Filed 9/9/16 P. v. Lozano CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHN VINCENT LOZANO, Defendant and Appellant.	B262337 (Los Angeles County Super. Ct. No. BA429161)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert C. Vanderet, Judge. Affirmed in part; reversed in part; remanded.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Deputy Attorney General, and Wyatt E. Bloomfield, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant John Vincent Lozano (defendant) of forcible sodomy and sodomy of an intoxicated person involving his girlfriend Veronica Doe. Veronica had a history of alcohol-induced black-outs, and had in the past sought out defendant for sex while in a highly intoxicated state. The defense at trial was that Veronica's recall of events on the night in question was so sketchy and inconsistent that there was no proof that any anal intercourse had occurred, let alone nonconsensual anal intercourse. We consider whether the trial court erred in excluding the testimony of a defense expert witness on memory reconstruction, or in the alternative whether trial counsel was ineffective in his approach to presenting that expert testimony. We also consider whether trial counsel was ineffective in failing to present a defense based on accident, and whether there is sufficient evidence of force to support the forcible sodomy conviction. In addition, we decide various claims of sentencing error.

I. BACKGROUND

Veronica has known defendant and his sister Vicky Lozano since junior high school or high school. During most of that time, Veronica was friends with Vicky. Vicky estimated she had known Veronica for about 15 years.[1] She described Veronica as one of her best friends. Veronica began her relationship with defendant in March 2013, about eight months before the offenses in the case occurred. The evidence at trial additionally established the following facts.

Veronica acknowledged that she liked to drink to the point of intoxication, and had experienced events she described as black-outs. During black-outs, she remained functional and did not pass out, but she did need help. She usually did not remember what she did during black-outs. She was unable to estimate the total number of times she had had black-outs in her life. During the eight months she dated defendant, she believed

---

[1] Veronica was 35 years old at the time of trial. Vicky Lozano was called by the defense as a witness. We summarize her testimony here in order to present events in chronological order.

that she had black-outs a "handful" of times. Vicky estimated that Veronica had a black-out about once a month.

Veronica's relationship with defendant began when she went out with Vicky and defendant, became drunk, and had a black-out. She believed she and defendant had sex multiple times that night. She did not have an independent memory of it, but defendant later told her about the sex. After that first outing, Veronica and defendant started dating and became a couple. During her relationship with defendant, Veronica went out with him, drank, and had sex with him "a lot of the time." Sometimes, she would not remember the sex the next day. She was sure, however, that it was vaginal sex, not anal sex. Veronica and defendant had discussed anal sex and she told him, "absolutely not."

On November 2, 2013, Veronica went to Vicky's house at about 2:00 p.m. to prepare for a party there that night. Over the course of the day and evening, Veronica consumed various different types of alcohol. She did not remember precisely how much she drank, but by the end of the evening, her intoxication level was "high," one of her "most intoxicated times."

When the party ended around 1:00 a.m., Veronica called defendant to ask for a ride home and he agreed to pick her up. Veronica's account of events after the phone call (or calls) to defendant varied over the course of the investigation and trial in this matter.

Veronica testified that once defendant arrived at Vicky's home, Veronica left the party in her own car and followed defendant's car. At some point, they pulled over near a Jack-in-the-Box restaurant and parked because Veronica could not drive. Defendant got into Vicky's car and drove it. She remembered defendant driving and she remembered him becoming upset over the dress she was wearing because he viewed it as low cut. Veronica, however, did not remember reaching the apartment where defendant lived, or getting out of the car and entering the apartment.

Veronica further testified that she did not remember what happened inside the apartment until pain in her anus brought her to consciousness. As Veronica returned to consciousness, she realized she was laying on her stomach and defendant was on top of her with his penis in her anus. She tried to get out of that position but could not.

Veronica started crying and screaming for defendant to stop. Veronica testified that defendant kept thrusting for what felt like "forever. Like he wouldn't stop." "Eventually" he did stop on his own. On cross-examination, defense counsel asked Veronica, "after you had said stop, [defendant] stopped, correct?" Veronica replied, "Yes." (Defendant interprets this question and answer to mean that he stopped immediately after she said stop, a questionable interpretation that we reject under the applicable standard of review that requires us to view the evidence in the light most favorable to the verdict.)

After defendant stopped, Veronica got up and put on her dress, which was not torn or damaged. Veronica called 911 on her cell phone. She believed that she called the 911 operator once, and could only remember one call. In fact, records show that she called twice. Veronica accordingly gave an incomplete and somewhat inconsistent account of the call(s). For instance, she claimed both that she told defendant she was calling 911 and also that she did not want him to know she was calling 911.

Recordings of the 911 calls, which also captured audio of conversations between Veronica and defendant while the calls were ongoing, were played for the jury. The recordings reflect Veronica was unable or unwilling to provide the 911 operator with the address of defendant's apartment. Once Veronica understood that the 911 operator could not trace her call to determine her location, she hung up. Veronica called back a few minutes later, but when she did not provide any location information to the 911 operator, the operator ended the call.

After the unsuccessful 911 calls, Veronica went back to bed with defendant. She wanted to sober up before trying to leave, and they both fell asleep. Veronica testified that she woke up at 6:00 a.m. and was able to get her belongings and leave without waking defendant up.

Once Veronica was outside defendant's apartment, she again called 911 and reported that she had been raped by her boyfriend. The 911 operator said she would send police. Veronica testified that she then called defendant and asked him to bring her car keys down to her. When he did not do so, she called him again and threatened to call the

police if he did not bring the keys down. Defendant did bring the keys down and placed them on the hood of the car. According to Veronica, defendant "tried to tell [her] it was an accident." She replied that she was going to press charges.

Veronica drove straight to White Memorial Hospital. She testified that the 911 operator told her to do so, but the transcript of the call does not reflect any such instruction. At White Memorial, hospital personnel called police to take her to USC Medical Center.

Los Angeles Police Department (LAPD) Officer Evan Guillermo[2] and his partner responded to White Memorial Hospital. They met with Veronica and transported her to USC Medical Center. Veronica told Officer Guillermo that she and defendant had consensual vaginal intercourse in defendant's bedroom and during this intercourse, defendant started having anal intercourse with her, which was painful and nonconsensual.[3] After defendant stopped, Veronica felt she was too drunk to drive and she and defendant went to sleep. According to Officer Guillermo, Veronica said that defendant was either awake or she woke him the next morning. Veronica asked him for her car keys so she could drive home, but he said that he was going to drive her home. Once outside defendant's apartment, however, Veronica obtained her keys. She then told defendant she was going to call the police.

At USC Medical Center, nurse practitioner Patricia Sandoval conducted a sexual assault examination of Veronica. Sandoval had been hired by USC a few months earlier and had recently trained to be a sexual assault examiner. Sandoval's examination of Veronica was one of the first examinations Sandoval conducted on her own.

---

[2] Officer Guillermo was called by the defense. We summarize his testimony here in order to present events in chronological order.

[3] By the time of trial, Veronica no longer remembered the consensual vaginal sex. She said did not know if she had vaginal sex with defendant. She just assumed that she did because she at times would have sex with defendant when she got drunk and then be unable to remember it the next day.

Sandoval began by asking Veronica about the assault. Veronica stated that she was having consensual vaginal intercourse with defendant when he "flipped her over" and inserted his penis into her anus. She told him to stop but he did not stop until he was finished. Veronica mentioned that she had consumed alcohol, but denied any memory loss or lapse of consciousness. Veronica told Sandoval that defendant had asked her many times for anal sex but she always refused.

Sandoval's visual examination of Veronica did not reveal injuries in any area other than Veronica's anus. There, redness was visible. Sandoval examined Veronica's anal area with a colposcope, which is basically a magnifying instrument. With that device, Sandoval could see lacerations, abrasions, and bruising, and one of the lacerations was deep and bled during the exam. Sandoval believed the injuries were more significant than the photographs shown at trial suggested. Sandoval's examination of Veronica stood out in her memory because of the "amount of injury" that she found. Although Sandoval testified the injuries were consistent with nonconsensual intercourse, she also agreed it was possible that a person could sustain such injuries from consensual intercourse.

A few days after the sexual assault examination, LAPD Detective Steven Juarez, a sex crimes investigator, interviewed Veronica about the events on the night in question. Detective Juarez testified that Veronica told him she called defendant, who was her boyfriend, for over an hour to harass him and get a ride from him. Defendant came to the party and picked her up and took her to his house, but she did not remember the car ride from the party to defendant's house. Veronica told Detective Juarez she had consensual sex with defendant. She also explained she had never had anal sex with defendant because it "was not her thing," and when defendant inserted his penis into her anus it was painful. She was unable to get up at the time while defendant was on top of her. Veronica also told Detective Juarez that she called 911 after defendant finished and was no longer on top of her, but she was unable to leave the apartment at that time because she could not find her keys and was still intoxicated. She also told the detective that

defendant intimidated her by telling her to sit down when she was trying to leave and saying she was drunk and "this" was an accident.

Detective Juarez recorded his interview with Veronica, and a transcript was shown to her at trial by defense counsel in an effort to highlight the inconsistencies between her prior statements and her trial testimony. On re-direct, Veronica stated that she tried to tell Detective Juarez the truth, but "I don't know what I told him at that moment. My emotions were so high and it's the whole transition, so now I'm here a year later. So I'm just trying to do my best."

Defendant presented several witnesses at trial. Sexual assault nurse examiner Cari Caruso testified as an expert witness for the defense. She reviewed Sandoval's report of the sexual assault examination of Veronica and identified some injuries in the anus. She opined that it was not possible to tell whether Veronica's injuries were caused by consensual or nonconsensual sexual conduct, and in her view, it was inappropriate for a nurse to form an opinion on this subject. Defense counsel asked, "Now in reviewing the report, are you able to make an opinion as to whether the injuries were sustained by sexual conduct at all?" Caruso replied, "Well, you can't take it out of the mix, but there are findings that occur that are nonsexual in nature." She added, "[E]verything I see is not going to be related to the complaint. . . . [S]ome or most of the injuries that we find could be related to things other than penetration."

Two additional witnesses testified concerning the circumstances of Veronica's departure from the party, and Vicky and Officer Guillermo provided testimony we have already summarized. On cross-examination by the prosecution, Vicky testified about Veronica's behavior after the incident. Vicky testified that Veronica came to her after the incident with defendant and told her what happened. Vicky did not know what to tell Veronica "because, I don't know, they had been dating for a year." Vicky thought Veronica "was just drunk and it was going to blow over."

The jury convicted defendant of one count of sodomy by use of force in violation of Penal Code section 286, subdivision (c)(2)(A)[4] and one count of sodomy where the victim is prevented from resisting by an intoxicating substance in violation of section 286, subdivision (i). Defendant waived his right to a jury trial on prior conviction allegations the District Attorney had alleged against him. (As we shall later discuss, however, defendant never admitted the allegations.) The trial court sentenced defendant to a total term of 21 years in state prison, consisting of the upper term of eight years for the count 2 sodomy of an intoxicated person conviction, doubled to 16 years pursuant to the Three Strikes law, plus a five-year enhancement term pursuant to section 667, subdivision (a). The court stayed sentence on the count 1 forcible sodomy conviction pursuant to section 654, imposed a $300 restitution fine pursuant to section 1202.4, subdivision (b), imposed a $500 sexual offender fine pursuant to section 290.3, and imposed and stayed a $300 parole restitution fine.

II. DISCUSSION

Defendant contends the trial court abused its discretion in refusing to allow him to present the testimony of an expert witness on memory, or in the alternative, his counsel was ineffective in making the case for admission of the testimony. Based on our review of the entire record, the trial court's ruling was not an abuse of discretion nor is it reasonably probable the testimony would have resulted in a more favorable verdict if it had been admitted. Defense counsel's summary of the expert's testimony was terse, but defendant has not shown ineffective assistance of counsel in his attorney's handling of this issue. Defendant also argues that his counsel was ineffective in failing to present a defense based on accident, and implies that this would have been the better defense to present. The sole evidence of accident is Veronica's statement that defendant said that the anal intercourse was an accident. Defense counsel was not deficient in failing to attempt to present a defense based on such thin evidence, and even if we were to second-

---

[4] Undesignated statutory references that follow are to the Penal Code.

guess counsel's trial strategy, we would have no basis to conclude that accident would have been the better defense, and thus, that the decision to forego presenting such a defense was prejudicial.

Defendant further argues that a single act of penetration is insufficient to support his convictions for both forcible sodomy and sodomy of an intoxicated person and that there was insufficient evidence he used any force to sodomize Veronica. We find both arguments unpersuasive; a single act may support a conviction under both statutes because they have different elements, and there is substantial evidence on which the jury could rely to find the force element of forcible sodomy satisfied. We further hold, as we will describe in more detail, that there were certain errors committed in connection with sentencing that must be addressed by the trial court on remand.

A. Exclusion of Expert Testimony

Defendant contends the trial court abused its discretion in precluding him from presenting the testimony of Dr. Mitchell Eisen, an expert on memory. He further contends the court's ruling denied him due process, a fair trial, and the right to present a defense as provided in the U.S. and California constitutions. (U.S. Const. V., VI, & XIV Amends.; Cal. Const., art. I., §§ 7 & 15.)

1. Proceedings in the trial court

After four of defendant's five witnesses testified, the court told the jury that the case had "gone much faster than any of the three of us thought." The court dismissed the jury for several days until the last defense witness, Cari Caruso, was expected to testify. The court arranged to meet with counsel the day after dismissing the jury to go over jury instructions and to discuss any issues the attorneys might want to raise.

The next day, after the jury instruction discussion was complete, the following discussion took place:

[Defense counsel]: "And just one other issue. I did want to—just for record purposes, I did want to be heard regarding the expert testimony of Mitchell Eisen.

[Trial court]: "Okay. Well, give me the proffer that you think Mitchell Eisen will testify to."

[Defense counsel]: "Certainly. Dr. Eisen would testify to the building of one's memory based on things that might have occurred even though they really have no true memory or experience of it. And then—and in this case, Veronica would be pulling her memory in forming something that she thinks is her memory from instances that may have happened in the past, but not necessarily in this situation. She's trying to piece together a memory that—"

[Trial court]: "How do you reconcile that with the physical injuries?"

[Defense counsel]: "I don't think it goes to the—to the issue of—of the injuries themselves. I think it goes to the issue of consent and what she remembers that entire night. [¶] Her testimony went completely 180 where she had informed at least three different individuals that the sex was consensual, and now when she testified most recently, she said, I don't even remember if I had consensual sex. So her memory of what's going on and what she's testified to I think is called into question."

[Trial court]: "Well, I'm just very skeptical about the scientific validity of what Dr. Eisen is purporting to testify to."

[Defense counsel]: "I understand that, and I appreciate that, Your Honor. I just want to make a record, and with that I would submit."

[Trial court]: "Okay. Well, I'm not going to allow that testimony. I think it's far too speculative and not grounded."

Later, at the hearing on defendant's motion for a new trial, the court explained what it meant by "speculative." The court stated, "[A]s I indicated when I declined to permit [Dr. Eisen's] testimony, testimony by a psychiatrist about a patient's memory who he's never examined is far too speculative. I don't think it would advance the jury's

understanding to have—to hear generalized statements about people making up memories when they're intoxicated."[5]

2. Applicable law: expert testimony

We review a trial court's ruling to admit or exclude expert testimony for an abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1222.)

Expert testimony must be related to "a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "[A]lthough ordinarily courts should not admit expert opinion testimony on topics so common that persons of '"ordinary education could reach a conclusion as intelligently as the witness"' (*People v. McDonald* (1984) 37 Cal.3d 351, 367), experts may testify even when jurors are not 'wholly ignorant' about the subject of the testimony. (*People v. McDonald, supra*, 37 Cal.3d at p. 367.) 'If that [total ignorance] were the test, little expert opinion testimony would ever be heard.' (*Ibid*.) [¶] Rather, the pertinent question is whether, even if jurors have some knowledge of the subject matter, expert opinion testimony would assist the jury. (Evid. Code, § 801, subd. (a), *People v. McDonald, supra*, 37 Cal.3d at p. 367.)" (*People v. Prince*, *supra*, 40 Cal.4th at p. 1222.)

"Of course, the party offering the [expert testimony] has the burden of proving its admissibility." (*People v. Ashmus* (1991) 54 Cal.3d 932, 970 overruled on other grounds by *People v. Yeoman* (2003) 31 Cal.4th 93, 117.) "The weight of his burden is by a preponderance of the evidence." (*People v. Ashmus, supra,* at p. 970.)

There is no bright line rule about whether memory and the effects of alcohol are appropriate topics for expert testimony. Expert testimony "on the obvious fact that . . . the passage of time frequently [affects] one's memory" does not assist the jury. (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 555.) Expert testimony about specific aspects

---

[5] The reference to intoxication is a reference to defendant's expanded explanation of the substance of Dr. Eisen's testimony, which defendant provided in his new trial motion. Defendant has not claimed the trial court erred in denying that motion.

of memory can assist the jury, however. (See, e.g. *People v. McDonald*, *supra*, 37 Cal.3d 351; *People v. Earle* (2009) 172 Cal.App.4th 372, 405 [defense expert testified that "reported memories may not only be rendered inaccurate by deficiencies in the witness's original perception, but may in effect be corrupted by information later encountered and incorporated into memory"]; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1235 [defense expert Mitchell Eisen, the same expert proffered here, testified "about the fallibility of memory, and how people remember major features of important events and use inferences, which are sometimes inaccurate, to fill in the gaps"].)

Similarly, it is considered common knowledge that the "ingestion of drugs affects perception." (*People v. Fauber* (1992) 2 Cal.4th 792, 839.) Expert testimony to that effect would be unlikely to help the jury. On the other hand, "[expert] testimony regarding what [an alcoholic] blackout is, and what an individual is aware of during an event that he or she cannot later remember, was beyond the common experience of the jury and assisted it in determining defendant's culpability for his actions." (*People v. Edwards* (2013) 57 Cal.4th 658, 756-757.) As our Supreme Court has observed, "[t]he effect of drugs, while certainly a proper subject of expert testimony, has become a subject of common knowledge among laypersons." (*People v. Yeoman* (2003) 31 Cal.4th 93, 162.)

3. Analysis

Here, trial counsel's summary of Dr. Eisen's proposed expert testimony on memory did not sufficiently demonstrate that the testimony would be useful to the jury or even show how Dr. Eisen's testimony would relate to Veronica's testimony. Counsel indicated that Dr. Eisen's testimony would involve a situation where a witness testifies about "something that she thinks is her memory from instances that may have happened in the past, but not necessarily in this situation." The trial court apparently understood this to refer to the anal intercourse, questioning how a memory of a past event would be consistent with fresh injuries. Counsel then shifted gears and stated that the expert testimony "goes to the issue of consent and what she remembers that entire night."

Dr. Eisen clearly could not offer expert testimony about whether or not Veronica consented to any intercourse that night. Dr. Eisen might or might not have been able to offer expert testimony useful to the jury on Veronica's memory on the night of the sodomy (see, e.g., *People v. Edwards*, *supra*, 57 Cal.4th at pp. 756-757 [expert testimony on alcoholic blackouts and memory]), but defense counsel did not proffer any details of Dr. Eisen's proposed testimony about memory. After trial, the court explained that it excluded Dr. Eisen's testimony in part because "I don't think it would advance the jury's understanding to have—to hear generalized statements about people making up memories when they're intoxicated."

Defendant, however, points to various comments made by the trial court at the time of its ruling and contends those comments betray an abuse of discretion. He highlights in particular the trial court's comment that it was "skeptical about the scientific validity" of the testimony, as well as the court's statement the testimony was "far too speculative and not grounded." Defendant contends the comments are best understood as references to the rule of *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), and that *Kelly* is not applicable to expert medical testimony, including psychiatric testimony.

Defendant is correct that as a general rule, the *Kelly* rule does not apply to expert medical or psychiatric opinion. (*People v. McDonald*, *supra*, 37 Cal.3d at pp. 373-374 ["We have never applied the *Kelly-Frye* rule to expert medical testimony, even when the witness is a psychiatrist and the subject matter is as esoteric as the reconstitution of a past state of mind"]; see *People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1157; *People v. Rowland* (1992) 4 Cal.4th 238, 266.)

It is not unreasonable for defendant to view the court's initial comments to refer to the *Kelly* rule. (See *People v. McDonald*, *supra*, 37 Cal.3d at p. 372 [trial court's "choice of words" made it clear that trial court "was implicitly invoking the *Kelly-Frye* rule" when the trial court expressed the opinion that expert testimony on eyewitness identification was "not yet 'scientific enough' to be admissible"].) As we have explained, however, the trial court ultimately explained the basis of its ruling more clearly. That basis, at least in part, was that the trial court did not "think it would advance the jury's

understanding to have—to hear generalized statements about people making up memories when they're intoxicated." We accept the court's clarification of the basis of its ruling, and so understood, we do not find the court excluded the testimony on *Kelly* grounds.

At best, defense counsel described Dr. Eisen's proposed testimony in very broad terms. We find no abuse of discretion in the trial court's conclusion that the proffer constituted "generalized statements about people making up memories," and that such testimony would not assist the trier of fact.

4. Lack of prejudice

The exclusion of Dr. Eisen's testimony would not warrant reversal even if we conclude the court's comments did evince an abuse of discretion. According to defense counsel's offer of proof, Dr. Eisen would have testified that an individual may "build[ ]" a "memory based on things that might have occurred even though they really have no true memory or experience of it" and/or from "instances that may have happened in the past, but not necessarily in this situation." As described in defendant's motion for a new trial, Dr. Eisen would have testified that "even if not done maliciously, a person suffering from an alcohol-induced 'blackout' will attempt to piece together memories based on past experiences and assumptions."

In this case, however, the jury heard a great deal of concrete evidence about a specific individual's actual attempts to piece together memories and the inaccurate results of those attempts. Veronica herself acknowledged that she often had no direct memory of her behavior during black-outs, often learned about her behavior during black-outs from others, and then assumed that she behaved similarly in similar situations. Thus, she assumed she usually had sex with defendant when she was intoxicated, based on defendant's comments to her when she was sober. As she explained, this assumption almost certainly was the reason she told the nurse examiner and law enforcement officials that she had consensual vaginal sex with defendant the night of the sodomy.

Evidence introduced at trial demonstrated that Veronica's pieced together memories of events during black-outs was internally inconsistent in several respects.

Key in this regard were the recordings and transcripts of the three 911 calls Veronica made. Veronica had some memories of her conversation with the 911 operator on her cell phone while inside defendant's apartment, and firmly believed that this conversation took place in a single phone call. The 911 recordings show that there were two conversations. Similarly, Veronica was convinced that when she called 911 from the street outside defendant's apartment, the 911 operator told her to go the hospital. The recording of the call shows that the 911 operator did not tell Veronica to go to a hospital; instead, the operator told Veronica that she would send police to Veronica's location.

Given the nearly uncontested evidence that Veronica lacked a memory of certain events, and pieced together memories of other events in ways that could not be reconciled with certain other of her statements or evidence presented at trial, there is no reasonable probability that defendant would have obtained a more favorable outcome if Dr. Eisen had testified as proffered by defense counsel. (*People v. Watson* (1956) 46 Cal.2d 818.) His testimony may have given the jurors some further marginal reason to believe Veronica may not accurately recall aspects of what transpired, but given the manner in which the reliability of her memory had been forcefully challenged by the defense—and the common instructions the jury received regarding factors it should consider in deciding whether to believe a witness—we are convinced there is no reasonable probability the jury would have come to a different conclusion on this record.

5. Federal constitutional claim

Respondent contends defendant has forfeited his claim that the exclusion of Dr. Eisen's testimony violated his federal constitutional rights by failing to raise that claim in the trial court. Respondent is correct. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1044.) Because defendant contends that trial counsel was ineffective for failing to object, "we will address it 'on the merits to the extent necessary to decide the ineffective assistance claim.' (*People v. Osband, supra,* 13 Cal.4th at p. 693.)" (*People v. Ochoa* (1998) 19 Cal.4th 353, 431.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Ibid*.)

"'As a general matter, the "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense." [Citations.]' (*People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103.)" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1203.) When "the trial court merely reject[s] some evidence concerning a defense, and [does] not preclude defendant from presenting a defense, any error is one of state law." (*Ibid.*)

Here, as we have discussed, defendant was able to demonstrate Veronica had large gaps in her memory. More importantly, he was able to demonstrate that she had false or incorrect memories of events. Given the abundant evidence of Veronica's memory difficulties, defendant has not shown that the trial court prevented him from presenting a defense and violated his federal constitutional rights. Accordingly, he has not shown that a different result would have been reasonably probable if his counsel had objected on constitutional grounds, and so his claim of ineffective assistance of counsel fails.

B. Ineffective Assistance of Counsel – Expert Testimony

Defendant additionally contends that if his counsel's performance led, or contributed to the exclusion of Dr. Eisen's testimony, then defendant was denied his federal constitutional right to effective assistance of counsel. Defendant posits that a different result would have been reasonably probable if counsel had raised the issue sooner and requested an evidentiary hearing.[6]

---

[6] Defendant argues that if his claim is found forfeited due to his counsel's failure to make a timely and specific objection on the record to the trial court's ruling, that failure constituted ineffective assistance of counsel. We have already addressed this point.

1. Applicable law

"In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 217.)" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) We presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. Defendant thus bears the burden of establishing constitutionally inadequate assistance of counsel." (*Ibid*.)

If the appellate record "sheds no light on why counsel acted or failed to act . . . " as defendant claims his attorney should have in seeking to admit Dr. Eisen's testimony, a reviewing court on direct appeal must reject an ineffective assistance of counsel claim "unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation." (*People v. Carter*, *supra*, 36 Cal.4th at p. 1189, citation omitted [rejecting claim on direct appeal that counsel should have presented defense witnesses].)

2. Analysis

Dr. Eisen was identified twice as a possible expert witness during voir dire, but he was not mentioned again until the proffer which took place during the defense case. That alone precludes reversal on defendant's ineffective assistance claim on direct appeal; the timing of the proffer could have been set by the trial court to occur after the court heard the prosecution's evidence. (See *People v. Nguyen* (2015) 61 Cal.4th 1015, 1051 [on direct appeal, where reasons for decisions by counsel do not appear on the record, courts will not find ineffective assistance unless there could be no conceivable reason for counsel's acts or omissions].) Even if we were to assume that the timing of the proffer was defense counsel's choice and that he was deficient in selecting such a late time,

however, there is nothing in the record to show that an earlier proffer would have resulted in a different outcome. The trial court's comments during the proffer, for example, do not suggest that the timing of the proffer was a factor in the court's ruling. It is defendant's burden to make such a showing, and without it, his claim fails.

Similarly, there are circumstances that could satisfactorily explain why no evidentiary hearing on Dr. Eisen's proposed testimony occurred; indeed, given counsel's statement before the proffer that he wanted to be heard "just for record purposes," it is even possible that counsel did express some desire to present the court with additional information during an unrecorded sidebar or other exchange with the court. In any event, if we assume that counsel failed to seek a hearing, was constitutionally deficient in failing to do so, and such a hearing would have resulted in a decision to permit Dr. Eisen to testify, there is nothing in the record to show that testimony would have changed the outcome. It is defendant's burden to make such a showing, and without it, his claim fails. (*People v. Carter, supra*, 36 Cal.4th at p. 1189; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.)

C. Ineffective Assistance of Counsel - Accident Defense

Defendant contends he was denied his Sixth Amendment right to effective counsel because his trial counsel did not argue accident as a defense or request an instruction on accident, such as CALCRIM No. 3404.

We review defendant's claim in accordance with the authorities set forth in Part II.B, *ante*, to determine "whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability." (*People v. Carter, supra,* 36 Cal.4th at p. 1189.) "'[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' (*People v. Scott* (1997) 15 Cal.4th 1188, 1212). 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)" (*People v. Weaver* (2001) 26 Cal.4th 876, 926.)

An accident defense is a claim that the defendant lacked the intent required for the crime. (See *People v. Anderson* (2011) 51 Cal.4th 989, 997.) CALCRIM No. 3404, the instruction referenced by defendant, provides in pertinent part that "The defendant is not guilty of [the crime charged] if (he/she) acted . . . . without the intent required for that crime, but instead acted accidentally."

Defendant is correct that forcible sodomy is a general intent crime (*People v. Warner* (2006) 39 Cal.4th 548, 557), and so the only intent required is the intent to engage in the proscribed sexual act itself. (See *People v. Davis* (1995) 10 Cal.4th 463, 518, fn. 15.) That does not mean that the required intent is simply to have sex. It means the intent to have sex under the forbidden circumstances. Section 286, subdivision (c)(2)(A) proscribes anal intercourse against the will of the victim by force. Thus, this offense requires an intent to commit the sodomy against the will of the victim. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1130, overruled in part on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151 [discussing forcible rape].) Section 286, subdivision (i) "proscribes sexual intercourse with a person who is not capable of giving legal consent because of intoxication." (*People v. Giardino* (2000) 82 Cal.App.4th 454, 462 [discussing section 261, subdivision (a)(3) which uses language identical to the pertinent language of section 286, subdivision (i)].) This offense requires an intent to commit sodomy on a person who is not capable of consent.

Because more than simply an intent to penetrate the victim's anus is required for both sodomy offenses, there are factual scenarios which could, in theory, support an accident defense to these offenses. But here, there is virtually no evidence which would have supported an accident instruction. The only evidence that defendant acted accidentally was Veronica's testimony recounting defendant's claim, made under self-serving circumstances, that the sodomy was an accident. Nothing in Veronica's testimony indicates that defendant elaborated on how or why he believed it was an "accident," and defendant's bare use of the word accident to the victim is not sufficient to support an instruction on the defense of accident. Absent some evidence from defendant

concerning the facts which supported his claim that he lacked the required intent, any request by counsel for an accident instruction would have lacked merit.

To give just a brief summary of possible "accident" scenarios, defendant could have meant that he had no intent to penetrate Veronica at all. Defendant suggests on appeal that his penis might have "slipped" into Veronica's anus while they were having vaginal intercourse. There was, however, no evidence before the jury that this was what defendant meant.[7] It is also possible that when defendant said it was an accident, he meant that he mistakenly believed that Veronica consented to the anal intercourse, and so he lacked the intent to have anal intercourse against the will of the victim, as required for forcible sodomy. At a minimum, this form of an accident defense this would require some evidence explaining why defendant believed that Veronica consented. There is no such evidence.[8] We cannot find deficient performance in trial counsel's failure to seek an

---

[7] Defendant attempts to side-step the absence of proof by contending broadly that Veronica's "very minor injuries" were "more consistent with a brief accidental penetration, than prolonged forcible penetration" thereby implying that the jury could infer accident from the nature of Veronica's injuries. There is no logical reason defendant's intent in making the penetration would be reflected in Veronica's injuries. Whether the penetration was accidental or intentional, Veronica would not have been expecting it. Even assuming a brief episode of penetration (which was contrary to Veronica's testimony) would result in fewer injuries than a longer episode, the crime of sodomy does not require a long duration. "Any sexual penetration, however slight, is sufficient to complete the crime of sodomy." (§ 286, subd. (a).)

[8] There are hints of this "consent" argument in defendant's claim that he used little or no force to accomplish the penetration and that Veronica did not flee immediately afterwards. Defendant's argument misunderstands the force required for sodomy. There is no requirement that the force used by an attacker "be greater than or different from the force used to engage in the act of sodomy" (*People v. Hale* (2012) 204 Cal.App.4th 961, 979) or that the force used "overcame [the victim's] physical strength or ability to resist" (*id*. at p. 977) or even that the force used "physically facilitated sexual penetration" (*People v. Griffin* (2004) 33 Cal.4th 1015, 1027 [discussing rape]). The People need only prove "that the act of sodomy was accomplished by enough physical force to overcome the victim's will." (*People v. Hale*, *supra*, at p. 979.) Thus, defendant's claim that Veronica lacked serious injuries does not compel the conclusion that defendant did not use force to accomplish the sodomy against her will.

instruction for which there was insufficient evidence. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 434 ["Counsel cannot have been ineffective for failing to seek an instruction for which there was no supporting evidence: the court should properly have denied such a request"]; see *People v. McPeters* (1992) 2 Cal.4th 1148, 1173 [defense counsel is not required to advance unmeritorious arguments on defendant's behalf].)

In our judgment, defense counsel made a reasonable tactical choice to focus the defense on the unreliability of Veronica's memory. Any argument urging the jury to believe that Veronica was capable of accurately recalling one portion of the encounter, when defendant said it was an accident, would very likely have undermined the main defense, and for very little gain, given the lack of detailed evidence to support an accident defense. Counsel could reasonably have made a tactical decision not to argue that the jury should believe Veronica on this one point only. This would have been sound trial strategy, not deficient performance.

Defendant further implies that his counsel might have been ineffective in failing to investigate whether defendant had a viable accident defense, contending at one point "counsel has a duty to become thoroughly familiar with the factual and legal circumstances of the case prior to trial." He suggests that this would have been a better defense than the one actually offered. We see nothing that would suggest a constitutionally deficient investigation. In addition, an attorney's assessment of which defenses to pursue is a quintessentially tactical judgment we are not in a position to second guess. Moreover, an accident defense would have required testimony from defendant, and defense counsel could have made a reasonable tactical decision to recommend to defendant that he not testify. Alternatively, defense counsel might in fact have suggested that defendant testify, and defendant decided against it.

D. Double Convictions

Defendant contends there is evidence of only one act of anal penetration (followed by "thrusting") and so insufficient evidence to support his convictions for two counts of sodomy.[9] He asserts a conviction which rests on insufficient evidence violates his right to due process under the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution.

It is well settled that "the same act can support multiple charges and multiple convictions. 'Unless one offense is necessarily included in the other [citation], multiple convictions can be based upon a single criminal act or an indivisible course of criminal conduct (§ 954).' (*People v. Benavides* (2005) 35 Cal.4th 69, 97.)"[10] (*People v. Gonzalez* (2014) 60 Cal.4th 533, 537.) Here, as long as sodomy by force and sodomy of an intoxicated person are different offenses, convictions for both offenses based on one act would be proper. We hold the offenses are separate.

As our Supreme Court has explained, all crimes in California are statutory. (*People v. Gonzalez, supra*, 60 Cal.4th at p. 537.) Thus, whether subdivisions of the Penal code "define different offenses or merely describe different ways of committing the same offense properly turns on the Legislature's intent in enacting these provisions, and if the Legislature meant to define only one offense, we may not turn it into two." (*Ibid*.) As has long been the rule, we begin our determination of legislative intent by examining the statute's words, giving them a plain and commonsense meaning. (*Ibid*.) We consider

---

[9] The prosecutor's theory at trial was that defendant committed sodomy of an intoxicated person when he initially penetrated Veronica and then sodomy by force when he continued "thrusting" after Veronica told him to stop. Thus, the prosecutor did not present the case in a manner that would suggest both charges were based on a single act.

[10] Section 954 provides in pertinent part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts . . . . The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged . . . ."

the words in context, however, keeping in mind the nature and purpose of the statute. (*Ibid*.) We harmonize the various parts of a statute by considering the statutory framework as a whole. (*Ibid*.)

Section 286, subdivision (c)(2)(A) prohibits sodomy "when the act is accomplished against the victim's will, by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Section 286, subdivision (i) prohibits sodomy "where the victim is prevented from resisting by an intoxicating or anesthetic substance, or any controlled substance, and this condition was known or should have been known, by the accused."

The two offenses have different elements. Sodomy may be committed by the use of force against a person who is not intoxicated (§ 286, subd. (c)(2)(A)), and may also be committed without the use of force against a person who is intoxicated (§ 286, subd. (i)). Further, sodomy by force must be against the will of the victim, that is, the victim must have refused consent, while sodomy of an intoxicated person must be against a victim who is incapable of legal consent. (See *People v. Giardino, supra,* 82 Cal.App.4th at p. 462.) Thus, neither offense is included in the other, a fact which indicates there are two offenses, not one. (Cf. *Blockburger v. United States* (1932) 284 U.S. 299, 304 ["[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not"].)

Since sodomy by force (§ 286, subd. (c)(2)(A)) and sodomy of an intoxicated person (§ 286, subd. (i)) are two different offenses, defendant could properly be convicted of both based on the same act. (*People v. Gonzalez, supra*, 60 Cal.4th at p. 539.) Since the same act may properly be used to support both convictions, defendant's claim that his federal constitutional right to due process was violated also fails. That claim is premised on defendant's belief that the act could only support one conviction, leaving the other unsupported by any evidence.

E. Sufficiency of The Evidence – Force

Defendant contends that even if there is sufficient evidence of more than one penetration, there is insufficient evidence of force to support his conviction for forcible sodomy in violation of section 286, subdivision (c)(2)(A). He further contends such a conviction violates his federal constitutional rights.[11] He specifically contends that even if the evidence shows that he did not stop immediately after Veronica told him to, he did not use force to accomplish the "additional thrusts."

"In addressing a challenge to the sufficiency of the evidence supporting a conviction, the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. (*People v. Reilly* (1970) 3 Cal.3d 421, 425; accord, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1237.) The same standard applies when the conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable

---

[11] Defendant's heading for the pertinent section in his brief states that he was denied due process and a fair trial because the evidence was insufficient. In his introduction, he argued that the conviction based on insufficient evidence violates the double jeopardy provisions of the U.S. Constitution. Defendant has cited no case law holding that a conviction based on insufficient evidence violates double jeopardy provisions, and he makes no argument in support of this claim. Accordingly, we do not consider the double jeopardy claim. Since we hold that "a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt, the due process clause of the United States Constitution is satisfied [citation] as is the due process clause of article I, section 15 of the California Constitution." (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

doubt. (*Ibid*.) '"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"' (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

As we have already explained, to obtain a conviction under Section 286, subdivision (c)(2)(A), the People need only prove "that the act of sodomy was accomplished by enough physical force to overcome the victim's will." (*People v. Hale, supra,* 204 Cal.App.4th at p. 979.) This is in part because there is no requirement that the victim resist. (*Id.* at p. 1024.)

Here, Veronica was on her stomach with her arms underneath her when she felt defendant, at least partly on top of her, thrusting his penis into her anus. Defendant's weight was more than double Veronica's weight. She testified she tried but could not get out of that position. Veronica started crying and screaming for defendant to stop. Veronica testified that defendant did not stop right away, and that it felt like it lasted "forever." This is sufficient evidence to show that defendant used force to overcome Veronica's will and sodomize her. (See *People v. Hale, supra,* 204 Cal.App.4th at p. 979 [evidence that defendant was much larger than victim and did not stop sodomizing victim even though she said she was being hurt is sufficient to show that the sodomy was accomplished by force].)

Defendant contends that he was not holding Veronica down, but "just had his hands on her body, as in normal contact." Veronica's testimony indicated that defendant's body weight was holding her down, at least in part, which prevented her from getting out of her position on her stomach underneath defendant. "The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction." (*People v. Griffin,*

supra, 33 Cal.4th at p. 1027.) That is equally the case with defendant's sodomy offense here.

F. Cumulative Effect Of Error

Defendant contends that even if the trial court's errors are not prejudicial when considered individually, the cumulative effect of the five preceding errors is prejudicial. We have found no errors and so defendant's claim of cumulative error necessarily fails.

G. Prior Conviction Allegation

Defendant maintains he did not admit his prior conviction and the trial court did not hold a court trial on the truth of the prior conviction allegation. Respondent concedes the trial court failed to adjudicate or obtain an admission of defendant's prior conviction, and that a remand to the trial court is therefore appropriate. Respondent's concession is well taken.

Defendant did waive his right to a jury trial, but he did not expressly admit his prior conviction, or even exhibit an intention to admit it.[12] (Compare *People v. Moore* (1992) 8 Cal.App.4th 411, 415, 422 [where defendant agreed he was "going to admit" prior conviction, this expression of intent was sufficient to constitute an admission].) We therefore remand for further proceedings in connection with the unresolved prior conviction allegation.

---

[12] Defendant's sentencing memorandum does assume that the prior conviction has been established. That memorandum, however, was filed almost two months after the relevant hearing. At most it represents defense counsel's fallible memory of what occurred during the proceedings. It is not itself an admission and cannot serve as a substitute for a reporter's transcript of an admission.

H. Denial of Romero[13] *Motion*

Defendant contends the trial court abused its discretion in denying his motion to strike his prior 2004 conviction for a violation of section 245, subdivision (c), which was alleged to be a "strike" under the Three Strikes law. Respondent contends the trial court did not abuse its discretion, but suggests the issue may be moot if we remand the matter for adjudication of defendant's prior strike conviction. We are remanding the matter for that purpose, and we agree that the issue is therefore moot. If defendant's prior conviction is found true, defendant will have an opportunity to make a *Romero* motion before resentencing.

I. Section 290.3 Fine

Defendant contends the trial court erred in imposing a $500 fine pursuant to section 290.3. He maintains the proper amount of the fine is $300. Defendant also contends that even with this reduced amount, the trial court was required to hold a hearing to determine if defendant had the ability to pay the fine and associated penalty assessments of $930.

Section 290.3, subdivision (a) provides that "[e]very person who is convicted of any offense specified in subdivision (c) of Section 290 shall . . . be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." Sodomy in violation of section 286 is a listed offense. (§ 290, subd. (c).) Each qualifying conviction in a single case constitutes a separate conviction for purposes of section 290.3. (See *People v. O'Neal* (2004) 122 Cal.App.4th 817, 822.)

Fines that are punitive in nature may not be imposed on a sentence which is stayed pursuant to section 654. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 865.) As the

---

[13] *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

plain language of section 290.3 shows, fines imposed under that section are punitive. (See *People v. Valenzuela* (2009) 172 Cal.App.4th 1246, 1248.)

Defendant's count 1 conviction was stayed pursuant to section 654. Thus, this conviction cannot be used as a second conviction for purposes of section 290.3. Since defendant has only one conviction for purposes of section 290.3, the applicable fine is $300. Although not ordered by the trial court in this case, the imposition of a $300 fine under section 290.3 triggers additional assessments. (See *People v. Johnson* (2015) 234 Cal.App.4th 1432, 1457-1458 [total amount of additional assessments is $930].) Thus, on remand, the trial court should determine whether defendant has the ability to pay the fine and assessments, and if so, impose them and ensure the abstract of judgment is amended accordingly.

J. Sex Offender Registration

The trial court ordered defendant to register as a sex offender for life pursuant to section 290, subdivision (c). This directive, however, is not reflected in the abstract of judgment and respondent requests that we order the abstract corrected to reflect the requirement. Since we are remanding this matter to the trial for resentencing, the trial court should ensure this correction is made.

DISPOSITION

Defendant's sentence is vacated and this matter is remanded for a determination of the truth of the prior conviction allegation and for imposition of the section 290.3 fine and related assessments, unless defendant lacks the ability to pay. The clerk of the superior court is instructed to prepare a corrected abstract of judgment after defendant's resentencing and to deliver a copy to the Department of Corrections and Rehabilitation. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

TURNER, P.J.

RAPHAEL, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.