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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. JASWINDER SINGH SOOS, Defendant and Appellant.	B283269 (Los Angeles County Super. Ct. No. PA087127)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay, Ilana Herscovitz Reid, and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jaswinder Singh Soos appeals from the judgment after a jury convicted him of assault with intent to commit rape and sexual battery. We affirm.

FACTUAL BACKGROUND

1. Prosecution case

On June 3, 2016, sometime after 8:00 p.m., Rebecca C.[1] called a taxicab to take her, her infant daughter, her friend Helen, and Helen's son to the shelters where they lived. Defendant was driving the cab. Rebecca sat in back with the baby and Helen, and Helen's son sat in front with defendant.

They stopped at a bank so Rebecca could get money to pay the fare, and at a convenience store to buy food, drinks, and other items. Defendant offered to put Rebecca's drink in the cup holder in front, and Rebecca accepted.

Defendant dropped Helen and her son off at their shelter. He then drove a short distance and stopped, and asked Rebecca if she wanted to sit in front with him. Rebecca asked why, and defendant said so she could drink her beverage. Rebecca got in front with him, leaving the baby in her car seat in the back.

Defendant continued driving. He pulled over again at some point and said there was something wrong with the baby's car seat. Rebecca got out of the cab to inspect the seat. Defendant also got out and stood behind her. Rebecca "felt something grope [her] thigh" and looked back at defendant. Defendant apologized and said his hand had bumped into her.

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[1] To protect the witness's privacy, we refer to her by her first name, as did the trial court. We intend no disrespect.

Rebecca said it was late and she needed to go home. They continued driving. Rebecca noticed defendant was looking at her, although she tried not to look at him. Suddenly, he grabbed her hand. He said she was pretty and began to brush his hand against her face. Rebecca asked him to stop and told him he was scaring her. She asked him to take her home. Defendant continued holding her hand as she continued to tell him to stop and to take her home.

Defendant pulled the cab into the driveway of a park. The area was empty except for a car off in the distance. Pretending that she was sending a text message to a friend, Rebecca dialed 9-1-1 on her phone and placed it face down so defendant could not see the number she had called. Although a portion of the call was recorded, a testifying police officer said "[t]here appeared to be nothing on the 40 seconds captured on the tape."

Defendant again said Rebecca was pretty and began touching her. He put his hands inside her shirt and groped her breasts, then pulled the shirt down and kissed her breasts, chest, face, and neck. He tried to put his hand inside her pants but could not loosen the drawstring, so he rubbed her "vaginal areas" through her clothes. Rebecca did not fight with him out of concern for her and her baby's safety. She did not think she could leave because she was in an unfamiliar location and her baby was in the back seat.

Defendant held Rebecca's head in his hands and "shoved his tongue down [her] throat." Rebecca pushed him away and told him to stop. She testified that she said "no" "more than a dozen" times.[2]

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[2] It is not clear from Rebecca's testimony if the dozen times she said "no" were at this point of the incident or at other points.

Defendant took Rebecca's hand and brushed it against his "private area"; she could feel that he was "excited." Rebecca told him she had to get home or she might lose her bed at the shelter. She said she could not have sex with him without a condom, but if he got a condom, she would do whatever he wanted. She asked for his phone number and said they could meet later to have sex. Rebecca testified that her hope was that she might be able to escape when he went to get the condom.

Defendant said, "You have every excuse in the world, don't you?" Rebecca told him she was not making excuses and would do whatever he wanted if he got a condom. Defendant "fidget[ed] his head from side to side," then agreed to get the condom.

Defendant drove them to a gas station and went inside while Rebecca and her baby remained in the car. Rebecca could see him looking in her direction. When she saw him buying the condom, she took her baby out of the car and began yelling for help. Defendant came running out of the gas station, telling Rebecca to get back in the car and that he would take her home. When Rebecca refused, defendant got into the cab and drove away.

2. Defense case

Defendant did not testify and defense counsel did not call any other witnesses.

PROCEDURE

Defendant was charged in an amended information with assault with intent to commit a felony (count 1) (Pen. Code, § 220, subd. (a)(1)) and sexual battery by restraint (count 2) (*id.* § 243.4, subd. (a)). The jury found defendant guilty of both counts. The trial court sentenced defendant to four years on count 1 and

stayed an additional four-year sentence on count 2 pursuant to Penal Code section 654. The trial court ordered defendant to register as a sex offender for the remainder of his life and awarded credits and imposed fines and fees.

DISCUSSION

A. There Was Insufficient Evidence To Support An Instruction On The Defense Of Reasonable And Good Faith Mistake Of Fact

Defendant argues that the trial court erred in not instructing the jury that defendant could be found not guilty of both charges if he had a reasonable and good faith belief that Rebecca consented to his actions. We disagree.

"[A] defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape." (*People v. Andrews* (2015) 234 Cal.App.4th 590, 600 (*Andrews*), citing *People v. Mayberry* (1975) 15 Cal.3d 143, 155.) The *Mayberry* defense has been extended to a charge of sexual battery as well. (*Andrews*, *supra*, 234 Cal.App.4th at p. 603.) The defense has both a subjective and objective component. (*Id.* at p. 600.) " 'The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse.' " (*Ibid.*) The objective component " 'asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable.' " (*Id.* at pp. 600-601.) A trial court has a sua sponte

duty to instruct on this defense if there is substantial evidence to support it. (*Id.* at p. 601.)

Here, when the trial court instructed the jury on the elements of assault with the intent to commit rape, it referred to and provided the jury instructions for rape, including the *Mayberry* defense. However, the trial court did not repeat the *Mayberry* defense instruction when instructing the jury on sexual battery. Defendant argues there was sufficient evidence to warrant such an instruction as to both charges because Rebecca's "own testimony provided evidence of equivocal conduct on her part." As to the sexual battery, defendant points to Rebecca's testimony that she willingly got into the front seat with defendant and requested his phone number so they could arrange a subsequent meeting. As to the assault with intent to rape, in addition to Rebecca giving him her number and suggesting a future meeting, defendant points to Rebecca's testimony that she told defendant she would have sex with him if he obtained a condom. Defendant argues that he "was unaware [Rebecca] was trying to trick him" and "reasonably could have viewed [Rebecca's] comments as her willingness and consent to engage in sexual activity with him including intercourse. Indeed, given that [defendant] actually drove to a gas station and went inside to purchase condoms, it would appear [Rebecca] gave a credible performance."

We reject this argument. As to the assault charge, the trial court provided a *Mayberry* instruction "because the court, in advising the jury of the elements of assault with intent to commit rape, referred to the instruction for the elements of rape" that included the *Mayberry* instruction. (*Andrews*, *supra*, 234 Cal.App.4th at pp. 599-600.) Defendant argues that *Andrews*

is distinguishable because there, the defendant was actually charged with rape, with assault as a lesser-included offense, whereas here, assault was a separate charge. Thus, defendant claims, in *Andrews* the jury would reasonably think that a defense applying to the greater crime would also apply to the lesser, whereas here, "the jury had no reason to understand that reasonable belief in consent was a defense to the assault count as well as to rape." This is illogical; given the absence of a rape charge, there would be no point in the trial court reading the *Mayberry* instruction unless it applied to the assault charge. The jury had no reason to conclude differently.

Regardless, on this record the trial court had no duty to give a *Mayberry* instruction as to either the assault charge or the sexual battery charge because there was no evidence that defendant had an honest and good faith belief that Rebecca consented to his conduct. No reasonable person could have construed Rebecca's decision to sit in the front seat of the cab as consent to any sort of sexual activity absent some other indication. To the extent defendant thought otherwise, Rebecca swiftly corrected that misperception by objecting immediately when he touched her hand, telling him he was scaring her, and insisting repeatedly that he take her home. Her offers to have sex with him if he obtained a condom and to meet with him later arose only after he had taken her and her baby to an isolated area and forced himself on her, groping and kissing her against her will. In other words, they occurred after the sexual battery had taken place, and therefore cannot support any claim that defendant believed she had consented before he assaulted her. No reasonable person could believe that her offers were anything other than an attempt on her part to stop the assault before

defendant raped her, and to provide an opportunity for her escape. Defendant's decision to leave Rebecca in the cab while he obtained a condom was not evidence of a reasonable and honest belief that she had consented; rather, it indicated either an unreasonable misunderstanding of human behavior or a belief that she would not escape because she was so afraid. There was no basis to give a *Mayberry* instruction, and the trial court did not err to the extent it did not do so.

Defendant argues that the fact the trial court gave a *Mayberry* instruction as part of the rape instruction indicated the trial court and the prosecution believed the defense was warranted. We make no such presumption, particularly given the lack of any evidence supporting the defense. To the extent the trial court gave an unnecessary *Mayberry* instruction, we can discern no prejudice nor does defendant claim any.

B. The Sexual Battery Verdict Was Supported By Sufficient Evidence

Defendant contends that there was insufficient evidence that he unlawfully restrained Rebecca, and therefore his conviction for sexual battery should be reduced to misdemeanor sexual battery under Penal Code section 243.4, subdivision (e). We disagree.

When evaluating the sufficiency of evidence, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime . . . 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 have deduced from the evidence." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) " 'In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts.' [Citations.] Rather, ' "it is the exclusive province of the . . . jury to determine the credibility of a witness and the truth or falsity of the facts," ' and it is not for us to substitute our judgment for that of the jury's." (*People v. Truong* (2017) 10 Cal.App.5th 551, 556.) " '[T]he testimony of a single witness is sufficient for the proof of any fact.' " (*People v. Avila* (2009) 46 Cal.4th 680, 703.)

Under Penal Code section 243.4, subdivision (a), a person commits sexual battery if he "touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and if the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse." "[A] person is unlawfully restrained when his or her liberty is being controlled by words, acts or authority of the perpetrator aimed at depriving the person's liberty, and such restriction is against the person's will." (*People v. Arnold* (1992) 6 Cal.App.4th 18, 28.) The victim does not have to be physically restrained; it is sufficient that a "[d]efendant's conduct forced [the victim] to remain where [he or she] did not voluntarily wish to be." (*People v. Grant* (1992) 8 Cal.App.4th 1105, 1113 (*Grant*).)

Here, Rebecca testified that, although defendant did not physically restrain her, she was afraid to leave because she was in an unfamiliar location and her baby was in the back seat. Based on this testimony, the jury reasonably could conclude that

defendant had unlawfully restrained Rebecca. He had invited her to the front seat, thus separating her from her baby, and against her protests, had driven her to an isolated area with no one around who could help her. Had Rebecca attempted to leave, she risked defendant harming or driving off with her child. Defendant's actions "forced [Rebecca] to remain where she did not voluntarily wish to be." (*Grant*, *supra*, 8 Cal.App.4th at p. 1113.)

Defendant argues the evidence was insufficient because he "did not use any physical force or coercion to restrain [Rebecca's] movement" and Rebecca "could have simply opened the passenger door." He did not "threaten her or her child with any harm," and when Rebecca got out of the car at the gas station, defendant "did not employ any type of force or threats to get her back into the vehicle." Rebecca "never testified that [defendant] made any effort to prevent her from removing either herself or the baby from the vehicle."

These arguments are unavailing. The prosecution did not have to prove that defendant physically restrained Rebecca, so long as his conduct prevented her from leaving. And although Rebecca did not testify that defendant threatened her or her child, the jury could infer an implicit threat from defendant's conduct, or at least that defendant was taking advantage of a mother's fear to restrain her. Rebecca's testimony was substantial evidence supporting the verdict.

C. Defendant Has Forfeited His Challenge To The Trial Court's Explanation Of The "Acquittal-First" Rule

Defendant argues that comments made by the trial court when instructing the jury violated the "acquittal-first" rule, which permits a jury to deliberate on greater and lesser-included

offenses in any order it chooses. We hold that defendant has forfeited this claim by failing to raise it in the trial court.

1. Proceedings below

In addition to instructing the jury on the two charged offenses, the trial court provided instructions for several lesser-included offenses, specifically misdemeanor sexual battery as a lesser-included offense of sexual battery, simple battery as a lesser-included offense of misdemeanor sexual battery, and simple assault as a lesser-included offense of both assault with intent to commit rape and misdemeanor sexual battery. The trial court instructed the jury that "[i]t is up to you to decide the order in which you consider each crime and the relevant evidence, but I can accept a verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." The trial court then read instructions on the manner in which to complete the verdict forms depending on the various possible verdicts; for example, if the jury found defendant guilty of the greater offense, it would so indicate on the verdict form and not complete the verdict forms for the lesser offenses of that count; if the jury could not reach a verdict on the greater offense, it would inform the trial court and not complete any verdict forms as to that count; if the jury found defendant not guilty of the greater offense but guilty of the lesser, it would return a verdict form indicating not guilty for the greater and a form indicating guilty for the lesser.

After reading these instructions to the jury, the trial court stated: "That's complicated. It's actually quite simple, though, when you break it down. [¶] So, we have what are called greater offenses. It's kind of like a pyramid. And you have lesser offenses. In this particular case, count 1, for example, is assault

with intent to commit rape. That's called the greater offense. The lesser offense is what we call simple assault. So it's like a sub-set of the greater."

The trial court continued: "So here's what this instruction says. This applies to both counts. [¶] If the jury unanimously finds the defendant guilty of the greater crime, you never get to the lesser. If you find the defendant not guilty of the greater crime, then you start talking about the lesser. [¶] If for some reason you cannot reach unanimous agreement about the greater crime, whether it's guilty or not guilty, let me know. You are still not going to get to the lesser."

2. Analysis

Under California's "acquittal-first" rule, "a trial court may direct the order in which jury verdicts are returned by requiring an express acquittal on the charged crime before a verdict may be returned on a lesser included offense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110.) However, it is error for a trial court to instruct a jury not to " 'deliberate on' or 'consider' " the lesser-included offenses before reaching a conclusion on the greater offense. (*People v. Kurtzman* (1988) 46 Cal.3d 322, 335 (*Kurtzman*).) "Instructions should not suggest that a not guilty verdict must actually be returned [on the greater offense] before jurors can consider remaining offenses. Jurors may find it productive in their deliberations to consider and reach tentative conclusions on all charged crimes before returning a verdict of not guilty on the greater offense." (*Id.* at p. 336, fn. omitted.)

Defendant does not dispute that the trial court read the correct instruction to the jury, but contends that the trial court's "supplemental explanation" misstated the law. Defendant concedes that his counsel did not object to the trial court's

instructions. Failure to ask the trial court to clarify an instruction results in forfeiture on appeal. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1211.) "But no forfeiture will be found where . . . the court's instruction was an incorrect statement of the law [citation], or the instructional error affected the defendant's substantial rights." (*People v. Mason* (2013) 218 Cal.App.4th 818, 823.)

Here we conclude that defendant forfeited his challenge. The trial court did not make an incorrect statement of the law. The trial court provided the correct instruction on the acquittal-first rule, including informing the jury that it could "decide the order in which you consider each crime and the relevant evidence." The trial court's subsequent comments about the jury reaching a decision as to the greater offense before "get[ting] to" or "talking about the lesser" arguably muddled the correct rule. But the trial court did not explicitly order the jury to follow a particular procedure, or explicitly forbid the jury from considering the lesser offenses before deciding the greater; at most, the trial court's comments created an ambiguity that defendant's counsel could have clarified through a proper request to the trial court.

These circumstances distinguish this case from *Kurtzman* and *People v. Olivas* (2016) 248 Cal.App.4th 758 (*Olivas*), cited by defendant, which held that trial courts erred by explicitly prohibiting juries from discussing certain offenses until they had reached unanimous agreement on others. In *Kurtzman*, during deliberations the jury asked the trial court, " 'Can we find the defendant guilty of manslaughter without unanimously finding him not guilty of murder in the second degree?' " (*Kurtzman*, *supra*, 46 Cal.3d at p. 328.) The trial court responded, " 'No, you

must unanimously agree on the second degree murder offense before *considering* voluntary manslaughter.' " (*Ibid.*) Similarly, in *Olivas* the jury asked the trial court whether, if the jurors were " 'hung' " on a count, they were "able to consider [an] alternate count.' " (*Olivas*, *supra*, 248 Cal.App.4th at p. 772.) The trial court responded, "No." (*Ibid.*)

In both *Kurtzman* and *Olivas*, the juries specifically asked whether they could deliberate in a particular sequence, and in both cases the trial courts explicitly said no. This indisputably misstated the law, which allows juries to deliberate in whatever order they see fit. Here, in contrast, the only explicit statement the trial court made as to the sequence of deliberations was the correct one, namely, that the jury could "decide the order" of those deliberations. The trial court's subsequent comments, which were not in response to any questions from the jury, may have suggested that the jury resolve the greater offenses before discussing the lessers, but did not explicitly so direct. (Cf. *Olivas*, *supra*, 248 Cal.App.4th at p. 777 ["there was no ambiguity in the trial court's unequivocal 'No' in response to the jury's question"].) Thus, there was no misstatement of the law entitling defendant to challenge the instruction absent an objection in the trial court.

We further hold that the trial court's instructions did not affect defendant's substantial rights. We determine whether a purported instructional error affected a defendant's substantial rights by "ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Because error under *Kurtzman* "implicate[s] California law only," prejudice is shown if the error

had " 'a reasonable probability of an effect on the outcome.' "[3] (*People v. Berryman* (1993) 6 Cal.4th 1048, 1077, fn. 7, overruled on other grounds by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; see *Olivas*, *supra*, 248 Cal.App.4th at p. 775.)

Defendant argues that constraining the order in which jurors deliberate may lead certain jurors who do not believe the defendant is guilty of the greater offense to "nevertheless vote to convict . . . because they erroneously believe they lack the option of trying to persuade the other jurors to convict on a lesser charge, and therefore believe that convicting the defendant on the greater charge is the only available alternative to allowing him to go free." Whatever the merits of this concern, we do not believe it existed here. First, as we have discussed, the trial court instructed the jury that it could deliberate in any order it chose, and its subsequent comments, while arguably confusing, did not prohibit the jury from considering the lesser-included offenses before deciding the greater offenses. The risk that the jury might have misinterpreted the trial court's comments was therefore lessened in comparison to *Olivas*, for example, where the trial court's direction as to the order of deliberations was "unequivocal." (*Olivas*, *supra*, 248 Cal.App.4th at p. 777.)

Second, given the evidence, we do not think it reasonably probable that any juror would acquit defendant of the charged offenses in favor of the lesser-included offenses. Rebecca's uncontroverted testimony established that she repeatedly made clear that she did not consent to sexual activity, yet defendant

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[3] Given that the acquittal-first rule implicates state law only, we reject defendant's argument that the purported error has federal constitutional dimensions under the circumstances of this case.

forced himself on her. His intention to rape her was evident: He took her to a secluded location despite her repeated requests that he take her home, then kissed her aggressively, groped her breasts, attempted to put his hands down her pants, and fondled her genitals through her pants when he could not loosen the drawstring. He also went to purchase a condom, removing any doubt that he intended to have sexual intercourse with Rebecca; although defendant argues that the purchase of the condom was evidence that he was convinced by Rebecca's entreaties that she actually wanted to have sex with him, the more reasonable conclusion is that he knew she was unwilling, but believed he had so terrorized her into submission that he could leave her briefly to obtain a condom. Defendant repeats his arguments that the evidence of unlawful restraint was lacking, but as we have discussed, this element was firmly established by defendant taking Rebecca and her baby to an isolated location where Rebecca could not escape without putting her child at risk. It is not reasonably probable that the trial court's comments on the acquittal-first rule affected the verdict. We deem defendant's challenge forfeited. Even if it were not, it would fail on the merits given the lack of prejudice.

D. Defendant Has Failed To Show Prosecutorial Error

Defendant argues that the prosecutor committed error by misstating the acquittal-first rule during closing argument. We reject this argument.

During closing argument, the prosecutor, in discussing the greater and lesser offenses said, "So if you find the defendant guilty on count 1, assault with intent, then you don't go further than that. You don't have to consider simple assault under there. Okay?" A moment later, the prosecutor said "if you found the

defendant guilty on count 1, you go no further as to the simple assault. Then you just go straight to count 2. Okay? It's only if you find him not guilty on count 1 that you then consider simple assault. Okay?" Then, "So you consider felony sexual battery, sexual battery by restraint. If you find the defendant guilty, then it's actually easier—then you just don't consider the other three lessers underneath. Okay? Then you just—you're done. [¶] It's only if you find not guilty on count 2, the felony sexual battery, that then you have to consider the misdemeanor sexual battery. If you find guilty, then you stop there. If you find not guilty, then you have to go to simple battery."

As an initial matter, defendant forfeited any challenge to the prosecutor's comments by failing to object in the trial court. "It is well settled that making a timely and specific objection at trial, and requesting the jury be admonished . . . is a necessary prerequisite to preserve a claim of prosecutorial misconduct for appeal." (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Defendant correctly notes that no objection or request for admonition is required if either would be futile or would not cure the harm caused by the error. (See *ibid.*) This exception does not apply here, where the trial court easily could have cured the error by correcting the prosecutor's purported misstatement.

Even if defendant properly preserved the issue, his challenge fails on the merits. Like the trial court's comments discussed in the previous section, the prosecutor's comments did not suggest the jury was prohibited from deliberating in any particular order, which would have been a misstatement of the law. Instead, the prosecutor suggested a possible order in which deliberations might take place, and accurately stated that if the jury reached a guilty verdict on the greater counts, it would not

have to consider the lesser offenses. Defendant cites no authority indicating that this was improper.

Defendant's argument also fails because he cannot show prejudice for the same reasons he cannot show prejudice from the trial court's explanation of the acquittal-first rule.

E. The Trial Court Properly Controlled Witness Testimony

Defendant argues that the trial court did not control adequately Rebecca's "emotional outbursts" during her testimony and defendant was prejudiced thereby. We reject this argument.

Defendant identifies two portions of the reporter's transcript demonstrating Rebecca's "outbursts." During cross-examination, the following exchange took place when defense counsel asked about Rebecca's drink in the cab's cup holder:

"[Defense counsel]: And what happened when he straddled the console? Did it spill?

"[Rebecca]: No, it did not spill. He was very careful. [¶] He knew exactly what he was doing, sir.

"[Defense counsel]: Okay. So there was no problem with the drink being in his way.

"[Rebecca]: No. There was no problem with the drink being in his way.

"[Defense counsel]: And that's when—

"[Rebecca]: And my mind was not on any drink. [¶] I'm sorry, Your Honor. I don't know what this has to do with this man sexually assaulting me.

"The Court: I will tell you what—

"[Rebecca]: I am getting very pissed off.

"The Court: Stop talking. Stop talking. Okay? [¶] I will run the courtroom. Trust me, I will do a good job. [¶] You need

to wait until [defense counsel] is done. He will wait until you are done. [¶] If questions are asked of you that are not relevant, there will be an objection and I will deal with it. [¶] The jury is entitled to hear factually what occurred that day, as long as it's relevant."

Then, during the prosecutor's redirect examination, the following exchange occurred:

"[Prosecutor]: Why didn't you feel like you could leave the car?

"[Rebecca]: Because my baby was in the back seat of the car. [¶] And if he took me to the park, you know, for whatever reason—whatever reason, you know, why would he just let me go like that? You see what I'm saying?

"[Prosecutor]: Right.

"[Rebecca]: It's not making no sense to me. [¶] He knows what he did to me was wrong."

Defense counsel objected to this last statement and moved to strike. The trial court sustained the objection and struck the testimony as speculative, instructing the jury that "[w]henever I say 'stricken,' the jury is ordered to disregard that portion."

We fail to see any error in how the trial court dealt with Rebecca's testimony. In the first example, when Rebecca apparently became angry, the trial court admonished her and explained why defense counsel was entitled to ask about the drink in the cup holder. In the second example, the trial court sustained defense counsel's objection and struck the objectionable portion of Rebecca's testimony. The record thus indicates the trial court properly controlled witness testimony and responded quickly to potential problems. This stands in contrast to defendant's cited case, *People v. Tucker* (N.Y. App. Div. 1987)

133 A.D.2d 787, in which the trial court failed to admonish a witness and strike her testimony "exclaim[ing] her certainty that the defendant was the perpetrator." (*Id.* at p. 788.)

We are unconvinced by defendant's argument that Rebecca's "tone of annoyance and impatience, as well as her express assertion that [defendant] knew he was guilty, were highly prejudicial and so manifest it could not help but to have inflamed the passions of the jurors against [defendant] and deprive him of a fair trial." The prejudicial effect of Rebecca's tone and assertions of defendant's guilt, if any, would be marginal relative to the emotional effect of her descriptions of defendant's criminal acts. We expect the latter had a far greater effect on the jury than the former.

F. Rebecca Did Not Comment On Defendant's Decision Not To Testify

Defendant contends that Rebecca's statement, "He knows what he did to me was wrong," improperly commented on his decision not to testify. We disagree.

" ' "Under the Fifth Amendment of the federal Constitution, a prosecutor is prohibited from commenting directly or indirectly on an accused's invocation of the constitutional right to silence." ' " (*People v. Denard* (2015) 242 Cal.App.4th 1012, 1020 (*Denard*).) The concern is that the prosecutor's comments might "misle[a]d the jury 'into drawing an improper inference regarding defendant's silence,' " namely that defendant is guilty. (*Ibid.*) Violation of this rule is commonly referred to as "*Griffin*" error after *Griffin v. California* (1965) 380 U.S. 609. (See *Denard*, *supra*, 242 Cal.App.4th at p. 1019.)

Defendant argues that Rebecca's comment suggested that defendant "[was] knowledgeable on the subjects of inquiry and

[was] capable of answering counsel's questions concerning his guilt." This "necessarily had the impact of highlighting for the jurors that [defendant] was just sitting at counsel table and not testifying. The comment that [defendant] knew what he had done was particularly pregnant with the implication that [defendant] was not on the witness stand because he was guilty."

We need not decide whether this challenge was preserved properly for appeal and whether the *Griffin* rule applies to witnesses. (Cf. *People v. Noriega* (2015) 237 Cal.App.4th 991, 1003 [declining to extend *Griffin* to witness testimony].) Regardless, reversal is unwarranted because Rebecca did not " 'comment[ ] directly or indirectly on [defendant's] invocation of the constitutional right to silence.' " (*Denard*, *supra*, 242 Cal.App.4th at p. 1020.) For one thing, defendant had not yet invoked that right; Rebecca's comments came during the prosecution's case-in-chief, before defendant had a chance to testify, so there was no "right to silence" on which to comment or any inference to be drawn from invocation of that right.[4] Second, Rebecca's comment said nothing other than that she believed defendant was aware that he was guilty. We are not persuaded that this referred to defendant's right to remain silent, even if, as defendant argues, it implied that defendant had knowledge regarding his guilt or innocence and was capable of answering questions. Defendant does not cite to any cases in which similar

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[4] This is not to say a prosecutor or other person subject to the *Griffin* rule can never violate that rule before the defendant has invoked the right to silence. The rule might be implicated, for example, if a prosecutor giving an opening statement told a jury that defendant was unlikely to testify and was therefore guilty. No such facts are present here.

comments were found to constitute *Griffin* error. We reject his argument.

G. Defendant Has Failed To Show Cumulative Errors Denied Him A Fair Trial

Defendant argues the multiple purported errors he identifies on appeal "all combined to deprive [defendant] of a fair trial." Because we hold that defendant's challenges are without merit for lack of error, lack of prejudice, or both, we decline to hold that in the aggregate they violated defendant's state and federal constitutional rights to a fair proceeding.

H. Defense Counsel Was Not Ineffective

Defendant argues that to the extent his challenges were not preserved for appeal, his counsel was ineffective under the Sixth Amendment of the federal Constitution and the California Constitution, article I, section 15. To prevail on this claim, defendant must show "(1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003.) As we have discussed, the purported errors to which defendant's counsel did not object either were not errors or were not prejudicial; under either scenario, there is no "reasonable probability that defendant would have obtained a more favorable result" had counsel objected. Accordingly, defendant's claim of ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

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