THE PEOPLE, Plaintiff and Respondent, v. ISAAC ORTIZ, Defendant and Appellant.-A116064
COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE-2008 Cal. App. Unpub. LEXIS 4001-May 16, 2008, Filed

PRIOR HISTORY: [*1]-San Francisco County Super. Ct. No. 199328.
JUDGES: Siggins, J.; McGuiness, P.J., Jenkins, J. concurred.-OPINION BY: Siggins

OPINION
Defendant Isaac Ortiz appeals his conviction for multiple sexual offenses. He contends the court abused its discretion when it admitted preliminary hearing testimony given against him by a prior sexual assault victim in another case; that the prosecutor committed misconduct by citing facts not in evidence and making an improper gender-based appeal in her closing argument; and that his sentence violates Cunningham v. California (2007) 549 U.S. 270 [127 S.Ct. 856]. We find these contentions to be meritless and affirm.

BACKGROUND

I. Prosecution Evidence

A. Victim R.O.

Around 2:45 a.m. on April 5, 2006, Andre Williams was walking home from work through Duboce Park. As he neared the children's playground he heard screams and a woman loudly pleading "Help me. Help me. Mister, help me." Williams saw a woman who was naked from the waist down scramble up from a small embankment and a man who appeared to be pulling up his pants and putting on his shoes. The woman threw herself over a fence and ran toward Williams, pleading for help and saying she had been raped. When she reached Williams she grabbed [*2] him and begged for help. Williams described the woman as very distraught, traumatized, choked up, and sobbing. It seemed that she was either intoxicated or in shock from a traumatic event. Williams called 911 while the woman put her clothes on.

San Francisco Police Sergeant John Lewis and his partner were the first to arrive in response to the call. When he arrived he saw R.O. standing with a man just inside the children's playground. R.O. was hysterical, crying and yelling "I was raped, I was raped." She was dirty or muddy and her makeup was streaming down her face. She described her assailant as a Hispanic male about 29 years old with a shaved head and wearing a gray sweat-shirt. The police drove R.O. and Williams around the area in an unsuccessful search for the suspect.

San Francisco Police Officer Leo Lamela also responded to the scene with his partner Officer Ruben Reyes. R.O. was clearly upset and distraught. She was crying hysterically, her hair was in disarray, and her clothes were muddy. She said she had been raped and described her assailant as a bald Latin male named Isaac with slight facial hair, wearing a gray hoody sweater and dark pants. R.O. cried throughout the 15-to-20 [*3] minute drive they took to look for the suspect. After the drive, Officer Lamela took R.O. to San Francisco General Hospital for a rape exam.

Officer Ruben Reyes described R.O.'s emotional state as troubled, angry and very upset. She was crying and kept saying she had been raped. Her clothing was disheveled and dirty, her hair was out of place and her makeup was smeared. Officer Reyes inventoried and retained as evidence all of the clothing R.O. was wearing the night of the rape, including a black jacket, a zippered gray jacket with a hood, a hat, a belt, pants, a black long sleeve pullover shirt, a black bra, and black shoes. The clothes were dirty and the belt was ripped.

Marshal Barnhart was R.O.'s friend and her ex-boyfriend. In Barnhart's opinion, R.O. was very honest and very loyal. In the time he had known her he never knew her to say anything that was not true.

R.O. was 21 years old, living in Oregon attending college when this case was tried. She came to San Francisco for the first time in 2005 for a vacation and stayed about a week. For a few months before she returned to live in San Francisco in March 2006, she worked as an exotic dancer because it paid a lot more than working [*4] in retail. R.O. planned to dance to make enough money to stay in San Francisco. She rented a room at the same hostel where she had stayed during her 2005 vacation.

R.O. testified that although exotic dancers strip and dance naked, they have no physical contact with their customers. Shortly after her arrival in San Francisco, R.O. got jobs dancing at The Roaring 20's and The Hungry I. A lot of customers propositioned her, but she always declined and told them she was not that kind of girl. She never engaged in prostitution or even considered it; she found it "disgusting."

Around midnight the night of the assault, R.O. was hanging out with other residents in the television room at her hostel. A lot of people were watching television and playing video games. R.O. went across the street to a store and bought a pint of Southern Comfort. Defendant and some friends were standing outside next door to the hostel in front of the Noc Noc Bar. As R.O. approached, defendant asked if she wanted to get a drink at the bar. She declined at first, but defendant persisted and she eventually agreed because she did not have anything better to do and did not know anyone.

At the Noc Noc Bar, R.O. had one or [*5] two small cups of sake with defendant and one of his friends. Defendant seemed like a nice and normal guy and they exchanged phone numbers. R.O. said she was a dancer and told him where she worked.

They stayed in the bar for half an hour to an hour. They talked about drinking R.O.'s Southern Comfort in a park. Defendant and his friend also talked about getting some pot, and one of them made a phone call. Defendant and his friend waited outside while R.O. went into the hostel to get her jacket. When she learned that she was allowed to invite guests inside, R.O. invited defendant and his friend up to the television room. They played video games and shared R.O.'s pint of Southern Comfort. The bottle was passed around among the seven people in the room. R.O. sat on a couch and defendant sat on a chair.

After about an hour R.O. said she wanted to buy more Southern Comfort. Defendant told her he knew a liquor store that stayed open until 4:00 a.m. R.O. left the hostel with defendant and his friend to buy more alcohol. They planned to return and drink the liquor at the hostel. Defendant and his friend talked as they walked down Fillmore Street. R.O. did not know the area and did not pay attention [*6] to their route.

Defendant's friend left as they neared a park. Defendant said he knew a shortcut through the park, but when they came to a dead end he grabbed her and put his arm around her neck. Up to that point it had not occurred to R.O. that she was unsafe.
Defendant put R.O. into a headlock, squeezed and told her he was going to "choke [her] out." He also told her he was going to "fuck [her]." R.O. thought, "Oh shit. . . . I'm going to get raped." She asked him not to kill her and said she hoped he did not have AIDS. Defendant took her to some bushes, pushed her down, and pulled her pants off. R.O. complied and did not fight because she was shocked and terrified and thought defendant would hurt her. Defendant held her arms down, orally copulated her and then penetrated her vagina with his fingers as he told her he was going to "punch [her] out" and "choke [her] out." He penetrated her vagina with his penis and fingers and orally copulated her more than once. During the assault he "kept moving [R.O.] around and tossing [her] around into positions." He put her on her hands and knees and had intercourse with her in that position. He pinned R.O.'s arms down and pushed her back against [*7] some bushes. When she said the bushes were hurting her back, he said "I don't give a fuck. [P] . . . [P] Shut the fuck up, bitch." His tone was threatening, and he called her a bitch more than once. Defendant had difficulty maintaining an erection, never ejaculated, and did not use a condom.

R.O. never screamed, fought, or tried to get away. She was afraid that defendant would hurt her because he was bigger and stronger than she was and said he had a knife in his pocket. He told her he was going to "fuck [her] dead or alive," and "choke [her] out, punch [her] out, strangle [her]." At one point defendant said "Oh my God. Everyone saw me leave with you." In that moment R.O. believed he was going to strangle her. She tried to pretend she liked the rape so that he would trust her and not strangle her.
R.O. thought the rape lasted half an hour to an hour. It finally ended when she screamed for help as Williams walked by. After R.O. escaped, defendant said "Bitch has been feeling me all night" and ran away.

R.O. was emotionally "freaked out." She moved back to Oregon a week after the assault. She became very distrustful of men, and "freaked out" about people in general.
Nurse practitioner [*8] Lucretia Bolin examined R.O. at the hospital around 3:30 a.m. R.O. responded appropriately to questions and did not appear to be altered or under the influence of drugs or alcohol. She complained of pain from scratches on her back. Bolin observed several fresh scratches and abrasions on her back and legs, including an area on her back where the skin had been rubbed off, and bruises on her inner thigh. The injuries were not more than 12 or 13 hours old. Bolin also noted that R.O.'s skin was soiled with dirt.

R.O. did not have a vaginal injury, and Bolin rarely saw vaginal injuries after a rape, because of factors such as penile size, sexual history, and the elasticity of the vaginal canal. Less than half of all rape victims suffer vaginal injuries or even vaginal pain.

Bolin's observations and the results of her examination, including the absence of sperm in R.O.'s vagina, were consistent with R.O.'s description of the sexual assault. Bolin did not think R.O. was lying about the sexual assault.

Before she was examined by Bolin, R.O. was interviewed at the hospital by Inspector Joseph Cordes of the San Francisco Police Department sexual assault unit. R.O. was upset, nervous, and scared, [*9] but coherent and sober. Inspector Cordes did not detect alcohol on her breath or anything un-steady about her, and he was able to understand everything she told him. R.O. was very certain about what had happened to her.

It was stipulated that R.O. laughed at times during the interview. Inspector Cordes could not remember her laughing or giggling, but he explained that laughter is not an uncommon reaction of sexual assault victims. There is no typical behavior. Some completely shut down and will not say anything, some are "fighting mad" and want to "go out and grab the guy, themselves. It's a wide range of emotions."

Defendant was identified through the phone number he had given R.O. and her recognition of him in a photo lineup. He was eventually arrested in Illinois.

B. Victim C.S.

C.S. was called as a witness at trial, but invoked her Fifth Amendment privilege against self-incrimination and refused to answer questions about her own previous encounter with defendant. She was declared to be unavailable as a witness and her preliminary hearing testimony from a prior criminal case against defendant was read to the jury.
C.S. was approached by defendant as she walked home from a bar early the [*10] morning of January 15, 2005. They talked and defendant invited C.S. to his friend's apartment to look at some paintings. She accepted the invitation and they went to an apartment belonging to defendant's friend Jacob. Defendant, C.S. and Jacob talked about the paintings and the two men smoked methamphetamine. Defendant and C.S. left after an hour. C.S. was going to walk home, but defendant invited her to his place to look at more paintings and she agreed. He also told her he had a friend who worked in a bar near her house who he thought could get her a job.

Defendant lived in a small hotel room. He and C.S. sat, smoked cigarettes and talked. Defendant snorted more methamphetamine while they talked for hours. At approximately 7:00 a.m. C.S. was exhausted and began gathering her belongings to go home. Defendant sat down on the bed next to her, rolled on top of her and started touching her and pulling at her clothes. C.S. told defendant to stop because he was making her uncomfortable, and he told her to calm down and try to relax. Defendant also told her it was "going to happen" whether she fought him or not.

Defendant removed all of C.S.'s clothes and undressed, while she lay there and [*11] "freak[ed] out." She cried but did not fight because she was afraid defendant would hit her. Defendant kept saying he would knock her out and she would wake up some-where and that it would happen anyway. Defendant also threatened to pistol whip C.S. and get a bunch of

guys to gang rape her unless she cooperated. Defendant held her down on the bed, moved her in "weird ways," and had intercourse with her 20 or 30 times. He put his fingers in her vagina and touched her everywhere. They had sex over and over until approximately 4:00 that afternoon. Defendant had difficulty maintaining an erection and never ejaculated. He did not use a condom. C.S. cried a lot and repeatedly asked him to stop, but he ignored her. She never consented to have sex with defendant.
C.S. was finally able to leave the hotel room when defendant was distracted by someone knocking on his door and voices in the hallway. C.S. asked to go to the bathroom and, when defendant let her up from the bed, she put her clothes back on. Defendant told her to be quiet. He said there were parole officers and police officers in the hallway, and C.S. would get in trouble if they knew she was there because she had been to jail be-fore. [*12] C.S. told defendant she did not care and left the room.
C.S.'s friend called the police later that day and C.S. underwent a sexual assault examination at the hospital. Her elbows and knees were bruised, her arm was numb for weeks from being pinned down, her legs were sore and she had difficulty walking after the assault.

C.S. admitted that she took heroin and cocaine before the assault and that she injected heroin afterward. She also acknowledged that she was addicted to heroin at that time.

II. Defense Evidence

A.C.S.

Defendant testified that he met C.S. on the street on January 15, 2005, when she bummed a cigarette from him. C.S. wanted defendant to find someone who could sell her heroin. They hung out at defendant's friend Jacob's apartment for a while. Then they ran into another of defendant's friends, Mark Holeman, and the three of them went to defendant's hotel room. Defendant snorted crystal methamphetamine and took ecstasy while C.S. and Mark injected heroin. C.S. also snorted crystal methamphetamine and took ecstasy. He and C.S. had con-sensual sex and used three condoms while Holeman dozed on and off in a chair. Eventually defendant's girl-friend knocked on the door and defendant [*13] made Holeman and C.S. leave.

Defendant testified that he spent the day with his girlfriend. When he returned to his room he learned the police had searched it and taken bed-ding, drug paraphernalia and other items pursuant to a warrant. He did not realize the warrant stemmed from a sexual assault complaint until he received a phone message from a detective three or four days later. Defendant turned himself in to the police some six weeks later, and spent the next 11 months in custody.

A urine specimen received from C.S. on January 19, 2005, tested positive for acetone, amphetamine, methamphetamine, ecstasy, cocaine and opiates. The drugs could have been in her sys-tem for up to a week before the test. The toxicologist did not have enough information about C.S. to opine on how these substances would have effected her, but it was likely that she exhibited significant signs of drug influence. The effects would have been less

pronounced if C.S. were a chronic drug user.

Pursuant to a plea agreement, defendant pleaded guilty to false imprisonment and assault by means of force likely to produce great bodily injury and was placed on three years' felony probation. He testified that he pled guilty [*14] because he was tired of fighting the charges and he wanted to visit his brother in Illinois and go to a wedding in St. Lucia. Defendant's girlfriend bought him a plane ticket to St. Lucia before he was released from custody. He flew there on April 6 and returned on April 12, 2006. On April 13, 2006, he bought a bus ticket to Illinois. He did not buy the ticket earlier because Grey-hound does not reserve bus tickets. He went to Illinois to visit his brother, whom he had not seen for six or seven years.

B.R.O.

On the night defendant met R.O., he had been drinking with a few friends at the Noc Noc Bar. He and his friend Andy went outside for a cigarette when R.O. walked by. Andy invited her to have a drink with them. She accepted the invitation, but first she went up-stairs and changed. She and defendant exchanged names and telephone numbers. R.O. took so long upstairs that defendant called her 15 minutes later on her cell phone and left a message that they were still at the bar having drinks. A few minutes later R.O. came downstairs with a bottle of Southern Comfort. The bartender took the bottle, so she drank shots of sake and beer.

R.O. told defendant that she was a stripper at The Roaring [*15] 20's and other clubs. Defendant said he was an artist but had not painted anything recently because he was just released from jail after being falsely accused of rape and sexual assault. R.O. was sympathetic. They eventually left the bar and went to her hostel. Defendant, R.O. and Andy shared the bottle of Southern Comfort and briefly played video games. They left because it was almost 2:00 a.m. and they wanted to drink more.

They planned to drink in the park. They tried to buy another bottle of Southern Comfort but the store had already closed, so they decided to walk and look for another liquor store. Defendant told them they could just get a drink at the Noc Noc Bar, but R.O. wanted to go to the park. As they walked, defendant asked R.O. if sleazy guys hit her up for sexual favors in exchange for money. She said they were not all sleazy, and that she was paid well. Defendant offered her $ 200 to give him and Andy oral sex. She giggled and asked, "At the same time?" When defendant said yes, she responded, "Fuck no. Not at the same time. Maybe one at a time." Defendant said okay, and Andy asked her if she liked "a big dick." R.O. said, "Ugh," and put her arm around defendant. She complained [*16] that Andy seemed wasted. She told defendant she would give him oral sex, but did not know about Andy. Andy must have heard her and had his feelings hurt, because he decided to go home.

Defendant and R.O. held hands as they entered the park. Defendant thought they were going to make out. R.O. wanted to go where it was dark and people would not see them, so he directed her to the playground. He thought it was the darkest place in the park. They sat down by a wall which had little seats and started kissing. He slipped his hand into her shirt and felt her breasts. He did not put his arm around her neck or push her to the ground. She pulled off her sweater so he could kiss her breasts. He eventually took off his pants and

underwear and put them on the wall, and laid down on her jacket. R.O. still had her pants on, and was on her knees. She started to orally copulate him, and then stopped and asked, "You're still going to pay me, right?" Defendant was kind of shocked because he thought R.O. liked him and it was going to be free. When he offered her money it was for him and Andy, but Andy had left. He was aroused, so he said, "Yeah, I'm going to pay you still." H! e started touching her vagina [*17] through her pants. She said he was making her hot and that she wanted him inside her. She helped him remove her pants, and had an orgasm when he orally copulated her. Defendant was too drunk to ejaculate.

R.O. continued to orally copulate defendant but he could not maintain an erection. Eventually his penis became irritated and he stopped her. When he told her he was sure it was not going to happen, she said, "we're going to the ATM, right?" He laughed and said no. She said, "You fucking asshole. I knew you were going to do this." He responded, "If you knew, then you should have got paid before we came here." R.O. replied, "You fucking jerk. You're going to fucking pay me." When defendant asked how she was going to make him pay her, she called him an asshole. Then they heard a noise and R.O. started screaming "Rape, rape." Defendant got scared and could not be-lieve what was happening to him again. A man approached and told defendant to "hold it right there." Defendant said that R.O. was lying and left when he realized the man was not going to lis-ten to his explanation. He knew R.O. was angry, but he thought she would get over it. It did not occur to him that she would tell the police [*18] he had raped her. They had not even had intercourse.

III.Rebuttal

Geri Fegley, a city manager for Greyhound bus lines, testified that passengers can purchase advance tickets to travel at a future date.

Dolores Casazza, the San Francisco Police Inspector who investigated the sexual assault case involving C.S., said she served a search warrant at defendant's hotel room the morning of January 16, 2005. She left a note ad-dressed to defendant on the bed. When she returned the next day the note had been moved and defendant's belongings were gone.

Jacob Kanduch testified that he met defendant in the Arrow bar on Market Street and by January 2005 had known him casually for three or four weeks. Jacob was gay and thought defendant was cute. Defendant brought C.S. to Jacob's apartment on the evening of January 15. Defendant and Kanduch took cocaine or some other drug; C.S. did not. Defendant and C.S. stayed for about half an hour talking about heroin and their past experiences in jail before they left to go to defendant's place.

The police asked Kanduch to help with their investigation by luring defendant to the Arrow bar. Kanduch had trouble reaching defendant on the phone. When he finally did get [*19] through, defendant was "very paranoid" that police were looking for him or were in the area. Defendant told Kanduch that he had raped the girl he brought to Kanduch's apartment and that she had gone to the police.

Nurse Lucretia Bolin examined C.S. in the emergency room the night of the assault. C.S. had

reddish-brown bruises on her legs, an abrasion on her ankle and a bruised elbow; all of these injuries appeared to be fresh. C.S. also complained of vaginal tenderness and aches and pains all over her body. Nurse Bolin's findings were consistent with C.S.'s report of sexual assault.

IV.The Verdict

A jury convicted defendant of oral copulation by force (count 1), penetration by force (count 2), rape by force (count 3), and false imprisonment (count 5). The jury acquitted defendant of assault by means of force likely to produce great bodily injury (count 4) but found him guilty of the lesser included offense of assault. The court found a prior conviction al-legation to be true and sentenced defendant to 16 years in state prison. Defendant filed a timely appeal.

DISCUSSION

I.The Admission of C.S.'s Prior Testimony

Defendant contends the trial court abused its discretion when it admitted C.S.'s [*20] preliminary hearing testimony from another assault case against defendant. He says this evidence should have been excluded under Evidence Code sections 1108 and 352 1 due to a "strong appearance" that the preliminary hearing testimony was perjured, and that its admission as evidence was unduly prejudicial. We disagree.

1 All further statutory references are to the Evidence Code.

A.Background

C.S.'s testimony about the prior sexual assault was the object of a pretrial motion filed by the prosecution pursuant to sections 1108 and 352. The prosecution argued C.S.'s testimony was material because it tended to establish defendant's predatory intent, his common plan to force young, impaired women to comply with his sexual demands, lack of mistake, lack of consent, and defendant's propensity to commit sexual crimes. Defendant argued the evidence was unduly prejudicial and should be excluded. The court ruled the evidence of the prior assault on C.S. would be admitted if C.S. appeared in court and testified.

When C.S. was to be called to testify at trial, defense counsel told the court he intended to cross-examine her on subjects that might implicate her Fifth Amendment privilege and "could conceivably [*21] result in probation violations." He intended to ask C.S. about her drug use and allegations that she had committed AFDC (Aid to Families with Dependent Children) fraud in three different counties. The trial court directed C.S.'s appointed conflict counsel to ascertain whether her testimony would be potentially incriminating. After speaking with her lawyer, C.S. invoked the Fifth Amendment and refused to testify. The trial court ruled that C.S. was unavailable as a witness and, over defense objections, her preliminary hearing testimony was admitted into evidence.

B.Sections 1108 and 352 Analysis

Section 1108, subdivision (a) states that "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." As explained in People v. Falsetta (1999) 21 Cal.4th 903, section 1108 requires trial courts to engage in a careful weighing process under section 352. "Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible [*22] remote-ness, the degree of certainty of its commission and the likelihood of con-fusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense." (People v. Falsetta, supra, at pp. 916-917.) We review the trial court's weighing of these factors for abuse of discretion, and will not disturb it " ' "except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' " (People v. Callahan (1999) 74 Cal.App.4th 356, 366-367; People v. Ramos (1997) 15 Cal.4th 1133, 1170.) There is a presumption that favors the admission of evidence offered under section 1108. (People v. Callahan, supra, at p. 368.)

Before we discuss the many reasons defendant claims C.S.'s prior testimony was "both unusually prejudicial [*23] and confusing," we first consider whether the court erred by failing to conduct an inquiry into the reasons for her invocation of the Fifth Amendment. Defendant says "[w]ithout any inquiry into why [C.S.] believed it necessary to assert the Fifth Amendment, there is a strong appearance that [C.S.]'s concerns may have arisen from the knowledge that she had perjured herself during her preliminary hearing testimony." We disagree. There was considerable discussion between the court and counsel that defense counsel intended to cross-examine C.S. about her drug use and possible AFDC fraud. Since she was on probation in San Mateo County for drug possession at the time of the preliminary hearing, her answers to questions on both topics would have given her " 'reasonable cause to apprehend danger from a direct answer.' " (Ohio v. Reiner (2001) 532 U.S. 17, 20-2! 1; People v. Seijas (2005) 36 Cal.4th 291, 304.) "Although the court should make a particularized inquiry as to whether or not a claim of privilege is well founded [citation], in order to approve invocation of the privilege ' "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive [*24] answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." ' " (People v. Lucas (1995) 12 Cal.4th 415, 454.) Such is the case here. In light of the intended questions about her drug use and welfare fraud, defendant's speculation that C.S. was afraid to testify because she knew she committed perjury in her prior testimony is unpersuasive. 2

2 Defendant protests that C.S.'s earlier willingness to testify about drug use at the preliminary hearing indicates that perjury was "the basis of her fears at trial." However, as the trial court observed, it was not until trial that C.S. had the benefit of legal counsel about the potential consequences of her testimony; moreover, the welfare fraud allegations provided an

in-dependent basis for her to invoke the privilege.

The assertion that C.S. was not credible and lied in her preliminary hearing testimony is also a factor defendant relies upon to criticize the court's weighing process under section 352. He cites as "ample evidence" of C.S.'s poor credibility: (1) Mark Holeman's testimony that sex between defendant and C.S. was consensual and that, contrary to her testimony, [*25] C.S. had injected drugs when she was in defendant's hotel room; (2) the presence of drugs in C.S.'s urine; and (3) the used condom found in defendant’s room the morning after the as-sault, although C.S. testified he did not use one when he assaulted her. But there was countervailing evidence and/or explanations for each of these points. C.S. admitted that she was a drug user, and the toxicologist testified the substances found in her sys-tem could have been ingested days be-fore the assault. The used condom found in defendant's room does not prove that he used one when he had sex with C.S.; C.S. had fresh injuries that corroborated her report of sexual assault; and Jacob Kanduch testified that defendant admitted that he raped C.S.

Defendant argues that "perhaps the single best indicator" that C.S. lied at the preliminary hearing is that the prosecutor initially charged defendant with multiple rape and forcible penetration, but agreed defendant could plead to two non-sex offenses and credit for time served. But, as the People correctly observe, the prosecutor could have entered this plea bar-gain for many reasons, including evidentiary and procedural concerns unrelated to any assessment [*26] of C.S.'s credibility. The trial court did not abuse its discretion when it determined that C.S.'s testimony was sufficiently credible to warrant admission.

Although defendant acknowledges that the admission of C.S.'s preliminary hearing testimony did not violate his constitutional right to confront the witnesses against him (see People v. Seijas, supra, 36 Cal.4th at p. 303), he maintains the reading of her prior testimony imbued C.S.'s testimony with a "false air of veracity" because she was not cross-examined in the jury's presence. We are not so persuaded. C.S.'s testimony was tested by cross-examination at the preliminary hearing, and her cross-examination, as well as her direct testimony, was read to the jury. Defendant had, and used, his opportunity at trial to introduce evidence de-signed to undermine C.S.'s version of the events, such as Holeman's testimony and the results of C.S.'s urine test.

Defendant also claims the preliminary hearing cross-examination of C.S. was inadequate because he had no opportunity to question her about the welfare fraud allegations that came to light after she testified. But, as the court observed, although defense counsel did not have the opportunity [*27] to cross-examine C.S. about these fraud allegations, he could at-tack her credibility through witnesses or documentary evidence. Moreover, "a defendant's interest and motive at a second proceeding is not dissimilar to his interest at a first proceeding within the meaning of Evidence Code section 1291, subdivision (a)(2), simply because events occurring after the first proceeding might have led counsel to alter the nature and scope of cross-examination of the witness in certain particulars. [Citation.] The ' "motives need not be identical, only 'similar.' " ' [Citation.] 'Both the United States Supreme Court and this court have concluded that "when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to

satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or the complete-ness of the earlier testimony." ' " (People v. Harris (2005) 37 Cal.4th 310, 333.) Defendant's interest and motive when he cross-examined C.S. at the preliminary hearing were similar to those he harbored at trial: to challenge her credibility and discredit [*28] her account of a sexual assault.

Defendant further posits that evidence of the 2005 offense upon C.S. was unduly prejudicial because the relatively lenient disposition of those charges might have led jurors to convict him of raping R.O. solely be-cause they believed he was not adequately punished for the 2005 assault. This is sheer speculation. The record reveals no indication that the jurors wished to convict defendant for any offense on C.S. rather than R.O.'s rape. (See People v. Branch (2001) 91 Cal.App.4th 274, 284.) His complaint that the C.S. incident consumed an un-due amount of time at trial fails in light of the trial court's broad discretionary authority to manage its schedule.

Defendant next argues that in light of its extraordinary capacity to in-flame and confuse the jury, C.S.'s prior testimony was of little probative value because there were "considerable differences" between the sexual assaults on C.S. and R.O. Defendant observes that the attack on C.S. took place in a hotel room rather than a park, involved oral copulation, 3 and lasted considerably longer than the assault on R.O. Even though the facts and circumstances were not identical, there were substantial similarities [*29] between the two offenses. On each occasion defendant lured a young woman to an isolated location. Each time he forcibly restrained his victim, used threats of violence to over-come her, and manipulated her into a variety of positions designed to facilitate his sexual gratification. Both assaults involved multiple acts of penetration, and on both occasions defendant had difficulty maintaining an erection and did not ejaculate. "Section 1108 does not require ' "more exacting requirements of similarity between the charged offense and the defendant's other offenses . . . ." ' [Citation.] Such a requirement was not added to the statute because ' ["]doing so would tend to reintroduce the excessive requirements of specific similarity under prior law which [section 1108] is designed to overcome, . . . and could often prevent the admission and consideration of evidence of other sexual offenses in circumstances where it is rationally probative. Many sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character.' " (People v. Soto (1998) 64 Cal.App.4th 966, 984.)

3 It was actually the assault against R.O., not C.S. that involved oral copulation

Courts possess [*30] broad discretion under section 1108 to determine whether the prejudicial effect of evidence of other crimes outweighs its probative value. (People v. Falsetta, supra, 21 Cal.4th at pp. 916-917.) Here, the decision to admit C.S.'s prior testimony was well within the bounds of the trial court's discretion.

II. Prosecutorial Misconduct

Defendant contends the prosecutor committed two instances of misconduct during final argument and that his lawyer's failure to object to them deprived him of effective assistance of counsel. First, he says the prosecutor improperly referred to facts not in evidence when she argued that R.O. could not possibly have been a prostitute because she did not dress or

be-have like one. Second, he claims the prosecutor made an improper gender-based appeal when she urged female jurors to explain to their male counter-parts why a woman might not fight back to resist a rapist. Neither comment supports reversal.

A. Facts Not in Evidence

The defense theory was that R.O. offered defendant oral sex in exchange for $ 200 and cried rape when he re-fused to pay her. We will repeat in its entirety the portion of the prosecutor's closing argument that ad-dressed defendant's theory. The [*31] prosecutor said:

"The defense says she's a prostitute. That's what this was all about: 'I led her on, burned her. That's why she's going to this huge length, to get back at me.'

"Prostitutes do not act this way, ladies and gentlemen. I'm sure you probably don't know very many intimately, but use your common sense. What do we know about prostitutes?

"Prostitutes usually wear pretty sleazy clothing out there, not fully layered and bundled up to the neck like [R.O.] was that night. Street-walkers have the high skirts, high heels, cleavage. They're showing it. [R.O.] is not a prostitute. She's not dressed that way.

"Time is money for prostitutes, la-dies and gentlemen. They're not going to go off on some jungle tour, blocks and blocks away to get some money.

"They're going to go in the closest little alley, recessed doorway, you name it; do the act; get their money; get out. they're not going to be going off on some long hike. Doesn't make sense. [P] . . . [P]

"She's not a prostitute. That's not what it's about. This is a figment of the defense's imagination. Prostitutes, when they get burned, they don't call the police. They don't.
"How many burned drug dealers call the police, say, 'Hey, [*32] a drug purchaser, this guy ripped me off'? The same thing with prostitutes. They don't call the police when the deal has gone bad.

"They require condoms. They have sex with all sorts of people. All require condoms. They distrust strangers. Again, another reason not to go to this isolated area, not to wait for money later.

"They avoid areas of extreme isolation. You don't see them out in Golden Gate Park. You see them in very, very busy areas; the Tenderloin, the Mission. Very busy, well-traveled areas. They don't go isolate themselves with some total stranger.

"They don't follow through with prosecution. They don't. Not in a case like a rape case. You think they're going to be sticking around, off in some other city? They're not going to be going to all this time and effort to get a customer that burned them; a sexual assault exam that lasts several hours. Doesn't make sense.

"All this for $ 100? . . . [P] So they would have you believe she's going through all of this because he didn't pay $ 100? Absolutely doesn't make sense. Because none of this fits."

Because defendant did not object to any of these remarks, he forfeited the right to argue they constituted prosecutorial misconduct [*33] in this appeal. (People v. Medina (1995) 11 Cal.4th 694, 756-757; People v. Fierro (1991) 1 Cal.4th 173, 211.) Nor has he shown that his lawyer was ineffective because he failed to object. Defense counsel could reasonably have decided not to make an objection out of a concern that doing so would only draw attention to the prosecutor's comments and the logic of her argument.

Accordingly, we are not persuaded that counsel's performance fell below the requisite standard of reasonableness. (See In re Cordero (1988) 46 Cal.3d 161, 180; Strickland v. Washington (1984) 466 U.S. 668, 687, 693-694.) In any event, there does not appear to be any reasonable probability for a more favorable outcome to defendant had his attorney objected. The jurors were instructed to decide the facts based only on the evidence presented. The court also instructed them 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." 4 "Jurors are, of course, presumed to follow the instructions given by the court." (People v. Hamilton (1988) 45 Cal.3d 351, 375.) Nothing in the record suggests they did otherwise. [*34]

4 The prosecutor emphasized the same point in her closing argument.

B. "Gender-based Biases"

Defendant's second point of prosecutorial misconduct complains the prosecutor improperly "appealed to the jurors' gender-based biases" in her closing argument when she said: "[R.O.] went into survival mode. As a guy, you might not understand that. But as a woman, I would hope that you would. [P] And, women on the jury, ex-plain this to the guys. She went into survival mode. She let the defendant do what he was going to do. She was hoping to get through it, and that she would survive this attack." Defendant maintains this improperly suggested that (1) the male jurors were unable to comprehend why a woman might choose not to fight back; and (2) the female jurors should "conduct their deliberations, not in their capacity as individual jurors, but in their capacity as women jurors."

"It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. (People v. Wein (1958) 50 Cal.2d 383, 396; People v. Silva (1953) 41 Cal.2d 778, 783; People v. Ross (1960) 178 Cal.App.2d 801, 808; [*35] People v. Coontz (1953) 119 Cal.App.2d 276, 282.) It is also clear that counsel during a summation may state matters not in evidence, but which are common knowledge or are il-lustrations drawn from common experience, history or literature. (People v. Thornton (1974) 11 Cal.3d 738, 762; People v. West (1983) 139 Cal.App.3d 606, 611.) The prosecutor is entitled to draw conclusions from the evidence presented and to state them to the jury. The right is very broad and includes the opportunity to fully state his views as to what the evidence shows and as to the conclusions to be drawn therefrom. (People v! .

Eggers (1947) 30 Cal.2d 676, 693; People v. Beivelman (1968) 70 Cal.2d 60, 76-77.) [P] Moreover, even in a case where prosecutorial misconduct is shown, reversal will not result '. . . unless the misconduct can be said to have contributed materially to the verdict in a closely balanced case or is of such a nature that it could not have been cured by a proper and timely ad-monition.' (People v. McDaniel (1976) 16 Cal.3d 156, 176.)" (People v. Sas-sounian (1986) 182 Cal.App.3d 361, 396-397.)

In context, we do not interpret the prosecutor's remarks as an appeal to gender bias. Rather, it appears [*36] she was exhorting all jurors to under-stand why a woman undergoing sexual assault promulgated by means of force, violence or intimidation may not resist her attacker. In context, we do not consider these remarks to be misconduct. But this claim, too, was forfeited by the lack of any objection at trial. Even were we to assume that the comments constitute misconduct, there is no reason to suppose that an objection and admonition by the trial court would not have cured it. (See People v. Gionis (1995) 9 Cal.4th 1196, 1215 [claim of prosecutorial misconduct is reviewable absent objection " 'only if an admonition would not have cured the harm caused by the misconduct.' ") Nor is it conceivable that the jury would have reached a different verdict if defense counsel had asserted an objection. (In re Cordero, supra, 46 Cal.3d at p. 180.)