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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LAMAR WHITE, Defendant and Appellant.	B262373 (Los Angeles County Super. Ct. No. BA425751)

APPEAL from a judgment of the Superior Court of Los Angeles County, James R. Dabney, Judge. Affirmed in part, reversed in part and remanded with directions.

Mark David Greenberg, 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, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Lamar White's DNA was detected when a sexual assault victim's rape kit was analyzed in 2012—seven years after the victim reported the assault in 2005. White, who testified at trial, claimed the victim had solicited him and a friend on Sunset Boulevard in West Hollywood for consensual sex in her car. The friend, whose DNA was also found when the kit was analyzed, died in 2014 before White was charged. A jury convicted White of one count of rape by foreign object in concert with others and one count of sexual battery by restraint. We affirm the rape conviction but reverse the sexual battery conviction and direct the trial court on remand to enter a judgment of acquittal and vacate the sentence imposed on that count.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

White was charged in an information filed on August 27, 2014 with one count of rape by foreign object acting in concert (Pen. Code, §§ 289, subd. (a), 264.1, subd. (a))[1] and one count of sexual battery by restraint (§ 243.4, subd. (a)). The information also alleged that in 1999 White had suffered a prior serious felony conviction of first degree burglary (§ 459) within the meaning of the three strikes law (§§ 1170.12, subds. (a)-(d); 667, subds. (b)-(i)) and section 667, subdivision (a)(1). White pleaded not guilty to the charges and denied the special allegations.

2. *The Evidence at Trial*

a. *The People's case*

Around 8:00 p.m. on August 26, 2005 Margot W., then 55 years old, stopped at the Bar Marmont on Sunset Boulevard in

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[1] Statutory references are to this code unless otherwise stated.

West Hollywood for a drink.[2] She had a glass of wine, maybe two. Around 11:00 p.m. she left the bar because she was not feeling well and retrieved her Range Rover from the valet. The valet parked it below the bar on Sunset Boulevard. As Margot was adjusting her seat, three black men entered the rear seat of the car and a fourth got into the front passenger seat. Margot was not able to recall many details about the encounter because she was fading in and out of consciousness, but she remembered seeing the penis of the man in the front seat and felt something sharp, like a fingernail, going into her vagina.[3]

The next thing Margot remembered was waking up in her car around 8:00 a.m. the following morning. She did not recall where she was and did not remember driving home. Once she parked in her garage and tried to get out of the car, she realized her pants were around her ankles and she was otherwise naked from the waist down. She went into her house to sleep. When she woke up again, she realized something terrible must have happened. She went back to the car for her purse and discovered it was missing. After cancelling her credit cards,[4] she drove to

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[2] Margot had dined with a friend at the Peninsula Hotel in Beverly Hills, where she had one or two glasses of wine, and stopped at the Bar Marmont because she had fond memories of the Chateau Marmont from time spent there with her ex-husband and son when they first moved to the United States from the Netherlands some 30 years earlier. She testified that since her divorce in 2001 she had not had any sexual partners.

[3] While at the bar Margot did not speak with anyone other than the bartender and did not believe she drank anything other than white wine. There was no suggestion at trial that any of the men who assaulted her had been seen inside the bar.

[4] By the time Margot cancelled her cards, there had been two unauthorized transactions at gas stations, one at 1:39 a.m. and a second at 6:07 a.m. A third transaction, also at a gas station, was declined after Margot cancelled the card.

the Los Angeles Police Department's Hollywood station to report the crime.

At the police station Margot was first interviewed by Sergeant Kelly Muniz. She told Muniz she had some drinks at the Chateau Marmont and left at 11:00 p.m. She had only been inside her car for a brief time when four black men entered the car. Although the men were initially "jovial," she became frightened when one of the men in the back seat pushed a lever that caused her seat to recline. The man in the front seat then jumped on her while the men in back held her down. She tried to fight but believed it was useless to resist. The man in the front seat took his penis out of his pants and pulled down her underwear. He placed his penis in her vagina for approximately 15 seconds and then ejaculated on her chest. The men then fled.

Sergeant Muniz also testified Margot did not appear to be intoxicated at the time of her interview. Muniz drove Margot home to retrieve the clothes she had worn and then to the Rape Treatment Center at UCLA Medical Center in Santa Monica, where a nurse, Laura Delgado, performed a sexual assault examination. In addition to the details Margot gave Muniz, Delgado testified Margot had told her the man in the front seat had forced her to orally copulate him. Margot also reported soreness and swelling in the genital area, which was corroborated by Delgado's physical examination. According to Delgado, the redness and irritation were consistent with forcible penetration by a finger or penis although she admitted under cross-examination that she could not rule out consensual sex. Margot also had some bruising on her upper arm and left thigh.

A year later, in October 2006, the LAPD scientific investigations unit analyzed the swabs and samples from the rape kit. Sperm was detected on the external genital swab, the vaginal swab and Margot's pants and underwear. The blouse and oral swabs tested negative for seminal fluid or sperm.

In 2012 DNA testing of the swabs was performed, and one of the profiles developed was linked to White. White was interviewed in October 2013 by Detectives Carla Zuniga and David Cedeno. He claimed not to recognize a photograph of Margot and said he had never had sex with her or raped anyone in his life.[5] White was arrested on June 23, 2014.

Additional DNA testing was performed on other samples in 2014. The profile of a major male contributor derived from the "sperm fraction[s]" of the internal and external vaginal samples was consistent with White's DNA profile. The profile derived from Margot's pants was consistent with a mixture of two male contributors, one of whom was White. White was excluded as a contributor to a sample taken from Margot's thigh, which linked instead to the profile for the second male contributor. A profile from a third male contributor was found in a sample taken from Margot's underwear.

b. *The defense's case*

The defense called Detective Steven Ramirez, the original investigating officer on the case. Ramirez interviewed Margot in 2005 and described her as "embarrassed" because she could not remember any details from the assault. She originally told him she had not used the valet service but agreed she must have done so after Ramirez told her both Chateau Marmont and Bar Marmont required customers to use the valet service to park in their lots. She told him she left the bar at 11:00 p.m. but said nothing about being dizzy or feeling unwell. She also told him she had been knocked unconscious but remembered one of the assailants had been masturbating and another had ejaculated on her blouse, although she admitted the possibility it had been vomit instead. She also remembered someone penetrating her

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[5] An audio recording of this interview was played for the jury.

vagina with a finger. When she woke up in her garage the next morning, her seat was fully reclined and her pants were down around her knees.

White testified on his own behalf. Around 10:00 p.m. on August 26, 2005 he and Cory Wilson, a friend, had gone to the Sunset Strip in Wilson's car to try to meet women. They parked and walked along Sunset Boulevard, which was crowded. They drank alcohol they had purchased at a liquor store. Because cigarettes were too expensive at the liquor store, Wilson walked to a nearby gas station, leaving White, who was speaking with two women he recognized from a television show. A few minutes later White saw Wilson beckon him toward a Range Rover driven by Margot W. After introducing White to Margot, Wilson rubbed his fingers together and told White Margot wanted to have a "nice time." White understood Margot wanted to pay them to have sex with her. He got into the back seat, and Wilson got into the front passenger seat. As Margot drove them along Sunset, she asked, "Is it true you guys have big black dicks?" White answered he had a long and big black one. Although he could not tell if she was intoxicated, White thought she may have been "on something." When he asked her about money, she told them, "Don't worry about the money. I'm not rich. I'm wealthy," explaining that "rich" meant merely having money, while "wealth" referred to money that "runs in your family." She also told them she was not driving to a room but they would have "fun in the car."

After driving for about 15 minutes, Margot entered a parking lot with valets and paid them to allow her to park along the wall. She reclined her seat and began to masturbate. Wilson proceeded to give her oral sex. When White insisted on receiving his money, she gave him $100. He pulled out his penis, and Margot began playing with it. She slid into the back seat where they had sex. His penis was in her vagina, and he ejaculated inside her. He then got out of the car to urinate and smoke a

cigarette. White was outside the car for 15 to 20 minutes while Margot and Wilson remained inside the car. One of the valets asked him in Spanish if he was having sex with the woman in the car. He indicated he was, and the valet smiled, saying, "We know."

Wilson finally got out of the car, and Margot drove off. Wilson handed White another $100 and told White he had taken her money and credit cards. When White became upset because he feared he could be identified, Wilson assured him she would never admit she had paid two black guys for sex. They argued, and White demanded Wilson take him home. They walked 10 to 15 minutes to get back to Wilson's car, and Wilson took White home. They were not together when Wilson used Margot's credit cards.[6]

White admitted he lied to the detectives in October 2013 when asked about the event because he was scared. He did not think they would believe a white woman would have paid him for sex.

3. *Verdicts and Sentencing*

White was found guilty on both counts and admitted the alleged prior serious felony conviction. He was sentenced to a determinate state prison term of 25 years, calculated as the upper term of nine years for count 1, doubled under the three strikes law, plus a consecutive term of five years for the prior serious felony enhancement, plus a consecutive term of two years (one-third the middle term of three years, doubled under the three strikes law) for count 2. The court imposed a $1,000 restitution fine and a $1,000 (stayed) parole revocation fine, as well as a $30 criminal conviction assessment fee and a $40 security fee, and ordered White to register as a sex offender under section 290.

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[6] Wilson died of a heart attack on May 31, 2014.

CONTENTIONS

White contends the trial court erred by failing to instruct the jury sua sponte pursuant to CALCRIM No. 123 that the identification of Margot by her first name and last initial was only to protect her privacy and should not be considered as evidence. He also contends improper opinion evidence was admitted over his counsel's objection. As to his conviction for sexual battery, he contends there was insufficient evidence to support the charge, that his counsel provided ineffective assistance by failing to object to the out-of-court statement that supported the conviction and by failing to move for acquittal at the close of the People's case, and that the court erred by failing to give a unanimity instruction as to the act that supported the conviction.

DISCUSSION

1. *The Trial Court's Failure To Instruct the Jury with CALCRIM No. 123 Was Harmless Error*

Section 293.5, subdivision (a), authorizes a court, at the request of an alleged victim of a sex offense, to "order the identity of the alleged victim in all records and during all proceedings to be either Jane Doe or John Doe, if the court finds that such an order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution or the defense." If the court agrees to use the designated pseudonym, subdivision (b) of section 293.5 requires the court to instruct the jury "the alleged victim is being so identified only for the purpose of protecting his or her privacy." Section 293.5 is "intended to protect the privacy of victims of sex offenses, to encourage such victims to report the offenses so that rapists may be apprehended and prosecuted, and to protect these victims from harassment, threats, or physical harm by their assailants and others." (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 53.)

White contends the trial court had a sua sponte duty to instruct the jury with CALCRIM No. 123, the instruction drawn from section 293.5 (see *People v. Ramirez, supra,* 55 Cal.App.4th at pp. 52-53), and that the failure to do so prejudiced him in the eyes of the jury. CALCRIM No. 123 states: "In this case, a person is called (John/Jane) Doe. This name is used only to protect (his/her) privacy, as required by law. [The fact that the person is identified in this way is not evidence. Do not consider this fact for any purpose.]" The bench notes following CALCRIM No. 123 direct the court to include the bracketed sentences upon request, citing *Ramirez,* at page 58.[7]

The trial court ruled CALCRIM No. 123 was inapplicable because the victim was referred to by her first name and last initial (Margot W.), rather than Jane Doe. However, instead of instructing the jury the victim would be referred to by her redacted name solely to protect her privacy, the court allowed the prosecutor in her opening statement, over a defense objection, to tell the jury the victim would be referred to by her first name to protect her confidentiality.[8]

The court's rationale for declining to follow the procedure outlined in section 293.5 is manifestly unconvincing. As

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[7] This instruction is repeated in CALCRIM No. 208 as a posttrial admonition.

[8] As the prosecutor began her opening statement, the following exchange took place:

> Prosecutor: "Many years ago back in 2005, specifically August 26, 2005, Margot W.—and we refer to her by her first name because we protect the confidentiality just like we protect— "
>
> Defense counsel: "Objection. Improper."
>
> Court: "Go ahead. Overruled. Go ahead."
>
> Prosecutor: "So I would refer to her as Margot W."

discussed, in adopting section 293.5 the Legislature provided a simple method for protecting the identity of an alleged sexual assault victim, while ensuring the defendant suffers no prejudice as a consequence. Instead of following that statutorily mandated procedure, the court allowed the prosecutor to use the redacted name of the alleged victim—a choice plainly congruent with the purpose of section 293.5 but untethered to the required consideration of potential prejudice to the defendant. By failing both to make the necessary findings and to instruct the jury with a modified version of CALCRIM No. 123 (or No. 208), the court ignored that potential for prejudice. This was error.[9]

The prejudice to White associated with this plain error, which we review under *People v. Watson* (1956) 46 Cal.2d 818, 836 [reversal not required for state law error unless "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error"], is less apparent. White contends the failure to instruct the jury with CALCRIM No. 123 allowed the People to present Margot W. as an actual, rather than an alleged, victim—in effect presenting her with official endorsement of her veracity. In a case such as this one, in which the defense of consent was predicated upon the jury's weighing of White's and Margot W.'s competing versions of what happened that night, White argues it is impossible to tell whether the jury would have convicted him had the instruction been given.

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[9] The Attorney General contends White forfeited this argument by failing to request the court instruct the jury with CALCRIM No. 123. That argument ignores the plain language of section 293.5. Presumably Margot W. requested her identity not be disclosed. At that point it was incumbent on the prosecutor to request the court make the necessary findings under section 293.5, subdivision (a); and, if use of the redacted name was permitted, the court was obligated to instruct the jury in accordance with section 293.5, subdivision (b).

We disagree. Notwithstanding White's assertion this was a close case, the jury agreed to convict him after deliberating for less than an hour. (See, e.g., *People v. Harris* (1994) 22 Cal.App.4th 1575, 1581 ["[t]he fact the jury required less than one hour to render their verdict confirms this was not a close case on the issue of guilt"].) Nor was it simply a question of credibility; the jury saw a video recording of the injuries Margot suffered, and Delgado testified the redness and irritation shown were consistent with forcible penetration by a finger or penis. In addition, White's assertion he and Wilson were the only men involved in the encounter was undercut by the detection of a third male's DNA profile on Margot's underwear. Under these circumstances, it is not reasonably probable the jury would have reached a different result had they been instructed with CALCRIM No. 123.

2. *The Trial Court Did Not Abuse Its Discretion by Overruling Defense Objections to Opinion Evidence*

White challenges the trial court's admission of statements from two witnesses he contends constituted irrelevant opinion evidence. In the first instance, Delgado had testified Margot was "calm" and "very quiet" during her examination. In response to the prosecutor's question whether it was unusual for someone in Margot's situation to be calm or quiet, Delgado testified, over a defense objection of relevance, "Usually when I do conduct exams, I would say 75 percent of victims are more calm than hysterical."

"Generally, 'all relevant evidence is admissible.'" (*People v. Cottone* (2013) 57 Cal.4th 269, 283, quoting Evid. Code, § 351.) "The trial court enjoys broad discretion in determining the relevance of evidence and in assessing whether concerns of undue prejudice, confusion, or consumption of time substantially outweigh the probative value of particular evidence. [Citation.] 'The exercise of discretion is not grounds for reversal unless "'the court exercised its discretion in an arbitrary, capricious or

patently absurd manner that resulted in a manifest miscarriage of justice.'"'" (*People v. Clark* (2016) 63 Cal.4th 522, 572.)

Delgado's observation that 75 percent of the sexual assault victims she had examined were more calm than hysterical was relevant to the question of Margot's credibility, that is, whether her demeanor during the examination was typical of other sexual assault victims Delgado had examined. White argues Delgado's "ersatz expertise" provided no aid to the jury. A lay witness, however, may express an opinion based on his or her perception when helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800, subd. (b).) "Such a situation may arise when a witness's impression of what he or she observes regarding the appearance and demeanor of another rests on 'subtle or complex interactions' between them [citation] or when it is impossible to otherwise adequately convey to the jury the witness's concrete observations. [Citations.] A lay witness generally may not give an opinion about another person's state of mind, but may testify about objective behavior and describe behavior as being consistent with a state of mind." (*People v. Sanchez* (2016) 63 Cal.4th 411, 456; accord *People v. DeHoyos* (2013) 57 Cal.4th 79, 130.) Delgado's testimony, based on her personal experience in examining victims of sexual assault, was both relevant and proper under these principles.

In the second instance challenged by White, the prosecutor asked Sergeant Muniz, who testified Margot had described her assailants as "jovial" when they first entered the car, whether Margot had "a good grasp of the English language." Muniz answered Margot had an accent and "was a bit different." In response to the question, "What do you mean by that?" Muniz stated, "Hollywood has a lot of different people. She was just unusual. She was an unusual victim compared to all of the different types of reports that I have taken that are sexual in nature. She was just unusual." The prosecutor then asked, "So is it fair to say that on Sunset Boulevard you typically get sexual

assault reports from intoxicated or drunk women who are younger?" Defense counsel moved to strike Muniz's answer of "Yes," but the court allowed the answer to remain.

Again, Sergeant Muniz's testimony was relevant to explain any inference of consent related to Margot's use of the word "jovial" in describing her assailants, as well as Muniz's perception of Margot as unusual or different, an observation White did not move to strike. (See *People v. Hurlic* (1971) 14 Cal.App.3d 122, 127 ["[w]henever feasible, 'concluding' should be left to the jury; however, when the details observed, even though recalled, are 'too complex or too subtle' for concrete description by the witness, he may state his general impression"]; accord, *People v. Sanchez, supra,* 63 Cal.4th at p. 456.)

In any event, White's argument the comments were not relevant underscores the minimal prejudice associated with allowing them in evidence. Delgado's comment served to assist the jury in understanding that Margot's demeanor fell within the range of typical responses to an alleged sexual assault, hardly a definitive confirmation of her truthfulness. White acknowledges that Sergeant Muniz's description of Margot as an atypical victim of sexual assault in Hollywood can be interpreted either way—that is, it is equally susceptible to the interpretation young men in their twenties would not choose Margot as a victim as it is to the prosecutor's closing argument a woman like Margot was unlikely to be involved in any type of sexual encounter on the Sunset Strip. Muniz's statement, moreover, contributed little to the prosecutor's argument, which focused on Margot's age at the time of the crime (55) and affluence (inferred from her patronage of the Bar Marmont, a "very posh, sophisticated bar").

In light of the broad discretion afforded a trial court in ruling on the admissibility of allegedly irrelevant or improper

opinion testimony, we cannot conclude the court abused that discretion.[10]

3. *White's Conviction for Sexual Battery by Restraint Must Be Reversed*

White contends there was insufficient evidence to support his conviction for sexual battery by restraint. In considering this claim, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., 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. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably

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[10] White contends a conviction based on the erroneous admission of irrelevant evidence violates federal due process rights and must be reviewed under the beyond a reasonable doubt standard. (See *Chapman v. California* (1967) 386 U.S. 18, 23-24 [87 S.Ct. 824, 17 L.Ed.2d 705].) It is well settled that, the admission of evidence, even if erroneous under state law, violates due process only when that error makes the trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439; see also Cal. Const., art. VI, § 13 ["[n]o judgment shall be set aside, or new trial granted, in any cause, on the ground of . . . the improper admission or rejection of evidence, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice"].) White has not met this threshold, and we similarly reject his contention the court's combined errors rendered his trial fundamentally unfair. (See *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795 ["'litmus test' for cumulative error 'is whether defendant received due process and a fair trial'"].)

have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Sandoval* (2015) 62 Cal.4th 394, 423; *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal." (*Zamudio*, at p. 358; accord, *People v. Clark*, *supra,* 63 Cal.4th at p. 626.)

Sexual battery by restraint occurs when the defendant touches "an intimate part of another person while that person is unlawfully restrained by the accused" and the touching is against the will of the victim and "is for the purpose of sexual arousal, sexual gratification, or sexual abuse." (§ 243.4, subd. (a); see *People v. Ortega* (2015) 240 Cal.App.4th 956, 966.) "Touching" as used in section 243.4 is defined as "physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense." (§ 243.4, subd. (f); see *Ortega*, at pp. 966-967.) "'Intimate part' means the sexual organ, anus, groin, or buttocks of any person, and the breast of a female." (§ 243.4, subd. (g)(1).) "Sexual battery" does not include the crimes of rape (§ 261) or rape by foreign object (§ 289). (§ 243.4, subd. (g)(2); see generally *People v. Elam* (2001) 91 Cal.App.4th 298, 310.)

As requested by the People, the court instructed the jury "You must not find the defendant guilty of sexual battery in Count Two unless all of you agree that the People have proved specifically that the defendant committed the offense either personally or aiding and abetting another to touch Margot W.'s breasts . . . ." During closing argument the prosecutor argued the act of touching Margot's bare breast constituted the conduct necessary to support the sexual battery count: "The defendant touched an intimate part of the victim—the breast is an intimate part—and it was done against her will." As support for the charge, the prosecutor stated, "The victim talked about being held down when the seat goes back, all the way back. And she wakes up and the seats are—her seat is reclined all the way back, she talks about being held down and having—feeling her breasts being touched."

As White points out, however, Margot never testified anyone had touched her breast. The only evidence suggesting her breast was touched came from Detective Ramirez, who testified as a hostile witness in the defense case. Asked if Margot had told him what happened when the men entered Margot's SUV, he said, "I remember from the questions by the gentleman, finger penetrated her vagina, someone rubbed on her chest, and then she saw one of them masturbate." There was no other testimony at trial suggesting Margot's breast was touched by any of the assailants, and Ramirez's answer does not indicate any touching involved contact with her bare skin. Indeed, when separately describing the incident to Ramirez, Delgado and Sergeant Muniz, Margot said one of the men had ejaculated on her chest, leaving a stain on her blouse.[11] Although tests on the stain proved

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[11] At trial Margot identified the black blouse she had been wearing that night and stated she did not know what had caused the white stains visible on the front of the blouse.

negative for semen, Margot never indicated her blouse had been removed during the assault.

Margot's own testimony corroborates the fact she never told anyone one of the assailants had touched her bare breast. Margot first testified that, when she tried to leave her car after driving home the next morning, she realized her "pants were around [her] ankles" and she "was naked from the bottom part up." Her subsequent testimony, however, clarified this description as involving only the lower portion of her body. The prosecutor, reviewing Margot's recollection of waking up in her garage, asked, "So when was it that you realized that your pants were down and you were naked from the waist up?" "That I remember, it was about 8 o'clock in the morning. And then I realized that I lost everything, all my—" "Listen to my question." "Okay." "When you woke up in the garage, the seats reclined, and you tried to get out of the vehicle, is that when you realized you were naked from the waist down or you realized that later?" she said, "No, I realized it because I couldn't get out of the car." Revisiting this topic, the prosecutor asked, "What happened once you found yourself at some point inside your car naked from the waist down inside the garage?" Margot answered, "I got out and pulled my pants from the one leg so I could get out, took my shoes off and pulled the pants."[12] "And do you know what, if anything occurred to your underwear?" "No, I don't recall." "Do you know whether or not your underwear were also on you or somewhere inside the vehicle? "I don't remember." Asked if her memory had been fresher at the time she reported the crime than it was at trial, Margot answered, "No," but then corrected herself: "Ten years later, it's very hard to remember how many drinks or

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[12] Based on this testimony, the prosecutor argued in closing that Margot had awoken to discover she was naked from the waist down.

where I stopped or who was wearing what. I couldn't possibly remember."

Under cross-examination, after Margot stated she was unable to recall what she had told Detective Ramirez about the attack, defense counsel offered her a copy of Ramirez's report, which she read. Asked if she had been knocked unconscious as Ramirez reported, she answered she did not recall. Asked if she had initially told Ramirez she had no memory of what had occurred, she answered, "Yes, I'm sure." "Did you tell him you were just trying to fill in the blanks?" "I don't recall." "Did one of the men ejaculate on your shirt?" "I don't remember." "Did one of the men ejaculate on your chest?" "I don't recall." "Did you tell the first officers that you spoke to that somebody ejaculated on your chest?" "No, I don't recall." "Did you tell the SART nurse examiner that somebody ejaculated on your chest?" "I don't recall." "Did you tell Detective Ramirez that somebody ejaculated on your chest?" "I don't recall." "And as you sit here, you don't recall whether someone did or not?" "No, I don't recall." On redirect, the prosecutor asked Margot whether, when first asked about the stains on her shirt, she believed someone had ejaculated on her shirt or simply assumed it. She answered she had assumed it.

In sum, the record lacks substantial evidence supporting the allegation Margot's bare breast was touched by White or anyone else. Having elected to use that alleged conduct to support the charge of felony sexual battery by restraint, that conviction must be reversed. (See *People v. Elam*, *supra*, 91 Cal.App.4th at p. 310 [reversing conviction under § 243.4, subd. (a), for lack of evidence defendant touched the skin of victim's breasts or buttocks].)

4. *Defense Counsel's Failure To Move for Acquittal on Count 2 Pursuant to Section 1118.1 Constituted Ineffective Assistance of Counsel*

The Attorney General contends that, if White's conviction for felony sexual battery fails, we should reduce the offense in count 2 to misdemeanor sexual battery,[13] which may be accomplished by the unconsented touching of a victim's breast through her clothing. (§ 243.4, subd. (e)(1).) In response, White argues that, had his counsel moved for acquittal on count 2 at the close of the People's case-in-chief (see § 1118.1),[14] the motion would have been granted and the count dismissed with no opportunity for the People to amend the information to allege a lesser included offense. (See *People v. McElroy* (1989) 208 Cal.App.3d 1415, 1424, disapproved on another ground by *People v. Cromer* (2001) 24 Cal.4th 889, 901, fn. 3 ["where the

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[13] Section 1181, subdivision (6), provides: "When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict, finding or judgment accordingly without granting or ordering a new trial." (See also § 1260 ["court may . . . modify a judgment or order appealed from, or reduce the degree of the offense or attempted offense"].)

[14] "In ruling on a motion for judgment of acquittal pursuant to section 1118.1, a trial court applies the same standard an appellate court applies in reviewing the sufficiency of the evidence to support a conviction, that is, '"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."' [Citations.] 'Where the section 1181.1 motion is made at the close of the prosecution's case-in-chief, the sufficiency of the evidence is tested as it stood at that point.'" (*People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213; accord, *People v. Huggins* (1997) 51 Cal.App.4th 1654, 1656.)

accusatory pleading fails separately to charge lesser included offenses, and the court grants a motion for acquittal under section 1118.1 without any prior indication that the ruling is intended to be limited to acquittal only on the greater, charged offense[], the judgment of acquittal on the charged offense includes acquittal on all uncharged lesser included offenses"]; accord, *People v. Powell* (2010) 181 Cal.App.4th 304, 312-313 ["*McElroy* stands for the unproblematic proposition that a defendant may not be threatened anew by a lesser included offense after the greater offense has been unequivocally dismissed"].) White contends his counsel's failure to move for acquittal at the close of the People's case-in-chief violated his Sixth Amendment right to competent counsel.[15]

""To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant."' (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980; accord, *In re Crew* (2011) 52 Cal.4th 126, 150.) Because there is a presumption the challenged action or inaction "'might be considered sound trial strategy'" under the circumstances (see *Strickland v. Washington* (1984) 466 U.S. 668, 689 [104 S.Ct. 2052, 80 L.Ed.2d 674]; accord, *People v. Gamache* (2010) 48 Cal.4th 347, 391; *People v. Carter* (2003)

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[15] White also contends his counsel provided ineffective assistance of counsel by failing to object or move to strike Ramirez's hearsay statement that Margot had said one of the assailants rubbed her chest. We reject that contention as defense counsel expressly asked Ramirez what Margot had reported to him. (See *People v. Harrison* (2005) 35 Cal.4th 208, 237 [defense invited error in admitting hearsay evidence].)

30 Cal.4th 1166, 1211), on a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*Gamache,* at p. 391; *People v. Anderson* (2001) 25 Cal.4th 543, 569; *People v. Lucas* (1995) 12 Cal.4th 415, 442.) If the error claimed is the failure to make a motion, an appellant must show the motion would have been successful. (*People v. Grant* (1988) 45 Cal.3d 829, 864.)

When the People have failed to prove an element of the charged crime, a motion for acquittal under section 1118.1 must be made to preserve the issue on appeal. (*People v. Smith* (1998) 64 Cal.App.4th 1458, 1464.) Tactically, to prevent the prosecutor from reopening the case to supplement the defective showing, the defense need not specify the charge to which it applies or the element as to which proof is insufficient. (*Smith,* at p. 1468.) Accordingly, "unless the defendant has a very good reason not to do so, the close of the prosecution's case should always be followed by a nonspecific section 1118.1 motion directed at all counts and enhancements." (*Ibid.*) Because White's counsel could have moved for acquittal outside the presence of the jury without alerting the prosecutor to the nature of the specific evidentiary gap, there appears to be no reasonable or sound trial strategy that would justify his failure to make the motion. Had he moved for acquittal, the trial court would have been required to grant the motion as to count 2 because the People's case-in-chief included no evidence that Margot's breast had been touched. If the court erroneously denied the motion, the issue would have been preserved for appeal, and this court would have reversed and directed the trial court to enter a judgment of acquittal on that count. (See *People v. Belton* (1979) 23 Cal.3d 516, 527; accord, *People v. Velazquez* (2011) 201 Cal.App.4th 219, 231-232 [reversing trial court's denial of § 1118.1 motion made at the close of the People's case-in-chief when necessary evidence was not provided until People's rebuttal].)

The Attorney General does not argue that defense counsel's failure to move for acquittal under section 1118.1 was a tactical decision. Instead, the Attorney General recites the selective testimony reviewed above to show Margot was naked from the waist up during the assault, an asserted fact we have already decided is not supported by the evidence. Because it is reasonably probable a section 1118.1 motion would have been successful either at trial or in this court, we conclude White was provided ineffective assistance by his counsel. White should have been acquitted on count 2 at the close of the People's case-in-chief, and the People would not have been permitted to amend the information to allege the lesser included offense of misdemeanor sexual battery.

DISPOSITION

White's conviction on count 1 for rape by foreign object in concert is affirmed. White's conviction on count 2 for felony sexual battery by restraint is reversed. The matter is remanded to the trial court to enter a judgment of acquittal on count 2, to vacate the consecutive two-year sentence imposed on that count and to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J. KEENY, J.*

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