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Court of Appeal, Second District,

Division 8.

**The PEOPLE, Plaintiff and Respondent,**

**v.**

**Nicholas Filiberto DIMAS, Defendant and Appellant.**

No. B223795.

(Los Angeles County Super. Ct. No. SA068055).

April 4, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County. [Elden S. Fox](#), Judge. Affirmed in part, reversed in part and remanded with directions.

[Vanessa Place](#), under appointment by the Court of Appeal, for Defendant and Appellant.

[Kamala D. Harris](#), Attorney General, [Dane R. Gillette](#), Chief Assistant Attorney General, [Pamela C. Hamanaka](#), Assistant Attorney General, [Lawrence M. Daniels](#) and Michael R. Johnsen, Deputy Attorneys General, for Plaintiff and Respondent.

**[BIGELOW, P.J.](#)**

\*1 A jury convicted Nicholas Dimas of one count of rape of an unconscious person ([Pen.Code, § 261, subd. \(a\)\(4\)](#)) and one count of rape of an intoxicated person ([Pen.Code, § 261](#), subds.(a)(3).) <sup>FN1</sup> The trial court denied Dimas's motion for new trial, and sentenced Dimas to the low term of three years on the rape of an unconscious person and stayed sentence on the other count. (§§ 264, 654.) We affirm the judgment. The order denying the motion for new trial is reversed and the cause is remanded with directions to the trial court to reconsider Dimas's motion for new trial.

[FN1](#). All further references are to the Penal Code, unless otherwise indicated.

## FACTS

On June 5, 2008, I.M. and her cousin, Terra M., went out to a bar and then to a club. By the early hours of June 6, Terra had become “completely plastered. Very drunk.” At about 2:00 a.m., I. drove Terra to I.'s apartment. As they were arriving, I.'s roommate, Ivy S., and Dimas were also just getting there. <sup>FN2</sup>

[FN2](#). Ivy and Dimas were coworkers at a steakhouse.

Once inside the apartment, I., Ivy and Dimas went into the kitchen and started drinking tequila shots. Terra went into a bathroom, vomited, and passed out on the floor. When Ivy heard Terra throwing up, she went to check on her and found her unconscious on the bathroom floor. I., Ivy and Dimas carried Terra to

I.'s bed, and left her in her clothes, with a blanket and a bucket. When they got back to the living room, Dimas tried to get “a little frisky” with Ivy, touching her leg and making statements like, “Come on, baby.” Ivy told Dimas to stop, and to go sleep on the couch. I. and Ivy then went to sleep in Ivy's bed.

Terra remembered throwing up in I.'s toilet. The next thing she could recall, she was “waking up with someone on top of [her], with someone inside of [her]. It was early dawn. [She] could just see the light coming in through the window.” Terra asked, “Where am I and who are you?” The man laughed, and said that she was in her cousin's room. Terra tried to push the man away with her elbow, but she was “very out of it and not quite sure what was going on.” When the man asked, “Do you like it?” Terra said, “No,” and tried to push the man again. At that point the man stopped, and asked if he could stay. Terra said, “No. Get out of here.” The man left.

At about 6:00 or 7:00 in the morning, Dimas woke Ivy, and asked her how to get back to their work. She told him, and then went back to sleep. At some point, Dimas left the apartment. When Terra finally woke up, she realized she was not wearing any pants. She did not consent to anyone taking them off the night before, and she did not recall taking them off herself. Terra was confused, but knew enough to believe that “something had happened, something wasn't right.” She sent a text message to a friend: “I think I've been raped.”

At about 10:00 a.m., I. and Ivy woke up to find Terra searching the apartment for her identification. I. and Ivy began to help Terra. I. discovered a condom wrapper in her bed and showed it to Terra. Terra began crying, and said that something had happened, but she could not remember what. Eventually, Terra said that she had woken up with a man on top of her, that she had pushed him off, and that she had “blacked out” again. Ivy called the steakhouse where she and Dimas worked, confirmed his last name, and then called the police.

\*2 In April 2009, the People filed an information charging Dimas with three counts of rape of an unconscious person (counts 1–3, [§ 261, subd. \(a\)\(4\)](#)), and three counts of rape of an intoxicated person (counts 5–7, [§ 261, subd. \(a\)\(3\)](#)). The charges against Dimas were tried to a jury in October 2009.

The People presented evidence establishing the facts summarized above through testimony by Terra, I., and Ivy. The People also presented evidence of police interviews of Dimas. During one interview, Dimas stated that Terra had helped him take off her pants, that she never told him to stop, and that, at one point, she had even told him to “keep on going.” Dimas admitted that Terra kept falling in and out of sleep, and that he had sex with her while she was asleep. He admitted, “What I did was wrong I know.” Dimas presented two character witnesses in his defense, both of whom testified that he was “respectful” toward others.

On October 28, 2009, the jury returned verdicts finding Dimas guilty of a single count of rape of an unconscious person (count 1; [§ 261, subd. \(a\)\(3\)](#)), and a single count of rape of an intoxicated person (count 6; [§ 261, subd. \(a\)\(4\)](#)). The jury found Dimas not guilty of the two additional counts of rape of an unconscious person (counts 2 and 3), and not guilty of the two additional counts of rape of an intoxicated person (counts 5 and 7). Dimas filed a motion for new trial based on a claim of insufficiency of the evidence; the court denied the motion. In March 2010, the court sentenced Dimas as noted at the outset of this opinion.

## DISCUSSION

### I. The Jury Issue

Dimas contends his convictions must be reversed because his trial was tainted by *Wheeler/Batson* error.<sup>FN3</sup> We disagree.

<sup>FN3</sup>. *People v. Wheeler* (1978) 22 Cal.3d 258 ( *Wheeler* ); *Batson v. Kentucky* (1986) 476 U.S. 79 ( *Batson* ).

## ***The Governing Law***

No party may use a peremptory challenge to remove a prospective juror based on a presumption that the juror may be biased for or against a defendant due to a commonality in an identifiable racial, ethnic or religious group. (*Wheeler, supra*, 22 Cal.3d at pp. 276–277; *Batson, supra*, 476 U.S. at pp. 88–97.) The cases have established definitive rules and procedures applicable in the *Wheeler/Batson* context. “When a defendant moves at trial to challenge the prosecution’s use of peremptory strikes, the following procedures and standards apply. ‘First, the defendant must make out a prima facie case “by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose.” [Citation.] Second, once the defendant has made out a prima facie case, the “burden shifts to the State to explain adequately the racial exclusion” by offering permissible race-neutral justifications for the strikes. [Citations.] Third, “[i]f a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.” [Citation.] [Citations.]” (*People v. Lewis* (2008) 43 Cal.4th 415, 469.) To establish a prima facie case of discrimination, the defendant must (1) raise the issue in a timely fashion, (2) make as complete a record as feasible, (3) show that the persons excluded are members of a cognizable class, and (4) produce evidence sufficient to permit the trial court to draw an inference that discrimination has occurred. (*People v. Gray* (2005) 37 Cal.4th 168, 186.) “ ‘An “inference” is generally understood to be a “conclusion reached by considering other facts and deducing a logical consequence from them.” ‘ [Citation.]’ (*Ibid.*) “When a trial court denies a *Wheeler* motion because it finds no prima facie case of group bias was established, the reviewing court considers the entire record of voir dire. [Citation.]” (*People v. Davenport* (1995) 11 Cal.4th 1171, 1200.)

\*3 The determination whether a defendant has established a prima facie case of discrimination is largely within the province of the trial court, whose decision is subject to limited review. (*People v. Wimberly* (1992) 5 Cal.App.4th 773, 782.) “On appeal, we examine the entire record of voir dire for evidence to support the trial court’s ruling.... Because of the trial judge’s knowledge of local conditions and local prosecutors, powers of observation, understanding of trial techniques, and judicial experience, we must give ‘considerable deference’ to the determination that [the defendant] failed to establish a prima facie case of improper exclusion.” (*Ibid.*, citing *People v. Sanders* (1990) 51 Cal.3d 471, 501.)

A reviewing court applies a similar deferential standard of review to a trial court’s determination, when reached, that a prosecutor’s explanation for a juror’s exclusion was bona fide, i.e., that the prosecutor, in fact, had a legitimate, nonracial basis for challenging the juror. (*People v. Lenix* (2008) 44 Cal. 4th 602, 613–614 (*Lenix*)). “ ‘We review a trial court’s determination regarding the sufficiency of a prosecutor’s justifications for exercising peremptory challenges “ ‘with great restraint’ “ .... So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.] [Citations.]” (*Lenix, supra*, 44 Cal.4th at pp. 613–613, fn. omitted.)

## ***The Voir Dire Proceedings***

Each party was allowed 10 peremptory challenges. From the initial 24 prospective jurors questioned, the prosecutor exercised five peremptory challenges. After the prosecutor’s fifth challenge, Dimas’s counsel asked to approach the bench. The court responded, “Not at this point.” The prosecutor exercised two more challenges, for a total of seven. Dimas’s counsel exercised six peremptory challenges for the defense. The court called an additional 13 prospective jurors, and the prosecutor then exercised the People’s three remaining peremptory challenges. Dimas’s counsel exercised the defense’s four remaining challenges.

When the prosecutor exercised the People’s 10th peremptory challenge, Dimas’s counsel asked to approach the bench, and the trial court called the attorneys forward. At sidebar, before Dimas’s counsel spoke, the court stated to the prosecutor, “You *need* to explain to me Juror No. 2.” (Italics added.) At that point, the following exchange transpired:

“THE PROSECUTOR: Juror No. 2 is a psychologist.... She has a master’s in clinical psychology. She also says that she’s never been intoxicated to the point where she’s blacked out. [¶] She seems like she may have trouble with rape cases. When the information was being read, she was grimacing. She seems like she isn’t paying attention.... It appears she may not be paying attention. She said that she hasn’t been intoxicated to

the point where she blacks out which I think may make her judge the victim. She's also a clinical psychologist, and given the issues how they may be decided regarding false confession, I don't want her speculating as to what may have not and what may have occurred.

\*4 “THE COURT: Okay. I'll note that just so the record is clear that based on the last name, she appears to be Hispanic, and this is the third peremptory for the prosecution in terms of a Hispanic prospective juror. [¶] However, the last two the court did not require an explanation because the court believes there was a basis based on the responses. [¶] ... [¶]

“DEFENSE COUNSEL: I think that that's a pretext. I did not see her wince any more than anybody else.

“THE COURT: That's not my issue.... The fact she's a psychologist I could understand might be an issue.

“DEFENSE COUNSEL: She's not ... a practicing psychologist. She's a student. She just graduated. She's looking for a job. [¶] I would point out it appears to me, at least based on the names that I can read, that the prosecution has eliminated all Hispanics from the panel of 12. I don't think there's anybody remaining in the larger panel of 18. My client is a Hispanic male.

“THE COURT: There were two others that the court is aware of that peremptories were exercised.... Okay. Your objection is noted. I'll indicate to [the prosecutor] you've given me an explanation and justification. I will indicate to counsel that we are now in a situation where I'm seriously considering the *Wheeler* issue. If it happens again, you better have a good explanation.” <sup>FN4</sup>

<sup>FN4</sup>. It appears that the prosecutor did not have further peremptory challenge available after excusing Juror No. 2.

## ***Analysis***

We reject Dimas's claim of *Wheeler/Batson* error because the record, in our view, shows that the trial court made a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered by the prosecutor.

As a preliminary matter, we find that, by stating to the prosecutor, “*You need to explain to me Juror No. 2*” (italics added), the trial court had implicitly found that a prima facie case of group bias in jury selection existed. The court was plainly telling the prosecutor that he needed to explain his nondiscriminatory reasons for challenging Juror No. 2. After listening to the prosecutor's explanation, the court denied the defense's *Wheeler/Batson* objection, accepting that there were, in fact, legitimate nondiscriminatory reasons for the prosecution's peremptory challenge exercised against Juror No. 2. Dimas argument on appeal essentially invites us to evaluate the voir dire independently, and to reach a different conclusion regarding group bias than did the trial court. Absent a showing of an exceptional circumstance for doing so, we will not substitute our assessment of the voir dire. We defer to the trial court's determination that group bias had not tainted jury selection.

Dimas's argument that Juror No. 2's traits were comparable to other non-Hispanic jurors not challenged does not persuade us that we should intervene. Although Dimas is correct that the record shows there were other jurors with psychology backgrounds who were not challenged, his comparative analysis based on this one factor is not persuasive. The prosecutor did not offer Juror No. 2's psychology background as the only factor in the decision to challenge Juror No. 2. Further, it was for the trial court to assess the integrity of the prosecutor's other, demeanor-based reasons. “ [T]he very dynamics of the jury selection process make it difficult, if not impossible, on a cold record, to evaluate or compare the peremptory challenge of one juror with the retention of another juror which on paper appears to be substantially similar.... It is therefore with good reason that we and the United States Supreme Court give great deference to the trial court's determination that the use of peremptory challenges was not for an improper or class bias purpose.” ( [People v. Reynoso \(2003\) 31 Cal.4th 903, 919](#), quoting [People v. Johnson \(1989\) 47 Cal.3d 1194, 1220–1221](#).)

## II. The Expert Witness Issue

\*5 Dimas contends his convictions must be reversed because the trial court wrongly excluded his proffered expert testimony on the subject of “false confessions.” We find no error.

### *The Governing Law*

A party may offer expert testimony related to a subject that is sufficiently beyond common experience such that the expert's opinion would assist the jury in evaluating the remaining evidence presented at trial. ([Evid.Code, § 801, subd. \(a\)](#).) A trial court has broad discretion in deciding whether to admit an expert's testimony, and its ruling will be deemed error on appeal only when the record demonstrates an abuse of discretion. (See, e.g., [People v. Page \(1991\) 2 Cal.App.4th 161, 187](#) (*Page*) [expert opinion on false confessions held properly excluded].)

### *The Trial Proceedings*

Prior to trial, the People moved to exclude the proffered testimony of a defense expert, Richard Leo, Ph.D., J.D., on the subject of false confessions. The trial court did not initially render a definitive ruling before trial, advising counsel it wanted to hear from Dr. Leo first. During trial, the court considered the issue at a hearing outside the presence of the jury pursuant to [Evidence Code section 402](#).

Dr. Leo testified that he had reviewed Dimas's video-recorded interviews. He explained that if he were allowed to testify, he would note and explain certain interrogation techniques used by the police, and discuss the scientific research that has identified the aspects of those techniques posing “risk factors for false or unreliable statements.” He would not offer any opinion about whether Dimas's statements to the police were true or false.

According to Dr. Leo, the techniques used during Dimas's interrogations were of a kind that have been linked to false statements. The officers used a “ploy” of informing Dimas that he had failed the polygraph examination, and told him that the results would be admissible in court. The interrogation was accusatory and based on a presumption of guilt. In addition, the officers tried to induce a confession by telling Dimas that admitting guilt would be in his self-interest. The interrogation the following day involved similar, albeit more “muted” inducements to give a confession.

On cross-examination, Dr. Leo acknowledged that he had not interviewed Dimas. Dr. Leo admitted he did not evaluate Dimas to assess his particular susceptibility to any interrogation techniques. Dr. Leo agreed that Dimas had spoken voluntarily to police during his interrogations, but opined that “any” interrogation which includes threats or promises, whether implied or explicit, will be “psychologically coercive” insofar as a confession is concerned. Dr. Leo conceded that there was no established scientific foundation for measuring how often false confessions are made because it is difficult to know the number of false confessions that have actually been provided by suspects. He acknowledged there is insufficient data on the subject.

### *Analysis*

\*6 Dimas's argument relies heavily on an analysis akin to that found in [U.S. v. Hall \(7th Cir.1996\) 93 F.3d 1337](#) (*Hall*), in which the Seventh Circuit Court of Appeals ruled that expert evidence concerning false confessions should have been admitted at defendant's trial on charges of kidnapping a child for purposes of sexual gratification. The People's argument relies more on [Page, supra, 2 Cal.App.4th 161](#), and [People v. Ramos \(2004\) 121 Cal.App.4th 1194](#) (*Ramos*). In *Page*, Division Three of the First District Court of Appeal ruled that a trial court had not erred in limiting an expert's testimony regarding the reliability of confessions. Specifically, the Court of Appeal found no error in precluding the expert from offering an opinion “as to the reliability or accuracy of the statements made by [the defendant.]” (*Page, supra*, at pp. 183, 187–189.) In *Ramos*, Division Three of our court examined *Page*, and ruled that there had been no error in excluding expert testimony on false confessions. We note that *Ramos* also deals with the testimony of Dr. Leo.

## 1. *Hall, Page and Ramos*

In [Hall, supra, 93 F.3d 1337](#), the Court of Appeals found the expert's testimony on false confessions should have been admitted, noting as a foundation for its analysis that “each case necessarily turns on its own facts” and that “the jury was entitled ‘to hear relevant evidence on the issue of voluntariness.’” Further, that the trial judge would “ ‘instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.’ ” ([Id. at p. 1344.](#)) The court's reasoning continued: “By analogy, it was certainly within the jury's province to assess the truthfulness and accuracy of the confession.... The court indicated that it saw no potential usefulness in the [expert's] evidence, because it was within the jury's knowledge. This ruling overlooked the utility of valid social science. Even though the jury may have had beliefs about the subject, the question is whether those beliefs were correct. Properly conducted social science research often shows that commonly held beliefs are in error. Dr. Ofshe's testimony, assuming its scientific validity, would have let the jury know that a phenomenon known as false confessions exists, how to recognize it, and how to decide whether it fit the facts of the case being tried. [¶] The district court's conclusion therefore missed the point of the proffer. It was precisely because juries are unlikely to know that social scientists *and psychologists have identified a personality disorder that will cause individuals to make false confessions that the testimony would have assisted the jury in making its decision.* It would have been up to the jury, of course, to decide how much weight to attach to Dr. Ofshe's theory, and to decide whether they believed *his explanation of Hall's behavior* or the more commonplace explanation that the confession was true. [Citation.] But the jury here may have been deprived of critical information it should have had in evaluating Hall's case.” ([Hall, supra, 93 F.3d at pp. 1344–1345](#), italics added.)

\*7 In [Page, supra, 2 Cal.App.4th 161](#), the Court of Appeal ruled that the trial court did not err in precluding an expert from offering an opinion on the accuracy of the defendant's statements to police. This was the Court of Appeal's reasons: “In deciding to admit Professor Aronson's testimony, the trial court relied on [People v. McDonald \[ \(1984\) 37 Cal.3d 351 \( McDonald \) \]](#) as the most analogous authority. In *McDonald*, the Supreme Court concluded the trial court had abused its discretion when it excluded *all* expert testimony on the psychological factors affecting the accuracy of eyewitness identification. (*Id.* at p. 376.) The Supreme Court reasoned that ‘the body of information now available on these matters is ‘sufficiently beyond common experience’ that in appropriate cases expert opinion thereon could at least ‘assist the trier of fact.’ ...” ([Page, supra, 2 Cal.App.4th at pp. 187–188.](#))

However, the Court of Appeal in *Page* went on to explain that *McDonald* did not hold that a trial court must permit an expert to discuss any particular evidence in a given case. On the contrary, noted the *Page* court, *McDonald* stood for the proposition that a trial court cannot exclude expert testimony on the reliability of eye-witness identifications “ ‘in *wholesale* fashion merely because the trial would be simpler without it.’ ” ([Page, supra, 2 Cal.App.4th at p. 188](#), quoting [McDonald, supra, 37 Cal.3d at p. 372](#), italics added.)

The *Page* court further explained that *McDonald* supports the proposition that expert testimony should not take over the jury's task of judging credibility. And, to the extent expert testimony may refer to the particular circumstances of an eyewitness identification before a jury, such testimony may properly be limited to explaining the potential effects of those circumstances on the powers of observation and recollection of a typical eyewitness. ([Page, supra, 2 Cal.App.4th at p. 188](#), discussing [McDonald, supra, 37 Cal.3d at pp. 370–371.](#))

Turning to the record before it, the *Page* court concluded that the trial court had properly followed *McDonald's* lead, and had properly limited Professor Aronson's testimony to a discussion of certain factors that may affect the reliability of a confession in a typical case. ([Page, supra, 2 Cal.App.4th at p. 188](#)) As the *Page* court put it: “In our view, nothing in *McDonald* or the Evidence Code required the [trial] court to permit Professor Aronson to discuss the particular evidence in this case or to give his opinion regarding the overall reliability of the confession.” (*Page*, at p. 188.) In the end, the *Page* court observed that “Professor Aronson outlined the factors which might influence a person to give a false statement or confession during an interrogation. Having been educated concerning those factors, the jurors were as qualified as the professor to determine if those factors played a role in Page's confession, and whether, given those factors, his confession was false.” ([Page, supra, 2 Cal.App.4th at p. 189.](#))

\*8 In [Ramos, supra, 121 Cal.App.4th 1194](#), the court affirmed a trial court's decision to exclude Dr. Leo's testimony. In reaching its decision, the court found there had been no blanket exclusion of a defense theory based on a false confession because the defense had been afforded an extensive opportunity to cross-examine witnesses on the circumstances of the defendant's confession, and the videotapes of the interrogation was played for the jurors. (*Id.* at pp. 1204–1206.) The court found *Page's* acceptance of false confession evidence distinguishable for several reasons, the most predominant of which was that the defendant had confessed after a “complex” interrogation, and had thereafter recanted, and testified at trial that the interrogation had caused him to make false statements. (*Ramos, supra*, at pp. 1206–1207.) In other words, the *Ramos* court construed the *Page* opinion to support the principle that expert witness testimony on the subject of false confessions is appropriate when there is some evidence that a confession was false. Expert testimony in that context is responsive to the evidence, and explains why a person might falsely admit to a crime. (*Ramos*, at pp. 1206–1207.) We agree with *Ramos's* construction of *Page*.

## 2. Application

In our view, Dimas's case falls somewhere in between *Hall* and *Page*, and best fits the *Ramos* model. We reject Dimas's claim of expert witness error because the record supports the trial court's conclusion that Dr. Leo's testimony would not have been helpful. There is no evidence in the record suggesting that Dimas ever refuted his confession, or that Dr. Leo had any reason to believe Dimas's confession was false. Absent some evidence indicating that Dimas was susceptible to making a false confession there was little for Dr. Leo to offer to the jury other than an abstract, academic discussion on the subject of false confessions. Such testimony would have been unrelated to a substantive foundation concerning Dimas' case. Dimas did not testify about his experience during the interrogations, and Dr. Leo acknowledged that he never interviewed Dimas. We will not find the trial court abused its discretion in rejecting Dr. Leo's testimony because we cannot say that the trial court's ruling was arbitrary or beyond the bounds of reason in light of all of the circumstances. ([People v. Carbajal \(1995\) 10 Cal.4th 1114, 1121.](#))

For the same reason, we find the trial court's ruling under [Evidence Code section 352](#) was also correct. Dr. Leo's proffered testimony, presented in a vacuum, created a substantial danger of confusing the issues or misleading the jury.

## III. The New Trial Issue

Dimas contends the trial court's order denying his motion for new trial on the ground of insufficiency of the evidence must be reversed because the court applied the wrong standard of review in addressing the motion. We agree.

### *Forfeiture*

Initially, we reject the People's argument that Dimas forfeited his “wrong standard” claim of error because he did not raise the issue in the trial court. None of the three cases cited by the People directly addressed whether a defendant forfeits a claim of error when he or she fails to object *at the hearing* on a motion for new trial that the court is applying an improper standard on a motion for new trial based on a claim of insufficiency of the evidence. Dimas's written points and authorities in support of his motion for new trial based on a claim of insufficiency of the evidence included an express explanation of the proper standard of review for such a motion, which we find preserved the issue for his appeal. Dimas is not arguing a *ground* for new trial which he did not raise in the trial court. (Cf. [People v. Masotti \(2008\) 163 Cal.App.4th 504, 508.](#))

### *The Governing Law*

\*9 “An appellate court cannot order a new trial on the ground of insufficiency of the evidence if there is any substantial evidence by which the verdict can be supported.... But a trial court can grant a motion for new trial where the evidence is legally sufficient....” ([People v. Sarazzawski \(1945\) 27 Cal.2d 7, 16](#), overruled on another ground in [People v. Braxton \(2004\) 34 Cal.4th 798, 817.](#)) “Although the trial court is to be ‘guided’ by a presumption in favor of the correctness of the jury's verdict ..., this means only that the court may not *arbitrarily* reject a verdict which is supported by substantial evidence. [But the] court is not

bound by the jury's determinations as to the credibility of witnesses or as to the weight or effect to be accorded to the evidence.... Thus, the presumption that the verdict is correct does not affect the trial court's duty to give the defendant the benefit of its independent determination as to the probative value of the evidence....” (*People v. Dickens* (2005) 130 Cal.App.4th 1245, 1251–1252.) In short, a trial court may order a new trial when it is of the view that the evidence is not sufficiently probative to sustain the verdict. (*Id.* at p. 1252.)

As our Supreme Court recently explained, the trial court “extends no evidentiary deference” in addressing a motion for new trial based on a claim that the evidence is not sufficient to support the jury's verdict. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.) “Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt to the judge, who sits, in effect, as a '13th juror.' ... If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is ‘contrary to [the] ... evidence’ [within the meaning of section 1181(6) ]. [Citation.] In doing so, the judge acts as a 13th juror who is a ‘holdout’ for acquittal.” (*Id.* at pp. 132–133, italics omitted.)

A trial court's ruling to deny a motion for new trial is reviewed under the abuse of discretion standard. (See, e.g., *People v. Davis* (1995) 10 Cal.4th 463, 524.) An abuse of discretion “arises if the trial court based its decision on ... an incorrect legal standard.” (*People v. Knoller* (2007) 41 Cal.4th 139, 156.) In the event we find the court's ruling rests on the application of an incorrect standard, the appropriate remedy is to remand the cause for consideration of the new trial motion under the proper standard. (*Id.* at p. 158.)

### ***The Trial Court's Decision***

The reporter's transcript from the hearing on Dimas's motion for new trial discloses the following comments by the trial court:

“You are requesting the court ... to consider the evidence as presented in this matter based on the motion for a new trial as to its substance and credibility in order for the jurors to reach a verdict which they did in this case. [¶] And the record should reflect, since this is apparently going to be reviewed, the jury found Mr. Dimas guilty of counts 1 and 6; not guilty on counts 2, 3, 5 and 7.

\*10 [¶] ... [¶]

“As to the evidence itself, and I'll be honest for the record in this matter that the court in reviewing the statements of the victim and witnesses in this matter certainly did have some questions about the substance, demeanor and the presentation of those statements made by the victim, not so much as to the other witnesses. I think her name was [I.].

[¶] ... [¶]

“... And while the court is required to evaluate this based on both the legal standard of substantial evidence to support the verdict, it also must view the issue as to whether there was credible evidence presented.

“Having said that, I was not a juror in the case. I was the judge in the case, and the court cannot say that her testimony was inherently unbelievable so as to not allow a trier of fact to make their independent determinations of that. If I felt it was inherently unbelievable, I think the court's ruling in this matter would be in favor of the defense. But I cannot and will not say that it cannot have been found to be credible; although, I may have placed less weight on some of the aspects of the testimony as to the named victim in this case.

“So having said all of the aforementioned, having a complete record of those proceedings, the court is of the belief and does rule that the prosecution's evidence taken in the light of both its credibility and its substantial nature, the court finds does warrant the jurors in making their factual and credibility findings in this matter and does support the verdicts.

“I do note that it appears these verdicts do show that the jurors did evaluate carefully both the statements of the defendant and the statements of the victim and witnesses in this case in light of the fact that they found the defendant not guilty of four of the six counts that were alleged. So the motion for a new trial based on the grounds as submitted at this time is denied.”

### ***Analysis***

We agree with Dimas that the trial court's comments are phrased in such a manner to disclose a reasonable probability that the court applied a standard of review not altogether applicable to a motion for new trial based on a claim of insufficiency of the evidence. While we agree with the People that there is language in the trial court's ruling to support a conclusion that the court understood its discretion to consider the evidence independently,<sup>FN5</sup> the predominant tenor and content of the court's comments suggest that the court overlaid or melded into its evaluation of Dimas's motion an undue deference to the jury's verdicts. The court's references to “substantial evidence,” and “inherently unbelievable” evidence, and its comment that it “was not a juror,” when viewed in light of its acknowledgment that it “did have some questions about the substance, demeanor and presentation of ... statements made by the victim,” and would have “placed less weight on some ... aspects” of the victim's testimony, persuade us that the court did not fully exercise its independent judgment of the evidence in addressing Dimas's new trial motion.

[FN5](#). We note this passage from the court's ruling: “And while the court is required to evaluate this based on both the legal standard of substantial evidence to support the verdict, *it also must view the issue as to whether there was credible evidence presented.*” (Italics added.)

\*11 In our view, the trial court's comments defeat the People's position that Dimas has inaccurately “construe[d] certain isolated comments by the trial court as reflective” of the application of an improper standard in considering the new trial motion. The parts of the court's ruling that reflect a possibility that the court applied an incorrect standard are not merely “isolated comments;” they are a significant part of the court's ruling.

Finally, we reject the People's argument that the application of a wrong standard, in the event this occurred, was harmless error. (Cf. [People v. Braxton, supra, 34 Cal.4th at p. 820](#) [a trial court's refusal to hear a new trial motion is harmless error if the record on appeal allows the reviewing court to determine as a matter of law that the motion for new trial lacked merit or that the trial court would properly have exercised its discretion to deny the motion].) Because the trial court made comments that it had questions about the victim's testimony, we cannot say as a matter of law that the court would have, had it acted in the role of a 13th juror, denied Dimas's new trial motion. We may not at this point express any view regarding the trial court's assessment of the victim's credibility, nor is anything in this opinion reflective of our view on whether the trial court should grant or deny the new trial motion upon remand. We hold only that the trial court must reconsider the new trial motion in light of the proper standard of review. If after such review, the trial court determines the motion for new trial should be granted, it should re-try the case. If after such review the trial court determines the motion should be denied, the court should reinstate the judgment.

### **DISPOSITION**

The judgment is affirmed. The order denying Dimas's motion for new trial is reversed, and the cause is remanded to the trial court with directions to consider the motion anew, in accord with this opinion.

**We concur: [FLIER](#) and [GRIMES, JJ.](#)**

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