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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. LUIS ALBERTO RAMOS, Defendant and Appellant.	B271918 (Los Angeles County Super. Ct. No. PA081141)

APPEAL from a judgment of the Superior Court of Los Angeles County. Hilleri G. Merritt, Judge. Modified and affirmed with directions.

Doris M. LeRoy, 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, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.

Luis Ramos appeals the judgment entered following a jury trial in which he was convicted of forcible oral copulation (Pen. Code,[1] § 288a, subd. (c)(2)(a); count 1), and forcible rape (§ 261, subd. (a)(2); count 3). The jury found appellant not guilty of the charge of sexual penetration by a foreign object (§289, subd. (a)(1)(a); count 2). The trial court sentenced appellant to 12 years in state prison and, as to count 1, imposed a $40 court security fee (§ 1465.8, subd. (a)(1)) and a $30 court construction fee (Gov. Code, § 70373, subd. (a)).

Appellant contends: (1) the trial court abused its discretion in excluding the victim's statement that she intended to have sex with someone at the party on the night in question; (2) the prosecutor committed misconduct in argument by mischaracterizing the evidence; and (3) the prosecutor committed misconduct by asking the jury to consider the lack of evidence of consent, by misstating the law on the burden of proof, and by making statements that amounted to *Griffin*[2] error. Appellant further contends that the cumulative effects of the court's erroneous evidentiary ruling and the prosecutorial misconduct deprived him of a fair trial. We disagree and affirm the judgment of conviction.[3]

Respondent asserts that the sentence was unauthorized and must be corrected to impose a mandatory court security fee

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[1] Undesignated statutory references are to the Penal Code.

[2] *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

[3] Because we find no error in the trial court's evidentiary rulings and no prosecutorial misconduct, we reject appellant's claim that cumulative error denied him a fair trial.

(§ 1465.8, subd. (a)(1)) and a mandatory court construction fee (Gov. Code, § 70373, subd. (a)) as to count 3. We agree and modify the judgment accordingly.

FACTUAL BACKGROUND

In June 2014, Ana C., her husband, Edson, her 11-year-old daughter, Ana S., and two of her sons, Boris and Christopher, attended the quinceanera of appellant's daughter, Amy. Ana S. and Amy had been on drill team together. Ana C. and appellant's wife, Karla, were close friends, and Ana C. was also friends with Karla's mother, but Ana C. hardly knew appellant at all.

Ana C. and her family arrived at the quinceanera about 11:00 p.m. Ana C. drank and socialized at the party. She had two to four shots of tequila,[4] and was intoxicated by the time she left the quinceanera. At one point she tried to talk with appellant, but he did not seem to pay attention to her. Three times Ana C. approached appellant and tried to get him to dance with her. At some point, Edson left the party by taxi while Ana C. and her children remained at the party. Edson was angry because he wanted the rest of the family to leave with him, and Ana C. was drinking shots with Karla.

The quinceanera ended about 1:00 a.m. Karla invited Ana C. and her kids to her house to spend the night because Ana C. had had too much to drink to drive home. At Karla's house, Ana C. spent about two hours talking with Karla's mother in her bedroom. She did not have anything to drink while she was

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[4] According to another guest at the quinceanera, Mayra Prieto, Ana C. was drinking tequila, Long Island iced teas, and vodka, and had six or seven drinks.

there.[5] Ana C. borrowed pajamas from Karla, and about 3:00 or 3:30 a.m. went to sleep on a mattress on the floor in Amy's room next to her daughter.

After Ana C. had fallen asleep, Ana S. saw appellant enter the room. Ana S. was afraid and rolled over to face the wall, pretending to sleep. She felt the mattress move as appellant got on it. As Ana S. lay frozen on the mattress, she heard her mother say, " 'Please stop. My baby's here.' " Ana S. knew that appellant was touching her mother because she felt Ana C. move appellant's hand away. After a while, Ana S. heard her mother crying and turned over to see appellant leaving the room.

Ana C. awoke to find appellant on top of her and her hands pinned over her head. Initially, she thought she was dreaming. Mindful of her daughter on the mattress next to her, Ana C. froze and said, "Please don't do it." Appellant covered Ana C.'s mouth and said, "Shush." Appellant kissed Ana C.'s cheek, licked her neck, and kissed her breast. Ana C. protested, "I'm Karla's friend. Don't do it." Appellant pulled Ana C.'s pants and underwear halfway down her legs. He put his fingers in Ana C.'s vagina. Ana C. told appellant to stop, pleading, "Please, don't do this to me." She told him to stop, that her child was on the bed next to her. At some point appellant put his mouth on Ana C.'s vaginal area, and she pushed his head away. He then penetrated her vagina with his penis. Afterwards, appellant got up, adjusted his pants, and left the room.

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[5] According to Amy, however, Ana C. seemed to be drunk and made numerous trips to the kitchen for beer.

Ana C. felt dirty. Crying, she turned and hugged her daughter. Ana S. said, " 'Everything is going to be okay, Mommy.' " Ana C. said she was sorry Ana S. had to see that. Ana S. began to cry. She ran out of the room and told her brothers their mother had been raped. Shortly thereafter, as Ana C. was leaving the house, she saw appellant reclining on the sofa. His eyes were closed and he appeared to be sleeping.

Ana C. and Ana S. were taken to a rape treatment clinic. There, Lonelyss Lewis, a forensic nurse examiner and nurse practitioner, conducted a sexual assault examination and interviewed Ana C. and Ana S. separately. Ana C. was crying and upset throughout the interview. She told the nurse she had had consensual sex with her husband the morning of the quinceanera. She related the details of the sexual assault, explaining that when she awoke to find appellant on top of her, she thought she might be dreaming because she was drunk. Lewis understood that Ana C.'s husband did not trust her and thought she had made up being raped. He had taken Ana C. to the police to see if her story was true. Ana C. told the nurse she was afraid her husband was going to try to take the children because he was mad at her and had accused her of consenting to have sex with appellant.

Ana S. also described the sexual assault to Nurse Lewis and said what appellant had done was unforgivable.

A criminalist with the Forensic Science Division of the Los Angeles Police Department testified to the results of a DNA analysis of the forensic evidence collected in this case. Male DNA (spermatozoa) was detected on the vaginal, cervical, anal, and external genital swabs, as well as the vaginal lavage. The sperm fraction from the vaginal swab matched appellant's DNA profile.

The probability of matching appellant's DNA profile at random from a population of unrelated individuals was approximately one in 4 quintillion. The same match was obtained from the swab taken from the cervix and the vaginal lavage. The samples obtained from the anal and external genital swabs contained both sperm and epithelial[6] cell fractions, which were mixtures of the DNA profiles of appellant and Edson.

Ana C., Edson and appellant were determined to be possible contributors to the epithelial cell fraction from the anal swab. The oral and neck swabs contained mixtures of epithelial cell fractions from at least three individuals, including appellant. Appellant was included as a possible contributor to the epithelial cell fraction obtained from the external genital swab. The probability of matching appellant's DNA profile at random from a population of unrelated individuals was one in 2 million. The criminalist explained that while it is not possible to determine whether the epithelial cell fraction came from saliva, if saliva was present, it would be found in the epithelial cell fraction.

DISCUSSION

I. The trial court properly excluded evidence of Ana C.'s statement.

A. *Procedural background*

Before trial, the prosecutor moved to exclude a statement Ana C. made to Prieto that she was planning to have sex with someone at the party that night. According to the prosecutor, Ana C. told Prieto "she wasn't sure if it was going to be the

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[6] Epithelial cells include both skin and saliva cells.

security guard or the valet [or the bartender], but she was going to get laid." Defense counsel argued that the statement was relevant to the issue of Ana C.'s "mental state for consent." The trial court indicated that the statement was irrelevant if the defense was that nothing happened, and deferred its ruling until Ana C. had testified.

During the cross-examination of Ana C., defense counsel asked, "Now, when you were at the quinceanera, were you looking for someone to spend the night with?" The court sustained the prosecution's relevance objection. During an in-chambers conference, defense counsel argued that Ana C.'s statement, " 'I'm going to sleep with someone tonight. I don't know who it's going to be,' " followed by naming "random people while she's at the bar," was probative of motive and consent since it showed that Ana C. "was thinking these things." The prosecutor maintained that Ana C.'s statement was irrelevant.

The trial court concluded that Ana C.'s statement expressed an intent to have sex with a "service employee," not appellant, and thus had little probative value on the issue of Ana C.'s state of mind with respect to appellant. On the other hand, the court found the statement "extremely prejudicial," and thus inadmissible under Evidence Code section 352.

Appellant twice renewed the request to admit the evidence of Ana C.'s statement, arguing that the statement should be interpreted broadly to mean "she was going to get together with *someone* that night, even if her husband became upset," and it did not matter that she identified specific people other than appellant. Counsel maintained that, in combination with the evidence that Ana C. repeatedly tried to get appellant to dance with her, the statement was highly relevant to her mental state,

and its probative value on the issue of Ana C.'s consent outweighed any prejudice. While the court agreed that evidence of Ana C.'s interactions with appellant was highly relevant and admissible, it reaffirmed its prior ruling that her statement about wanting to get laid by someone else was inadmissible under Evidence Code section 352 because she had not specifically referred to appellant.

B. *The trial court did not abuse its discretion.*

Appellant contends that Ana C.'s statement should be understood to include appellant as a possible intended sexual partner that night. So interpreted, appellant maintains Ana C.'s statement was relevant and admissible pursuant to Evidence Code section 1103, subdivision (c)(3) as evidence of Ana C.'s sexual conduct with appellant. We disagree.

" ' "Relevant evidence is defined in Evidence Code section 210 as evidence 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.' The test of relevance is whether the evidence tends ' "logically, naturally, and by reasonable inference" to establish material facts such as identity, intent, or motive. [Citations.]' [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence." ' " (*People v. Carter* (2005) 36 Cal.4th 1114, 1166–1167; *People v. Hamilton* (2009) 45 Cal.4th 863, 913.)

We review the trial court's exclusion of evidence under Evidence Code section 352 for abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 743.) Under that deferential standard, we affirm the court's ruling "unless it was arbitrary, capricious, or patently absurd and the ruling resulted in a

miscarriage of justice." (*People v. Winbush* (2017) 2 Cal.5th 402, 469; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9–10.)

We find no abuse of discretion in the trial court's conclusion that evidence that Ana C. contemplated sex with someone other than appellant had no tendency in reason to prove that she consented to sex with appellant hours later at an entirely different location.

The evidence of Ana C.'s statement was also not admissible under Evidence Code section 1103, subdivision (c)(3). Evidence Code section 1103, subdivision (c)(1) mandates the exclusion of "opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness' sexual conduct . . . in order to prove consent by the complaining witness." Subdivision (c)(3) contains an exception to this broad rule of exclusion, providing that "evidence of the complaining witness' sexual conduct *with the defendant*" is not inadmissible under subdivision (c)(1). (Italics added.)

Appellant asserts that Ana C.'s statement nevertheless qualified as " '[s]exual conduct' in this context." (See *People v. Franklin* (1994) 25 Cal.App.4th 328, 334 ["sexual conduct . . . encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity"].) Appellant reasons that because Ana C. made a "general statement of consent to a sexual act" with someone in a group which included appellant, the statement was admissible as "evidence of the complaining witness' sexual conduct with the defendant." Ana C.'s statement, however, did not relate to any previous sexual conduct, but to her future intent. Evidence Code section 1103, subdivision (c) thus has no application here. (See *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 [Evid. Code § 1103, subd. (c) excludes

"evidence of specific instances of the alleged victim's previous sexual conduct" with narrow exceptions].)

Moreover, even accepting appellant's dubious characterization of Ana C.'s statement as evidence of a specific instance of sexual conduct, the statement as a whole quite plainly did not refer to appellant at all. To the contrary, Ana C. specifically identified three people with whom she would consider having sex that night: "the bartender, the security guard, *or* the valet"; appellant was not mentioned. Because the statement did not involve "sexual conduct with the defendant," Evidence Code section 1103, subdivision (c)(3) did not make it relevant or otherwise permit its admission.

The fact that Ana C. made no reference to appellant in her statement undermines appellant's reliance on *People v. Guerra* (2006) 37 Cal.4th 1067 (*Guerra*), disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151, and *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*).

In *Guerra*, our Supreme Court upheld admission of the murder victim's statement that she was afraid of the defendant under the state-of-mind exception to the hearsay rule under Evidence Code section 1250, subdivision (a)(2). (*Guerra*, *supra*, 37 Cal.4th at pp. 1113–1114.) Noting the relevance of any evidence tending to show the victim's lack of consent in a prosecution for forcible rape (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123–1124), the court held that the victim's statement that she was afraid of the defendant was "clearly probative of her lack of consent to sexual intercourse in the attempted rape." (*Guerra*, at p. 1114; see also *People v. Thompson* (1988) 45 Cal.3d 86, 103.) In sharp contrast to the victim's statement in *Guerra*, which had directly referred to the defendant, Ana C. did not mention

appellant at all in stating her intent to have sex with someone that night, instead identifying three other men as possible sexual partners. The statement thus had no bearing on Ana C.'s consent to sexual relations with appellant.

Geier is also inapposite. There, our Supreme Court upheld the admission of the murder victim's statement that she preferred "muscular African-American men" as sexual partners to show the victim would not have consented to sexual relations with the defendant, who was White. (*Geier*, *supra*, 41 Cal.4th at pp. 586–587.) Nothing in *Geier* supports the inference that because Ana C. indicated she would consent to sex with the bartender, the security guard, or the valet, she likely consented to having sex with appellant. Indeed, the reasoning in *Geier* actually supports the opposite conclusion: Ana C.'s specification of three service employees as potential sexual partners would tend to show she would not have consented to sexual relations with appellant, who was not a service employee, but her friend's husband.

The trial court also did not abuse its discretion in excluding Ana C.'s statement on the ground that its admission would create a "substantial danger of undue prejudice." (Evid. Code, § 352.) Under Evidence Code section 352, "evidence should be excluded ' " 'when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' " ' " (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1091–1092.)

Here, Ana C.'s casual declaration that she intended to "get laid" by the bartender, security guard, or valet at her daughter's friend's quinceanera is precisely the sort of minimally relevant evidence that tends to inflame the emotions of the jury, creating a substantial likelihood that the evidence will be put to an illegitimate purpose. (*People v. Doolin* (2009) 45 Cal.4th 390, 439.) The trial court properly exercised its discretion in excluding the statement.

II. The prosecutor did not commit misconduct.

A. *Argument concerning the DNA evidence as to count 1*

On direct examination, the criminalist testified that there were two contributors to the epithelial cell fraction obtained from the external vaginal swab. The major profile matched Ana C.'s DNA profile, while appellant was included as a possible contributor to the mixture profile, and Ana C.'s husband was excluded as a possible contributor. The expert testified that the probability of matching the profile of a contributor to this mixture to a person chosen at random from a population of unrelated individuals was approximately one in 2 million.

The prosecutor concluded the direct examination by asking, "Now, is saliva included as part of how you can—can you do the epithelial cell fraction when testing for saliva?" The criminalist answered, "Yes. I mean we wouldn't be able to tell you specifically what came from saliva, but if saliva was to have been present, it would typically be found in the epithelial cell fraction."

During opening argument, the prosecutor argued: "[The criminalist] talked to you about epithelial cells, saliva and skin. Epithelial. On the external part of her vagina, there was epithelial cells, saliva of the defendant. One in two million. Not

her husband. The defendant. [¶] This is corroboration. This corroborates that the crime of forcible oral copulation happened against the body and the vagina of Ana C." Defense counsel interposed no objection, requested no admonition, and failed to argue a contrary view of the evidence.

Appellant contends that the prosecutor's assertion that the epithelial cells on the external genital swab confirmed the presence of appellant's saliva constituted a gross mischaracterization of the evidence. Not only did the criminalist never testify that the source of the epithelial cells on the vaginal swab was saliva, but he expressly stated it was not possible to determine what portion of the epithelial cell fraction, if any, came from saliva. Because the presence of appellant's epithelial cells on the external genitalia was the only physical corroboration for the charge of forcible oral copulation, appellant argues the prosecutor's mischaracterization of the criminalist's testimony constituted prosecutorial misconduct requiring reversal of appellant's conviction on count 1. He further asserts that defense counsel's failure to object to the prosecutor's statement amounted to ineffective assistance of counsel.

Appellant's failure to object to the prosecutor's statement forfeited the issue for appeal. " ' "As a general rule, a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." ' " (*People v. Covarrubias* (2016) 1 Cal.5th 838, 894; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

We further reject appellant's contention on the merits. " 'A prosecutor commits misconduct when his or her conduct either

infects the trial with such unfairness as to render the subsequent conviction a denial of due process, or involves deceptive or reprehensible methods employed to persuade the trier of fact.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1219, quoting *People v. Avila* (2009) 46 Cal.4th 680, 711.) "A prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence." (*People v. Ledesma* (2006) 39 Cal.4th 641, 726; *People v. Hill* (1998) 17 Cal.4th 800, 819.) " ' "Whether the inferences the prosecutor draws are reasonable is for the jury to decide." ' " (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1061.) Nevertheless, " '[w]hile counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation]," counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence.' " (*People v. Tafoya* (2007) 42 Cal.4th 147, 181.)

Here, the prosecutor drew permissible inferences without crossing the line into mischaracterization of the evidence. Ana C. testified that appellant licked her neck and her vagina. She also reported forcible oral copulation to both the police and Nurse Lewis. Appellant was identified as a possible contributor to the epithelial cell mixture from both the neck and external vaginal swabs. The probability that appellant could be included in this mixture profile was one in 2 million. While the criminalist explained that saliva could not be separately identified in the epithelial cell fraction, if saliva was present, it would be included in the epithelial cell fraction. On the strength of this evidence, it was certainly reasonable to infer that the epithelial cell fraction from the external genital swab contained saliva. Such an

inference was reinforced by the epithelial cell fraction attributable to appellant from Ana C.'s neck where she described appellant licking her.

Even if the prosecutor's remark was misleading, however, the comment did not amount to misconduct. " 'When attacking the prosecutor's remarks to the jury, the defendant must show' that in the context of the whole argument and the instructions there was ' "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." ' " (*People v. Rangel*, *supra*, 62 Cal.4th at p. 1219, quoting *People v. Centeno* (2014) 60 Cal.4th 659, 667.) " '[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. [S]he has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [s]he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the deductions are illogical because these are matters for the jury to determine.' " (*People v. Tully* (2012) 54 Cal.4th 952, 1043.)

Here, the jury itself could have reasonably drawn the same inference from the evidence, and was properly instructed that it alone was to determine the facts based on the evidence. Moreover, the court instructed that nothing the attorneys might say is evidence. Absent any indication to the contrary, we presume the jury followed the trial court's instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)[7]

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[7] Based on our conclusion that the prosecutor's comment on the evidence did not constitute misconduct, we reject appellant's claim that defense counsel's failure to object to the argument constituted ineffective assistance of counsel.

B. *The prosecutor's argument on the lack of any evidence of consent*

Appellant contends the prosecutor committed misconduct by arguing there was no evidence that Ana C. consented to sexual relations with appellant when such evidence was available but erroneously excluded at the prosecution's behest. Given our holding in part I, *ante*, that the trial court properly excluded evidence of Ana C.'s statement, we conclude that the prosecutor's argument constituted a fair comment on the state of the evidence. (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 726.) There was no prosecutorial misconduct.

C. *Claimed* Griffin *error*

Appellant next argues that, assuming Ana C.'s statement was properly excluded, the prosecution committed *Griffin* error by arguing the absence of any evidence of consent. We disagree.

"Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*People v. Hughes* (2002) 27 Cal.4th 287, 371.) Our Supreme Court has further declared "it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." (*Id.* at p. 372.) "*Griffin*'s prohibition against ' "direct or indirect comment upon the failure of the defendant to take the witness stand," ' however, ' "does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." ' " (*People v. Harrison* (2005) 35 Cal.4th 208, 257; *People v. Thomas* (2012) 54 Cal.4th 908, 945.)

In assessing appellant's claim of misconduct based on *Griffin* error, we must determine whether it is reasonably likely the jury construed or applied the prosecutor's remarks as a comment on the defendant's failure to testify. (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275; *People v. Roybal* (1998) 19 Cal.4th 481, 514; see also *People v. Carr* (2010) 190 Cal.App.4th 475, 484.) However, "[a]rguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.)

Here, the prosecutor's comments on the absence of any evidence of consent came in response to defense counsel's argument that Ana C. had consensual sex with appellant sometime earlier that night and lied about a sexual assault. In rebuttal, the prosecutor argued that the defense claim of consent required the jury to speculate that Ana C. agreed to have sex with appellant, without any evidence to support such a scenario. Rather than speculate about what might have happened "at another place or time," for which there was no evidence, the prosecutor urged the jury to consider what the evidence showed happened in Amy's bedroom. The prosecutor also pointed out the absence of any evidence to support the defense theory of a tryst between appellant and Ana C. earlier in the evening. The argument, which neither directly nor indirectly referred to appellant's failure to testify, plainly constituted permissible comment on the state of the evidence and " ' "the failure of the defense to introduce material evidence or to call logical witnesses." ' " (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304 ["Had defendant testified, he might have contradicted [the

prosecution witness's] recollection, but this possibility does not transform the prosecutor's observations into a veiled comment upon defendant's decision not to testify"]; *People v. Brady* (2010) 50 Cal.4th 547, 566.)

Finally, appellant has suggested no reason to conclude the jury disregarded the court's instruction "not [to] consider, for any reason at all, the fact that the defendant did not testify." In the absence of any indication to the contrary, we must presume the jury understood and applied the instruction, and did not draw an improper inference of guilt based on appellant's decision not to testify. (*People v. Brady*, *supra*, 50 Cal.4th at p. 566, fn. 9; *People v. Taylor* (2010) 48 Cal.4th 574, 632.)

D. *Claimed prosecutorial misconduct based on burden shifting*

Appellant contends the prosecutor sought to lower the People's burden of proof when she stated the following in her rebuttal argument: "You're supposed to look at evidence, and there has been no evidence to say that it was consensual," and, "You have the evidence. You have what we have both submitted. Both of us could have submitted anything to you that was presented. Anything." According to appellant, the prosecutor's argument was improper because it told the jury appellant had the burden to provide evidence of consent rather than only raise a reasonable doubt. We disagree.

"A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) The prosecutor's comments on the quality or lack of

evidence presented by defense neither exceeded the bounds of proper rebuttal argument nor shifted the burden of proof. (See *People v. Ledesma*, *supra*, 39 Cal.4th at p. 726.) There was no misconduct.

E. *Misstatement of the law*

Appellant contends the prosecutor misstated the law when she told the jury that "Ana C. could not consent if she was very drunk." Appellant asserts that because he was not charged with rape of an intoxicated person under section 261, subdivision (a)(3), the question of whether Ana C.'s intoxication prevented her from giving consent was not properly before the jury. Further, the prosecutor's simplistic argument incorrectly stated the law on the crime of rape of an intoxicated person.

"Although it is misconduct for the prosecutor to misstate the applicable law" (*People v. Boyette* (2002) 29 Cal.4th 381, 435), reversal is required only if, when viewed in the context of the prosecutor's argument as a whole, there is " 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*People v. Wilson* (2005) 36 Cal.4th 309, 337; *People v. Dennis* (1998) 17 Cal.4th 468, 522 [the reviewing court must view the statements of a prosecutor claimed to be misconduct in the context of the argument as a whole, not in isolation].) However, " '[i]n conducting [our] inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Covarrubias*, *supra*, 1 Cal.5th at p. 894.)

Viewing the arguments as a whole, and taking into account the court's instructions, we find no reasonable likelihood the jury construed the prosecutor's remark in an impermissible manner.

Defense counsel responded to the prosecutor's statement by reminding the jury that the charge was forcible rape, not rape by intoxication. In overruling defense counsel's objection that the prosecutor had misstated the law, the court declared, "The jury has been instructed on the law, and they will follow the law given them." Those instructions included the elements of the offenses, including the requirement that the jury find "the defendant accomplished [each of the charged acts] by force, violence, duress, menace, or fear of immediate and unlawful bodily injury" in order to convict. The court specifically instructed the jury that "[n]othing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence." The court also instructed the jury to follow the law as explained by the court, even if "the attorneys' comments on the law conflict with [the court's] instructions." We presume the jury understood and followed these instructions. (*People v. Sanchez, supra*, 26 Cal.4th at p. 852.)

III. Mandatory fees as to count 3

The minute order from the sentencing proceedings in this case indicates the trial court ordered appellant to pay one $40 court security fee (§ 1465.8, subd. (a)(1)) and one $30 court construction fee (Gov. Code, § 70373, subd. (a)) as to count 1 only. The abstract of judgment also shows the imposition of but a single court security fee and court construction fee.

Section 1465.8, subdivision (a)(1) requires the imposition of a $40 court security fee on each count of conviction. (*People v. Roa* (2009) 171 Cal.App.4th 1175, 1181.) Similarly, Government Code section 70373, subdivision (a) mandates the imposition of a $30 court construction fee on every count of conviction. (*People v. Lopez* (2010) 188 Cal.App.4th 474, 480.) Here, the court security and court construction fees were mandatory as to count 3. We therefore modify the judgment to reflect the imposition of these fees. (*People v. Woods* (2010) 191 Cal.App.4th 269, 272–274.)

DISPOSITION

The judgment is modified to reflect imposition of a $40 court security fee (Pen. Code, § 1465.8, subd. (a)(1)) and a $30 court construction fee (Gov. Code, § 70373, subd. (a)) as to count 3. The trial court is ordered to correct the minute order and to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment to reflect these modifications. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.