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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>SANDRO CALDERON VILLANUEVA,<br><br>Defendant and Appellant. | B234063<br><br>(Los Angeles County<br>Super. Ct. No. BA220075) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers Jr., Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, 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.

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Sandro Calderon Villanueva (appellant) was convicted by a jury of attempted murder (Pen. Code, § 664/187, subd. (a)),[1] forcible rape (§ 261, subd. (a)(2)), attempted forcible rape (§§ 664/261), torture (§ 206) and two counts of sexual penetration by a foreign object (§ 289, subd. (A)(1)(a)). The jury also found that he personally kidnapped and tortured the victim and inflicted great bodily injury and personally used a dangerous or deadly weapon as to the rape, and the two counts of sexual penetration (§ 667.61). In a separate phase of the trial, the jury found appellant to be sane at the time of the commission of the offenses. He was sentenced to a term of life plus 32 years to life in state prison. He appeals, raising the following contentions: there was insufficient evidence to support the two counts of penetration with a foreign object; his constitutional right to confrontation was violated by the admission of evidence regarding DNA testing; his constitutional right to present an insanity defense was violated when the trial court limited the testimony of one of his witnesses; his constitutional right to a fair trial was violated when the court instructed the jury with CALJIC No. 1.12; there was insufficient evidence to support the conviction of attempted rape; and he was deprived of his constitutional right to effective trial counsel when his counsel failed to object to erroneous jury instructions, failed to elicit critical evidence in support of his insanity defense and failed to object to the DNA testimony.

## *FACTUAL & PROCEDURAL BACKGROUND*

On July 18, 2001, Pedro Hernandez, the manager of an apartment building on Witmer Street in Los Angeles, called police after he discovered appellant lying on top of a woman on the floor of the laundry room. Hernandez recognized appellant as a tenant in the building. Hernandez's penis was inside the woman, and there was blood on her body and the floor and walls. Appellant told Hernandez, "Two gangbangers had beat the shit out of her." Hernandez called the police.

Los Angeles Police Officer Fernando Prieto arrived on the scene and saw appellant with fresh blood on his hands and face. Appellant said nothing and was taken

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[1] All subsequent statutory references shall be to the Penal Code unless otherwise indicated.

into custody. Hernandez took Officer Prieto into the laundry room where they found Ruth L. with blood around her head and genitals. There was a broken stick with blood on it lying nearby.

Ruth L. was transported to the hospital where she was examined by Nurse Julie Lister. She had trauma on her face and neck with extensive bruising and swelling. She had six lacerations and two large hematomas around the genital area. Detectives interviewed Ruth and determined that she was living in the neighborhood of 3rd and Witmer and went into a nearby liquor store that day. As she exited the store, appellant approached her, putting something in her back which felt like a gun. He told her to walk about a block and a half away to an apartment building, where he took her downstairs to the laundry room.

The trial did not commence until ten years after the incident.

Ruth L. was deceased by the time of trial but the cause of death was not related to this attack. The jury was informed she was unavailable, and her preliminary hearing testimony was read at trial.

Detective Moses Castillo testified he came into contact with appellant shortly after the incident. Based on his training and experience he did not feel appellant was under the influence of any intoxicating or controlled substance.

Another detective found a used condom behind a washing machine and a condom wrapper inside the drum of the washing machine.

Charlotte Word, a former laboratory director of Cellmark, testified that Wendy Magee, an analyst at Orchid, examined four items: (1) a swatch of underwear, (2) a swab labeled "inside condom," (3) a swab labeled "outside condom" and (4) a swab of red stain. Word reviewed Magee's analysis and they co-wrote a report. Word knew Magee and was familiar with her qualifications, and also reached her own independent conclusions with respect to the evidence. Word testified that the sperm recovered from the "outside condom" sample matched appellant's DNA profile. The sperm recovered from the underwear had a mixture of DNA from three or more individuals, but the

primary DNA profile matched appellant's. The inside condom sample contained DNA which matched the profile for Ruth as well as DNA from a male and three other sources.

Appellant called only one defense witness, Detective Castillo, who testified the laundry room in the apartment complex was available to all the tenants.

Appellant pled not guilty and not guilty by reason of insanity. After the verdicts were reached, a separate sanity phase was held.

Nestor Villatoro testified on behalf of the defense. He was a laborer originally from Guatemala and explained that in the 1980s and 1990s there was a war in Guatemala.

Mariana Francis Xuncax also testified on behalf of the defense. She was an elementary school teacher and public health nurse in Guatemala from 1982 to 1990 but had lived in Los Angeles for the past 20 years. She testified that when she was working in Guatemala, she treated many refugees fleeing death squads. She had never interacted in any way with appellant.

The defense also called Doctor Claudia Degrati, a clinical psychologist, who had met with appellant twice for a total of six hours. She also met with Xuncax. She reviewed materials concerning Guatemalan history, the police reports and psychological and psychiatric reports about appellant. She opined that appellant was in the range between mild mentally retarded to borderline cognitive functioning. He recently had lost his mother and was not comfortable living with his father. He told her that when he lived in Guatemala, he was forced to walk past dead bodies by the side of the road and saw vultures picking at corpses. His description of events was consistent with what she had read about the history of Guatemala. Appellant told her that he had witnessed lynchings where people were dragged by cars and burned alive and that one of his friends was about to be lynched for stealing a car. Dr. Degrati found appellant to be profoundly traumatized and in her opinion that he met the criteria for post-traumatic stress disorder (PTSD). She opined appellant's crimes were attributable to post-traumatic stress, and he was reenacting what he saw On cross-examination she admitted that she did not administer any tests to determine if appellant was malingering. She also admitted he lied to her when he told her that he had smoked rock cocaine and other drugs before

committing the crimes against Ruth. He told her he had seen Ruth L. prior to the incident "prostituting herself with other men." He then told her that he had consensual intercourse with Ruth, and paid her $40, before things "got out of hand." Degrati also knew appellant told police officers he attacked Ruth because he was angry that he was going to be kicked out of the 18th Street gang.

Hernandez, the apartment complex manager, testified on behalf of the prosecution. Appellant once showed him his 18th Street gang tattoo and told him, "Now, you will have to respect me because I'm in the gang."

The prosecution also called Dr. Kaushal Sharma. Dr. Sharma was appointed by the court to render an opinion as to appellant's sanity. He met with appellant for approximately 80 minutes. Appellant was defensive, answered many questions with "I don't know," and terminated the interview.

Dr. Sharma was familiar with PTSD. The documents which indicated appellant might have experienced traumatic events as a child did not necessarily mean he suffered from PTSD. Dr. Sharma did not believe appellant suffered from PTSD or any mental illness. Appellant seemed to be proud of his gang membership and said he could not recall the incident. He said at the time he committed the crime he was abusing alcohol and drugs but according to toxicological reports there were no drugs in his system. Dr. Sharma thought it was significant that appellant attempted to hide the condom he used during the rape. He concluded that appellant knew what he was doing at the time and his attempt to hide evidence showed knowledge of his actions and consequences. He opined that appellant was legally sane at the time he committed the crimes.

The jury found appellant was sane at the time he committed the offenses.

## *DISCUSSION*

### *1. Sexual Penetration Counts*

Appellant contends that the evidence did not establish multiple penetrations of Ruth L.'s vagina, and therefore that either count 5 or count 6 must be reversed.

Section 289, subdivision (k)(1) provides that: "'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening . . . by any foreign object, substance, instrument, or device, or by any unknown object."

In *People v. Harrison* (1989) 48 Cal.3d 321, the Supreme Court held that the offense of section 289 is complete "the moment 'penetration' occurs." (*Id*. at p. 328.) As a result, in that case, each separate and distinct digital penetration of the victim was found to be a separate violation of section 289, subdivision (a).

Appellant contends that the testimony of Ruth only establishes that appellant thrust the stick in her two times, not that there were two penetrations of her vagina. This contention is meritless. The testimony of Ruth was as follows: "[The Prosecutor]: Okay, Now how many times, Ruth, did [appellant] shove this stick into your vagina? [¶] A: As far as I can remember, I think twice, twice or three times he did. [¶] Q: Two or three times? [¶] A: Yes. [¶] Q: When he shoved, is that three, two, or three separate times? [¶] A: Yes." Julie Lister, the nurse who examined Ruth L., testified that Ruth's only statement to her was: "He stuck a stick in me." But Lister also testified that Ruth had "about 6 lacerations around the genital area and two rather large hematomas."

The testimony of Ruth L. and Lister was sufficient evidence to establish two separate counts of sexual penetration.

*2. Charlotte Word's testimony*

Charlotte Word testified that she formerly worked at Cellmark for 15 years and was a molecular geneticist, and then as a laboratory director. She had a Ph.D in Microbiology and joined Cellmark in 1990. She described the four basic steps of DNA testing, which she said were the same at every DNA laboratory. She testified about the procedures in place in the laboratory regarding cleanliness and keeping the samples free from contamination. The process involves actual handling of the sample – putting it in a test tube, cutting from the sample, putting it into a tube, sealing the tube, examination of a microscopic slide – as well as the generation of electronic data and the analysis of test results. At Cellmark, the laboratory analyst who performs the work writes a draft report and reaches conclusions. The analyst documents all the steps of the work and records

any results or findings. A second individual, perhaps a laboratory director, reviews those data and work, and comes to an independent conclusion. The second person reviews the draft report, and if that person agrees with those conclusions, co-signs the report, stating that opinions and findings come from two individuals.

At trial, Word had a copy of the original file with the documents that reflect the raw data but the report was not admitted into evidence. She testified she had reviewed the file with the DNA samples from this case and reached her own independent conclusions. Wendy Magee was the original analyst that co-wrote the report in this case. Word knew Magee, and was familiar with her, and co-signed her report. Word reviewed the work and had reached her own independent conclusion. She said she was not aware of any problems with any of the protocols used in terms of contamination, "Everything looked to me had been done appropriately, correctly. . . ."

Appellant contends that the admission of Word's testimony was error because she did not perform the tests, Magee did. He argues that Magee's unavailability was never established and she was not made available for cross-examination, as required under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

In *Crawford*, the U.S. Supreme Court held that generally the prosecution may not rely on "testimonial" out-of-court statements unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. (541 U.S. at p. 59.)

The prosecutor filed a memorandum of points and authorities regarding Word's anticipated testimony on January 7, 2011, prior to jury voir dire. The trial court indicated that the testimony of Word would be permitted.

Appellant did not object at trial when Word was called to the stand. The People contend that appellant forfeited his right to raise this issue on appeal. As we explain, even if the claim had been raised, it would have been futile. (*People v. Redd* (2010) 48 Cal.4th 691, 730; *People v. Chaney* (2007) 148 Cal.App.4th 772, 777-780.)

The trial court allowed Word to testify citing *People v. Geier* (2007) 41 Cal.4th 555. In *Geier*, a laboratory director testified at trial about a report prepared by an analyst. The analyst's notes were generated as part of a standardized scientific procedure

conducted pursuant to laboratory guidelines. The California Supreme Court held that a statement about scientific evidence was not testimonial unless "(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial." (*Id*. at p. 605.) The court found that the report was not testimonial because it was a "contemporaneous recordation of observable events rather than the documentation of past event." (*Ibid*.)

After the trial took place in this case, the California Supreme Court issued three companion opinions involving *Crawford* issues: *People v. Lopez* (2012) 55 Cal.4th 569, *People v. Rutterschmidt* (2012) 55 Cal.4th 650 and *People v. Dungo* (2012) 55 Cal.4th 608.

Each of those cases reviewed three U.S. Supreme Court cases which discussed whether evidence of laboratory results implicated the Sixth Amendment and *Crawford*: *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. ___ 131 S.Ct. 2705, 180 L.Ed.2d 610 and *Williams v. Illinois* (2012) 567 U.S. ___, 132 S.Ct. 2221.

In *Melendez-Diaz, supra,* 557 U.S. 305, state laboratory analysts' certificates were sworn to before a notary public. There was no live testimony by the analysts. The Supreme Court held the certificates were affidavits and were thus testimonial statements. (*Id*. at pp. 329-330.)

In *Bullcoming, supra*, 564 U.S. ___, a defendant was convicted of driving while intoxicated, based on evidence from a forensic laboratory of his blood-alcohol concentration. An analyst who was familiar with the laboratory's testing procedures but who had not performed or observed the tests, testified at trial. The report was held to be testimonial and could not be admitted through the "surrogate testimony" of an analyst who did not perform or observe the tests or even sign the certification of the tests. (564 U.S. at p. ___, 131 S.Ct at p. 2717.)

In *Williams v. Illinois, supra*, 577 U.S. ___, a defendant was on trial for rape and a DNA sample was tested by Cellmark. No one from Cellmark testified, nor was the laboratory report introduced into evidence, but a police forensic biologist testified as to

the results. Four justices concluded that the information in the Cellmark DNA report was not testimonial because it was not offered for its truth, but as a basis for expert testimony, and even if the report had been introduced for its truth, it was not testimonial because it was not an affidavit made for the primary purpose of proving the guilt of a particular defendant. The plurality opinion of four justices found that the expert's testimony did not violate the Sixth Amendment because the expert testimony was not admitted for its truth but only to explain the basis of the witness' independent conclusion, and because the report was not prepared for the primary purpose of a criminal prosecution since at the time the defendant was not yet a suspect. (*Id.* at p. ___. )

With these cases in mind, the California Supreme Court determined the applicability of *Crawford* in the three companion cases. In *Lopez*, a laboratory assistant made a chain of custody log sheet showing the results of blood tests. The other part of the report was data generated by a machine to measure alcohol in a blood sample. The analyst initialed the pages of the report but made no statement. (*People v. Lopez, supra*, 55 Cal.4th at p. 583.) The first component in determining whether an out-of-court statement is testimonial is that it be made with some degree of formality or solemnity. The second component is that the statement's primary purpose pertains to a criminal prosecution. (*Id*. at pp. 581-582.) Examining the two separate components of the report, the court concluded that the chain of custody log sheet was admissible because it did not meet the requisite amount of formality to constitute a testimonial statement. The second part of the report, machine-generated data, also did not implicate the Sixth Amendment. (*Id*. at pp. 583-584.) The court held that the report was not testimonial in nature. (*Id.* at p. 585.)

In *Rutterschmidt, supra*, 55 Cal.4th 650, the laboratory director of the county coroner's department testified at trial. Four laboratory analysts working under his supervision had tested the victim's blood. The four analysts gave the data generated by their equipment to the clerical staff, who then prepared a report containing the test results. The report was "peer reviewed" and the data entered into a computer which generated a final report. The laboratory director reviewed the report to correct errors and check that

proper procedures had been followed and then he signed the report. (*Id.* at pp. 655-656.) The victim's blood was tested again a year later and the laboratory director reviewed the second report. (*Id*. at p. 656.) The director testified that based on the reports, he concluded that the victim's blood contained alcohol and sedatives. (*Id*. at p. 659.) None of the analysts testified and the laboratory reports were not introduced into evidence. (*Id*. at p. 659.) The issue of whether the laboratory director's testimony was testimonial was not reached because overwhelming evidence supported defendant's guilt. (*Id*. at p. 661.)

In *Dungo, supra*, 55 Cal.4th 608 a pathologist examined the victim's body and prepared an autopsy report. Another pathologist who reviewed the autopsy report and accompanying photographs testified at trial and opined that the victim had died of strangulation. (*Id.* at p. 612.) The autopsy report was not introduced into evidence and the examining pathologist did not testify. (*Id*. at pp. 612-613.) The court held that the autopsy report was not testimonial because criminal investigation was not the primary purpose for the condition of the victim's body. It was "an official explanation of an unusual death." (*Id*. at p. 621.) The testifying pathologist's description of the objective facts contained in the autopsy reports did not give the defendant a right to confront and cross-examine the pathologist who performed the autopsy. The Court found no violation of the right to confrontation. (*Ibid*.)

Here, Word reviewed Magee's work and reviewed the laboratory test results used by Magee and reached the same conclusion as Magee. Word's testimony was based on her own independent review of the test results. She was able to testify as to the procedures in place at Cellmark and opine as to their trustworthiness. She was able to testify to the means by which the instrument-generated data was produced and interpreted that data, and give her own independent opinion of the DNA results.

Unlike *Dungo* and *Rutterschmidt*, in this case, Word herself personally examined the lab results and came to her own independent conclusion regarding the DNA evidence. She did not just review for procedural errors as in *Rutterschmidt*. Unlike the testifying pathologist in *Dungo*, Word reviewed the data contemporaneously with the other laboratory analyst and testified as to her own observations and conclusions of the data as

the samples were examined. The report was not admitted into evidence but only served as the basis for Word's opinion. It was therefore unnecessary to determine if the report was testimonial in nature. Word's opinion was based on personal knowledge of the procedures followed and the raw data, and she made her observations and conclusions at or about the time the evidence was gathered. She was familiar with the procedures followed in the laboratory. The defense had an opportunity to, and did, cross-examine and confront her. No Sixth Amendment violation occurred.

*3. Mariana Xuncax's testimony*

During the sanity phase, defense counsel sought to introduce testimony by Xuncax about the trauma appellant suffered while in Guatemala and how it affected his mental state. The defense argued that Xuncax was a graduate nurse who worked as an instructor and outreach public health worker in Guatemala. Counsel stated that her specialty was dealing with people from Northwestern Guatemala and as a trained nurse, her observations of how the widespread atrocities that occurred during war affected the population at that time and how the effects are ongoing. Defense counsel made the following statements about her testimony: "It is my intention to use her to describe the residual effects of the war in Guetemala [sic] on the people she sees and interacts with which will be consistent with . . . Doctor De Grati's opinion of sanity. [¶] Otherwise, Doctor De Grati's opinion has no factual support. So she's just a live witness for some of Doctor De Grati's predicates. She's not here to draw any opinions."

The court acknowledged that appellant came from a country which had been at war where civilians have suffered psychological damage. It then asked if appellant had exhibited post-traumatic stress symptoms to Xuncax. Appellant's counsel indicated that Xuncax had never seen appellant.

The court ruled, after further discussion: "The nurse will be permitted to testify as to the civil conditions of the country while she has been a mental health specialist. She will not be permitted to testify regarding any issues concerning what the court keeps saying as post traumatic stress syndrome issues. The bottom line is what she will do is basically backup or validate statements that may have been made by your client to Doctor

De Grati in this matter. And beyond that, that's all I'm saying at this point. . . . The court does not find a sufficient nexus since this nurse has never personally spoken to or interviewed your client. I find her opinions or what she might say with respect to this matter to be anecdotal in nature and not applicable to this incident. That's the court's ruling right now. It's subject to renegotiation."

Appellant renewed his argument in a motion for a new trial. The court denied the motion on the same grounds.

Appellant contends the trial court erroneously limited Xuncax's testimony because it had already designated her as an expert witness. He argues that this violated his state and federal constitutional rights by barring him from making an effective presentation of an insanity defense. He also claims that his counsel was prevented from laying a complete foundation for the testimony of Dr. Degrati by not allowing Xuncax to testify as to the full extent of the atrocities which took place in Guatemala.

Evidence Code section 801 defines expert testimony as "(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing. . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates. . ." Evidence Code section 720 provides that a person is qualified to testify as an expert witness "if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert *on the subject to which his testimony relates*." (Italics added.)

The question of whether an expert witness is qualified to testify and whether a foundation has been laid for his or her testimony rests in the sound discretion of the trial court and its ruling will be reversed on appeal only if there is abuse of discretion. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175.)

Appellant's conclusion that the court designated Xuncax as an expert is based on a single statement in which he asked all "expert witnesses to leave the courtroom." It is

clear that Xuncax's qualifications were considered and ruled upon in the sanity phase and she was only considered as an expert on certain grounds.

Xuncax could not have given a qualified opinion as to the effect of the Guatemalan war on appellant's mental state during the commission of the crimes since she had never met appellant. She was, however, allowed to testify about the war in Guatemala. Dr. Degrati, who had seen appellant, was allowed to testify as to its effects on appellant's mental state. We find no abuse of discretion in the trial court's ruling and no violation of appellant's constitutional rights. (*Ramos, supra,* 15 Cal.4th at pp. 1175-1176; *Korsak v. Atlas* (1992) 2 Cal.App.4th 1516, 1526.)

*4. Jury Instructions*

The court instructed the jury with CALJIC No. 1.12 as follows: "In this proceeding the alleged victim has been identified as Ruth L. This has been done only for the purpose of protecting her privacy pursuant to California law. The fact that the alleged victim has been so identified is not evidence, and should not be considered by you for any purpose in this trial."

Appellant contends that this instruction was prejudicial error since Ruth L. was dead at the time of trial and had no privacy right which required protection.

Section 293.5 provides that the court may identify the alleged victim of a sex offense by Jane Doe or John Doe if the alleged victim requests it and if the court finds that the order is reasonably necessary to protect the privacy of the person and will not unduly prejudice the prosecution of the defense.

Appellant did not object to the instruction, and thus has forfeited his claim on appeal, but we conclude that in any event, there was no error in giving this instruction. (*People v. Moore* (2011) 51 Cal.4th 1104, 1134.)

It was undisputed that a sexual assault had occurred and Ruth L. was alive at the time of the preliminary hearing. Moreover, no improper inferences could be drawn simply from the reference to Ruth L. by her first name, and the jury was instructed not to make any conclusions about the court's opinion based upon this reference. There was no error in giving the instruction. (*People v. Ramirez* (1997) 55 Cal.App.4th 47, 57-59.)

*5. Sufficiency of evidence to support attempted rape conviction*

Section 261 provides in pertinent part that rape is "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator . . . Where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another."

Section 263 provides that "[t]he essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."

Ruth L.'s testimony at the preliminary hearing indicated that appellant pushed a stick into her two or three times, then he attempted to put his penis in her. She testified that before he put the stick in he tried twice to put his penis inside her vagina, and tried to force it in and she fought him off, the first time "a part of it" went in and the second time, "a little" went in, showing the tip of her finger. He then hit her, and that she felt the stick going in. On cross-examination, she testified that appellant was unable to insert his penis into her vagina on the second attempt because she successfully fought him off.

Hernandez, the apartment manager, testified that when he saw appellant lying on top of Ruth L., appellant's penis was inside her.

This testimony was sufficient evidence of an attempted rape. (*People v. Rundle* (2008) 43 Cal. 4th 76, 151, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 416, 421, fn. 22.)

*6. Ineffective assistance of counsel*

Appellant contends that he was denied the right to effective assistance of counsel as a result of his trial counsel's failure to object to CALJIC No. 1.12 and the testimony of Word, and his failure to elicit critical evidence from Xuncax about her expertise.

In order to successfully claim ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objective standard of reasonableness and that, there is a reasonable probability, the defendant would have obtained a more favorable result absent counsel's alleged shortcomings. (*Strickland v. Washington* (1984) 466 U.S. 668, 687*; People v. Dennis* (1998) 17 Cal.4th 468, 540-545.) Counsel is not

ineffective for failing to make a futile or unmeritorious objection or request an unwarranted jury instruction. (*People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836-838; *People v. Ferraez* (2003) 112 Cal.App.4th 925, 932.) ""The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."" (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

As we have already determined, even if counsel had objected on the basis of the confrontation clause, Word's testimony did not violate the Sixth Amendment.

In addition, there was no error in giving CALJIC No. 1.12, thus appellant's counsel was not ineffective by failing to object to that instruction.

Appellant bases his contention about Xuncax on remarks made by the trial court when trial counsel attempted to recall her to the stand. Counsel told the court that she would testify that when she was working in rural Guatemala she saw "bodies and body parts floating in the rivers with stakes very similar to the one in this case sticking out of their torsos and heads. And that it's been her experience the purpose of that was to intimidate the people." The court then remarked, "I can't believe that you let her get off the stand without saying that. That's critical stuff. . . ." But the court did not allow counsel to recall Xuncax.

However, a review of the complete transcript reveals that during the discussion about the extent of Xuncax's expertise, the court and counsel did discuss that Xuncax would testify that "the stick is the signature instrument of the Guatemala death squads" and that defense counsel first argued that the reason he wanted to recall Xuncax was that he was not satisfied with the Spanish interpreter. The court made comments at sidebar to defense counsel about his failure to interpose timely objections. The prosecutor then reiterated her objection to re-calling Xuncax, and defense counsel was only able to say that he would ask Xuncax which acts of violence she personally witnessed. The court then replied, inter alia, "I think the record is getting pretty much replete with the fact that things are coming up in a hodge podge manner, and I don't believe there is any system or

plan as to what is going on here. . . . I believe this issue whether or not atrocities were committed in Guatemala at the time this man was in Guatemala was established."

We conclude the trial court did not err in refusing to allow defense counsel to recall Xuncax. Doctor Degrati already opined that appellant was not sane and that his criminal acts were the result of his reenactments of the violence in Guatemala. Therefore, any testimony on this subject by Xuncax would have been cumulative and any error in failing to question her further was not prejudicial. Furthermore, Xuncax had never met appellant and thus could not opine on whether he had personally seen any of the crimes committed with sticks. During argument, defense counsel pointed out the weaknesses and credibility problems with Dr. Sharma's testimony, and the prosecutor did the same with Dr. Degrati's and Xuncax's testimony. The jury found Dr. Sharma to be the more credible witness. It is not reasonably probable appellant would have been acquitted had his counsel asked Xuncax about the sticks used in Guatemala. Accordingly, appellant was not deprived of the effective assistance of counsel. (*People v. Kraft* (2000) 23 Cal.4th 978, 1068.)

*DISPOSITION*

The judgment is affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.** **ZELON, J.**