clause grounds should be excused because his trial predated the Supreme Court's opinion in *People v. Sanchez* (2016) 63 Cal.4th 665. We disagree. *Sanchez* held that expert testimony relating case-specific, out-of-court statements violates the hearsay rule absent independent proof of the statements' content. (*Id*. at p. 686.) If the statements are testimonial, the testimony also violates the confrontation clause. (*Ibid*.) But Adams was not testifying as an expert in this case, and *Sanchez* did not change the law about standard testimonial hearsay.[8]

Accordingly, we conclude defendant has forfeited these claims.

2. Trial counsel did not provide ineffective assistance.

"The Sixth Amendment secures to a defendant facing incarceration the right to counsel at all 'critical stages' of the

---

[7] Nor did counsel object to the photograph of Sharron's injuries admitted as exhibit 5 or to Adams's testimony about that photo.

[8] We note that even if Adams did testify as an expert witness, it would not change our conclusion that the statements were not testimonial under the confrontation clause.

criminal process [citations]." (*Iowa v. Tovar* (2004) 541 U.S. 77, 87; see *People v. Doolin* (2009) 45 Cal.4th 390, 417 ["A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution."].) Defendant contends he was denied constitutionally adequate representation when his attorney: (1) failed to object that Adams lacked the personal knowledge required to testify, (2) failed to object to Adams's testimony on hearsay grounds, (3) failed to object to Adams's testimony on confrontation clause grounds, and (4) failed to ask the court to instruct the jury with CALCRIM No. 3404, concerning inadvertence or mistake. We find no constitutional violation.

2.1. Legal Principles

Under either the federal or state constitution, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Strickland v. Washington* (1984) 466 U.S. 668, 686 (*Strickland*).) To establish ineffective assistance, defendant must satisfy two requirements. (*Id.* at pp. 690–692.)

First, he must show his attorney's conduct was unreasonable "under prevailing professional norms"—that is, that it fell "outside the wide range of professionally competent assistance." (*Strickland*, *supra*, 466 U.S. at pp. 688, 690.) This requires him to establish "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (*Id.* at p. 687.) " '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. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Next, the defendant must demonstrate that the deficient performance was prejudicial—i.e., there is a reasonable probability that but for counsel's failings, the result of the proceeding would have been different. (*Strickland*, *supra*, 466 U.S. at pp. 687 [defendant must show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable"], 694.) "It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008.)

Claims of ineffectiveness must usually be "raised in a petition for writ of habeas corpus [citation], where relevant facts and circumstances not reflected in the record on appeal, such as counsel's reasons for pursuing or not pursuing a particular trial strategy, can be brought to light to inform" the inquiry. (*People v. Snow* (2003) 30 Cal.4th 43, 111.) "There may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court sua sponte." (*Massaro v. United States* (2003) 538 U.S. 500, 508.) But those cases are rare.

Usually, if "the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation. [Citations.]" (*People v. Scott*, *supra*, 15 Cal.4th at p. 1212.) These arguments should instead be raised on collateral review. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

2.2. Counsel had sound tactical reasons not to object on hearsay grounds.

One reason claims of ineffective assistance are typically limited to collateral review is that failure to object is not necessarily evidence of incompetence. Often, "competent counsel may often choose to forgo even a valid objection. '[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' [Citation.] Each of the instances in which defendant now claims his attorney[ ] should have objected comes within this broad range of trial tactics that we may not second-guess. [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197, alteration in *Riel*.)

Hearsay is an out-of-court statement offered for the truth of the matter asserted in the statement. (Evid. Code, § 1200, subd. (a).) "Thus, a hearsay statement is one in which a person makes a factual assertion out of court and the proponent seeks to rely on the statement to prove that assertion is true. Hearsay is generally inadmissible unless it falls under an exception. [Citation.]" (*People v. Sanchez*, *supra*, 63 Cal.4th at p. 674.) In light of his testimony that he did not remember the incident and

that he was answering questions based on his written report, Adams's testimony was plainly based on hearsay. As such, counsel could have properly objected to its admission.[9]

Yet until cross-examination, it was not clear that Adams was testifying from his report rather than from memory. And an objection at that juncture would not necessarily have led to exclusion of the testimony, which appears to have been admissible under the past recollection recorded exception to the hearsay rule. (Evid. Code, § 1237, subd. (a).) Instead, an objection would have required the prosecution to establish the testimony's admissibility under Evidence Code section 1237.[10]

The prosecution could have easily established the first two foundational requirements of the hearsay exception: that the

---

[9] As to defendant's personal knowledge argument, because Adams recorded his observations, the proper inquiry is whether Adams knew the facts to which he testified *when he wrote the report*. (See *People v. Valencia* (2006) 146 Cal.App.4th 92, 103–104 [personal knowledge requirement applies to hearsay statements].) His testimony that he observed and recorded what Alnes was doing was sufficient for the jury to conclude he had such knowledge. For example, Adams testified that "what I could tell … was that she was hit by some sort of blunt object and I wrote that down." (See *People v. Anderson* (2001) 25 Cal.4th 543, 573 ["court may exclude the testimony of a witness for lack of personal knowledge *only if no jury could reasonably find* that he has such knowledge"].) Thus, the fact that Adams no longer remembered what he once knew and had to rely on his contemporaneous account is a hearsay problem—not a personal knowledge problem.

[10] While Adams's testimony about the exhibit 5 photograph was not taken from his report, he was not asked to authenticate the photograph or establish its admissibility. Instead, he was asked if the photograph was "consistent with what [he] recall[ed] from … reviewing [his] report." Though Adams's response was based on hearsay, it also would have been admissible under Evidence Code section 1237.

statement would have been admissible if made by the witness while testifying and that the witness had insufficient present recollection to permit full and accurate testimony. (Evid. Code § 1237, subd. (a).) And it seems likely the prosecutor could have established the remaining requirements: that "the statement was contained in a writing which: (1) Was made at a time when the fact recorded in the writing actually occurred or was fresh in the witness' memory; (2) Was made … by the witness himself … for the purpose of recording the witness' statement at the time it was made; (3) Is offered after the witness testifies that the statement he made was a true statement of such fact; and (4) Is offered after the writing is authenticated as an accurate record of the statement." (*Ibid.*) That is, the prosecution would have had to establish the report's reliability.

It was reasonable for counsel to let Adams's testimony stand without that showing. On direct examination, the court admonished Adams twice to testify only from his personal experience. On cross-examination, Adams admitted that his testimony was based entirely on his report, and that his report, in turn, was largely based on Sharron's statements. Because counsel did not object, the jury was left with the impression that Adams was forgetful and unreliable.

An objection, on the other hand, could have undermined the powerful cross-examination by providing the prosecution with an opportunity to rehabilitate Adams. The required foundation would have highlighted the report's accuracy by explaining the circumstances under which it was prepared. And it would have kept the jury's focus on the medical evidence rather than on the question of whether Sharron was lying. An objection, in short,

would have made the testimony longer and more credible. Accordingly, counsel's performance was not deficient.

2.3. The testimony did not violate the confrontation clause.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to confront the witnesses against them by limiting the prosecution's use of testimonial hearsay. (*Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).) Defendant contends Adams's testimony in this case violated that right, and counsel was ineffective for failing to object. We disagree.

As a preliminary matter, it is unclear what confrontation defendant claims he was denied. Defendant was able to cross-examine both Adams, the author of the medical report, and Sharron, the injured party. And while it is possible, as defendant asserts, that Adams was a mere scrivener for Alnes, making Alnes the relevant declarant for at least some statements, the record is silent on that point. Regardless of the precise nature of the claim, however, we conclude the testimony did not violate the confrontation clause because the hearsay statements were not testimonial.[11]

---

[11] To the extent defendant challenges the photograph in exhibit 5, that evidence was not subject to the confrontation clause because a photograph is not a statement, and therefore, is not hearsay. (Evid. Code, §§ 1200, subd. (a) [hearsay rule], 225 [a statement is an "oral or written verbal expression or … nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression"].)

To the extent defendant argues there can be no constitutionally effective cross-examination when the witness cannot recall the facts related in his own hearsay statement, that contention also lacks merit.

"In *Crawford*, the United States Supreme Court reexamined the application of the Sixth Amendment to the admission of hearsay statements. *Crawford* did not replace a conventional hearsay analysis. Instead, it added a second layer of inquiry when hearsay is offered against a criminal defendant. *Crawford* established … [that] if a hearsay statement is testimonial in nature it cannot be introduced against a criminal defendant unless the declarant is unavailable, and the defendant had a previous opportunity to cross-examine the declarant." (*People v. Blacksher* (2011) 52 Cal.4th 769, 811.)

"[T]estimonial out-of-court statements have two critical components. First, to be testimonial the statement must be made with some degree of formality or solemnity. Second, the statement is testimonial only if its primary purpose pertains in some fashion to a criminal prosecution." (*People v. Dungo* (2012) 55 Cal.4th 608, 619.) The statements in this case do not satisfy either component.

Here, the statements were made by an injured victim to paramedics at the scene. Adams testified that his purpose was to assess Sharron's injuries, stabilize her, and treat her. Though defendant speculates to the contrary, the scant record before us contains no evidence that the paramedics were acting as law-enforcement surrogates. (See *Michigan v. Bryant* (2011) 562 U.S.

(See *People v. Cowan* (2010) 50 Cal.4th 401, 468 [" 'when a hearsay declarant is present at trial and subject to unrestricted cross-examination,' 'the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements' notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement" (alteration in *Cowan*)].)

344, 364–65; *People v. Cage* (2007) 40 Cal.4th 965, 986–988 [testimonial nature of statements to medical professionals based on medical professional's relationship to the police and the nature of the questions asked the victim].) Nor is there evidence in the record before us that the primary purpose of Sharron's statements at the scene and Adams's statements in his report was to create an out-of-court substitute for trial testimony. (See *People v. Blacksher*, *supra*, 52 Cal.4th at pp. 813–815 [addressing factors]; see also *Melendez-Diaz v. Massachusetts*, *supra*, 557 U.S. at p. 312, fn. 2 [medical records created for treatment purposes are not testimonial]; *People v. Rodriguez* (2014) 58 Cal.4th 587, 634–635 [same]; *Cage*, at p. 987 [statements made by a victim to a police officer were testimonial while similar statements given to a physician were not testimonial].)

We therefore conclude trial counsel did not provide ineffective assistance by failing to object on confrontation clause grounds. (See, e.g., *People v. Lewis*, *supra*, 26 Cal.4th at p. 359 [where " 'there was no sound legal basis for objection, counsel's failure to object to the admission of the evidence cannot establish ineffective assistance' "].)

2.4. CALCRIM No. 3404 was incompatible with defendant's asserted defense.

Finally, we conclude counsel's decision not to request an instruction on mistake or inadvertence was a matter of sound trial strategy. Defendant's theory was that Sharron was a liar, a drunk, and the actual perpetrator of the domestic violence in the relationship. Throughout the trial, defense counsel used photographs of Sharron's head wound as evidence to support this view, arguing that the events she described could not have caused her injuries: "How," counsel asked, "does a 1.5 [liter]

mostly full bottle of Carlo and Rossi sangria translate into the injury that we see? The scrape on the back of the head?" "And the answer is it doesn't. It makes no sense. It belies the laws of physics."

Furthermore, no witness's testimony supported such an instruction. Sharron testified that defendant woke her up at 3:00 in the morning and hit her in the back of the head out of the blue. Defendant testified unequivocally that he did not hit Sharron with a wine bottle or anything else. There was simply no evidence of inadvertence or mistake.

3. The $500 domestic violence fund fee is unauthorized.

"In passing sentence, the court has a duty to determine and impose the punishment prescribed by law." (*People v. Cattaneo* (1990) 217 Cal.App.3d 1577, 1589.) An unauthorized sentence may be challenged "for the first time on appeal, and is subject to judicial correction whenever the error comes to the attention of the reviewing court." (*People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.) In response to our request for supplemental briefing, defendant contends, and the People properly concede, that the trial court erred in ordering appellant to pay a $500 domestic violence fee under section 1203.097, subdivision (a)(5)(A).

The $500 domestic violence fee is to be imposed only when a defendant is "granted probation." (§ 1203.097, subd. (a)(5)(A); see *People v. Killion* (2018) 24 Cal.App.5th 337, 341 ["section 1203.097, a rather lengthy statute, deals only with the initial imposition of probation at sentencing for domestic violence offenders"].) Here, because probation was denied and defendant was sentenced to state prison, the fee was unauthorized. We therefore modify the judgment to strike it. (See *People v. Kirvin*

(2014) 231 Cal.App.4th 1507, 1520 [striking the fee where the defendant was sentenced to prison].)

4. The minute order of October 20, 2016, must be corrected.

In a criminal case, the oral pronouncement of sentence constitutes the judgment. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) To the extent a minute order diverges from the sentencing proceedings it purports to memorialize, it is presumed to be the product of clerical error. (*Ibid.*) "Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" may order correction of court documents that do not accurately reflect the oral pronouncement of sentence. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185–188.)

Here, the court properly struck one of defendant's two prior strikes under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. It also properly exercised its discretion to strike the one-year personal-use enhancement (§ 12022, subd. (b)(1)). (*People v. Jones* (2007) 157 Cal.App.4th 1373, 1378–1383 [court has statutory authority to strike enhancements under this subdivision].)

But page 3 of the minute order dated October 20, 2016, states: "The remaining strike prior is stricken for purposes of sentencing in this matter only, pursuant to Penal Code section 12022(b)(1)." While page 2 of the minute order indicates: "The *Romero* motion is argued and granted as to the strike prior in case #A647169 only," it does not otherwise mention the personal-use enhancement. Accordingly, the court is ordered to correct page 3 to reflect that the court struck *both* the strike prior *and* the personal-use enhancement (§ 12022, subd. (b)(1)) for purposes of sentencing only.

DISPOSITION

The judgment is modified to strike the $500 domestic violence fund fee (§ 1203.097, subd. (a)(5)(A)). As modified, the judgment is affirmed.

Upon issuance of the remittitur, the trial court is directed to correct the minute order for October 20, 2016, to reflect deletion of this fee and to correct the clerical error identified in section 4 of this opinion. The clerk of the superior court is directed to prepare an amended abstract of judgment deleting the fee and to send a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

EGERTON, J.