Filed 10/22/09

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ARNULFO VARGAS, Defendant and Appellant.	B211821 (Los Angeles County Super. Ct. No. BA268612)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis B. Rappe, Judge. Reversed in part and Affirmed in part.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Linda C. Johnson and Robert David Breton, Deputy Attorneys General, for Plaintiff and Respondent.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Background parts 1, 3, 4, Defendant's Arrest, Discussion part B, and III.

A jury convicted defendant Arnulfo Vargas of various sex offenses against four victims -- Shosh G., Maria R., Tamika G., and Bin Z. – and also found true three so-called "one strike" allegations.[1] The trial court sentenced defendant to three consecutive terms of 25 years to life in state prison, one consecutive term of 15 years to life, and a total consecutive determinate term of 61 years.[2]

On appeal, defendant raises two contentions under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), and its progeny. First, he contends that the trial

---

[1] All section references are to the Penal Code. The jury convicted defendant of the following offenses: as against Shosh G., forcible rape (counts 1 and 21; § 261, subd. (a)(2)), kidnapping to commit rape (count 17; § 209, subd. (b)(1)), sexual penetration by a foreign object (count 18; § 289, subd. (a)(1)), forcible oral copulation (count 19; § 288a, subd. (c)(2)), and forcible sodomy (count 20; § 286, subd. (c)(2)); as against Maria R., forcible rape (count 3), forcible oral copulation (count 5), and sexual penetration by a foreign object (count 6); as against Tamika G., kidnapping to commit rape (count 11), forcible rape (count 12), and forcible oral copulation (count 13); and as against Bin Z., kidnapping to commit rape (count 14), forcible rape (count 15), and second degree robbery (count 16; § 211). The jury acquitted defendant of kidnapping Maria R. to commit rape (count 2). During jury deliberations, on the People's motion, the trial court dismissed count 4 (forcible oral copulation against Maria R.).

In counts 1, 18, 19, 20, and 21 (Shosh G.), counts 12 and 13 (Tamika G.), and count 15 (Bin Z.), the jury found true one strike allegations that the offense was committed during a kidnapping as defined in section 207, subdivision (a) (see § 667.61, subd. (e)(1)) and that the offense was committed during an aggravated kidnapping as defined in section 209, subdivision (b)(1) (see § 667.61, subd. (d)(2)). The jury also found true a separate one strike allegation that defendant was convicted in the present case of two or more designated sex offenses against more than one victim. (§ 667.61, subd. (e)(5).) The jury found a one strike allegation (§ 667.61, subd. (d)) not true as to counts 3, 5, and 6 against Maria R.

[2] The trial court sentenced defendant as follows: three consecutive terms of 25 years to life in state prison under the one-strike allegations of section 667.61, subdivision (d)(2) for the convictions on count 1 (kidnapping Shosh G. to commit rape), count 12 (forcible rape of Tamika G.), and count 15 (forcible rape of Bin Z.); a fourth consecutive term of 15 years to life for the conviction on count 3 (forcible rape of Maria R.) under the one strike allegation of section 667.61, subdivision (e)(5); and, as to the remaining counts, a total consecutive determinate term of 61 years.

court erred in admitting "testimonial" hearsay statements made by Maria R. during a sexual assault examination, requiring reversal of count 3 (forcible rape) and count 6 (sexual penetration by a foreign object). In the published portion of our opinion, we conclude that the court erred in admitting Maria R.'s hearsay statements. The error is harmless beyond a reasonable doubt as to defendant's conviction of count 3 (forcible rape), but not as to his conviction of count 6 (sexual penetration by a foreign object). We therefore reverse the latter conviction and the sentence on that count.

In the unpublished portion of our opinion, we consider defendant's second *Crawford* contention: that the court improperly allowed the sexual assault examinations of Tamika G. and Bin Z. to be described through the testimony of two non-examining nurses, who relied on the reports prepared by the nurses who performed the examinations. Defendant contends that this error requires reversal of all counts as to those victims. We conclude that defendant has forfeited his challenge to the testimony regarding the sexual assault examinations of Tamika G. and Bin Z. Moreover, even if the admission of that testimony was improper, the error was harmless beyond a reasonable doubt.

We also consider in the unpublished portion of our opinion defendant's claims that the court committed two instructional errors, namely, failing to properly instruct on the elements of kidnapping for rape against Tamika G. and Shosh G. (counts 11 and 17), and failing to instruct on simple kidnapping as a lesser included offense, requiring reversal of those counts. We find no error. We disagree with the legal premise of defendant's argument regarding the instructions on kidnapping for the purpose of rape, and also conclude that he has forfeited the contention. Regarding defendant's argument that the court erred in failing to instruct on simple kidnapping as a lesser included offense, we find no substantial

evidence to support the instruction, and in the alternative conclude that defendant suffered no prejudice. Therefore, with the exception of reversing the conviction and sentence on count 6, we affirm the judgment.

BACKGROUND

1. *Shosh G.-- forcible rape (counts 1 and 21), kidnapping to commit rape (count 17), sexual penetration by a foreign object (count 18), forcible oral copulation (count 19), and forcible sodomy (count 20)*

Around 11 p.m. on March 1, 2000, Shosh G. was waiting for a bus at Santa Monica and La Brea Boulevards, heading to a friend's home in the San Fernando Valley. After she had been waiting approximately 45 minutes, defendant drove up in a white van, stopped, and asked where she was going. She told him she was going to the San Fernando Valley. Defendant offered to drive her. Because she had been waiting a long time and defendant seemed nice, Shosh accepted.

Defendant drove on the 101 freeway, exited at Sherman Oaks, and stopped in a construction area behind a gas station. He told Shosh he was going to collect some money and left. He returned in a few minutes, locked the vehicle's doors, and began choking Shosh by pressing his elbow against her throat. Shosh cried and begged him to let her go. Defendant told her to take off her pants, shirt and bra. Shosh complied, but said she was on her period. Defendant penetrated her with his finger, told her she was lying, and became very angry.

Defendant raped Shosh, turned her over, and sodomized her. She was bleeding, and begged him to let her go. He then forced her to orally copulate him, after which he raped her again. Defendant told her that she was beautiful and could make a lot of money. He urged her at least to pretend like she enjoyed it.

When he finished, Shosh dressed and defendant started driving. Shosh repeatedly begged to be released, but defendant kept driving. After a few minutes,

Shosh was able to escape by unlocking the passenger door and jumping from the vehicle. She ran to an apartment complex and called her boyfriend, Oren Waks, who picked her up and took her to Cedars-Sinai Hospital. Shosh felt pain in her vagina and also in her anus, which was bleeding.

Dr. Matthew Hendrickson, an emergency room physician at Cedars-Sinai Hospital, examined Shosh and filled out a standard form for sexual assault examinations, the OCJP-923 form. Shosh said that she had been penetrated orally, rectally, and vaginally. She complained of pain to the vagina. Dr. Hendrickson found white secretions and blood on the cervix. He collected vaginal swabs and gave them to the police.

At trial, Shosh identified defendant as her attacker. Also, in September 2004 she selected his photograph from a photo lineup.

2. *Maria R. -- forcible rape (count 3), forcible oral copulation (count 5), and sexual penetration by a foreign object (count 6)*

On September 19, 2001, Ana Cardenas was working at First Legal Support at 1511 West Beverly Boulevard in Los Angeles. A young girl later identified as Maria R., perhaps 14 to 17 years old, entered the business. She was shaking and crying. Cardenas asked, in Spanish, what had happened. Maria, speaking in Spanish and crying constantly, told her that a man had forced her into his car and "made [her] do things." When Cardenas asked what things, Maria repeatedly said that he made her give him oral sex.

Later that day, Jean Stephenson, a forensic nurse examiner at California Hospital, performed a sexual assault examination on Maria, and completed the standard OCJP-923 report. Referring to the report, Stephenson testified that she asked Maria what had happened to her. Stephenson recorded Maria's response in

her report as follows: "[I]t says penetration of vagina by penis and I have marked it yes times two. Finger, yes. . . . For oral copulation of genitals [of] victim by assailant it is marked yes and of assailant by victim it's marked yes times five." As to whether the assailant ejaculated, Stephenson recorded Maria's answer as "yes times two."

In examining Maria, Stephenson observed redness on the genitalia, and abrasions to both sides of the labia majora (the outer lips of the vulva) and to the hymen. In Stephenson's opinion, the injuries were consistent with blunt force trauma. Stephenson collected oral and vaginal swabs.

3. *Tamika G. -- kidnapping to commit rape (count 11), forcible rape (count 12), and forcible oral copulation (count 13)*

Around 3:00 a.m. on October 8, 2003, Tamika G. was waiting for her boyfriend at a bus stop near the Greyhound bus station in downtown Los Angeles. At the time, Tamika was a prostitute. She was "coming down" after using methamphetamine. (By the time of trial, she was married, had a family, and had been drug free for four years.) Defendant passed by twice in his white truck, finally stopped, and asked if she "dated." She replied that she did, but at the time was simply waiting for her boyfriend. Defendant offered her a ride. Tamika approached his truck, but then thought she saw her boyfriend and started to back away. Defendant grabbed her arm through the open passenger door, pulled her into the truck, and drove off.

Defendant drove through a tunnel near the Sixth Street Bridge and onto the bed of the Los Angeles River. While driving, defendant told her that he was an undercover police officer and recognized her. He said that he knew a spot to go, and mentioned that he had a stun gun. He said that if she tried to get out, he had

people nearby that would get her. Because the truck was moving, Tamika had no chance to escape.

Defendant stopped in the riverbed, then backed the truck into the mouth of another tunnel. There was no lighting. Defendant said that he had a friend that was a pimp, that she could make a lot of money, and that he had to try her out first. He ordered her to take her clothes off. She complied, but told him that she did not want to do anything. Defendant forced her to orally copulate him, and then raped her; he used a condom because she told him she had children.

Tamika started to put on her clothing, but defendant stopped her and said that she did not need her clothes where she was going. He then threw her clothes out the window into the water in the river bed. He backed the truck further up into the tunnel. Thinking that he was going to kill her, she pleaded for her life. Defendant let her open the door, and when she got out he sped off, leaving her in standing in the tunnel in her underwear. Tamika ran out of the tunnel. A homeless person gave her a shirt to cover herself, and someone called the police.

Tamika identified defendant as her attacker in a pretrial photo lineup and at trial.

Later on October 8, 2003, a forensic nurse at California Hospital, Chris Pollard, performed a sexual assault examination on Tamika and completed the standard form (the OCJP-923). Pollard did not testify at trial. Rather, Jean Stephenson, the nurse who had examined Maria R. at the same hospital and who had trained and supervised Pollard, testified concerning Tamika's examination by relying on Pollard's OCJP-923 report.

According to Stephenson, Pollard wrote in her report that Tamika complained of pain to her vagina. In a diagram, Pollard recorded that she observed redness at the cervix (the end of the vaginal barrel and the beginning of the uterus).

Stephenson testified that such a condition "could mean anything," but "can be" consistent with a complaint of sexual assault.

Referring to another diagram prepared by Pollard, Stephenson testified that Pollard observed abrasions to Tamika's left foot and to her right knuckle, and observed dirt on the right knee. Stephenson examined photographs of the injuries, and found them consistent with the injuries diagramed by Pollard.

On the same diagram, Pollard wrote that she observed Tamika to be "disheveled, unkempt and tearful," and that Tamika's clothing "was dirty [and she was] wearing a bra and long-sleeved men's shirt." Pollard also wrote that Tamika's "clothes were thrown out of the car."

According to Stephenson, Pollard recorded the sex acts as described by Tamika: the assailant penetrated her vagina with his penis three times, and Tamika orally copulated his genitals. Tamika said that the assailant used a condom and threw it out the window.

4. *Bin Z. -- kidnapping to commit rape (count 14), forcible rape (count 15), and second degree robbery (count 16)*

On October 20, 2003, twelve days after the assault on Tamika G., Bin Z. arrived at the Greyhound bus station in downtown Los Angeles around 6:00 a.m. She had traveled from Northern California, intending to visit her boyfriend in Monterey Park and make arrangements for their wedding. Bin spoke very little English. For more than an hour, she waited for a bus at a nearby bus stop – the same location where defendant had picked up Tamika G. Finally, a passerby told her that there was a bus strike. Another passerby directed her to defendant, who was seated in his white truck stopped at the curb. Bin went over to defendant and told him, in broken English, she was headed for Monterey Park. Defendant said

that he lived in El Monte, which was on the way, and would drive her. He mentioned something about money – eighteen or eighty dollars -- that Bin did not understand. She thought he was going to charge her for the ride.

Bin got in, and defendant drove under a bridge to a tunnel, and then through the tunnel to the Los Angeles River basin, the same area where he had assaulted Tamika G. twelve days earlier. Bin became frightened and asked where they were going. Defendant said that they were headed to the freeway. Defendant drove on the river basin for a few minutes, then began to back up. When Bin tried to make a call with her cell phone, defendant stopped the truck and grabbed her phone. Bin grabbed the car keys, and defendant pinned her against the interior side of the car with his elbow. Bin tried to get out, but the car door was locked. Defendant obtained the keys, and backed the truck into a tunnel opening, still pressing Bin against the interior side of the truck.

After stopping, defendant removed Bin's clothing and forced her onto his seat (which was lying flat) and raped her. He ejaculated and pulled up his pants. Bin gathered her clothing. Threatening her with a screwdriver, defendant motioned for Bin to get out. She did, and defendant drove off with her belongings, including her cell phone and $3,000 in her purse, leaving her standing naked in the tunnel. Bin dressed and ran out of the tunnel. A passerby called the police.

Bin selected defendant's photo in a photo lineup a "long time after [the assault]," and also selected it on the day of her trial testimony. She also identified defendant at trial.

Bin was examined on October 20, 2003, at Los Angeles County U.S.C. Medical Center by nurse practitioner Gina McConnell. McConnell did not testify at trial. Rather, another nurse practitioner who had helped train McConnell, Julie

Lister, testified about the examination, relying on the OCJP-923 report that McConnell completed.

Lister testified that Bin told McConnell that she felt like she had been bruised all over her body. In her report, McConnell identified nine areas of bruising. She wrote that Bin had "profound ecchymosis [bruising] to the left side of neck across upper chest to left shoulder." She also observed bruising above the right breastbone, on the right waist area, on the left leg below the buttock, and on upper left thigh. McConnell observed evidence of trauma to Bin's genital area -- redness just beside the hymen, and blood-tinged fluid below the cervix.

Lister had performed four to five thousand sexual assault examinations. In her training and experience, the trauma to Bin's genitals as reflected in McConnell's report was consistent with blunt force trauma occurring in a sexual assault. McConnell wrote that her physical findings and examination were consistent with the history given by Bin. Lister agreed, based on Lister's review of McConnell's report and her own training and experience.

McConnell collected two vaginal swabs and two anal swabs.

Defendant's Arrest

In April 2004, approximately six months after defendant's attack on Tamika G., Tamika spotted defendant's white truck and noted part of the license plate number. She called Los Angeles Police Detective Adolfo Contreras, who investigated her sexual assault case, and gave him the information. Detective Contreras was able to trace the partial plate number to a white 2000 Chevrolet pickup truck registered to defendant with an address in Montebello. (Peos. 11, 12.) Detective Contreras went to the address on April 15, 2004, where defendant lived

with his family. He observed the truck, contacted defendant, and asked him to provide an oral swab for a DNA comparison. Defendant refused.

On April 21, 2004, Detective Contreras obtained a search warrant authorizing the taking of an oral swab from defendant as well as a search of defendant's residence and truck. That day he returned to the residence, but defendant had left. The next day Detective Contreras searched the residence, and recovered two used condoms from the wastebasket in the master bedroom (Peos. 10, 9A and B). He submitted them to the police lab. Defendant was ultimately arrested in Ensenada, Mexico, and in April 2005 Detective Contreras obtained an oral swab from him.

DNA Analysis

DNA analysis matched samples obtained from Shosh, Bin, and Maria to samples from defendant's oral swab and the used condoms seized from his master bedroom. The parties stipulated to the facts establishing the obtaining of the relevant DNA samples and the chain of custody for those samples.[3]

---

[3] Michael Mastrocovo, a criminalist assigned to the Los Angeles Police Department DNA Unit, performed DNA typing on the sperm fraction of a genital swab taken from Bin Z., (item 1-1B) and also performed typing on an oral swab taken from defendant (item 44) and a swab taken from a condom seized from defendant's residence (item 33). The DNA profiles of the condom swab (item 33) and defendant's oral swab (item 44) matched each other, and also matched the sperm fraction of the genital swab from Bin (1-1B).

Mastrocovo compared the DNA profiles he obtained from the sperm fraction of Bin's genital swab (item 1-1B) and from the condom swab (item 33), to DNA profiles done by others on two other samples: a profile done by the California Department of Justice on the sperm fraction of a swab taken from Shosh G. (item 1-2B), and a profile done by Orchid Cellmark (a Maryland laboratory that performed DNA analysis for the Los Angeles Police Department) on a swab from Maria R. Mastrocovo found that the DNA profiles of Shosh's and Maria's sample matched the DNA profiles of Bin's sample (item 1-1B) and the condom sample (item 33).

DISCUSSION

I. *Crawford Issues*

In *Crawford, supra*, 541 U.S. 36, the United States Supreme Court held that the introduction of "testimonial" hearsay statements against a criminal defendant violates the Sixth Amendment right to confront and cross-examine witnesses, unless the witness is unavailable at trial and the defendant has had a prior opportunity for cross-examination. (*Crawford, supra*, 541 U.S. at p. 59.) In subsequent decisions -- *Davis v. Washington* (2006) 547 U.S. 813, and most recently *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. __, 129 S.Ct. 2527 (*Melendez-Diaz*), -- the High Court has sought to refine the concept of "testimonial" hearsay. The California Supreme Court has also analyzed that concept in two post-*Davis*, pre-*Melendez-Diaz* decisions, *People v. Cage* (2007) 40 Cal.4th 965 (*Cage*), and *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*).

Here, defendant challenges the introduction of two classes of hearsay under *Crawford* and its progeny: (1) Maria R.'s hearsay statements to nurse Jean Stephenson, and (2) hearsay testimony by Stephenson and Julie Lister regarding the OCJP-923 reports of the sexual assault examinations performed on Tamika G. and Bin Z. by other nurses (Chris Pollard as to Tamika, and Gina McConnell as to Bin). We discuss each contention in turn.

A. *Maria R.'s Statements to Jean Stephenson*

Maria R. did not testify at trial. Rather, the prosecution relied on: (1) Maria's statements to Ana Cardenas, apparently made immediately after the crime while Maria was crying and shaking, that a man had forced her into his car, "made

---

Defendant used a condom in his assault on Tamika, and no DNA evidence was introduced concerning the crimes against her.

[her] do things," and made her give him oral sex; (2) nurse Jean Stephenson's sexual assault examination of Maria, during which Maria said, inter alia, that the assailant had penetrated her vagina with his penis and finger and forced her to orally copulate him, and during which Stephenson observed injuries consistent with blunt force trauma to Maria's genitalia; and (3) criminalist Michael Mastrocovo's testimony matching the DNA profile of the sperm fraction of a vaginal swab taken from Maria to defendant's DNA. Based on this evidence, the jury convicted defendant of the following crimes against Maria R.: forcible rape (count 3), forcible oral copulation (count 5), and sexual penetration by a foreign object (count 6).

On appeal, defendant does not challenge the introduction of Maria's statements to Ana Cardenas, and does not challenge his conviction for forcible oral copulation of Maria. He contends, however, that the introduction of Maria's statements to Jean Stephenson – in particular, her statements that her assailant penetrated her with his penis and finger and forced her to orally copulate him – constituted inadmissible, "testimonial" hearsay under *Crawford*, as analyzed by the California Supreme Court in *Cage* and *Geier*. He asserts that the error requires reversal of his convictions for the forcible rape of Maria and for penetration by a foreign object.

We conclude that Maria's statements to Stephenson were testimonial and thus inadmissible. We find the error was harmless beyond a reasonable doubt as to defendant's conviction of forcible rape of Maria (count 3), but not as to his conviction of sexual penetration by a foreign object (count 6). Therefore, the latter conviction must be reversed.

1. *The OCJP 923 Form*

Sexual assault examinations are performed pursuant to a statutorily mandated "protocol for the examination and treatment of victims of sexual assault and attempted sexual assault . . . and the collection and preservation of evidence therefrom." (§ 13823.5, subd. (a).) Part of the procedure is the completion of a mandatory form – called (at the time of the relevant events here) the "OCJP-923" form. (§ 13823.5, subd. (c).)[4]

Before trial, the prosecutor filed a motion in limine to introduce Maria's statements to Stephenson describing the sexual assault. As part of the motion, the prosecutor produced a copy of the OCJP-923 form completed by Stephenson. The form explained that with the victim's consent "a separate medical examination for evidence of sexual assault at public expense [would] be conducted by a physician to discover and preserve evidence of the assault," and that "the report of the examination and any evidence obtained will be released to law enforcement authorities." The form described the procedure for conducting the physical examination and collecting and recording physical evidence, and also required Stephenson to question Maria about several categories of sex acts. It contained boxes for recording whether the listed acts occurred or were attempted or whether Maria was unsure. (See § 13823.11, subd. (d) [requiring history of sexual assault to be recorded pursuant to outline form].)

---

[4] The acronym "OCJP" stands for the Office of Criminal Justice Planning. At the time of Maria's examination in 2001, section 13823.5, subdivision (c), made the OCJP responsible for creating the examination form and for establishing a protocol for sexual assault examinations. (Former § 13823.5, subds. (a) & (c), Stats 1988, ch. 1575, § 3.) The Legislature abolished the OCJP in 2003 and directed the Department of Finance to designate another agency to carry out the OCJP's former duties. (§ 13820, subd. (a).) According to Jean Stephenson's testimony at trial, the Office of Emergency Services is now responsible for the examination form, and the current form bears the initials "OES."

2. *The Motion in Limine*

At the hearing on the motion in limine, Stephenson did not testify, and the prosecutor did not make a specific offer of proof as to Stephenson's proposed testimony regarding the circumstances or purpose of the examination. Nonetheless, the prosecutor argued that Stevenson questioned Maria using the OCJP-923 form primarily for the purpose of providing treatment following the sexual assault, and that Stevenson's role in obtaining evidence was secondary. Therefore, according to the prosecutor, introduction of the statements was permissible under *Cage, supra,* which held that an injured victim's statements made to a physician "not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound" (*Cage, supra,* 40 Cal.4th at p. 970) were not testimonial.

Defense counsel argued, by contrast, that the introduction of Maria's statements were testimonial, because Stevenson acted as an agent of law enforcement and questioned Maria not for the purpose of medical treatment, but according to an established protocol for the purpose of gathering evidence for later use in court. The trial court overruled defense counsel's objection, and Stevenson testified at trial.

3. *Stephenson's Trial Testimony*

At trial, Stephenson testified that she was a registered nurse and forensic nurse examiner specializing in sexual assault examinations. She had performed more than 500 sexual assault exams. As she explained, in conducting such exams,

"[w]e [forensic nurse examiners] collect evidence, . . . document evidence, . . . send the evidence to the crime lab, . . . take photographs and . . . testify in court."

Stephenson described the typical sexual assault examination as follows: "A sexual assault exam consists of an introduction to the patient, a consent to do the exam, a forensic interview on what happened, a very detailed – there is a specific document [the OCJP-923 form] from the State of California on detailed questions regarding the assault and we go through that. We interview with that form and we collect evidence, based on the history or lack of history, and we collect the evidence, document the evidence, identify it, put it in a special sexual assault exam kit, collect the clothes, identify the clothes, complete the form and photograph as we are going along for injuries and/or lack of injuries. [¶] Basically all patients are photographed. [¶] And then we give the patient medication for sexually transmitted diseases as a precaution and also as a precaution for the patient a morning after pill and we then give her instructions regarding her care and where she may have – seek out further care and we also provide an advocate for the patient, an advocate being a counselor, for her for the event and we send their package to the police department. [¶] And that basically consists of the exam." Stephenson also explained that the completed OCJP-923 form would be sent to the police department, a copy would be placed in the sexual assault examination kit for the crime lab, and a second copy would be maintained by the hospital.

Stephenson identified the OCJP-923 form that she completed when she examined Maria R. on September 19, 2001 and a photograph she had taken of Maria. Through a translator, Stephenson informed Maria of the consent portion of the OCJP-923 form, which stated that the examination was to "discover and preserve evidence of the assault," and that "the report of the examination and any evidence obtained will be released to law enforcement authorities." Stephenson

explained that the OCJP-923 form requires that the examiner ask certain questions and record the patient's answers by check marks. Describing the form she filled out for Maria's examination, Stephenson testified that the form required her to document "physical injuries and/or pain described by [the] patient. She [Maria] said she had a headache and pain in her stomach." According to Stephenson, the completed form also reflected the following: "[I]t says penetration of vagina by penis and I have marked it yes times two. Finger, yes. . . . For oral copulation of genitals [of] victim by assailant it is marked yes and of assailant by victim it's marked yes times five." As to whether the assailant ejaculated, the report says "yes times two."

Stephenson also described her physical examination of Maria as reflected in the diagram portion of the OCJP-923, in which she recorded her observation of redness on the genitalia, and abrasions to the both sides of the labia majora (the outer lips of the vulva) and to the hymen. According to Stephenson, the injuries were consistent with blunt force trauma.

As was also reflected in the OCJP-923, Stephenson gathered other physical evidence: she took photographs and pubic combings and collected Maria's clothing; she collected oral and vaginal swabs and blood samples. All of the evidence was placed in a box, sealed, and given to the Los Angeles Police Department.

4. *Cage, Geier, and Melendez-Diaz*

We agree with defendant that under the analysis of the California Supreme Court in *Cage* and *Geier,* Maria's statements to Stephenson were testimonial.

In *Cage*, a 15-year-old boy, suffering from a deep cut on his face, was awaiting treatment at a hospital emergency room when a deputy sheriff asked him

what had happened between him and the defendant, the boy's mother. The boy said that while his grandmother held him, the defendant cut him with a piece of glass. (*Cage, supra*, 40 Cal.4th at pp. 971-972.) Later, as part of his standard procedure in treating patients, an emergency room physician asked the boy what had happened. The purpose of the physician's question was to obtain information that might be important in treating the wound. The boy again said that his grandmother had held him down while the defendant cut him. (*Id.* at p. 972.) Finally, after the boy was released from the hospital, the deputy sheriff conducted a tape recorded interview at the police station in which the boy described the assault in greater detail. (*Id.* at pp. 972-973.)

The California Supreme Court held that the statements to the deputy sheriff were testimonial under *Crawford* and *Davis*, but that the statements to the physician were not. The court's reasoning required the analysis of several factors: "We derive several basic principles from [the United States Supreme Court's decision in *Davis v. Washington*, *supra*, 547 U.S. 813]. First, . . . , the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial. Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken *primarily* for the *purpose* ascribed to testimony—to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation,

one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage, supra*, 40 Cal.4th at p. 984, fns. omitted.)

Analyzing the statements to the deputy sheriff under these principles, the court concluded that the statements were testimonial because, though somewhat informal, they "were given as an analog of testimony by a witness – they were made in response to focused police questioning whose primary purpose, objectively considered, was not to deal with an ongoing emergency, but to investigate the circumstances of a crime, i.e., 'to "establis[h] or prov[e]" some past fact.' (*Davis, supra,* 547 U.S. 813, 827.)" (*Cage, supra,* 40 Cal.4th at p. 970.) By contrast, the statements to the physician were non-testimonial: "The primary purpose of the physician's general question [as to what happened], objectively considered, was not to obtain proof of a past criminal act, or the identity of the perpetrator, for possible use in court, but to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound." (*Cage, supra,* 40 Cal.4th at pp. 970-971.)

In *People v. Geier, supra,* 41 Cal.4th 555, the California Supreme Court considered "whether the admission of scientific evidence, like laboratory reports, constitutes a testimonial statement that is inadmissible unless the person who prepared the report testifies or *Crawford's* conditions—unavailability and a prior opportunity for cross-examination—are met." (*Id.* at p. 598.) *Geier* was a rape-murder prosecution in which the laboratory director of Cellmark, Dr. Robin Cotton, testified to the results of DNA testing performed by one of Cellmark's

biologists. Relying on the testing biologist's completed forms and notes, Dr. Cotton testified, inter alia, that the defendant's DNA sample matched DNA found in vaginal swabs taken from the victim. (*Id.* at pp. 595-596.)

In finding testimony concerning the DNA report admissible, the court "extract[ed from *Crawford* and *Davis*] that a statement is testimonial if (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. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra,* 41 Cal.4th at p. 605.) Applying this analysis, the court concluded: "There is no question that the DNA report was requested by a police agency. Even if the employees of Cellmark are not themselves members of law enforcement, they were paid to do work as part of a government investigation; furthermore, it could reasonably have been anticipated that the report might be used at a later criminal trial. [The testing biologist's] observations, however, constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, she recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks. 'Therefore, when [she] made these observations, [she]—like the declarant reporting an emergency in *Davis*—[was] "not acting as [a] witness[];" and [was] "not testifying."' [Citation.]" (*Geier, supra,* 41 Cal.4th at pp. 605-606.)

Recently, in *Melendez-Diaz,* a five-to-four decision, the United States Supreme Court held that "certificates of analysis" sworn to by prosecution laboratory analysts before a notary public and showing that seized evidence was cocaine, were testimonial under *Crawford.* (*Melendez-Diaz, supra,* 557 U.S. __, 129 S.Ct. at p. 2532.) Noting that the certificates of analysis were in substance

"affidavits," and that affidavits were expressly included in *Crawford's* description of the "core class of testimonial statements," the majority in *Melendez-Diaz* found "little doubt" that the certificates were testimonial. (*Ibid.*) Justice Thomas provided the decisive fifth vote, and authored a concurring opinion in which he explained that he "continue[d] to adhere to [his] position that 'the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.]" (*Melendez-Diaz, supra,* 557 U.S. at p. __, 129 S.Ct. at p. 2543 (Thomas, J., conc.).) He "join[ed] the Court's opinion in this case because the documents at issue in this case 'are quite plainly affidavits,' [citation]. As such, they 'fall within the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]'" (*Ibid.*)

The reasoning of the majority in *Melendez-Diaz* is inconsistent with the primary rationale relied upon by the California Supreme Court in *Geier* to uphold the introduction of the DNA report in that case – that because a scientific observation "constitute[s] a contemporaneous recordation of observable events rather than the documentation of past events," it is analogous to "the declarant reporting an emergency in *Davis*" and therefore is not testimonial. (*Geier, supra,* 41 Cal.4th at pp. 605-606.) In *Melendez-Diaz,* the majority dismissed the contention of the respondent and the four dissenters that there is a distinction, for Confrontation Clause purposes, between a "conventional witness" who testifies to past events and is subject to confrontation, and the report of an "analyst" who makes near-contemporaneous observations of neutral, scientific test results, and thus is not subject to confrontation. (*Melendez-Diaz, supra,* 557 U.S. at pp. __, 129 S.Ct. at pp. 2535-2540.) Nonetheless, because of the limited nature of Justice Thomas' concurrence, the precedential value of the majority's analysis on this

point is unclear as applied to a laboratory analyst's report or a similar forensic report, rather than to, in Justice Thomas' words, "'formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' [Citations.]" (*Melendez-Diaz, supra*, 557 U.S. at p. __, 129 S.Ct. at p. 2543 (Thomas, J., conc.); see *People v. Gutierrez* (2009) __ Cal.App.4th __ (B211622, filed 9/9/09) and *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047 [both concluding that *Geier* remains viable]; compare *People v. Lopez* (2009) 177 Cal.App.4th 202, 206 [concluding that it "appears that *Geier* has been disapproved" by *Melendez-Diaz*] and *People v. Dungo* (2009) 176 Cal.App.4th 1388 [observing that some of *Geier's* rationale has been undermined by *Melendez-Diaz*].)

For purposes of our analysis of Maria R.'s hearsay statements to Jean Stephenson, we conclude that even under the view of testimonial hearsay relied upon by our Supreme Court in *Geier* and *Cage*, Maria R.'s statements were testimonial.

5. *Maria's Statements Were Testimonial*

First, within the meaning of *Geier*, Stephenson acted "in an agency relationship with law enforcement." (*Geier, supra*, 41 Cal.4th at p. 605.) Pursuant to the consent portion of the OCJP-923, Stephenson informed Maria through a translator that the examination was to "discover and preserve evidence of the assault," and that "the report of the examination and any evidence obtained will be released to law enforcement authorities." As Stephenson explained in her trial testimony, her purpose in conducting a sexual assault examination was to "collect evidence, . . . document evidence, . . . send the evidence to the crime lab, . . . take photographs and . . . testify in court." A copy of the completed OCJP-923 form

recording Maria's statements was turned over to the Los Angeles Police Department, along with all other evidence collected. Thus, in examining and questioning Maria for the purpose of collecting evidence to be used by the police in investigating the sexual assault and in possibly prosecuting the offender, Stephenson acted as an agent of law enforcement. (See *People v. Uribe* (2008) 162 Cal.App.4th 1457, 1481 [physicians who performed sexual assault examination deemed "part of the 'prosecution team'" under *Brady v. Maryland* (1963) 373 U.S. 83]; see also *Medina v. State* (2006) 122 Nev. 346 [143 P.3d 471, 476] [forensic nurse who conducted sexual assault examination and "gather[ed] evidence for the prosecution for possible use in later prosecutions" deemed a police operative under *Crawford*].)

Second, the statements Maria made to Stephenson were, in the words of *Cage*, "out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial," and "occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*Cage*, *supra*, 40 Cal.4th at p. 984.) Stephenson questioned Maria according to a rigorous, statutorily mandated format designed to have Maria describe the specific sexual acts which she was forced to perform. Thus, like testimony, the interview was intended to make a record of past facts, and it certainly possessed at least "some degree" of "the formality and solemnity characteristic of testimony." Indeed, *Cage* observed that the requisite level of "formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses." (*Id.* at p. 984.) As we explain below, the situation in which Maria was questioned by Stephenson, objectively viewed, does not bear the characteristics of an emergency. We note here, in addition, that because Maria was informed that the

results of the sexual assault examination would be given to law enforcement, any "deliberate falsehoods" she gave in responding to Stephenson's questions concerning the sexual assault might well have constituted a criminal offense. Section 137, subdivision (c), provides in relevant part: "Every person who knowingly induces another person . . . to give false material information pertaining to a crime to . . . a law enforcement official is guilty of a misdemeanor." Arguably, had Maria lied to Stephenson about material aspects of the sexual assault, knowing that Stephenson would transmit those lies to the police, Maria would have "induced" Stephenson to give "false material information pertaining to a crime" to the police, and thereby violated section 137, subdivision (c).

Third, "'objectively' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation," it is clear that the primary purpose of the examination was "to establish or prove some past fact for possible use in a criminal trial." (*Cage, supra*, 40 Cal.4th at p. 984.) As we have already noted, pursuant to the consent portion of the OCJP-923, Stephenson informed Maria through a translator that the examination was to "discover and preserve evidence of the assault," and that "the report of the examination and any evidence obtained will be released to law enforcement authorities." As we have also already noted, Stephenson described her purpose in conducting a sexual assault examination as collecting evidence, submitting it for evaluation and testifying in court. She conducted her examination of Maria in accordance with that purpose. Thus, the primary purpose of Maria in describing the assault, and of Stephenson in receiving the statements, was to describe the particulars of the sexual assault for possible transmittal to law enforcement and for possible use in court.

Fourth, unlike the injured victim's statements to the physician in *Cage*, Maria's responses to Stephenson's questions were not made and received "to deal with a contemporaneous medical situation that required immediate information about what had caused the victim's wound." (*Cage, supra*, 40 Cal.4th at p. 970.) Nor was Stephenson's documenting of Maria's statements in the OCJP-923 form analogous to the biologist's "contemporaneous recordation of observable events" in the DNA report in *Geier, supra*, 41 Cal.4th at page 605. True, Maria had been the victim of a sexual assault shortly before the examination, and the questions asked by Stephenson seeking to document the specific nature of the sex acts performed are the type of questions that would also be asked if the primary purpose were to determine the extent of injury, observe the site of injury, and offer treatment. But nothing in the record, viewed objectively, suggests that Stephenson's *primary* purpose in questioning Maria was to elicit information about possible injuries in order to render treatment. To the contrary, the record is undisputed that Stephenson examined and questioned Maria for the primary purpose of documenting the nature of the sexual assault and gathering evidence for transmittal to the police and for possible later use in court. Thus, Maria's statements are most analogous to the statements made by the victim in *Cage* to the deputy sheriff. Like the deputy in *Cage,* Stephenson's "clear purpose . . . was not to deal with a *present emergency*, but to obtain a fresh account of *past events involving defendant* as part of an inquiry into possible criminal activity." (*Cage, supra*, 40 Cal.4th at p. 985.) That Stephenson may have had a subsidiary purpose to treat any injuries disclosed or suggested by Maria's statements is insufficient to purge the statements of their testimonial character.

Thus, we hold that Maria's statements to Stephenson were testimonial and inadmissible. (See *People v. Gutierrez, supra*, __ Cal.App.4th __ (B211622,

decided September 9, 2009) [narrative portion of sexual assault examination report containing victim's description of assaults found testimonial].)

Harmless Error

"Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. [Citation.]) 'Since *Chapman*, we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.' (*Delaware v. Van Arsdall* [(1986) 475 U.S. 673, 681].) The harmless error inquiry asks: 'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?' (*Neder v. United States* (1999) 527 U.S. 1, 18.)" (*Geier, supra,* 41 Cal.4th at p. 608.)

Here, the error in admitting Maria's statements was harmless beyond a reasonable doubt as to defendant's conviction of forcible rape of Maria. Even without Maria's statement to Stephenson that defendant had penetrated her vagina with his penis, there was incontrovertible evidence that sexual intercourse occurred: the vaginal swabs taken from Maria contained spermatozoa with defendant's DNA profile. Moreover, Stephenson observed injuries to Maria's genitalia consistent with blunt force trauma: redness on the genitalia and abrasions to both sides of the labia majora and hymen. Maria told Ana Cardenas a man had forced her into his car and "made [her] do things." When Cardenas inquired, Maria repeatedly said that he made her give him oral sex. Having convicted defendant of forcible oral copulation of Maria (a conviction defendant does not challenge), it is clear beyond a reasonable doubt that a rational jury would have

also convicted defendant of forcible rape even in the absence of Maria's statement that defendant had penetrated his vagina with his penis.

Defendant states that it was "entirely possible" Vargas may have ejaculated after oral copulation and inadvertently placed the sperm in Maria's vagina by digital penetration. Thus, the fact that sperm was found in Maria's vaginal sample did not necessarily mean that sexual intercourse occurred. However, nothing in the record supports defendant's suggestion – indeed, it is contrary to common sense. The existence of such a speculative possibility is insufficient to defeat the conclusion that the error in introducing Maria's statement that defendant had sexual intercourse with her is harmless beyond a reasonable doubt.

As to the conviction of forcible penetration by a foreign object, other than Maria's statement to Stephenson that defendant digitally penetrated her vagina, there was no independent evidence to support the conviction. Therefore, the error in admitting that statement is not harmless beyond a reasonable doubt, and the conviction of penetration by a foreign object must be reversed.

B. *Testimony by Stephenson and Lister regarding the reports of the sexual assault examinations on Tamika G. and Bin Z.*

The second *Crawford*-related issue raised by defendant relates to testimony concerning the sexual assault examinations performed on Tamika G. and Bin Z. At trial, the nurses who performed these examinations -- Chris Pollard as to Tamika, and Gina McConnell as to Bin -- did not testify. Rather, other nurses testified concerning the contents of the OCJP-923 reports prepared by Pollard and McConnell -- Jean Stephenson as to Pollard's report on the examination of Tamika, and Julie Lister as to McConnell's report on the examination of Bin. The reports themselves were not introduced into evidence.

Defendant did not object to Stephenson and Lister's testimony in the trial court. On appeal, he concedes that the OCJP-923 reports of the sexual assault examinations of Bin and Tamika were admissible under *Geier, supra*. But he contends that the United States Supreme Court's decision in *Melendez-Diaz, supra,* demonstrates that *Geier* was wrongly decided and that, therefore, the court erred in permitting Stephenson and Lister to testify concerning the OCJP-923 reports of the examinations.

We construe defendant to be challenging only those portions of the testimony concerning the OCJP-923 reports that described the observations of the victims' physical injuries.[5] We conclude that defendant has forfeited his objection

---

[5] The testimony portrayed the reports as containing three types of evidence. First, they contained the examining nurses' observations of the victim's injuries. As to Bin, this evidence consisted of McConnell's description of (1) nine areas of bruising on Bin Z., including "profound ecchymosis [bruising] to the left side of neck across upper chest to left shoulder," and bruising above the right breastbone, on the right waist area, on the left leg below the buttock, and on upper left thigh; and (2) the trauma to Bin's genital area -- redness just beside the hymen, and blood-tinged fluid below the cervix. As to Tamika G., the evidence consisted of the description in Pollard's report of (1) redness to Tamika's cervix; and (2) abrasions to Tamika's left foot and to her right knuckle, and dirt on the right knee.

The second type of evidence in the OCJP-923 reports consisted of statements made by Bin and Tamika describing the crimes. Bin said she felt like she had been bruised all over her body. Tamika complained of pain to her vagina and said that her "clothes were thrown out of the car." She also described the sexual assault: the assailant penetrated her vagina with his penis three times, and Tamika orally copulated his genitals. Tamika said that the assailant used a condom and threw it out the window.

Finally, the third type of evidence, applicable only to Tamika, is Pollard's observation concerning the general appearance of Tamika and her clothing. Pollard wrote that she observed Tamika to be "disheveled, unkempt and tearful," and that Tamika's clothing "was dirty [and she was] wearing a bra and long-sleeved men's shirt."

In his briefing, defendant variously refers to the objectionable portions of the reports as the examining nurses' "findings, as memorialized in their reports" and as "medical evidence." On the issue of prejudice, defendant refers only to the redness to Tamika's cervix and the abrasions to her knuckle and foot, and the redness just beside Bin's hymen, and blood-tinged fluid below her cervix. Thus, we infer that defendant is

to such evidence, and that, in any event, any error was harmless beyond a reasonable doubt.

1. *Forfeiture by Failing to Object to Evidence of Injuries*

At trial, defendant did not object to the testimony of Lister and Stephenson. Respondent contends that defendant thereby forfeited any claim that the testimony was inadmissible under *Crawford* and its progeny. Defendant responds that at the time of trial, *Geier* was binding precedent. Therefore, his failure to object was excusable because any such objection would have been futile.

"An objection in the trial court is not required if it would have been futile." (*People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 (*Sandoval*) [no objection required to preserve *Cunningham/Blakely* error by requesting jury trial on aggravating factors where trial and sentencing occurred after decision in *Black I* (*People v. Black* (2005) 35 Cal.4th 1238), which was binding on trial court].) But cases applying this exception, as here relevant, involve the failure to make objections under circumstances in which no arguable distinction could be drawn between the pending case and governing case law, thus necessarily rendering any

---

challenging *only* the admission of testimony by the non-examining nurses as to these injuries. Even if defendant means to challenge the introduction of the statements made by Bin and Tamika to the examining nurses, and also means to challenge the introduction of Pollard's observations of Tamika's general appearance and clothing, he fails to make any argument regarding that evidence. He has thus forfeited on appeal any claim that this evidence was improperly admitted. (See *People v. Stanley* (1995) 10 Cal.4th 764, 793.) This forfeiture is separate and apart from that which flows from his failure to object in the trial court, which we discuss below. In any event, given that Bin and Tamika were available for cross-examination at trial, it is difficult to understand how any *Crawford* violation based on the inability to cross-examine McConnell and Pollard concerning Bin and Tamika's statements, and Pollard as to Tamika's appearance and clothing, could be prejudicial.

objection a useless exercise. (E.g., *Sandoval, supra,* 41 Cal.4th at p. 837, fn. 4 ["Had defendant requested a jury trial on aggravating circumstances, that request clearly would have been futile, because the trial court would have been required to follow our decision in *Black I* and deny the request"]; *People v. Welch* (1993) 5 Cal.4th 228, 237 ["Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence"]; *People v. Turner* (1990) 50 Cal.3d 668, 703 ["Though evidentiary challenges are usually waived unless timely raised in the trial court, this is not so when the pertinent law later changed so unforeseeably that it is unreasonable to expect trial counsel to have anticipated the change"]; *In re Gladys R.* (1970) 1 Cal.3d 855, 861 ["we cannot expect an attorney to anticipate that an appellate court will later interpret the controlling sections in a manner contrary to the apparently prevalent contemporaneous interpretation"].)

Here, by contrast, trial defense counsel could have made a reasonable (even if not ultimately persuasive) argument that the observations of Bin and Tamika's physical condition as recorded in the OCJP-923 reports were not admissible under *Geier*. As we have stated, *Geier* held that the DNA report there at issue was not testimonial. Its reasoning involved an analysis of three factors: "a statement is testimonial if (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. Conversely, a statement that does not meet all three criteria is not testimonial." (*Geier, supra,* 41 Cal.4th at p. 605.)

Under this three-pronged analysis, trial counsel here could have argued as to the first and third prongs that the examining nurses acted as agents of law enforcement and prepared their OCJP reports for use as evidence at trial. Indeed,

he made precisely this argument when objecting to Stephenson's testimony concerning the statements of Maria R.; as explained above in our discussion of that issue, we agree. As to the second prong, which was crucial to the *Geier* holding, counsel reasonably could have argued that the reports related past facts because, unlike the DNA report in *Geier*, they contained statements by the victims describing the attacks, and recorded the injuries observed in order to corroborate the past facts asserted in those statements. Thus, trial defense counsel could have made a reasonable argument that the observations contained in the sexual examination reports were distinguishable from the DNA report in *Geier* and were not admissible.[6] For purposes of applying the futility doctrine, it is not enough that the argument might not have been persuasive. Nor is it enough that defendant asserts on appeal that *Geier* controls. The objection must have been "futile" in the trial court, in the sense that the trial court would have been required under *Geier* to overrule the objection because no arguable distinction between the instant case and *Geier* existed. That standard is not met, and therefore the futility doctrine does not apply.

2. *Harmless Error*

Even if defendant had not forfeited the issue, we still would not reverse any of his convictions relating to Tamika and Bin. Although defendant argues that the decision in *Melendez-Diaz* shows that *Geier* was incorrectly decided, we need not enter that debate, because any error in admitting the testimony concerning the

---

[6] We do not mean to suggest that counsel's failure to make that objection constituted ineffective assistance of counsel. In any event, as we explain, any error in admission of the testimony concerning the OCJP-923 reports was harmless beyond a reasonable doubt.

examining nurses' observations of Tamika and Bin's injuries was harmless beyond a reasonable doubt.

a. *Harmless Error as to Bin Z.*

The challenged evidence testified to by Julie Lister based on Gina McConnell's OCJP-923 report regarding Bin consists of: (1) the description of nine areas of bruising on Bin Z, including "profound ecchymosis [bruising] to the left side of neck across upper chest to left shoulder," and bruising above the right breastbone, on the right waist area, on the left leg below the buttock, and on upper left thigh; and (2) the description of the trauma to Bin's genital area -- redness just beside the hymen, and blood-tinged fluid below the cervix.

According to defendant, admission of this evidence was prejudicial as to Bin because "Bin was the sole eyewitness to testify that" she was sexually assaulted, and "[w]ithout this medical evidence, at least one juror might have had a reasonable doubt as to whether this was a consensual act followed by a quarrel that turned violent . . . rather than a sexual assault ab initio."

We note that in addition to convicting defendant of kidnapping Bin to commit rape and of forcible rape, the jury also convicted him of second degree robbery. Defendant provides no explanation as to how the supposedly erroneously admitted evidence could have had any effect on his robbery conviction. That offense was based on Bin's testimony that defendant, after completing his sexual assault, forced her out of his truck by threatening her with a screwdriver, and then drove off with her belongings, including her cell phone and $3,000 in her purse. Beyond a reasonable doubt, the admission of McConnell's observations of Bin's injuries did not contribute to the conviction of second degree robbery, and defendant offers no contention otherwise. Of course, the evidence supporting the

robbery conviction was consistent with Bin's version of the entire assaultive incident, and thus tends to support her account that she was forcibly raped.

Moreover, McConnell's observations were not the only evidence that Bin suffered significant injuries consistent with her account of the crimes. At trial, Bin identified three photographs depicting certain of her injuries, and the photographs were admitted into evidence. She testified that when defendant backed his truck into the tunnel where the rape occurred, he pinned her against the door of his truck with his left elbow. As she struggled when he began to rape her, the defendant pressed his arm and elbow against her neck. Bin identified two photographs taken by the police at the police station after the assault as depicting the resulting injuries. One photograph was of her upper left chest (the location of the severe bruising identified by McConnell,) and depicted, according to Bin, "the mark that was left behind because of the assault. . . . That was when he [was] using his elbow pressing on my neck." The second photograph depicted "the mark [that was] left behind when I was pressed against the car door." We have examined these photographs. The first shows widespread bruising on Bin's upper left chest, and the second shows similar bruising on her upper back. Bin also identified a third photograph, which showed "the mark [on her leg] left behind of him scratching me." We have examined this photograph, which was also admitted into evidence. It depicts a prominent cut above Bin's right ankle. These photographs of certain of Bin's injuries, independent of McConnell's observations, strongly corroborated Bin's account of defendant's assault, as did Bin's statement to McConnell that she felt as if she had been bruised all over.

There was absolutely no evidence tending to prove that Bin consented to have sex with defendant, and it is highly doubtful that any rational jury would have acquitted defendant of forcible rape on the theory that she might consented to have

sex with defendant after being driven to a tunnel under a bridge near Sixth Street. After all, she testified at trial that she had traveled from Northern California, intending to visit her boyfriend in Monterey Park and make arrangements for their wedding.

Beyond a reasonable doubt, a rational jury would have convicted defendant of kidnapping Bin to commit rape and forcible rape even without the evidence of McConnell's observations of Bin's injuries. (*Geier*, *supra*, 41 Cal.4th at p. 608.)

b. *Harmless Error as to Tamika G.*

As to Tamika G., the jury convicted defendant of kidnapping to commit rape, forcible rape, and forcible oral copulation. The challenged evidence testified to by Jean Stephenson from Chris Pollard's OCJP-923 report consists of: (1) the description of redness to Tamika's cervix; and (2) the description of abrasions to Tamika's left foot and to her right knuckle, and dirt on the right knee.

According to defendant, the alleged error in admitting this evidence was prejudicial because the evidence "tended to support Tamika's story that the sex was forcible. . . . Without this corroboration, jurors would have been hard pressed to take Tamika's story at face value," and could have easily found "that this was an instance of the all-too-common case in which a prostitute engages in voluntary sex with her customer but quarrels with him afterward over payment." We disagree.

First, although Tamika was a prostitute at the time of the charged crimes, it is highly unlikely that a rational jury would have discounted her testimony on the theory that that she was motivated by a dispute over compensation for prostitution. In April 2004, approximately six months after defendant's October 2003 assault on her, Tamika spotted defendant's white truck and noted part of the license plate number. She called Los Angeles Police Detective Adolfo Contreras, who

investigated her sexual assault case, and gave him the information. Detective Contreras was able to trace the partial plate number to a white 2000 Chevrolet pickup truck registered to defendant with an address in Montebello. Tamika's assistance in apprehending defendant months after the crimes against her makes little sense if defendant's only "offense" was refusing to pay for consensual sex.

Second, Pollard's observation of redness to Tamika's cervix was not significant in corroborating Tamika's account that defendant committed forcible rape. It was undisputed that defendant had sexual intercourse with Tamika. Asked by the prosecutor about "the significance of redness of the cervix," Stephenson testified that "[i]t could mean anything." Asked if it was "consistent with a complaint of sexual assault," Stephenson testified that "[i]t can be," not that it was. Thus, the redness to Tamika's cervix was at best equivocal evidence of a violent sexual assault.

Third, as to the other injuries observed by Pollard -- abrasions to the left foot and first finger, and dirt on the right knee -- Stephenson testified without objection that three photographs taken of Tamika during her examination were "consistent" with these injuries. Tamika also identified copies of the same three photographs. The original photographs and copies were admitted into evidence, and we have examined them. One photograph is of Tamika's face (apparently taken for identification purposes). The other two depict injuries: one shows a prominent abrasion to the knee, and the other a prominent abrasion to the index finger. Thus, apart from Pollard's testimony, there was undisputed evidence of the other injuries that tended to corroborate Tamika's account.

Fourth, Tamika's statements to Pollard describing the assault, including her statement that she felt pain in her vagina, were consistent with her testimony. Also, Pollard observed Tamika to be "disheveled, unkempt and tearful," and noted

that Tamika's clothing "was dirty [and she was] wearing a bra and long-sleeved men's shirt." This evidence, too, corroborated Tamika's account.

Finally, the assault on Tamika occurred in the same area as the attack on Bin – a tunnel under the Sixth Street Bridge. Defendant picked up both Bin and Tamika at the same bus stop, and committed the attacks only twelve days apart.

On this record, we conclude beyond a reasonable doubt that a rational jury would have convicted defendant of kidnapping Tamika to commit rape, forcible rape, and forcible oral copulation even without evidence of Pollard's observations of Tamika's injuries as recorded in Pollard's report.

III. *Instructional Errors*

Defendant contends that the trial court erred in failing to instruct the jury that he could be guilty of kidnapping Shosh and Tamika for the purpose of rape only if the purpose of the kidnapping was to effectuate his escape. According to defendant: "If the victim voluntarily enters the defendant's vehicle and travels with him to the site of the rape, there is no kidnapping with intent to commit rape. If the defendant subsequently drives the victim somewhere against her will, the crime is kidnapping with intent to commit rape only if the purpose of the kidnapping is to effectuate his escape. Here, the court erred in failing to instruct on this principle." Defendant relies on *People v. Monk* (1961) 56 Cal.2d 288, 295, which held that "where a kidnapping occurs after the actual perpetration of a robbery such kidnapping may be kidnapping for the purpose of robbery if it may reasonably be inferred that the transportation of the victim was to effect the escape of the robber or to remove the victim to another place where he might less easily sound an alarm."

We disagree with defendant's premise. After one incident of rape has been completed, the subsequent asportation of the victim against her will constitutes kidnapping for the purpose of rape if, among other requirements, the defendant intends, when the subsequent asportation begins, to commit yet another rape. Thus, defendant is incorrect in asserting that the subsequent asportation is kidnapping for the purpose of rape *only* if the kidnapping is to effect escape from the first rape. We note, too, that it is difficult to understand why the defense would have wanted the instruction posited by defendant, since it would have directed the jury to consider a specific additional theory on which to convict him of kidnapping to commit rape.

Moreover, even if defendant's premise were correct, the court instructed the jury on kidnapping for the purpose of rape using the 2008 revision of CALCRIM No. 1203.[7] That instruction is a correct statement of the law. (*People v. Curry*

---

[7] "To prove that the defendant is guilty of this crime [kidnapping for the purpose of rape], the People must prove that:

"1. The defendant intended to commit rape;

"2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear;

"3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance;

"4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a rape;

"5. When that movement began, the defendant already intended to commit rape; AND

"6. The other person did not consent to the movement; AND

"7. The defendant did not actually and reasonably believe that the other person consented to the movement.

"As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the rape. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.

"In order to consent, a person must act freely and voluntarily and know the nature of the act.

(2007) 158 Cal.App.4th 766, 781-782 [referring to 2006 version of CALCRIM No. 1203]), and properly informed the jurors as to the all the elements of kidnapping to commit robbery. Defendant failed to request clarification of that instruction so as to include the principle he now asserts. He has therefore forfeited the contention on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 622.)

Defendant also contends that the trial court erred in failing to instruct on simple kidnapping as a lesser included offense of kidnapping for the purpose of rape as to Shosh and Tamika. However, there was no substantial evidence to support such an instruction. (See *People v. Stewart* (2000) 77 Cal.App.4th 785, 795-796 [it is "error . . . to instruct on a lesser included offense when a defendant, if guilty at all, could only be guilty of the greater offense, i.e., when the evidence, even construed most favorably to the defendant, would not support a finding of

---

"To be guilty of kidnapping for the purpose of rape, the defendant does not actually have to commit the rape.

"To decide whether the defendant intended to commit rape, please refer to the separate instructions that I will give you on that crime.

"The defendant is not guilty of kidnapping if he reasonably and actually believed that the other person consented to the movement. The People have the burden of proving beyond a reasonable doubt that the defendant did not reasonably and actually believe that the other person consented to the movement. If the People have not met this burden, you must find the defendant not guilty of this crime.

"The defendant is not guilty of kidnapping if the other person consented to go with the defendant. The other person consented if she (1) freely and voluntarily agreed to go with or be moved by the defendant, (2) was aware of the movement, and (3) had sufficient mental capacity to choose to go with the defendant. The People have the burden of proving beyond a reasonable doubt that the other person did not consent to go with the defendant. If the People have not met this burden, you must find the defendant not guilty of this crime.

"Consent may be withdrawn. If, at first, a person agreed to go with the defendant, that consent ended if the person changed her mind and no longer freely and voluntarily agreed to go with or be moved by the defendant. The defendant is guilty of kidnapping if after the other person withdrew consent, the defendant committed the crime as I have defined it."

guilt of the lesser included offense but would support a finding of guilt of the offense charged"].) And in any event the error in failing to instruct on simple kidnapping, if any, was not prejudicial. (*People v. Breverman* (1998) 19 Cal.4th 142, 149 (*Breverman*) [error in failing to instruct on lesser included offense not prejudicial unless it is reasonably probable a more favorable result would have been reached in the absence of the error].)

As to Tamika, the evidence was somewhat conflicting as to whether she voluntarily entered defendant's truck. Tamika testified that defendant asked if she "dated." She replied that she did, but at the time was waiting for her boyfriend. Defendant offered her a ride. At one point, Tamika testified that she approached his truck, but then thought she saw her boyfriend and started to back away. Defendant grabbed her arm through the open passenger door, pulled her into the truck, and drove off. At another point, Tamika admitted that at the preliminary hearing she had testified "something like" defendant had offered her money for sex and she had agreed, but had later changed her mind at the point "when he started taking me to that bridge. I told him it didn't feel right."

Regardless of this factual inconsistency, the evidence was undisputed that defendant transported Tamika against her will to the site of the rape. Tamika testified that defendant drove through a tunnel near the Sixth Street Bridge and onto the bed of the Los Angeles River. While driving, defendant told her that he was an undercover police officer and recognized her. He said that he knew a spot to go, and mentioned that he had a stun gun. He said that if she tried to get out, he had people nearby that would get her. Because the truck was moving, she had no chance to escape. Once he stopped in the tunnel, defendant immediately began his sexual assault.

On this record, there is no substantial evidence on which a rational jury could conclude that defendant might have been guilty only of simple kidnapping as opposed to kidnapping for the purpose of rape. In the alternative, even if the failure to instruct on simple kidnapping was erroneous, it is not reasonably probable that a different result would have been reached in the absence of the error. (*Breverman, supra,* 19 Cal.4th at p. 149.)

As to Shosh G., after defendant finished the last incident of rape, he rested for a few minutes and then started to drive. Shosh put on her bra and shirt, panties and pants. She repeatedly begged for defendant to let her go, but he kept driving. After five or ten minutes, Shosh was able to escape by unlocking the passenger door and jumping from the truck. Defendant's refusal to let Shosh out of the car, despite her repeated requests to let her go, could rationally have been related only to a purpose to accomplish rape, in the sense that defendant intended to continue the sexual assault elsewhere or intended to facilitate his escape by transporting Shosh to another location before either harming her or releasing her. On either theory of intent, defendant committed kidnapping for the purpose of rape, not simple kidnapping. Thus, there was no substantial evidence on which to base an instruction on simple kidnapping. In the alternative, it is not reasonably probable that if the jury had been instructed on simple kidnapping as a lesser included offense, the jury would have convicted of that crime rather than kidnapping for the purpose of rape. (*Breverman, supra,* 19 Cal.4th at p. 149.)

DISPOSITION

The conviction on count 6 -- sexual penetration of Maria R. by a foreign object – is reversed, and the eight year sentence imposed on that count is ordered stricken. The clerk of the superior court is ordered to prepare an amended abstract of judgment so reflecting, and to transmit the amended abstract to the

Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.