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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RICARDO CLARKE, Defendant and Appellant.	B244775 (Los Angeles County Super. Ct. No. MA035466)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kelly Chung, Judge. Reversed.

Fay Arfa, a Law Corporation and Fay Arfa for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Daniel Ricardo Clarke on charges of rape, burglary, and related crimes. We granted Clarke's petition for writ of habeas corpus and vacated the judgment. (*People v. Clarke* (June 30, 2011, B203220, B228831) [nonpub. opn.].) The People elected to retry him, and a jury again convicted him on all charges. Clarke moved for a new trial on the basis of newly discovered evidence, among other grounds. The newly discovered evidence was a report from the county coroner, commissioned by the prosecution but not introduced at trial, which strongly supported the defense. The superior court denied the motion, and Clarke appeals. We reverse, because Clarke's new trial motion should have been granted.

BACKGROUND

I. Procedural History

The amended information charged Clarke with one count of forcible rape in violation of subdivision (a)(2) of Penal Code section 261[1] (count 1), one count of attempted forcible oral copulation in violation of section 664 and subdivision (c)(2) of section 288a (count 2), one count of first degree burglary in violation of section 459 (count 3), one count of criminal threats in violation of section 422 (count 4), one count of false imprisonment by violence in violation of section 236 (count 5), one count of inflicting corporal injury upon a spouse, cohabitant, or child's parent in violation of subdivision (a) of section 273.5 (count 6), and one count of dissuading a witness by force or threat in violation of subdivision (c)(1) of section 136.1 (count 7). It further alleged as to counts 1 and 2 that, within the meaning of section 667.61, subdivisions (a), (b), and (e), Clarke committed the offense during the commission of a burglary of an inhabited dwelling and personally used a deadly or dangerous weapon. It additionally alleged as to counts 1 and 2 that Clarke used a firearm and a deadly weapon (a knife) within the meaning of section 12022.3, subdivision (a), and as to counts 3 through 7

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[1] Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

that Clarke used a deadly and dangerous weapon (a knife) within the meaning of section 12022, subdivision (b)(1).

Clarke pleaded not guilty and denied the allegations. A jury found Clarke guilty on all counts and found all but one of the allegations true. The court sentenced Clarke to 32 years to life in prison.

Clarke timely appealed and also filed a petition for writ of habeas corpus, contending that his trial counsel rendered ineffective assistance by failing to present medical expert testimony concerning the victim's wounds. We ordered the People to show cause in the superior court why relief should not be granted on that claim, and we directed the superior court to conduct an evidentiary hearing. The court conducted the hearing and denied Clarke's petition.

Clarke then filed a new habeas petition in this court. We issued an order to show cause, consolidated the writ proceeding with Clarke's then-pending appeal, and ultimately granted the petition. (See *People v. Clarke* (June 30, 2011, B203220, B228831) [nonpub. opn.].) We agreed with Clarke that his trial counsel had rendered ineffective assistance by failing to investigate the physical evidence and consult with medical experts who could have testified at trial.

On remand, the People elected to retry Clarke. At retrial, the defense presented testimony from the same medical experts who had testified at the habeas hearing. Their testimony tended to show that the victim's wounds were not inflicted during a struggle (contrary to the victim's testimony at both trials), were not inflicted when the victim said they were (because some of the wounds were too old), and were self-inflicted. The prosecution initially indicated that it intended to call its own medical expert in rebuttal but ultimately declined to present any medical expert evidence. The jury again convicted Clarke on all counts and found all allegations true except the allegation that he committed count 1 during the commission of a burglary of an inhabited dwelling within the meaning of section 667.61, subdivisions (a) and (d).

After trial, defense counsel obtained the county coroner's report concerning the victim's wounds. The report had been prepared by order of the court at the prosecution's

request, but the report supported the defense. Clarke moved for a new trial and to dismiss the case on several grounds, including that the coroner's report constituted newly discovered evidence.

The trial court denied Clarke's motion. The court again sentenced him to 32 years to life in prison. Clarke timely appealed.

II. Prosecution Evidence at Trial

The charges arise from two alleged incidents in 2005 involving the same victim, T.G. Clarke and T.G. began dating in 2000. They had two children together: K., born in 2003, and Z., born in 2005 after the events in this case. T.G. had two other sons from former relationships. During their relationship, T.G. and Clarke each maintained separate residences. Clarke lived in an apartment in Los Angeles. In 2004, T.G. moved from her apartment in Los Angeles to a house in Palmdale, but Clarke did not have a key to her house.

A. Incident of February 13, 2005 (Uncharged)

In February 2005, T.G. and Clarke had broken up, but she was pregnant with his child and had told him so. On February 13, 2005, at approximately 11:00 p.m. or midnight, Clarke arrived at her house in Palmdale. T.G. was in bed when she heard knocking on the door. She ignored it, but Clarke began "banging on all the windows" and said "open the door or I am going to break all the fucking windows out." T.G. let him in, and Clarke said he wanted to see his son. T.G. said that it was too late because "the baby is asleep," and she told Clarke to leave. Clarke refused, got undressed, and lay down on the couch. T.G. threatened to call the police.

T.G. then used the kitchen telephone to call Clarke's mother. T.G. spoke with her, handed the phone to Clarke to speak with her, and then took the phone back to speak with her again. Clarke then "snatched" the phone out of her hand and "yanked the phone out of the wall." He wrapped the cord around T.G.'s neck, choked her with it so she "could hardly breathe," and said, "Bitch, you don't be calling my momma on me." He then shoved her into the stove with sufficient force that the oven door handle "broke off" and "the whole stove, like, lifted up." Clarke continued to push T.G. around the kitchen and

eventually pushed her into a big kitchen window. The window "broke out" and T.G. "almost flipped through the window."

Clarke said he was going to take K. and leave. T.G. did not want him to, so she got a "steak knife" from the kitchen and used it to puncture one of the tires on the car Clarke had driven to her house. Clarke came outside, saw the tire, and started cursing. T.G. then locked the front door of her house and ran to a neighbor's house and asked them to call the police. When the police arrived, Clarke was gone.

Clarke returned the next morning and entered the house. When T.G. confronted him, he said, "I came to see my son." He said he loved T.G. and did not mean to hurt her, and he then started "talking and playing with the kids." T.G. surreptitiously called 911 using a telephone she had borrowed from the neighbor the previous night. When the officers arrived, she rushed outside with the children, and the officers arrested Clarke.

T.G. did not see Clarke again until May, but he phoned her frequently and left her 10 to 20 messages per day. He told T.G. "you are not going to have any man around my child," and when T.G. said they could see whoever they want, Clarke replied, "if I catch some man around [K.], I will kill you and him both."

B. The Custody Dispute

On April 14, 2005, Clarke filed a petition seeking legal and physical custody of K. A mediation was scheduled for May 20, 2005, and a custody hearing was scheduled for May 23, 2005. T.G. testified that she "was okay with that because at least there would be some type of agreement," so Clarke would no longer go to her house "at midnight or just whenever he felt like it."

C. Incident of May 19, 2005 (Corporal Injury to a Child's Parent and Dissuading a Witness by Force)

On May 19, 2005 (the day before the scheduled mediation) at about 11:00 p.m., T.G. was doing laundry in her garage. When she returned to the house, she found Clarke inside. He said that he had come to see his son and had brought diapers. T.G. and Clarke began to argue, and Clarke said that he was going to get custody of K. and that T.G. was a terrible mother. When T.G. was looking in the refrigerator, Clarke came up

behind her, pressed a knife against her neck, and told her "that he was going to get [K.] and not to go to court." T.G. said she "can go to court too." Clarke kept pressing the knife against her neck and asking "are you going to go to court," and T.G. kept "shaking [her] head yes." Clarke then punched T.G. in the stomach three times; she was about seven months pregnant with his child at the time. Eventually, T.G. said she would not go to court. Clarke told her not to go to the police and then left, still carrying the knife, which did not belong to T.G. After this incident, T.G. began keeping a knife under a pillow on her bed.

T.G. did not immediately call the police because she "just got tired of calling and they don't do anything." But she went to the police station between 10:00 and 11:00 a.m. the following morning and made a report against Clarke. She had a "wound" on her neck "that was caused by [Clarke] putting the knife to [her] neck." The wound bled, but T.G. put "Neosporin" and a "bandage" on it, and it "eventually scab[bed] over." The prosecution introduced a photograph of the "scabbed wound"; T.G. testified that the picture was taken at the police station on the morning after the attack.

T.G. telephoned the mediator at the time of the mediation, but she asked the mediator not to tell Clarke that she had called. No agreement was reached as a result of the mediation.

D. Incident of May 21-22, 2005 (Forcible Rape and Other Crimes)

In the evening of May 21, 2005, T.G. went to bed at 10:00 p.m. and was awakened around 11:00 p.m. by a touch on the side of her face. She found Clarke sitting on the side of her bed, and he told her, "I told you not to talk to the mediator." He told her that K. did not need her and that he (Clarke) was going to make her suffer. He undressed and also pulled off T.G.'s pajamas, despite her efforts to keep them on.

Clarke lay on top of T.G., who was on her back. He sucked her breasts, touched them with his hands, and tried to penetrate her vagina with his penis. She "was fighting him," "kicking [her] legs," and "trying to prevent him from having sex with [her]." T.G. remembered the knife under the pillow and reached for it, but Clarke "flipped the pillow

off," saw her hand on the knife, "snatched it out of [her] hand," and said "Oh, you are going to try to kill me, bitch? . . . I'm going to kill you first."

Clarke then poked the tip of the knife into T.G.'s chest, and a struggle ensued. T.G. testified, "I just remember telling him get off of me and struggling and I was getting cut with the knife." When asked whether she was cut by the tip of the knife or the edge of the blade, T.G. testified, "It was just because I was moving around and he was on me with the knife." She testified that Clarke "was holding the knife to [her]," and she was "getting cut as [she was] moving." She similarly testified that as she was "moving to resist" she was "cut with the knife." As a result, T.G. suffered wounds on her chest and neck. When asked about the manner in which she was fighting and resisting, T.G. testified that when the knife was "pressed against" her, she was "trying to get up," but she also said that when the knife was "being held to [her] throat," she was not "literally trying to get up" but rather was "wiggling around." In a similar vein, she testified that she suffered wounds on her neck because she "kept kicking around and moving [her] body and telling him no," and although she "wasn't trying to get up," she "was trying to prevent him from penetrating [her]." Later, on redirect, she testified that she was not "trying to get up or move [her] upper body" when the knife was to her neck.

Clarke then put his face between T.G.'s legs, and she felt his tongue on her vagina. T.G. kicked him in the chin. Clarke then picked up the knife, which was on the side of the bed, and put it between her legs. He was "rubbing" the knife "back and forth" on her "inner thighs," and she "was getting cut." When the knife was between her legs, she was "struggling," "moving [her] body trying to get away," "wiggling around," and "trying to fight him off." T.G. also felt the knife at the "entrance" of her vagina, and Clarke said "I'm going to tear this pussy up," but she did not "feel a cut or anything."

Clarke then again lay on top of T.G. (who was still on her back) and penetrated her again, although she continued to resist and to tell him to stop. He continued until he ejaculated inside her. Later, Clarke was lying on his back and told T.G. to get on top of him. When she said no, he said he was "going to lay on [her] stomach again" or "was going to do it from the back." Afraid of what Clarke might do if she refused, T.G.

straddled Clarke, who again inserted his penis in her vagina and continued until he again ejaculated inside of her.

When Clarke got up to go to the bathroom, T.G. ran to another bathroom, pretending that she was going to vomit. She turned on the light and the faucet so that Clarke would think she was in the bathroom, and then she went to the kitchen to use the phone to call 911. She told the 911 operator that Clarke was raping her and was going to kill her. She hung up, returned to the bathroom and turned off the lights and the water, and emerged from the bathroom to find Clarke coming down the hallway with the knife in his hand. He motioned for her to go back on the bed, and she complied.

Later, T.G. heard sirens and a loud voice calling for those in the house to come outside. Clarke sat up and said, "What did you do? Did you call the police on me?" T.G. "hopped away from him" as he reached for her, and he missed. She grabbed her pajama shirt and ran out of the house naked. Clarke eventually came out of the house and was arrested. The police took T.G. to the hospital, where she was examined and photographed.

Police found a knife under a pillow on T.G.'s bed. The police found no signs of forced entry into the house; they also retrieved the sheets but did not recall seeing any blood.

While in custody, Clarke sent T.G. cards and love letters and also sent cards to her children.

E. Medical Examination Evidence

Joshua Ireland was employed by the Antelope Valley Hospital Emergency Department as a physician's assistant and forensic examiner on call for the hospital's sexual assault response services team. On May 22, 2005, Ireland performed a sexual assault examination on T.G. and documented her injuries. He found linear abrasions on T.G.'s neck, chest, and inner thighs. When shown the photographs during his testimony, Ireland stated that some of the neck injuries appeared to be older than others, but he could not "say the age of one particular wound." On the basis of the photographs, he testified that the wounds on the right inner thigh and the chest, as well as some of the neck

wounds, appeared to be in the "inflammatory" stage of healing, which Ireland said could mean they were anywhere from four hours to four days old. But Ireland's written report of the examination did not say anything about the age of any of the injuries or whether they were in the inflammatory stage. Ireland also found two lacerations on T.G.'s posterior forchette but said he "could not speak to the cause of the injuries," which "could be consistent with a knife" but could also be caused by consensual or nonconsensual intercourse.

Ireland explained that an abrasion is "an injury to the epidermis, which is the top layer of the skin." A laceration goes "through the epidermis and into the dermis." T.G.'s abrasions did not go through the epidermis and did not require stitches.

III. Defense Evidence at Trial

A. Clarke's Version of Events

Testifying on his own behalf, Clarke stated that he met T.G. in 1999 or 2000 and they were together until he was taken into custody on May 22, 2005. They had two children together, K. and Z. Clarke had not seen K. since May 22, 2005, and he had never seen Z.

As to the incident of February 13, 2005, Clarke testified that he came to see T.G. that day because she had called him. He admitted breaking the window but said he did not "hit [T.G.] that night or anything." Shawn Willey, the neighbor to whom T.G. had run for a phone to call 911, testified for the defense. He said that T.G. did not "seem frightened at all," "more angry than anything else." T.G. told Willey something to the effect that Clarke "was taking stuff that wasn't his or supposedly wasn't his." She did not say that she was in danger "or anything like that," and she did not say that Clarke had choked or threatened her.

Clarke testified that after February 2005 incident, T.G. would not let him see K. That was the third time she had cut off contact between him and K. As a result, he "decided to take the power out of her hands and go to family court." He filed papers

seeking custody of K. in April 2005 after T.G. said, "You will never see him. He's going to forget about you," and "Over my dead body will you have a relationship with him."

As to the incident of May 19, 2005, Clarke denied that he visited T.G. on that day. He said he spent the evening at his home with his friends Dennis Smith and Gina Anderson. Smith and Anderson testified to the same effect.

As regards the custody mediation, Clarke testified that T.G. did not attend the mediation, so he "gave the mediator her phone number to call her." Clarke took a parenting class in preparation for the mediation and received a certificate.

As to the incident of May 21-22, 2005, Clarke testified that on the morning of May 21 T.G. telephoned him and "was very nice and apologetic" and told him that he "could see [his] son and she's sorry for keeping him away from [Clarke]." T.G. invited him over and repeatedly called him later in the day, encouraging him to come. A friend drove Clarke to her house, and he arrived around 10:30 or 11:00 p.m. T.G. let him in and was "very nice" to him. They talked about naming the baby, and they eventually had consensual intercourse "once or twice or three times." Clarke noticed some scratches on her neck and asked about them, and T.G. said she had recently been robbed at an automated teller machine. Clarke eventually fell asleep but later woke to find K. in bed next to him. He tried to go back to sleep but then heard police calling him out of the house. He got up, went outside, and was arrested.

B. Medical Expert Evidence

The defense called two medical expert witnesses. Dr. Paul Bronston has been an emergency room physician for over 20 years and has examined tens of thousands of patients. As part of his training in emergency medicine, he was taught how to determine whether wounds were self-inflicted. Self-inflicted wounds "tend to be very superficial," "usually more than one," and "tend to be parallel with each other." "[S]o when you see these multiple type of very superficial, long, linear, very superficial wounds, a number of them, then that's extremely characteristic of somebody who's made self-inflicted wounds to themselves." They also tend to be in areas of the body that the victim can easily access by hand. Wounds inflicted in a struggle are different—they are

"highly variable," "would be deeper," "would be random" rather than in "parallel lines," and "wouldn't have that classic pattern." When shown the photographs of T.G.'s wounds, he testified that all of them appeared to be self-inflicted—"numerous long parallel lines," "constant parallel, very superficial type of wounds," "superficial parallel lines." The wounds are "not consistent with a struggle." Bronston also estimated that the wounds appeared to be "something around one to three days" old, and it was possible that some could be one day and some could be three days old.

Dr. Paul Sinkhorn has been a practicing obstetrician and gynecologist for 30 years. He examined the photographs of T.G. and found no injuries to her genitalia other than a quarter or third of an inch tear in the posterior forchette. Such a tear "occasionally happens when a patient . . . rubs over vigorously or the patient has long fingernails" or could even be caused by "simple spreading of the labia," because the tissue is so thin; Sinkhorn has seen such tears caused by "an examiner . . . spreading the tissue." It could also be caused by consensual or nonconsensual intercourse. Sinkhorn stated that it would be possible to cause such a tear with the knife that T.G. testified was used in the attack, but he said that it would be "improbable" and would have required T.G. to be perfectly still while the cut was made. There are "many more probable ways to create an injury like that," including vigorous rubbing, long fingernails, intercourse, or spreading of the labia.

DISCUSSION

I. The New Trial Motion

Clarke argues that the superior court abused its discretion by denying his motion for new trial. We agree.

On August 20, 2012, the prosecutor informed defense counsel that he planned "on consulting an expert on the victim's wounds" and said he would let counsel know when he had "a name and/or reports from that expert." On August 24, the prosecutor requested and the court granted an order that "the Los Angeles County Department of Coroner Office examine the photographic evidence in [this case] and testify to any opinions based

on the examination, if necessary." Defense counsel states that she did not receive notice of the request or the order.

Trial began on August 28, 2012. On that day, the prosecutor stated on the record, "I have an expert witness that is reviewing the wounds to the victim in this case . . . . I don't have a report back yet. I will turn it over as soon as possible." According to defense counsel, on or about that date, the prosecutor gave defense counsel an oral report of the expected testimony of his expert, a Dr. Rauch, indicating that T.G.'s wounds were not self-inflicted.

On August 29, 2012, Clarke moved to exclude the prosecution's medical expert witness on the grounds that the expert's report had not been timely disclosed and that the testimony would not constitute proper rebuttal evidence. The court denied the motion.

T.G. finished testifying on September 4, 2012. On September 6, 2012, because of witness scheduling issues the defense began presenting its case, even though the prosecution had not yet rested. On the same day, the prosecutor informed defense counsel that he had "corresponded with Deputy Medical Examiner Lisa Scheinin" in the afternoon of the previous day. He continued: "[Scheinin] has been assigned to examine the photos in this case. She gave me her preliminary impressions of the case, but said she will not be able to have a final report until September 12, 2012. She stated that preliminarily, it appears possible that the wounds could be self-inflicted based on their placement on the body. She stated that the wounds on the thighs appear to be healed injuries. She said the wounds on the chest appear to be a couple of days old. The wound on the breast appear[s] to be a day or two old. The wounds on the right side of the neck appear to be a couple of days old. The newer wound on the neck appears to be anywhere from 12 hours to a day old. It appears that the wound[s] on the neck have a double contour. She opined that this is not consistent with a knife unless the knife has a blade of a width of at least 1/32 inch. She opined that the wounds are consistent with self-infliction because they are superficial, of the same depth, and of varying age. [¶] I spoke to Doctor Rauch. He said this is not his area of expertise and would defer to the

medical examiner. He said that having several linear, parallel lines is consistent with self-cutting or with a perpetrator attempting to torture a victim."

On September 10, 2012, the prosecution rested, having presented no medical evidence other than Ireland's testimony. The defense presented its final witnesses and rested on the same day.

Also on September 10, 2012, but unknown to the defense at that time, Scheinin signed her final report. Scheinin's report begins with a summary of the police report, which contained T.G.'s description of the alleged attacks. But Scheinin's analysis and conclusions generally supported the defense.

Scheinin's report states that the injuries on the anterior neck "appear to have been made at approximately the same time" and "are at least 24 hours old and could easily be older (a few days)." Those injuries "are minimal" and "could easily be self-inflicted." "The fact that many abrasions extend from a single area of confluence indicates a deliberately repetitive action that is very consistent with self-infliction. (Infliction by another person is not excluded.)" Many of the wounds of the anterior neck exhibited a "double contour," which indicates that "the cutting edge had a thickness of between 1/32 and 1/16 inch. This suggests something other than a kitchen knife or pocket knife; such knives usually have much narrower cutting edges and leave a single mark, even if the blade is serrated. The relatively wide marks in this area suggest something like a scissor blade, but a piece of glass or other instrument cannot be excluded." The orientation and other characteristics of the anterior neck injuries "indicate[] repeated injuries inflicted with consistent pressure" and are "much more consistent with self-infliction than an attack by another person." "Due to the multiplicity of wounds, some of which are elongated, and multiple directions of travel, it is inconsistent with a blade held motionless against the victim's throat."

The report states that on the right lateral neck there were "linear abrasions that appear similar to, and the same age as, those of the anterior neck." There were also at least two "fine scars" that are "probably several months or more" old. There were also "several very faint pink (slightly erythematous) lines and a very rare short, hairline

abrasion," which "may represent marks from the raking of the dull edge of a blade across the skin; if so, they are most likely recent (a few hours old)." "All are minimal injuries that could easily have been self-inflicted, but infliction by another person is not excluded."

The injuries on the chest "appear to be recently inflicted, extremely superficial abrasions with mild edema (swelling) and erythema (reddening), most likely inflicted within a few hours." These too "may have been caused by raking the dull edge of [a] blade across the skin. These are very minimal injuries that could easily have been self-inflicted, but infliction by another person cannot be excluded." There was also a "hairline abrasion" on the "medial side of the right breast," which appeared to be "at least 24 hours old."

The injuries on the inner thighs "appear at least two weeks old and could easily be older." They too "could easily be self-inflicted." The report later observed that "[t]he locations of the wounds on the body are consistent with either self-infliction or infliction by another person. Specifically regarding the wounds of the inner thighs, a pregnant woman early in her third trimester could still reach these areas."

The report continued: "The extremely superficial nature of the injuries is consistent with self-infliction, implying that the person did not wish to cause him/herself serious injury. They are also of approximately the same depth, suggesting that the person was controlling the pressure applied. Injuries inflicted by an angry attacker would be expected to be deeper and to have more varying depths. The varying ages of the wounds is also inconsistent with a single attack; if the person receiving the injuries were the victim of a single attack, all of the wounds would appear to be approximately the same age." "Only the wounds of the right lateral neck and right chest appear to have been inflicted within the time of the reported assault."

On September 12, 2012, the jury convicted Clarke. On September 20, 2012, defense counsel spoke to Scheinin, who told defense counsel that the wounds had characteristics of self-infliction and did not appear consistent with T.G.'s account of the

time and manner in which she was injured. Scheinin also advised defense counsel that she had prepared a report setting forth her findings.

Defense counsel then contacted the chief coroner, who had the report but said he needed the prosecutor's permission before releasing it. Defense counsel asked the prosecutor to authorize release of the report, the prosecutor did so, and defense counsel received a copy of the report on September 27, 2012.

Clarke moved for a new trial on several grounds, including that Scheinin's report constituted newly discovered evidence. The superior court denied the motion.

"In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: '"1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits."' [Citations.]" (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) '"'"The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears."'" (*Ibid.*)

Clarke's new trial motion should have been granted. First, the evidence at issue—namely, Scheinin's report—is newly discovered. It did not exist until September 10, 2012, the day the defense rested.[2] The defense did not learn of the existence of the report until September 20, 2012, eight days after Clarke was convicted, despite the prosecutor's assurances on the record at the start of trial that he would turn over his expert's report as soon as possible. Even after defense counsel learned of the existence of the report, she was unable to obtain a copy without first seeking authorization from the prosecutor.

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[2] The handwritten date on the signature line of the final page of the report is September 10, 2012. That is the basis on which we have determined that the report did not exist until September 10. The record contains no evidence as to when the contents of the report were written.

Second, the evidence is not merely cumulative. Both in cross-examination and in closing argument, the prosecution attacked the credibility of Clarke's expert, Bronston, on the ground that he was being paid by the defense and consequently was going to say whatever the defense needed him to say. ("[T]heir expert will say absolutely anything to earn his money. He is absolutely going to lie as a man of science.") The prosecutor also attacked Bronston's credibility on the ground that Bronston had previously testified for the defense in criminal cases but never for the prosecution. Scheinin's report is not vulnerable to any such attacks—it is an opinion from the county coroner's office, commissioned by the prosecution. Under these circumstances, the report was not merely cumulative.

Third, Scheinin's report would render a different result probable upon retrial. We have already explained why it would be impervious to the credibility arguments that the prosecutor used against Clarke's retained experts. In addition, the substance of Scheinin's report presents an even more compelling refutation of T.G.'s testimony than Clarke's retained experts did. According to Scheinin, the wounds on T.G.'s thighs *were at least two weeks old when photographed on May 22, 2005*. But T.G. testified in detail that those wounds were inflicted on May 21-22, 2005, when Clarke held the knife between her legs, rubbed the blade back and forth, and so on. Also, according to T.G., all but one of the wounds on her neck were inflicted on May 21-22 with a knife. But Scheinin determined that many of the neck wounds were "at least 24 hours old and could easily be older" and appeared not to have been inflicted with "a kitchen knife or pocket knife" but rather with "something like a scissor blade." Given the strongly enhanced credibility of Scheinin's report, it is at least probable that a jury would reach a different result upon retrial.

Fourth, for the reasons already given, the defense could not with reasonable diligence have obtained and introduced the report at trial. The report did not exist until the day the defense rested.

Fifth, Clarke showed all of these facts by the best evidence possible, namely, Scheinin's report.

The superior court denied Clarke's motion on the grounds that Scheinin's report "was essentially cumulative" and that it was not probable that the report would lead to a different result upon retrial. For the reasons we have already given, neither conclusion was reasonable. An opinion commissioned by the prosecution from the county coroner that turned out to favor the defense is not cumulative to the opinions of the defense's retained experts, and Scheinin's report was in any event more strongly supportive of the defense than even the opinions of the experts Clarke presented at trial. For those reasons, the newly discovered evidence would make a more favorable result probable upon retrial.

Respondent's arguments to the contrary are likewise unpersuasive. First, respondent argues that Scheinin's report is not newly discovered evidence because Clarke "knew before and during trial that the prosecution was consulting with an expert" and "received a summary of Dr. Scheinin's evaluation during trial." We disagree. The evidence in question is the report, which did not exist until September 10, 2012, the day that the defense rested. It is irrelevant that Clarke knew that the prosecution was consulting an expert, and it is likewise irrelevant that Clarke was given a summary of the expert's "preliminary impressions" on September 6, accompanied by the caveat that the final report would not be available until September 12. For similar reasons, we reject respondent's argument that with reasonable diligence the report could have been discovered in time for presentation at trial.

Second, respondent argues that the evidence "would have been cumulative to other defense evidence" because of the ways in which it paralleled Bronston's testimony. For the reasons we have already given, we disagree.

Third and finally, respondent argues that Scheinin's report would not have rendered a different result probable upon retrial because, for example, Scheinin's "opinion that the injuries could have been self-inflicted did not exclude the possibility that another person had inflicted the wounds," and Scheinin "opined that the location of the wounds was consistent with either self-infliction or infliction by another." Similarly, as regards the age of the wounds, respondent focuses on Scheinin's admissions that it is not possible to determine "the precise age of an injury from viewing a

photograph," and that estimating ages of injuries from photographs "is inherently inaccurate and subject to interpretation." We reject respondent's argument because it overlooks the ways in which Scheinin's report, with its enhanced credibility, undercuts T.G.'s entire story. Scheinin's report candidly admits that infliction by another person cannot be *excluded* and that the *precise* ages of wounds cannot be determined from photographs. But the report opines, for example, that the neck wounds are "much more consistent with self-infliction than an attack by another person" and are "inconsistent with a blade held motionless against the victim's throat." Similarly, the uniformly superficial depth of the injuries makes it unlikely that they were "inflicted by an angry attacker." And even if the injuries could not be *precisely* dated, the wounds on the inner thighs appeared to be at least two weeks old, so they could not have been inflicted when T.G. said they were.

We note that both in cross-examination of Bronston and in closing argument, the prosecutor advocated a theory of the facts that conflicted with T.G.'s own testimony and was not otherwise supported by the evidence in the record. As we noted earlier, T.G. repeatedly testified that her wounds were inflicted while she fought, kicked, struggled, wiggled, tried to sit up, and generally attempted to repel Clarke's attack. (To take just one example: "I was getting cut on my neck and in my chest too because I kept moving my legs, moving[.]")[3] But in cross-examining Bronston, the prosecutor asked hypothetical questions about whether wounds like T.G.'s could be inflicted by an attacker if the victim "is afraid to move" and "is remaining very still." Those hypotheticals were inconsistent with T.G.'s testimony and assumed facts not in evidence. The prosecution took a similar approach in closing argument, going so far as to concede that "[e]verybody

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[3] The prosecutor tried to repair some of this damage on redirect by asking, "Why didn't you move when he had the knife to your upper body?" T.G. replied, "Because I was afraid I was going to get stabbed. That's why." Read in context, T.G.'s answer meant only that when the knife was on her upper body she was trying to reduce the movement of her upper body and was not trying to sit up. It is consistent with her repeated and emphatic testimony that she received the wounds to her upper body (and elsewhere) while she struggled, fought, wiggled, kicked her legs, and so forth.

agrees that these wounds did not come from a struggle. Wounds from a struggle are deep. They are of various depths. They are careless. They would be all over the body. They would be on the back, the shoulders. But that's not what happened here. There wasn't a struggle." The prosecutor thereby argued facts that were not in evidence (i.e., that T.G.'s wounds were inflicted by an assailant while she did *not* struggle) and that were actually contrary to the testimony of the prosecution's main witness, T.G. Given that the medical evidence introduced at trial forced the prosecutor himself to reject such a central and repeated component of T.G.'s version of events, it is probable that Scheinin's report—concluding, for example, that the thigh wounds were at least two weeks old—would have driven the final nail into the coffin of T.G.'s credibility.

For all of the foregoing reasons, we conclude that the superior court abused its discretion when it denied Clarke's motion for new trial.

II. *Brady* Claim

Clarke argues that the prosecutor violated his rights under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) by withholding exculpatory evidence, namely, Scheinin's report. The remedy for a *Brady* violation is ordinarily a reversal permitting retrial. (See generally *Sons v. Superior Court* (2004) 125 Cal.App.4th 110.) Because we are reversing Clarke's convictions for independent reasons, we need not address his *Brady* claim.

Clarke argues, however, that the *Brady* violation was willful and constituted prosecutorial misconduct of such a character as to require dismissal of the charges against him. (See *Sons v. Superior Court*, *supra*, 125 Cal.App.4th at pp. 115-121; *People v. Batts* (2003) 30 Cal.4th 660, 692-696.) We conclude that the present record is inadequate for determination of the merits of such a claim. Clarke remains free to pursue the claim on remand, including the introduction of evidence to support it.

III. Sufficiency of the Evidence

Our resolution of the foregoing issues makes it unnecessary for us to address all but one of the remaining arguments that Clarke raises on appeal. Clarke argues that the convictions are not supported by substantial evidence and that the charges against him must therefore be dismissed. We disagree.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509, italics omitted.) We do not resolve "credibility issues" or "evidentiary conflicts," and the "testimony of a single witness is sufficient to support a conviction" unless "the testimony is physically impossible or inherently improbable." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) At the same time, "[s]ubstantial evidence . . . is not synonymous with 'any' evidence, but is evidence which is of ponderable legal significance. It must be 'reasonable in nature, credible, and of solid value . . . .'" (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871.) Moreover, substantial evidence review must be based on an appraisal of "the whole record" rather than focusing on "isolated evidence supporting the judgment." (*People v. Johnson* (1980) 26 Cal.3d 557, 577-578.)

Although it is a very close case, we conclude that viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the charged crimes beyond a reasonable doubt. T.G. testified that on May 19 Clarke assaulted her and attempted to dissuade her from participating in the mediation, and that on May 21-22 he raped her at knife point and committed the other charged offenses. We note, however, that the trial record does not contain Scheinin's report. We express no opinion as to whether, considered in light of the whole record, the evidence supporting the convictions would rise to the level of substantial evidence if Scheinin's report had been admitted.

For the reasons given, we reject Clarke's argument that his convictions are not supported by substantial evidence. We express no opinion on any of the remaining arguments that Clarke raises on appeal.

DISPOSITION

The convictions are reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

MILLER, J.*

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