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Court of Appeal, Sixth District, California.

The PEOPLE, Plaintiff and Respondent,

v.

Ernest William EKBLOM, IV, Defendant and Appellant.

No. H032974.
(Santa Clara County Super. Ct. No. CC638912).
July 23, 2010.

Rene A. Chacon, Office of the Attorney General, San Francisco, CA, for Plaintiff and Respondent.

Cindy A. Diamond, San Francisco, CA, for Defendant and Appellant.

DUFFY, J.

*1 Defendant Ernest William Ekblom, IV was convicted after a jury trial of sexual penetration of an unconscious victim, his massage client. The court suspended the imposition of sentence and placed defendant on probation on condition that he serve a 10-month term in the county jail.

Defendant raises several issues on appeal. He contends that the court erroneously excluded proposed testimony by an expert concerning the science of brain function and memory in order to explain how the alleged victim might have an honest but mistaken memory of having been sexually assaulted. Defendant also asserts that the court erred in excluding the testimony of another expert concerning the subject of false confessions to dispel the common myth that innocent persons do not confess to crimes. He argues further that the court erroneously deprived him of the opportunity to present demonstrative evidence by using a mannequin to explain to the jury his typical method of draping a sheet over his clients during massages. Defendant contends that the court erred in admitting evidence of a prior uncharged sex crime and then compounded that error by giving an instruction under Evidence Code section 1108.[FN1] Lastly, defendant argues that the errors, considered cumulatively, must be deemed prejudicial and require that the judgment be reversed.

FN1. Further statutory references are to the Evidence Code unless otherwise stated.

We conclude that there was no error. We will therefore affirm the judgment. [FN2]

FN2. In a separate petition for writ of habeas corpus that we ordered to be considered with this appeal (H034490, *In re Ekblom*), defendant urges that his counsel was prejudicially ineffective in that he (1) failed to make a sufficient offer of proof as to the substance of the proposed testimony of an expert concerning the false confessions, and (2) potentially waived an objection to the court's giving an instruction

concerning section 1108 evidence. By separate order of this date, we deny the petition for habeas corpus.

FACTUAL BACKGROUND

I. *Prosecution Evidence*

A. *Kristin Doe's Testimony*

Kristin Doe,[FN3] 27, had known defendant-whom she referred to by the nickname "Swede"-at least 10 years prior to the March 2008 trial. She thought of him as a friend whom she saw "[v]ery, very sporadically" over the years; they "weren't necessarily close." Prior to the incident occurring on the night/early morning of April 1-2, 2006,[FN4] defendant had given her massages approximately three times.

FN3. Although the court, prior to impaneling a jury, ordered that the alleged victim be referred to as "Jane Doe," throughout the trial, she was referred to as "Kristin Doe." We will use this fictitious surname, and we will refer to her husband only by his forename, Erick, in order to protect the anonymity of the alleged victim.

FN4. All dates are 2006 unless otherwise indicated.

On the night before her wedding on April 1, after the rehearsal dinner, Kristin checked into a Santa Clara Marriott hotel in which she shared a suite with her sister and her cousin. (She estimated that they arrived at about 10:00 or 10:30 p.m.) At her sister's suggestion, Kristin had made arrangements in advance to have defendant come to the hotel room to give both her sister and her a massage. The original arrangement was that Kristin would pay for her sister's massage and defendant's massage of Kristin would be free. Shortly after the three women had settled into their rooms, and around 11:00 to 11:30 p.m., defendant arrived with his massage table. At Kristin's suggestion, defendant, her cousin, and Kristin went outside to the patio and shared about one-half of a marijuana joint.

Afterwards, defendant and Kristin went into the adjoining room to prepare for the massage. After moving some furniture to accommodate the massage table, defendant went into the bathroom to allow Kristin some privacy. After getting completely undressed, she lay on the table, covering herself with a sheet. After Kristin told defendant that he could come out, he came out of the bathroom and began massaging her while she lay on her stomach. She dozed off for a while and either she awoke or defendant awakened her and asked her to turn over to lie on her back. After complying, defendant began massaging the front of her body. After some time passed, Kristin again fell asleep. She awakened and felt defendant's fingers in her vagina. He was moving his fingers around and up and down. After lying there for five to 10 seconds, Kristin "jolted [her] body" and defendant moved his fingers to her leg. The massage lasted another five to 10 minutes. During that time, defendant slowly moved his massage towards her upper body, massaging her shoulders, neck, and face. When defendant moved his hands towards her face, Kristin smelled her vaginal fluids on his hand.

*2 After the massage was completed, defendant went back into the bathroom to allow Kristin to get dressed. After she was dressed, defendant came out of the bathroom; Kristin checked with her sister, who had fallen asleep in the other room, to see if she wanted a massage. After determining that she did not, Kristin paid defendant the $50 that was supposed to have been the cost of her sister's massage and $10 for his parking, gave him a hug, and he left. Although she was disgusted, she felt that the best way to get defendant to leave was to pay him and give him a hug. After defendant left, Kristin got into bed and "cried [her]self to sleep."

Kristin testified that she was certain that she had awakened during the massage to find that defendant had his fingers inside her. She explained that she is "very nonconfrontational." Kristin testified that she did

not do anything at the time because she "didn't want to deal with it. [She] didn't want it to be real. [She] didn't want it to be happening at all. [She] didn't want to ruin [her] wedding that was about to happen.... [She] just wanted it to go away." She also explained that she did not tell her sister at the time because she "is very dramatic and she would have made a very large scene. And [Kristin] didn't want everybody that had come in for [her] wedding to remember what happened to [her] the night before [her] wedding. [Kristin] wanted them to remember [her] wedding."

On the evening of her wedding, after she and her husband had checked into their hotel room in Half Moon Bay, Kristin told her husband generally what had happened the prior evening. Sometime after the couple had returned from their honeymoon, Kristin communicated with her good friend, Morgan S.-who had been in Kristin's wedding party-about the incident involving defendant. The subject of defendant had come up while Kristin and Morgan were walking their dogs; Kristin was going to be in the bridal party of Morgan's June 3 wedding, and she learned that defendant was expected to be a guest. This made Kristin "sick to [her] stomach." Although Kristin did not tell her friend right away, afterwards, she sent Morgan two e-mails. In the first e-mail, she told Morgan that defendant had sexually assaulted her while he had given her a massage. In a later e-mail, Kristin told Morgan that she did not want to be at her wedding if defendant would be there.

Kristin reported the incident to the police within a day after she had communicated to Morgan what had happened. She did so after about two months had elapsed, after Morgan convinced her that she should make the report. She met with Officer Haverty; some time later, she was contacted by Detective Souza. At a later date, Kristin went to the police station, where Detective Souza made arrangements for her to telephone defendant and record their conversation.

B. *Erick's Testimony*

After Erick [FN5] and Kristin arrived at their hotel in Half Moon Bay on the evening of their wedding day on April 2, Kristin told Erick that defendant had sexually assaulted her the previous night at the hotel in Santa Clara where she had stayed. "She was very emotional and she started crying." She said that defendant had given her a massage and that she had fallen asleep. Kristin told Erick that she had awakened to find that defendant had his fingers in her vagina.

FN5. See footnote 3, *ante*.

C. *Morgan Sherrill's Testimony*

*3 Morgan Sherrill has known defendant since 1995 or 1996. She is four or five years younger than he. They dated for over a year when Morgan was in high school. They remained friends after their dating relationship ended.

Morgan was married on June 3. Defendant was initially invited to the wedding. About two weeks beforehand, Morgan asked him not to attend. She did so because Kristin was one of her bridesmaids, and Morgan "didn't want any drama at [her] wedding." Her comment related to "[w]hatever was going on between him and Kristin." Before contacting defendant, Kristin had told Morgan in both an e-mail and in a conversation that the night before Kristin's wedding, "she [had] got[ten] a massage and that she had fallen asleep and woken up with Swede's fingers inside of her." Morgan told Kristin that if what she said were true, she should contact the police.

The week before she was called to testify, defendant's brother, James, called Morgan, told her what the consequences to defendant might be if he were convicted, and asked her "not to throw his brother under the bus" with her testimony. Morgan did not alter her testimony in any way as a result of that phone call.

D. *Officer Tom Haverty's Testimony*

Santa Clara Police Officer Tom Haverty interviewed Kristin on May 17 at the police station. She told him that she wanted to file a sexual assault complaint against a person who had given her a massage at the

Santa Clara Marriott hotel between the approximate hours of 11:30 p.m. on April 1 and 1:00 a.m. on April 2. Kristin told Officer Haverty that she had hired defendant to provide massages for her sister and her the night before Kristin's wedding; defendant came to their hotel room; and gave Kristin a massage. Kristin told him that she had fallen asleep briefly during the massage while she was on her stomach; after she turned on her back and defendant continued the massage, she again fell asleep; she awoke and felt defendant's fingers penetrating her vagina; and later when he massaged her upper torso and face, she could smell her vaginal fluids on his fingers. She reported further that after the massage, she paid defendant, gave him a hug, and he left.

She did not confront defendant at the time; Kristin explained to Officer Haverty that she did not confront defendant at the time "because she was getting married the next day, or actually within several hours, that she felt that if she brought this up or mentioned anything about it, that it would cause a huge disruption of her wedding and bring a lot of unwanted drama." She told Officer Haverty that she had initially "wanted to just forget about it and go on with her life." However, because defendant was expected to be at the upcoming wedding of a friend, Morgan (in which Kristin was to be a member of the bridal party), Kristin started reliving the incident and told Morgan what had happened.

After the interview, Officer Haverty telephoned Morgan. She told Officer Haverty that after Kristin told her the day before that defendant had sexually assaulted her, she telephoned defendant and told him what Kristin had reported to her.

E. *Detective Sergeant Rick Souza's Testimony*

*4 Detective Sergeant Rick Souza of the Santa Clara Police Department was assigned to investigate the allegations reported by Kristin. He telephoned Kristin during the week of May 21 to introduce himself, to confirm that she wanted to prosecute the matter, and to determine whether she would be willing to participate in a pretext telephone call to defendant. After Detective Souza determined that she wanted to pursue the matter and was willing to participate in a call to defendant, he told her that he would call her back to make arrangements for the telephone call.

Detective Souza thereafter called Kristin and arranged for her to come to the police station on June 15 to make the call to defendant. When Kristin arrived at the station that day, he explained how the pretext call worked, telling her that he did not give her a script because she and defendant knew each other. Because it appeared that defendant already knew that the police were involved in the matter, Detective Souza told Kristin that it would be all right for her to lie to defendant on the subject of police involvement. After explaining the pretext call, Detective Souza made the arrangements to initiate the call, recorded it, and was present next to Kristin while she spoke to defendant. While the call proceeded, he communicated to her with gestures and notes to give her encouragement and to tell her to keep talking.

F. *Pretext Telephone Call*

The pretext telephone call between Kristin and defendant lasted approximately 19 minutes. A CD recording of it was introduced into evidence and played to the jury. Kristin started the conversation by stating, "I've been wantin' to talk to you about what happened." Defendant responded, "Yeah. What's goin' on here? I'm not really pleased with all this like stuff that's goin' on. I'm ... sorry you think somethin' happened but nothin' fuckin' happened, Kristin.... [T]here's nothin' I can say anything more to you about that. [*Sic*.]" A lengthy conversation followed in which Kristin insisted that something had happened and that she was having a very difficult time dealing with it, and defendant repeatedly denied having done anything. Kristin was heard on the recording to have been crying on at least six occasions.

About 12 minutes into the conversation, defendant brought up the subject of the police: "... I would've said, ... I would do exactly what you want, you know, OK? Even though it goes against everything that I fuckin' believe in 'cause I totally didn't do it. But over the phone bugs me because you've taken it to the lengths that you have with some police shit." Kristin asked what he was talking about, and defendant responded that Morgan had told him that she had been contacted by the Santa Clara Police Department seeking a statement from her. Kristin responded that Morgan had told him the police had contacted her because she felt awkward about telling him she didn't want him to come to her wedding.

*5 The following exchange then occurred: “[Defendant]: ... [T]hat bugged the hell out of me, Kristin.... I'm glad that there really isn't anything like that. I truly am. I truly am. That's awesome. Thank you for definitely not going that length and thank you. I appreciate that. [¶] ... [¶ Kristin]: I don't even know what to say to you for that. All I know is that I'm calling you to try to figure this out. [¶ Defendant, pausing]: I'm sorry for anything that I did wrong to you. [¶] ... [¶ Defendant]: If I did anything wrong to you that night, I am completely and utterly sorry for it, completely[. I]t was not my intentions [*sic*] to do anything wrong to you at all.” Shortly afterward, the conversation was as follows: “[¶ Defendant]: This doesn't make me comfortable right now. I'm sorry for touching you, Kristin. I'm sorry for putting my fingers inside you while I was massaging you. [¶ Kristin]: Are you saying it because you mean it ... ? [¶ Defendant]: ... I'm an asshole for doing it. [¶ Kristin]: Or are you saying it ... ? [¶ Defendant]: I'm saying it because I mean it. [¶ Kristin]: Thank you, Swede. [¶ Defendant]: I am so sorry. [¶ Kristin]: Thank you. That's what I was looking for. Why did you do it? [¶ Defendant]: I don't know. [¶ Kristin]: Did you think I wanted it? [¶ Defendant]: No, I'm just a stupid dumb ass asshole. [¶ Kristin]: You just couldn't help yourself or what? [¶ Defendant]: You're just a very attractive person.” Shortly afterward, defendant said, “I'm sorry that you had such a hard time going through this and that I was responsible for it.” He also asked that Kristin extend his apology to her husband.

II. *Defense Testimony*

A. *Defendant's Testimony*

Defendant holds certificates as a massage practitioner and as an acupuncturist. The certificates introduced into evidence indicate that he received 125 hours of training for each discipline. He had given approximately 100 massages since the time he received the certificate in 2002.

Defendant has known Kristin since at least 1998. She at one time hired him as an employee at Blockbuster Video. He considered her a good friend. Kristin made arrangements in advance to have defendant give her sister and her massages on the night before Kristin's wedding. (He had given Kristin five or six massages prior to April 1.) Kristin called him at about 11:00 p.m. the night of April 1, and he arrived at the Marriott Hotel at about 11:30 to give the massages. He had brought with him his portable massage table, sheets, lotion, and CDs. There were three adult women (Kristin, her sister, and her cousin) and one child (who was to be the flower girl at the wedding) in the hotel room. After introductions and short conversation, defendant was invited to go out on the balcony with Kristin and her cousin to smoke a marijuana joint.

After doing so, defendant and Kristin went into the adjoining room to set up the massage table. Defendant went into the bathroom to allow Kristin to disrobe for the massage. When he returned to the room, Kristin was lying on the table with a sheet covering her entire body other than her face. He draped the sheet covering Kristin “around her leg in a fashion that was kind of like a diaper .” Defendant explained that this is his practice in draping clients' legs during massages to pull the sheet underneath the leg being massaged taut before lowering the exposed leg on the sheet. The sheet is then tight and is “completely pinned around the client's leg.” Defendant used several photographs obtained from the Internet to explain the manner in which he drapes a sheet over his clients during a massage.

*6 Defendant started the massage working on her neck and back as she lay on her stomach. He became aware after a while that Kristin had fallen asleep, because “[s]he let out a little snore.” After about one-half hour, he asked her to turn over on her back. Defendant began massaging Kristin's head and worked down towards her feet. He did not perceive that she was asleep during this part of the massage; he testified that there was only one occasion during the massage (when she was lying on her stomach) that Kristin fell asleep.[FN6] While he was massaging Kristin's thigh, “[s]he jolted,” which is a common occurrence during massages. After completing the massage of her legs, defendant massaged her hands and moved up towards her face. When he was finished, he went into the bathroom and allowed Kristin to get off of the table. After about five minutes, he asked her if he could come out and she said it was OK. Defendant asked if Kristin's sister still wanted a massage; after checking, Kristin said that her sister was asleep and did not want a massage. Defendant packed up, received payment from Kristin, gave her a hug, and left. “She seemed normal” after they hugged.

FN6. Defendant was confronted on cross-examination with his statement to Kristin during the pretext call, "You went to sleep a shitload of times. You shook. You did a whole bunch of movin' around the whole time, Kristin. You were in and out of sleep the whole time." He testified that he "was speculating" when he had said that to Kristin, and that he only was aware of her falling asleep once.

About three weeks later, defendant received a telephone call from Morgan. Defendant had known Morgan for a number of years and they began dating when she was a freshman in high school. (On cross-examination, he admitted that he and Morgan had had a sexual relationship when she was between the ages of 15 and 17 and he was between the ages of 19 and 21.) [FN7] She told him that "Kristin was making allegations about the massage [he] gave to her on her wedding night." She said that Kristin had told her that defendant had put his fingers inside of her during the massage. Defendant laughed off the claim, because "[i]t was bewildering to [him] that someone would make an accusation like that [about him] but more bewildering that it came from Kristin." About one to two weeks later, Morgan called him again to disinvite him to her wedding. During that call, Morgan told him that the police were involved.

FN7. This testimony, as it concerns defendant's claim that the evidence was erroneously admitted and that the court later erred in giving an instruction pursuant to section 1108 is reviewed further in part IV of the Discussion, *post*.

About two weeks after his second conversation with Morgan, defendant received a telephone call from Kristin, a recording of which conversation was part of the evidence presented in court. At the time the call commenced, defendant had thought that Kristin had gone to the police to complain about something that she had thought had happened during the massage. He explained in his testimony that he admitted towards the end of the conversation having inserted his fingers in Kristin's vagina, even though it wasn't true, because Kristin was "obviously distraught" and he is "a very, very sympathetic and empathetic person ... [who doesn't] want anybody to feel any kind of pain."

B. *Character Witnesses' Testimony*

Morgan testified that her opinion of defendant is that he is an honest person. Likewise, John Biggar, a friend of defendant's family, Larry Howard, a supervisor where defendant was employed, and Keith Bayley, defendant's landlord and friend, each opined that defendant is an honest person.

PROCEDURAL BACKGROUND

*7 Defendant was charged by information on July 13, 2007, with one count of sexual penetration where the victim was unconscious of the nature of the act (Pen.Code, § 289, subd. (d)).[FN8] The case proceeded to jury trial occurring between late February and early March 2008. The jury returned a guilty verdict on March 7, 2008. In May 2008, the court suspended imposition of sentence and granted probation for a term of four years, subject to various conditions, including the condition that defendant serve 10 months in the county jail. Defendant filed a timely appeal.

FN8. "Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, 'unconscious of the nature of the act' means incapable of resisting because the victim meets one of the following conditions: [¶] (1) Was unconscious or asleep. [¶] (2) Was not aware, knowing, perceiving, or cognizant that the act occurred. [¶] (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact. [¶] (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose." (Pen .Code, § 289, subd. (d).)

ISSUES PRESENTED

1. Whether the court erred in excluding proposed expert testimony concerning the science of brain function and memory in order to explain how the alleged victim may have mistakenly recalled that she had been sexually assaulted.

2. Whether the court erroneously excluded the testimony of an expert concerning false confessions.

3. Whether the court erred in precluding defendant's presentation of demonstrative evidence by using a mannequin to explain to the jury his typical method of draping a sheet over his massage clients.

4. Whether the court erred in admitting evidence of a prior uncharged sex crime and then erred by giving an instruction concerning section 1108 evidence.

5. Whether the errors, considered cumulatively, must be deemed prejudicial and require that the judgment be reversed.

DISCUSSION

I. *Proposed Testimony by Philip Esplin*

A. *Background and Contentions*

One of the 40 issues raised in defendant's lengthy written motion in limine was the proposed admission of the testimony of Philip Esplin, an expert witness. Although the written motion listed five particular areas in which Esplin had previously qualified as an expert in California courts, defense counsel, Dennis Lempert, clarified at the in limine proceedings that the only subject on which it was anticipated that Esplin would give testimony concerned "[t]he effect of sleep, awakening and ingestion of drugs, alcohol and/or marijuana on memory and perception."

The court requested an offer of proof concerning the proposed expert testimony. Lempert responded: "... I believe that [Esplin's] testimony would be that when a person is sleeping and then suddenly wakes up in some traumatic manner-and that would be the testimony of [Kristin] in this case as given of the preliminary examination-that that memory is not always reliable because the brain doesn't work like a tape recording with an on and off switch. And compounded by the use of marijuana, that under those circumstances, it can be that people's memories are faulty. [¶] And that is to substantiate and to explain some of the testimony of [Kristin] given of the preliminary examination and as related to her husband. It is beyond the typical common experience of people because most people are not woken up [*sic*] as a result of some traumatic or spontaneous event. And most people don't really understand how memory and perception works [*sic*]." Lempert also noted that although he had been present at numerous meetings where Esplin had lectured, Lempert had "not spoken to him specifically about this case and about his opinion in this case."

*8 The People opposed the proffered testimony. The grounds for that opposition included the fact that the defense had not provided anything about the substance of Esplin's proposed testimony other than his curriculum vitae, and the proposed testimony was not beyond the common experience of the jurors and was thus unnecessary for them in their consideration of the ultimate issues in the case.

After hearing fairly extensive argument, the court denied defendant's motion and ordered Esplin's proposed testimony excluded. In so doing, the court indicated that the matters concerning which the expert testimony was proffered were not "beyond the [ken] of ordinary reasonable persons such that expert testimony of the evidence is necessary to assist the jury in reaching a conclusion regarding those issues." After Lempert indicated that he wished to submit in the future from Esplin "focused material with respect to the area of his testimony," the court indicated that it would consider a different offer of proof as to Esplin's anticipated testimony.

Following jury selection and immediately before opening statements, Lempert submitted to the court a declaration signed by Esplin that was marked as a court exhibit. It was submitted as a written offer of proof in support of defendant's request to allow Esplin's expert testimony. That declaration consisted largely of a synopsis of Esplin's background, qualifications, and prior experience; it included a general discussion of Esplin's opinions about "autobiographical (incidental) memories for personally experienced events" and "factors [that] can affect the accuracy of the recollections." FN9

FN9. Contrary to the assertions of defendant's counsel at oral argument, Esplin's declaration provided no specifics relating to the case, and the declaration did not contain an offer of proof as to the substance of the expert's proposed testimony.

At a break during testimony, the court again denied defendant's motion, observing that it had heard substantial arguments, reviewed a number of relevant authorities, and had again considered the matter in light of the testimony of Erick and the partial testimony of Kristin. It concluded again that the "the question of [Kristin's] memory, the accuracy of her testimony and perceptions[,] is not so far outside the understanding of the ordinary lay person that he or she could not as easily reach a conclusion on that subject as an expert," and therefore it would exclude the proffered testimony of Esplin. FN10

FN10. The court indicated that it did not need "to get to the issue of [Esplin's] qualifications which [we]re essentially the issues addressed by the declaration of the witness."

Defendant contends that the court erred in excluding Esplin's proposed expert testimony for the purpose of "explain[ing] issues relating to brain function, sleep, awakening traumatically or suddenly, [and] the [e]ffects of marijuana, all as they relate to memory and perception." He argues that this evidence was not offered to attack Kristin's credibility. Rather, it was to present "the science behind the brain's ability to create memories, and relate them accurately, all in relation to sudden awakening," to give the jury a possible explanation of "how Kristen could honestly believe her memory, but be mistaken."

The Attorney General responds that the court did not abuse its discretion in denying the proffered testimony of Esplin. He contends that Esplin's testimony was unnecessary because jurors, as people of ordinary education, could reach a conclusion concerning Kristin's testimony about the subject massage as intelligently as the expert. The Attorney General argues further that the court did not abuse its discretion by failing to hold an evidentiary hearing concerning Esplin's proposed testimony pursuant to section 402.FN11 Finally, he asserts that, assuming error in the exclusion of Esplin's testimony, any such error was harmless because there was no reasonable probability that defendant would have achieved a better result with the admission of the testimony.

FN11. "The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests." (§ 402, subd. (b).)

B. *Discussion of Claim of Error*

*9 Expert opinion testimony is appropriate where that testimony is: "(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and [¶] (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion." (§ 801.) The Supreme Court has interpreted the "beyond common experience" element as requiring the exclusion of the expert testimony " ' *only* when it would add *nothing at all* to the jury's common fund of information.' [Citation.]" (*People v. Stoll* (1989) 49 Cal.3d 1136, 1154, quoting

People v. McDonald (1984) 37 Cal.3d 351, 367 (*McDonald*), overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914, original italics.) "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact. [Citations.]" (*People v. Cole* (1956) 47 Cal.2d 99, 103-104.) "A trial court has broad discretion in determining whether to admit expert testimony and its ruling will be reversed on appeal only where the record reveals an abuse of discretion. [Citations.]" (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205; see also *People v. Valdez* (1997) 58 Cal.App.4th 494, 506.)

Opinion evidence offered to establish whether a witness is telling the truth is not a permissible form of expert testimony. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82.) This is the case because a jury is generally considered to be able to judge the credibility of a witness without the need of expert testimony. (*People v. Smith* (2003) 30 Cal.4th 581, 628; see also *People v. Anderson* (2001) 25 Cal.4th 543, 576 [" 'the psychiatrist may not be in any better position to evaluate credibility than the juror' "].) Thus, for instance, in *People v. Johnson* (1993) 19 Cal.App.4th 778, the three defendants, charged and ultimately convicted of murdering a prison guard, sought to introduce the testimony of two experts-a sociologist and a former inmate informant-on the subject of the general unreliability or lack of credibility of prison inmates' statements or testimony. (*Id.* at p. 786.) The court excluded the testimony. (*Ibid.*) The appellate court held that this ruling did not constitute an abuse of discretion, reasoning that the court "properly observed the proposed testimony by the two witnesses in issue would not assist the trier of fact, because it was irrelevant and of dubious scientific or testimonial value in considering the questions before the jury." (*Id.* at p. 789; see also *People v. Alcala* (1992) 4 Cal.4th 742, 787-789 [court did not abuse discretion in excluding expert testimony under section 352; probative value of proffered testimony by expert concerning allegedly suggestive nature of police interrogation of witness to impeach witness's testimony did not outweigh probability that its admission would necessitate undue consumption of time, confuse issue, or mislead jury].)

*10 Here the court excluded the proffered testimony of Esplin, finding that "the question of [Kristin's] memory, the accuracy of her testimony and perceptions[,] is not so far outside the understanding of the ordinary lay person that he or she could not as easily reach a conclusion on that subject as an expert." We find no error with respect to that ruling. Contrary to defendant's claim, the court did not act improperly by refusing to allow defendant to call the expert witness "to impeach Kristin's testimony with scientific facts known to Mr. Esplin...." Kristin was readily able to describe the events about which she testified. The fact that her perception of the act occurred after she had awakened after having fallen asleep during the massage-even with the additional facts that the awakening had been sudden and that she had previously smoked a modest amount of marijuana-did not clearly place her testimony in an area that was beyond common experience such that a memory expert would have been helpful to the jury. Additionally, although defense counsel was careful to indicate to the court that Esplin would not be testifying to attack Kristin's credibility, the court may have considered the potential danger that the jury might treat Esplin's proposed testimony as such an improper credibility challenge. (See *People v. Coffman and Marlow, supra,* 34 Cal.4th at p. 82.) Moreover, the proffer describing the proposed expert testimony was a very general one, concerning "[t]he effect of sleep, awakening and ingestion of drugs, alcohol and/or marijuana on memory and perception." Defendant did not present the court with a proffer of any *specific* proposed testimony that would relate to Kristin's perceptions and memory in this instance.[FN12] For this additional reason, the court may well have reasonably concluded that Esplin's testimony was not a matter that would be helpful to the trier of fact.

FN12. The Attorney General correctly observes that defendant's offer of proof at trial was more general than one would be led to believe from his arguments on appeal. The proffer to the trial court included no proposed testimony from Esplin specifically directed toward Kristin's memory and perceptions. Defendant did not present any proposed testimony, as suggested in his opening brief, that Esplin would explain "how Kristin could honestly believe her memory, but be mistaken ... [through a description of] the science behind the working of the brain and the way the brain processes senses and creates memories after sudden awakening." To the extent that defendant's argument on appeal constitutes an embellishment of the

proposed testimony actually proffered to the trial court, we will disregard it.

Defendant's reliance on *McDonald, supra,* 37 Cal.3d 351, in support of his position is misplaced. In *McDonald,* the trial court excluded proposed testimony by a defense psychologist concerning the psychological factors that could affect the accuracy of an identification by an eyewitness, including the perception of the event, subsequent memory of it, and its retrieval. (*Id*. at pp. 361-362.) The expert was prepared to discuss issues concerning perception that included "the observer's state of mind, his expectations, his focus of attention at the time, the suddenness of the incident, the stressfulness of the situation, and differences in the race and/or age of the observer and the observed." (*Id*. at p. 361.) The high court held that the exclusion of the proffered expert testimony constituted an abuse of discretion. (*Id*. at p. 376.) In so holding, the court cited judicially recognized concerns about the reliability of eyewitness identifications and historical instances of miscarriages of justice resulting from mistaken identification (*id*. at pp. 363-364, citing, e.g., *United States v. Wade* (1967) 388 U.S. 218, 228), and the emerging body of professional literature presenting studies on psychological factors affecting eyewitness identification. (*McDonald,* at pp. 364-365.) It held "that although jurors may not be totally unaware of the foregoing psychological factors bearing on eyewitness identification, 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' [citation]." (*Id*. at p. 369, quoting § 801, subd. (a), fn. omitted.) The court concluded further that given the substantial reliance on eyewitness identifications in support of the convictions, the error in excluding the expert testimony was not harmless. (*Id*. at p. 376.)

*11 Here, in contrast to *McDonald,* the proffered testimony did not concern psychological factors bearing on the accuracy of eyewitness identifications at all. Rather-although the offer of proof was somewhat nebulous-the expert testimony of Esplin involved "[t]he effect of sleep, awakening and ingestion of drugs, alcohol and/or marijuana on memory and perception," as they related to Kristin's testimony about awakening from the massage to observe defendant with his fingers penetrating her. As we have noted, the court here reasonably concluded that Kristin's perceptions following a sudden awakening were not so beyond common experience that expert opinion on the subject would be of assistance to the jurors. And although Kristin's testimony concerning the events was certainly a key aspect of the prosecution, another important evidentiary matter securing the conviction was defendant's admission during the pretext call that he had sexually molested Kristin. We conclude that *McDonald* does not compel a finding here that the court abused its discretion by excluding Esplin's testimony.

We reject further the claim that the court denied defendant's right to due process because it failed to conduct an evidentiary hearing under section 402. (See fn. 11, *ante*.) In contrast to defendant's position on appeal, it is far from clear that he even requested an evidentiary hearing under section 402. It was the People, not defendant, who requested an evidentiary hearing concerning the qualifications of defendant's experts (including Esplin) and the relevance of their proffered testimony in the written in limine motions filed by the parties. The People reiterated that request at the outset of the trial, and no such request on behalf of defendant appears in the record.[FN13] Further, prior to hearing defendant's offer of proof and argument regarding the proposed testimony of Esplin, the court noted that an evidentiary section 402 hearing might be unnecessary, because its experience had been that issues concerning the relevance and materiality of proposed expert testimony could often be resolved by offers of proof. Defense counsel Lempert indicated that because of expert availability problems, in the event an evidentiary hearing proved necessary, it would probably need to occur during trial immediately before the time slotted for the expert's testimony. Defendant later went forward with an offer of proof and argument on the admissibility of Esplin's testimony without requesting an evidentiary hearing. After the court ruled that Esplin would not be permitted to testify, and after defendant submitted Esplin's declaration in support of a renewed request to permit the testimony, the court affirmed its prior ruling, again without defendant asking for an evidentiary hearing. We therefore conclude that any claim that the court acted improperly in failing to conduct an evidentiary hearing under section 402 on the question of the admissibility of Esplin's testimony was forfeited. (*In re Seaton* (2004) 34 Cal.4th 193, 197-200.)

FN13. Indeed, although the matter is not completely clear, one might construe from the record that defendant *specifically agreed to forgo* an evidentiary section 402 hearing. Immediately after the prosecutor

requested an evidentiary hearing regarding the proposed testimony of Esplin, as well as for the proposed testimony of other defense witnesses, the court asked, “Any similar requests on behalf of the defense?” Lempert responded, “No.”

*12 Moreover, even if defendant had not forfeited the contention regarding the absence of a section 402 hearing, the claim of error is without merit. There is no requirement under the circumstances here for the court to have conducted an evidentiary hearing regarding the admissibility of Esplin's testimony. The court gave defendant ample opportunity to make an offer of proof and permitted the submission of supplemental material after the initial exclusion of the proffered testimony. “In determining the admissibility of evidence, the trial court has broad discretion.... On appeal, a trial court's decision to admit or not admit evidence, whether made *in limine* or following a hearing pursuant to Evidence Code section 402, is reviewed only for abuse of discretion. [Citations.]” (*People v. Williams* (1997) 16 Cal.4th 153, 197.) The court did not abuse its discretion by ordering the exclusion of Esplin's testimony after receiving defendant's offer of proof, and the fact that it did not conduct an evidentiary hearing under section 402 has no impact on our conclusion that there was no error.

Even were we to conclude that the exclusion of the proffered testimony of Esplin constituted an abuse of discretion-a conclusion we expressly do not make here-that assumed error does not require reversal. Although defendant urges that the determination of whether any such error is harmless is governed by the *Chapman* [FN14] standard-i.e., that reversal is required unless the error was harmless beyond a reasonable doubt-we disagree. Trial court errors involving the exclusion of evidence, including the erroneous exclusion of proffered expert witness testimony, are generally governed by the *Watson* [FN15] standard, namely, whether it is reasonably probable that a result more favorable to defendant would have been achieved in the absence of the error. (*People v. Stoll, supra*, 49 Cal.3d at p. 1163; *McDonald, supra*, 37 Cal.3d at p. 376.) Here, we conclude that even had Esplin's testimony been allowed, it is not reasonably probable that defendant would have been acquitted. We reach that conclusion after reviewing the entire record, including the evidence supporting the conviction that included Kristin's unwavering testimony that the offense occurred, and defendant's admission during the pretext call with Kristin of having committed the offense.

FN14. *Chapman v. California* (1967) 386 U.S. 18, 24-26.

FN15. *People v. Watson* (1956) 46 Cal.2d 818, 836.

II. *Proposed Testimony by Richard Ofshe*

A. *Background and Contentions*

In their written in limine motion, the People requested an evidentiary hearing to ascertain the qualifications and relevance of the proposed testimony of an expert, Dr. Richard Ofshe, that defendant included in his witness list. At the commencement of the trial, the prosecution reiterated that request, noting that although it had received a curriculum vitae, it was unaware of the substance of Ofshe's proposed testimony.

Prior to the jury being impaneled, defendant made an oral motion in limine to allow Ofshe to testify as an expert. Lempert identified Ofshe as “a world [-]renowned expert in false confessions” who would testify regarding “reasons why someone who is not guilty of an offense would confess to it.” The prosecution objected to the proffered testimony on the grounds that (1) the defense had not disclosed the specific nature of the proposed testimony; (2) Ofshe's qualifications varied from the subject matter of his proposed testimony in that his usual testimony concerned coerced confessions and police interrogation techniques, not the circumstances of an admission by a defendant to a victim during a police-initiated pretext telephone call; and (3) Ofshe's testimony was unnecessary to the trier of fact. Defense counsel acknowledged that he had received no reports from Ofshe concerning his anticipated testimony. In response to the court's request for an offer of proof, Lempert indicated that Ofshe would “dispel [the] myth” that “innocent people do not

confess to having committed crimes" and "[t]hat when badgered by an individual and by addressing the individual's sympathy and beneficence, that a person will confess to something [he or she] didn't do." The court ordered the exclusion of Ofshe's testimony. It reasoned that the circumstances of the case were dissimilar to those in which a suspect is coerced or bullied by the police into making a false confession, and that "there are no facts that take the question outside the [ken] of the ordinary juror.... [¶] ... [¶] ... There is nothing that the jury is not capable of understanding about how that personal pressure, emotional plea, and begging might affect someone to say something you think will have no consequence other than to placate an obviously distraught person."

*13 Defendant asserts that the court erred in excluding Ofshe's "testimony to dispel the common myth that innocent people do not confess to crimes they did not commit." He argues that such prospective testimony is analogous to expert testimony regarding Child Sexual Abuse Accommodation Syndrome (CSAAS), where testimony has been permitted to attempt to dispel particular myths associated with child sexual abuse, such as the myth that the alleged victim's delay in complaining about the abuse is indicative that the charges are unfounded, because "delayed reporting is not inconsistent with the secretive environment often created by an abuser who occupies a position of trust." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.) The Attorney General responds that the court did not err in excluding the testimony, and that it properly distinguished between a case involving a confession allegedly coerced by police interrogation tactics where expert testimony may be appropriate, and this instance where expert testimony is unnecessary to address defendant's admission of criminal activity to the victim.

B. *Discussion of Claim of Error*

As we have noted, our review of the ruling excluding the proposed testimony of the expert Ofshe is a deferential one, namely, whether the trial court abused its discretion. (*People v. Smith, supra,* 30 Cal.4th at p. 627.) Here, the offer of proof by defendant was that Ofshe would (1) explain how an innocent person, "when badgered" by another who elicited sympathy, might confess to a crime he or she did not commit; and (2) "dispel [the] myth" that "innocent people do not confess to having committed crimes." Based upon this limited offer of proof, the court did not abuse its discretion in excluding the expert testimony.

The court found that, under the circumstances, the jurors could decide for themselves from the testimony and from listening to the recording of the pretext call whether defendant was pressured by Kristin into falsely admitting that he had put his fingers inside of her while she was asleep during the massage. It was thus reasonable for the court to have concluded-based upon the principle that "ordinarily courts should not admit expert opinion testimony on topics so common that persons of ' "ordinary education could reach a conclusion as intelligently as the witness" ' [citations]" (*People v. Prince* (2007) 40 Cal.4th 1179, 1222)-that the proffered testimony by Ofshe would not be of assistance to the jurors in evaluating defendant's claim that he was essentially coerced to falsely admit to the crime by Kristin's emotionalism and her appeal to have him help her.

In support of his claim of error, defendant relies on *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*), and *People v. Page* (1991) 2 Cal.App.4th 161 (*Page*). Neither case supports his position.

In *Crane,* the trial court, after conducting an evidentiary hearing, denied a motion to suppress a confession of murder that the defendant claimed was coerced by improper police interrogation tactics. (*Crane, supra,* 476 U.S. at pp. 684-685.) Thereafter, during trial, the court precluded the defendant from presenting evidence concerning the circumstances surrounding the confession to attack its credibility; it concluded that such evidence was only relevant to the voluntariness of the defendant's confession, a matter the court had already decided. (*Id.* at pp. 685-686.) On appeal from the judgment of conviction, the Supreme Court reversed, concluding that the exclusion of evidence attacking the credibility of the confession prevented the defendant from having had a fair opportunity to present a defense. (*Id.* at pp. 690-691.) It held that "the circumstances surrounding the taking of a confession can be highly relevant to two separate inquiries, one legal and one factual. The manner in which a statement was extracted is, of course, relevant to the purely legal question of its voluntariness, ... [Citation.] But the physical and psychological environment that yielded the confession can also be of substantial relevance to the ultimate factual issue of the defendant's guilt or innocence. Confessions, even those that have been found to be voluntary, are not

conclusive of guilt. And, as with any other part of the prosecutor's case, a confession may be shown to be 'insufficiently corroborated or otherwise ... unworthy of belief.' [Citation.] Indeed, stripped of the power to describe to the jury the circumstances that prompted his confession, the defendant is effectively disabled from answering the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt? Accordingly, regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness, a defendant's case may stand or fall on his ability to convince the jury that the manner in which the confession was obtained casts doubt on its credibility." (*Id.* at pp. 688-689.)

*14 *Crane* is obviously distinguishable, since it (1) involved a confession after police interrogation, not an admission to the alleged victim during a telephone conversation; (2) concerned the complete exclusion of *all* evidence regarding the credibility of a confession, not the exclusion of *certain* evidence (i.e., expert testimony) attacking the reliability of defendant's admission; and (3) did not address in any way the subject of expert testimony proffered to challenge myths about confessions or admissions. The *Crane* decision therefore offers no support for defendant's claim of error.

In *Page,* the defendant was convicted of voluntary manslaughter of his girlfriend. (*Page, supra,* 2 Cal.App.4th at p. 164.) He claimed on appeal that the court erred by restricting the testimony of his psychologist expert concerning the psychological factors leading to a false confession. (*Ibid.*) Although the trial court permitted expert testimony about general psychological factors that may result in an unreliable confession, it did not permit the expert to testify as to specific evidence in the defendant's statements to the police to link it to the psychological factors about which he testified, or to opine as to the reliability of the confession at issue. (*Id.* at p. 183.) The appellate court rejected the claim of error, concluding that the court's rulings presented neither a case of constitutional error (*id.* at pp. 184-187), nor an abuse of discretion (*id.* at pp. 187-189). In so holding, the court found that the allowance of general expert testimony on the issue of factors that may impact the reliability of a confession was consistent with the holding in *McDonald, supra,* 37 Cal.3d at page 370, but that nothing in *McDonald* suggested that that it was appropriate to have the expert opine about the reliability of the particular confession at issue or comment on the specific evidence. (*Page,* at p. 188.)

A reading of *Page* does not suggest that the court abused its discretion by excluding Ofshe's testimony. As the trial court here recognized, there is a plain distinction between a confession obtained as a result of police interrogation techniques, and an admission given during a telephone conversation between the alleged victim and the defendant where the latter is unaware that the call is being monitored by the police. While a defendant challenging the reliability of a confession to the police may present a compelling argument that expert testimony concerning police interrogation tactics and a person's susceptibilities facing them may assist the trier of fact, the same is not true in this instance where it may legitimately be concluded from the record that jurors examining whether defendant falsely admitted the crime to Kristin would not be assisted by expert testimony. [FN16]

FN16. Defendant also cites *McDonald, supra,* 37 Cal.3d 351, in support of his contention. We have previously found the case inapposite in connection with defendant's claim that the court erred in excluding the expert testimony of Esplin. (See pt. I.B., *ante* .) *McDonald*-being concerned with expert testimony on the subject of the reliability of eyewitness identifications-is even more remote with respect to the proposed testimony of Ofshe than it is with respect to Esplin's.

Defendant also asserts that the court erred in failing to conduct "a full evidentiary [section] 402 hearing to place the details of Dr. Ofshe's knowledge base and testimony on the record for proper review." This contention is without merit. Prior to the court's ruling excluding the evidence, defense counsel made no request for such an evidentiary hearing.[FN17] Nor did Lempert indicate to the court after making an offer of proof that he had additional material concerning Ofshe's proposed testimony that he wished the court to consider before ruling on the admission of the expert's testimony. Further, although Lempert-after the court ruled-did request a section 402 hearing to "present firsthand knowledge by Doctor Ofshe of his qualifications," this did not include a request for such a hearing so that Ofshe could present the substance of his anticipated testimony. Defendant has forfeited any challenge based upon the court's failure to conduct

an evidentiary hearing. (*In re Seaton, supra,* 34 Cal.4th at pp. 197-200.) Moreover, in light of the fact that defense counsel did not advise the court that he had additional information concerning Ofshe's proposed testimony that necessitated a section 402 hearing, the court did not abuse its discretion in failing to conduct such an evidentiary hearing prior to it excluding Ofshe's testimony. (*People v. Williams, supra,* 16 Cal.4th at p. 197.)

FN17. As was true with respect to Esplin's proffered testimony (see pt. I.B. and fn. 13, *ante*), it was the prosecution, *not* the defense, that requested an evidentiary hearing pursuant to section 402 to consider whether Ofshe's testimony should be excluded.

*15 Where, as is the case here, discretion is vested in the trial court to determine the admissibility of expert testimony, its exercise of that discretion " 'must not be disturbed on appeal *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. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125, quoting *People v. Jordan* (1986) 42 Cal.3d 308, 316.) No such showing that the court "clearly abused" (*Page, supra,* 2 Cal.App.4th at p. 187) its discretion in excluding Ofshe's testimony appears here.

Finally, even were we to find that the court erred-a finding we expressly do not make here-any assumed error in excluding Ofshe's testimony is harmless. Defendant was given ample opportunity to attempt to convince the jury-both through his own testimony and through argument-that his admission during the pretext call was done to mollify Kristin, rather than because defendant was being truthful. Applying the *Watson* standard (see pt. I.B., *ante*), it is not reasonably probable that defendant would have been acquitted, had Ofshe's testimony been allowed.

III. *Proposed Demonstrative Evidence Using a Mannequin*

Prior to the jury being impaneled, defense counsel Lempert sought (by an oral in limine motion) leave to permit defendant to demonstrate on a live, clothed, model the manner in which he gave a massage to Kristin. The prosecution responded that it had not been previously aware of this anticipated evidence. The court indicated that it would defer further argument and consideration of the matter. Two court days later after the jury was impaneled, Lempert clarified that he intended to present through defendant's testimony the manner in which Kristin was draped with a sheet during the massage by using a live model to demonstrate that draping technique. The purpose of the demonstration was to show whether, given the draping of the client's legs with a sheet that defendant would testify occurred, it would have been possible for him to have inserted his fingers into Kristin's vagina as she claimed. Lempert estimated that the demonstration would take five minutes to complete. The prosecution objected that the proposed demonstration might not accurately reconstruct the conditions of the subject massage, including the possibility that the model would have a different body type than Kristin. He argued that the use of a model would thus be an impermissible experiment, rather than a demonstration accurately depicting what had occurred.

The court inquired about the necessity of using a live model; Lempert responded that he had not previously considered using a mannequin and had not made arrangements in that regard. The court indicated that it had concerns, citing section 352,[FN18] "about the potential ... for all kinds of problems" resulting from the demonstration using a live model, stating "there are so many ways in which this demonstration can go wrong...." After further discussion about potential problems with the demonstrative evidence through the use of a portable massage table and live model-and after the court expressed the preliminary view that defendant's issue about the draping technique might be illustrated by photograph or diagram without the risks associated with the proposed demonstrative evidence-the court indicated it would defer ruling on the matter, conduct some further research, and would rule on the matter on the morning of the next court day.

FN18. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial

danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.)

*16 There is no subsequent reference in the record to the proposed demonstrative evidence. Two court days after the above-described discussion about the use of a live model, defendant, during direct examination, described the method he used to drape a sheet around Kristin on the night of the massage. In aid of this testimony, he used four images that he had obtained from Internet research depicting the draping of a sheet over a massage client. The four images were introduced as exhibits over the prosecution's objection and were projected to the jury. Defendant testified that the images were a fair representation of the manner in which he draped Kristin during the massage of April 1 to April 2.

Defendant contends on appeal that the court erroneously deprived him of the opportunity to present demonstrative evidence by using a mannequin to explain to the jury his typical method of draping a sheet over his clients during massages.[FN19] He argues that the use of a mannequin as demonstrative evidence should have been allowed "to show the defense theory of why the crime ... would have been physically impossible to commit." Plainly, there was no evidentiary ruling which may be challenged on appeal, and even if there were one, any argument was forfeited.

FN19. Counsel for defendant in her opening brief states that "[t]he trial court denied the request for demonstrative evidence because the trial court decided the demonstration would take too much time, and too many things might go wrong." This misstates the record. As we have discussed, the court did not make such a ruling denying defendant the right to use demonstrative evidence. Rather, it gave its preliminary thoughts on the issue of defendant's proposed use of a live model and indicated that it would rule on the matter in the future.

As described above, the record shows that the court entertained argument on the subject of whether defendant should be allowed to present a live clothed model on a portable massage table as demonstrative evidence to explain through defendant's testimony the manner in which he draped a sheet over Kristin during the massage at issue. The court specifically *deferred* ruling on the admissibility of the demonstrative evidence. Although the court indicated that it would rule on defendant's request in a subsequent session, it never did so. And defendant never followed up with the court to obtain such a ruling. Further, although the court inquired whether a live model was required and there was a brief discussion about the possibility of defendant's use of a mannequin, *at no time* did defendant seek a ruling on the admissibility of demonstrative evidence through the use of a mannequin.

Clearly, defendant cannot complain on appeal that he was deprived of the right to present demonstrative evidence through the use of a mannequin. He did not ask for, nor did he obtain a ruling on the subject. For all that appears from the record, it is plausible that defendant may have simply *specifically chosen not to* present the demonstrative (mannequin) evidence when the time came for him to present his defense, instead using the images obtained from his Internet research.

Moreover, even were we to find from the record that the court excluded the demonstrative (mannequin) evidence, defendant has not preserved the claim of error. Section 354 requires as a condition to appellate review of a claimed error in the exclusion of evidence that the appellant must have apprised the trial court of "[t]he substance, purpose, and relevance of the excluded evidence ... by the questions asked, an offer of proof, or by any other means." (§ 354, subd. (a).) "[T]he 'offer-of-proof' requirement gives the trial court an opportunity to change its ruling in the event the question is so vague or preliminary that the relevance is not clear. [Citations.]" (*People v. Whitt* (1990) 51 Cal.3d 620, 648; see also *People v. Ramos* (1997) 15 Cal.4th 1133, 1178.) "[T]he failure to make an adequate offer of proof in the court below ordinarily precludes consideration on appeal of an allegedly erroneous exclusion of evidence. [Citations.]" (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282.) The record is devoid of any offer of proof made by defendant in support of the use of a mannequin for demonstrative evidence.

*17 We therefore reject defendant's claim that the court erred by excluding the demonstrative (mannequin) evidence, because there is no showing that the court made such a ruling and, even if such a ruling occurred, defendant did not preserve the claim by making an adequate offer of proof.[FN20]

FN20. Indeed, at oral argument, defendant's counsel-notwithstanding her arguments in the appellate briefs-indicated "reluctantly" that it appeared that trial counsel's failure to pursue the use of a mannequin resulted in a forfeiture of the claim.

IV. *Prior Uncharged Sex Crime Evidence and Instruction*

Defendant contends that the court erred in admitting evidence of a prior uncharged sex crime involving defendant that should have been excluded. The evidence was admitted pursuant to section 1108.[FN21] He argues further that the court compounded the error by erroneously giving an instruction concerning the prior uncharged sex crime evidence.[FN22] Both contentions are without merit.

FN21. "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." (§ 1108, subd. (a).)

FN22. In the opening brief, defense counsel states, "[O]ut of the presence of the jury, the prosecutor then asked for, and got over vehement objections, an Evidence Code section 1108 instruction." This again misstates the record. As we will show from the discussion of the record, *post,* defendant's trial counsel, after initially objecting to an instruction pursuant to section 1108, later *specifically requested* that the court give the instruction. Appellate counsel should exercise caution in order to give the court recitations of the record that are entirely accurate. (See *Mammoth Mountain Ski Area v. Graham* (2006) 135 Cal.App.4th 1367, 1375; *In re Marriage of Bereznak and Heminger* (2003) 110 Cal.App .4th 1062, 1070, fn. 11.)

During the prosecution's cross-examination, defendant was asked about his prior relationship with Morgan. He admitted that he had had "sexual relations" with Morgan when she was a minor (between the ages of 15 and 17) and he was an adult (between the ages of 19 and 21). Defense counsel did not object to this evidence and made no subsequent motion to strike.

Later on in proceedings outside the presence of the jury after both sides had rested, the court addressed the subjects of the prior admission of the evidence during defendant's cross-examination and whether it should instruct the jury concerning the other uncharged sex crime evidence. The hearing was apparently prompted by defendant's filing a motion opposing the giving of an instruction regarding evidence admitted under section 1108. Defendant's attorney clarified that he was only opposing the giving of an instruction and was not opposing the admission of the evidence, previously received without objection. Lempert responded that he was not seeking to strike the previously admitted evidence and did not seek to "unring that bell." [FN23] Rather, it was only the giving of an instruction that he opposed. The court heard argument on whether an instruction concerning the other uncharged sex crime evidence should be given, defense counsel arguing against the instruction because it would emphasize the prior uncharged crime evidence where the nature of that crime was dissimilar to the one charged and was remote in time. The court indicated that there was a conundrum: Since the jury had heard the prior uncharged sex crime evidence, it needed to be advised, for the protection of defendant, of the limitations on the use of such evidence. Indeed, the court indicated it felt it had a sua sponte duty "to instruct the jury on how [it] may, and more importantly may not, use the evidence before [it], because [the court is] not willing to take the chance that the jury will convict the defendant simply because [it doesn't] like his behavior with a 15-year-old girl some number of years ago."

FN23. Lempert admitted that he had not objected to the evidence. He noted that he "view[ed] the manner in which the district attorney inquired of the defendant as to that issue as [being] really peripheral in the examination. It was not emphasized unduly. He asked the defendant, he answered it rather forthrightly and

went on." Lempert also stated that he had not objected at the time because he "did not want to focus attention on [the evidence] and, frankly, [he] wasn't aware that it was a sexual relationship at that time."

After the court expressed this concern, Lempert requested a moment to confer with his client. After doing so, Lempert withdrew his objection to the instruction, indicating that he had discussed with his client the strategy of opposing the instruction and that after doing so, both had concluded "that it's probably better that the Court give the instruction." The court then confirmed this concession by defense counsel: "[The Court:] Better that it does? [¶ Lempert:] Better that it does." Accordingly, the court indicated that it would give an instruction concerning the prior uncharged sex crime evidence. FN24

FN24. The instruction the court gave, adapted from Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 1191, read as follows: "The People presented evidence that William Ekblom committed the crime of Unlawful Sexual Intercourse that was not charged in this case. This crime is defined for you in these instructions. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may consider that evidence and weigh it together with all the other evidence received during trial to help you determine whether the defendant committed Sexual Penetration Of A Person Who Was Unconscious Of The Nature Of The Act. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of Sexual Penetration Of A Person Who Was Unconscious Of The Nature Of The Act. The People must still prove each element of Sexual Penetration Of A Person Who Was Unconscious Of The Nature Of The Act beyond a reasonable doubt."

*18 Plainly, defendant forfeited any challenge to the admission of the uncharged sex crime evidence. Section 353 requires a timely objection or motion to strike the evidence at trial as a condition for the reversal of a judgment on the basis of error in the admission of evidence.FN25 At the time of the introduction of the evidence that defendant, as an adult, had had sexual relations with a minor, defendant neither objected to it, nor moved to strike it. He thus forfeited the claim of error. (*People v. Farnam* (2002) 28 Cal.4th 107, 189; *People v. Holt* (1997) 15 Cal.4th 619, 666-667.)

FN25. "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (§ 353.)

Defendant, however, contends that he did not forfeit the claim of error because he made a motion in limine before the jury was impaneled to exclude any prior uncharged sex crimes evidence under section 1108 that the prosecution might seek to introduce. When the motion was heard at the beginning of trial, the prosecution indicated that it was unaware of any section 1108 evidence. Based upon this statement, the court indicated that defendant's motion in limine to exclude section 1108 evidence was "moot." Thereafter, as noted, on the sixth day of trial, defendant admitted on cross-examination that he had had sexual relations with Morgan when he was an adult and she was a minor. Defendant's failure to object at that time and his failure to move to strike the evidence constituted a de facto withdrawal of the objection made at the beginning of trial and a waiver of any appellate challenge to the admission of the evidence. (See *People v. Jones* (2003) 29 Cal.4th 1229, 1255 [express withdrawal of objection to evidence waived appellate challenge to its introduction]; *People v. Robertson* (1989) 48 Cal.3d 18, 44 [same].)

Defendant's challenge to the court's having given the instruction patterned after CALCRIM No. 1191 is likewise without merit. Although defendant initially opposed the instruction, his counsel clearly and unequivocally-based upon a consultation with his client in which they agreed strategically that the instruction should be given-withdrew that opposition and expressly consented to the court giving the instruction. He has therefore waived the claim of error. (See *People v. Rogers* (2009) 46 Cal.4th 1136, 1162, fn. 14 [absence of objection resulted in forfeiture instructional error claim].) [FN26] Further, by reversing his position and specifically requesting the instruction, defendant cannot now challenge it under the doctrine of invited error, which "bars a defendant from challenging an instruction given by the trial court when the defendant has made a 'conscious and deliberate tactical choice' to 'request' the instruction. [Citations.]" (*People v. Lucero* (2000) 23 Cal.4th 692, 723-724; see also *People v. Brown* (2003) 31 Cal.4th 518, 560 [defense counsel's tactical decision to withdraw objection to instruction bars appellate challenge to instruction under invited error doctrine].) [FN27]

FN26. At oral argument, counsel for defendant again argued that Lempert had not waived his objection to the court giving this instruction; rather, Lempert's statements should be construed as merely having approved the language of the objected-to instruction. This court concludes after reviewing the transcript again that the record plainly reflects a waiver of the objection to the instruction.

FN27. In reaching this conclusion, we do not mean to suggest that there was in fact error in the court's giving of the instruction based on CALCRIM No. 1191.

V. *Cumulative Error*

*19 Lastly, defendant argues that the errors, considered cumulatively, must be deemed prejudicial and require that the judgment be reversed. Although reversal may be warranted where the errors, considered cumulatively, have deprived the defendant of a right to a fair trial (*People v. Hill* (1998) 17 Cal.4th 800, 847), as we have concluded, defendant's claims of error are without merit. The principle of cumulative error is thus not applicable.

DISPOSITION

The judgment is affirmed.

WE CONCUR: MIHARA, Acting P.J., and McADAMS, J.

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