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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DANIEL RICARDO CLARKE, Defendant and Appellant.	B203220 consolidated w/B228831 (L.A. Super. Ct. No. MA 035466)
In re DANIEL RICARDO CLARKE, on Habeas Corpus.	B228831 consolidated w/B203220 (L.A. Super. Ct. No. MA 035466)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Mangay Chung, Judge. Affirmed.

ORIGINAL PROCEEDING; petition for a writ of habeas corpus. Charles A. Chung, Judge. Granted.

Fay Arfa for Defendant and Appellant and Petitioner.

Edmund G. Brown Jr. and Kamela D. Harris, Attorneys General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent and Respondent on Habeas Corpus.

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A jury convicted Daniel Ricardo Clarke of rape, burglary, and related charges. Clarke appealed and filed a simultaneous petition for writ of habeas corpus on numerous grounds, including ineffective assistance of counsel. We granted a limited form of relief on the habeas petition, directing the superior court to conduct an evidentiary hearing and rule on the ineffective assistance of counsel claim. The superior court held the hearing and ruled against Clarke, who then filed a new habeas petition in this court. We issued an order to show cause and ordered that the petition be heard concurrently with Clarke's still-pending appeal. We now conclude that Clarke's ineffective assistance of counsel claim has merit and that Clarke was prejudiced by counsel's deficient performance. We accordingly grant the petition and vacate the judgment.

BACKGROUND

I. Procedural History

The second amended information charged Clarke with one count of forcible rape in violation of subdivision (a)(2) of Penal Code section 261[1] (count 1), one count of attempted forcible oral copulation in violation of section 664 and subdivision (c)(2) of section 288a (count 2), one count of first degree burglary in violation of section 459 (count 3), one count of criminal threats in violation of section 422 (count 4), one count of false imprisonment by violence in violation of section 236 (count 5), one count of inflicting corporal injury upon a spouse, cohabitant, or child's parent in violation of subdivision (a) of section 273.5 (count 6), and one count of dissuading a witness by force or threat in violation of subdivision (c)(1) of section 136.1 (count 7). It further alleged as to count 1 that, within the meaning of section 667.61, subdivisions (a) (b), (d), and (e), Clarke committed the offense during the commission of a burglary of an inhabited dwelling with intent to commit forcible rape and personally used a deadly or dangerous weapon. It additionally alleged as to counts 1 and 2 that Clarke used a

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1 Unless otherwise indicated, all subsequent statutory references are to the Penal Code.

firearm or deadly weapon within the meaning of section 12022.3, subdivision (a), and as to counts 3 through 7 that Clarke used a deadly or dangerous weapon within the meaning of section 12022, subdivision (b)(1).

Clarke pleaded not guilty and denied the allegations. A jury found Clarke guilty on all counts and found the allegations true, except that the jury found not true the allegation that Clarke committed the offense in count 1 during the commission of a burglary of an inhabited dwelling with intent to commit forcible rape.

The court sentenced Clarke to 32 years to life in prison, calculated as follows: 25 years to life on count 1; plus the midterm of 3 years on count 2, plus 4 years pursuant to section 12022.3, subdivision (a), as to count 2, all to run consecutively; plus the midterm of 3 years as to count 7, plus 1 year pursuant to section 12022, subdivision (b)(1), as to count 7, to run concurrently with the sentence under count 2. The court also imposed sentences as to counts 3 through 6 but stayed them pursuant to section 654.

II. Prosecution Evidence at Trial

The charges arise from two alleged incidents in 2005 involving the same victim, T.G. Clarke and T.G. began dating in 2000. They had two children together: K., born in 2003, and C., born in 2005 after the events in this case. T.G. had two other sons from former relationships. During their relationship, T.G. and Clarke each maintained separate residences. Clarke lived in an apartment in Los Angeles. In 2004, T.G. moved from her apartment in Los Angeles to a house in Palmdale, but Clarke did not have a key to her house.

T.G. testified that Clarke was sometimes abusive toward her. He sometimes slapped her for no reason, was disrespectful toward her, told her she was stupid, told her to "shut up," shoved her while she was pregnant with their son K., and sometimes acted inappropriately with the children. T.G. and Clarke sometimes broke up for months, but Clarke would then apologize and they would reconcile. T.G. explained that Clarke could sometimes be a caring person and that she had loved him.

A. Incident of February 13, 2005 (Uncharged)

According to T.G., she and Clarke broke up again in late January 2005. In February, she learned that she was pregnant with Clarke's child. At approximately 11:00 p.m. on February 13, 2005, Clarke arrived at her house in Palmdale. It was not unusual for him to visit her so late. He knocked on the door and banged on the windows. The house lights were off, and the children were asleep. T.G. was tired and pretended to be asleep, but she eventually opened the door because she feared that Clarke would break a window. She asked Clarke why he was there and told him to leave. Clarke said he wanted to see his son. T.G. replied that it was too late and that in any case K. had been asleep for hours. When Clarke announced that he had driven too far to return to Los Angeles and refused to leave, T.G. threatened to call police.

T.G. used the kitchen telephone to call Clarke's mother, explaining that Clarke had arrived uninvited and that, because he was angry, she was fearful he would become abusive toward her. Clarke snatched the phone from her hand, wrapped the telephone cord around her neck, and choked her until she could barely breathe. He told her, "'Bitch, you don't tell my momma on me.'" He pushed her into the stove with sufficient force that the stove moved and the oven door handle broke. As she tried to get away from him, he pushed her into a kitchen window, breaking it.

Clarke said he was going to take K. and leave. T.G. did not want him to take the "baby." Having no operative telephone to call police, she went outside and used a kitchen knife to puncture one of Clarke's car tires. When Clarke followed her outside to confront her, she locked the children inside the house, ran to a neighbor's house, and asked them to call the police. Clarke was gone by the time officers arrived.

The next morning T.G.'s children woke her to tell her that Clarke was in the kitchen. He apologized for his actions the night before, explaining he had been upset because she had involved his family in their private matters. T.G. surreptitiously called 911 using a telephone she had borrowed from a neighbor the previous night. When officers arrived, she rushed outside with the children, and the officers arrested Clarke.

Two days later, T.G. obtained a restraining order against Clarke. She asked her sister to serve Clarke with the order.[2]

T.G. testified that thereafter Clarke left her numerous telephone messages, asserting that he could come to her house any time he wished, sometimes threatening to take their son away, and sometimes threatening to kill her if he ever found her with another man.

T.G. learned that in April Clarke had filed a petition seeking custody of K. She testified that she thought a formal custody and visitation order would be beneficial and that she would retain both legal and physical custody of K. because he had never lived with Clarke, who lacked parenting skills and had never provided child support. She also believed that a formal order for visitation would schedule Clarke's visits with K. during reasonable daytime hours and require them to be monitored. T.G. received notice that a mediation was scheduled for May 20, 2005. She called the contact number on the notice, explained that she was too afraid of Clarke to appear in court, and was told that she could participate telephonically if she completed and returned the proper form.

B. Incident of May 19, 2005 (Corporal Injury to a Child's Parent and Dissuading a Witness by Force)

On May 19, 2005, at approximately 11:00 p.m. Clarke approached from the side of the house holding a box of diapers as T.G. was doing laundry in her garage. They argued about custody of K. and the mediation scheduled for the next day. Clarke criticized T.G.'s parenting skills, called her an unfit mother, and made other hurtful comments. T.G. went into the kitchen. When she reached into the refrigerator for a drink, she felt Clarke behind her. He told her not to go to the mediation and, still standing behind her, started punching her in the stomach; she was then roughly six and one-half months pregnant. She told him that she had the right to attend the mediation and that she intended to do so. When he tried to convince her not to go to court or to the

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[2] Sheriff's deputies could not verify that the order was ever served on Clarke.

mediation, she shook her head, letting him know that she did not agree. Still standing behind her, Clarke held her body, pressed a knife into her neck, and repeated that he did not want her to go to the mediation or to court. She then nodded in agreement. He told her not to call the police and left.

T.G. did not call the police that night. The next morning, on May 20, 2005, she went to the sheriff's station and reported the incident, and a deputy photographed the knife wound on her neck. Later that day, she participated in the mediation by telephone. She asked the mediator not to tell Clarke that she and the mediator had talked.

C. Incident of May 21-22, 2005 (Forcible Rape and Other Crimes)

In the evening on May 21, 2005, T.G. fell asleep watching television alone in bed but woke up at approximately 11:00 p.m. when she felt someone touching her. Clarke was sitting on the edge of her bed. She demanded to know how he had entered the house, and he replied, "'Bitch, I warned you not to talk to the mediator.'" He told her that K. did not need her, she was not going to raise him, and he would make sure that she suffered. He stood up, took off his clothes, and began to pull off her pajamas. As he pulled her pajama bottoms down, she tried to pull them back up, but he managed to remove them.

Clarke lay on top of T.G., sucked her breasts, and penetrated her vagina with his penis. She reached for the kitchen knife she had earlier hidden under a pillow. Clarke saw her reaching for the knife, threw the pillow aside, and said that he was going to kill her but that he was "'going to fuck [her] first.'" He held the knife to her chest and scraped her skin with it several times as she struggled and told him to stop. He then put his face between her legs, and she felt his tongue and mouth on the inside of her thigh near her genitalia. She kicked him in the chin with her knee as hard as she could. He called her a "bitch" and scraped both her inner thighs with the knife multiple times, leaving linear marks on both thighs. He placed the knife at the entrance of her vagina and said "'I am going to tear this pussy up,'" but he then moved the knife away. She felt the tip of the knife at the entrance of her vagina. When asked if she had been able

to tell whether she "had been cut at all by the knife at that time," she testified, "I mean, I felt just burning. It just burned." She was frightened because she knew he did not want the baby and had told her to get an abortion. She testified that Clarke cut her "[e]very time [she] tried to fight" and also cut her on the chest "when [she] was struggling," also stating "I got cuts from the—just from me struggling, like when I was fighting him off."

Clarke penetrated T.G.'s vagina again with his penis, and although she was crying and telling him to stop, he continued until he ejaculated. He next told her to get on top of him, threatening her that otherwise he would make her lie on her stomach and have anal sex with her. Not wanting to hurt the baby by lying on her stomach, she complied. He placed his penis inside her vagina, and after several minutes ejaculated again.

When Clarke went to use the bathroom, T.G. told him that she was about to be sick and ran to the bathroom down the hall. She turned on the light and, leaving the tap water running, ran into the other room to call 911. The tape recording of her 911 call was played for the jury at trial. Barely whispering, T.G. told the 911 operator to please help her and that Clarke had been raping her for hours and was going to kill her. Sheriff's deputies arrived at the house a few minutes later, at 5:30 a.m. T.G. grabbed her pajama top and ran out of the house naked. Using a public address system, the deputies called Clarke out of the house. He complied and was arrested. Deputies observed that T.G. seemed extremely frightened and was crying. They also noticed scratches on her neck and chest. Deputies found the kitchen knife in the bedroom and retained it and the bed sheets as evidence.The deputies, however, did not recall seeing any blood on her pajama top, in the bedroom, or anywhere else in the house. They also found no sign of forced entry, and the home did not appear to be disheveled.

While incarcerated and awaiting trial, Clarke sent T.G. cards, notes, and several love letters. He also called her parents several times to try to obtain her new telephone number and residence address.

D. Medical Examination Evidence

Joshua Ireland was employed by the Antelope Valley Hospital Emergency Department as a physician's assistant and forensic examiner assigned to the hospital's sexual assault response team. On May 22, 2005, Ireland performed a sexual assault examination on T.G. and documented her injuries. He noted linear abrasions to her chest and right breast, a group of linear abrasions to her neck area, an older healing abrasion on her neck, and linear abrasions to both inner thighs. Ireland testified that by "abrasion" he meant "an injury to the superficial layer of skin generally caused by a shearing force."

Ireland also described what he called a "laceration" to T.G.'s posterior forchette, the collection of skin just below the opening to the vagina. He testified that by "laceration" he meant "more of an injury to the superficial layer of the skin and into the layer beneath the superficial layer." But he could not offer an opinion as to the cause of the injury to T.G.'s posterior forchette, stating that the injury was consistent with consensual or nonconsensual intercourse and "could be consistent with a somewhat light cut of a knife."

III. Defense Evidence at Trial

Testifying on his own behalf, Clarke stated that he had been in a relationship with T.G. since 2000. Their son K. was born in September 2003, but T.G. refused to let Clarke see the child for the first three months of his life. She was mad at him because he was seeing another woman, and, every time she got mad at him, she refused to let him see his son. They reconciled, and in the summer of 2004 he helped move her and the children to a house in Palmdale. Although they lived together for a while in the Palmdale house, he kept his apartment in Los Angeles.

A. Incident of February 13, 2005

T.G. was mad at Clarke because he had forgotten about Valentine's Day. She told him that she was pregnant, and when he "was very nonchalant about it" and said he thought she had been using contraceptives, she said he was "very insensitive." At some

point she "tried to take the phone out of" his hands, and in the process of trying to hold on to it he accidently broke a window; she then became angry when he refused to pay for the repairs. Later that evening, when he was in the process of removing his belongings from the house, she punctured his car's tire with a knife. He spent the night in his car. The police arrived the next morning and arrested him, and he spent the night in custody and was released the next day. He then returned to the house, but no one was home, and his car was gone. He waited for T.G. to return, and about an hour later she drove up in his car. She refused to give him his car keys and instead called the police. The police arrived and gave Clarke his car keys. Clarke left and did not see T.G. again until May 21, 2005.

In April 2005, Clarke filed a petition seeking custody of K. A mediation was set for May 20, 2005, with a court hearing scheduled for May 23, 2005. Clarke attended the mediation as scheduled. T.G. did not attend, but the mediator apparently spoke to her by phone. No one mentioned a restraining order, and no one mentioned any incident between him and T.G. the night before. Clarke was never served with a restraining order and first learned about the restraining order during trial.

B. Incident of May 19, 2005

Clarke was at home, not in Palmdale, on May 19, 2005, and he did not see T.G. that day. He spent that evening at his apartment with some friends, who so testified.

C. Incident of May 21-22, 2005

Clarke testified that T.G. called him repeatedly, "maybe every 20 minutes," on Saturday, May 21, 2005. She told him it was wrong of her to keep him from seeing K., and she said she was sorry. She told Clarke that she needed him to bring diapers for K., and she kept calling back to see if Clarke was on his way yet. She "sounded very sweet and nice" on the phone, and when Clarke arrived at her house between 10:30 and 11:00 p.m., "everything was peaceful." They talked about possible names for the new baby,

and they did not discuss the custody hearing scheduled for Monday, two days later. There was no yelling, argument, or physical altercation.

They made love two or three times, with T.G. on top because her stomach was too big for Clarke to be on top. Clarke did not force T.G. to have sex with him. He noticed some scratches on her neck, which she said had been inflicted when she was robbed a few days earlier. He was not aware of any other marks on her neck or thighs, and he speculated, with respect to any injuries other than the scratches he saw, "I think she must have did it during the middle of the night because I didn't see those things until after I got arrested and was shown the pictures." He saw the knife that she kept in the bed, but he "moved it off the bed" and "put it on the dresser." He never held that knife or any other knife between her legs or against her skin on her neck, chest, thighs, or elsewhere.

After they had sex, Clarke fell asleep. He woke up later that morning when T.G. got up off the bed, but he then lay down again before hearing officers calling his name and telling him to come out of the house.

Clarke believed that T.G. had staged the evening's events and his arrest in order to thwart his efforts to obtain custody of K. and Clarke so informed the officers who arrested him. Clarke also testified that T.G. had falsely accused another man of rape, and that the man she accused is now serving a sentence of 25 years to life. Clarke further claimed that she had accused her estranged husband of being abusive toward her and had accused the father of another one of her children of raping her.

Clarke admitted that while incarcerated he sent T.G. some love letters. He also admitted having suffered a prior conviction for petty theft.

IV. Posttrial Proceedings

After being found guilty, Clarke retained new counsel and moved for new trial on numerous grounds, including that his trial counsel rendered ineffective assistance by failing to present medical expert testimony concerning T.G.'s wounds. In support of the motion, Clarke submitted declarations from two physicians. The physicians opined that

T.G.'s vaginal injury appeared to be a tear rather than a laceration, that it was "not consistent with a laceration made by a sharp object or a knife," that T.G.'s other injuries "were consistent with self-infliction and could have been easily self inflicted," and that the injuries "appear older than a few hours" and are "not consistent with injuries inflicted on the night of May 22, 2005." At the hearing on the motion, Clarke's trial counsel testified that he never consulted any medical doctors or other experts concerning T.G.'s injuries. Trial counsel gave the following reason for his decision not to consult an obstetrician and gynecologist: "The nature of the injuries seemed relatively obvious to me in terms of where they came from. They did not seem consistent with other types of cases I've handled where a tearing, for example, is an issue. And I didn't feel it was appropriate." As regards T.G.'s wounds generally, he gave the following reason for his decision not to consult any medical experts: "[The injuries] seemed to be consistent with what the victim was complaining of," and "[t]hey also seemed to be just as consistent and in [*sic*] Mr. Clarke's theory that they were self-inflicted."

The trial court denied Clarke's new trial motion, and Clarke timely appealed. Clarke also filed a simultaneous petition for writ of habeas corpus in this court, again arguing, inter alia, that trial counsel rendered ineffective assistance by failing to present medical expert testimony.

In response to the writ petition, we ordered the People to show cause in the superior court why relief should not be granted on Clarke's ineffective assistance claim based on the failure to present medical expert testimony concerning T.G.'s wounds, and we directed the superior court to conduct an evidentiary hearing on that claim. The court conducted the evidentiary hearing as ordered.

At the hearing, Clarke presented the testimony of two physicians, Dr. Paul Bronston and Dr. C. Paul Sinkhorn. Bronston practices emergency medicine, in which he is board certified, and has examined thousands of patients in his 20 years of medical practice. He reviewed T.G.'s medical records, the trial testimony and declaration of

Ireland (the physician's assistant who testified for the prosecution), the photographs Ireland took during his examination of T.G. on May 22, and the arrest report from Clarke's apprehension on the same day. Bronston testified that he has extensive training and experience concerning the different stages of wound healing and also concerning identification of self-inflicted wounds.

Defense counsel asked Bronston if, by looking at the photographs of T.G.'s wounds, he could gauge how old the wounds were when the photographs were taken on May 22. According to Bronston, all of the wounds appeared to be at least one day old, not "acute," which would be "within minutes to hours." Some lacerations on T.G.'s neck were "days to possibly a week or two" old. Other lacerations on her neck were in the third (of four) stages of healing and were "minimally a day, if not a couple days, old." Other lacerations on her neck "were at least a day old." The lacerations on her chest appeared to be "about a day or so" old. The laceration on her breast was "probably at least a day old." The lacerations on her inner thighs were "at least one to two days old." Overall, Bronston testified categorically that the photographs of T.G.'s wounds "are not consistent with" the wounds' having been inflicted on the night of May 22.[3]

Bronston further testified that the "basic characteristics" of self-inflicted wounds are that they tend to be parallel, superficial (that is, not very deep), and all the same depth. T.G.'s wounds met all three criteria, and, in his opinion, all of them were self-inflicted. ("[W]ithin medical probability based on my education and experience these are self inflicted." "[M]y expert opinion is these are self inflicted.") He also testified that all of the wounds were in locations "where it would be easy to self inflict these wounds," and "[t]hat also is consistent with self infliction."

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3 Bronston also testified that the term "abrasion" refers to what "a lay person would probably call a scrape where you rub off the skin." The term "laceration," in contrast, refers to "a cut," such as from "[a] sharp instrument."

Sinkhorn is a board-certified obstetrician and gynecologist who has been practicing for 28 years. In the course of his career he has examined "[m]any thousands" of women with vaginal injuries and has repaired "[t]housands" of vulvar and vaginal injuries, including lacerations. He testified that the only genital injury depicted in the photographs of T.G. was a "minor skin separation" on the posterior forchette. As shown in the photographs, the injury was in a location that was not visible until the examiner spread the labia. The injury was "very superficial, not associated with any bleeding, not deep and not linear." Sinkhorn testified that such an injury could be caused by vigorous wiping, by consensual or nonconsensual intercourse, or by the examination itself when the examiner was "spreading the tissue." In his opinion, the injury was not caused by a knife, because the injury was "exceptionally superficial" and "in a very protected area," so the person making the cut would have to use "just the tip of a knife" and make "a very, very careful, precise knife cut," after first "spreading the labia," while T.G. held "very still." At the same time, Sinkhorn did acknowledge that it was theoretically possible that such an injury could be caused by a knife.

Regarding the wounds on T.G.'s inner thighs, Sinkhorn testified that "in the few times" he has "seen patients with wounds from struggles," he has not "seen ones like these. In struggles usually the wounds are of varying depths and varying angles." He has "seen patients cut before during—cut or scratched during struggles and alleged sexual assaults," and those injuries were not similar to the injuries on T.G.'s inner thighs. He also testified that, because of the angle and location of T.G.'s wounds, it would be much easier for T.G. to self-inflict them than for someone else to inflict them.

The only witness presented by the prosecution was Ireland, the physician's assistant who examined and photographed T.G. on May 22, 2005, and who testified at trial. Ireland's testimony at the evidentiary hearing was to some extent merely a repetition of his trial testimony, and he acknowledged that he had "no independent recollection" of the case and that "everything" he was testifying to came "directly from" the report he had prepared when he examined T.G.

When shown a photograph of some wounds on T.G.'s neck, Ireland testified that one wound appeared to be older than another, because the more recent wound appeared "red" and "inflamed," which would indicate that it was not as old as the other one. He said that he "wouldn't speculate" as to whether the newer wound was "as old as one to three days." Ireland also testified that he saw "erythema," meaning "redness," around the injuries to T.G.'s breast, and believed that he had documented the erythema in his report. As regards the age of the breast injuries, he "wouldn't speculate as far as hours to days," but he said he would not "expect to see erythema or inflammation in a wound that was one to three days old." On cross-examination, however, Ireland admitted that his report said nothing about erythema.

The trial court denied Clarke's petition for writ of habeas corpus. Clarke then filed a new habeas petition in this court. We issued an order to show cause and ordered that the petition be considered concurrently with Clarke's still-pending appeal, and we now grant Clarke's motion to consolidate the writ proceeding (B228831) with the appeal (B203220).

DISCUSSION

In his present habeas petition, Clarke again argues that his trial counsel rendered ineffective assistance by failing to investigate the physical evidence and consult with medical experts, who then could have testified at trial. We agree and therefore grant the petition.

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. (E.g., *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [discussing federal constitutional rights]; *People v. Pope* [(1979)] 23 Cal.3d 412, 422 [discussing both state and federal constitutional rights].) The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. (See, e.g., *Strickland, supra*, at pp. 684-687; *Pope, supra*, 23 Cal.3d at pp. 423-425.)" (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

"Under this right, the defendant can reasonably expect that in the course of representation his counsel will undertake only those actions that a reasonably competent attorney would undertake. But he can also reasonably expect that before counsel undertakes to act at all he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation. [Citations.] If counsel fails to make such a decision, his action—no matter how unobjectionable in the abstract—is professionally deficient. [Citations.]" (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 215.)

To establish a claim of ineffective assistance of counsel the defendant must show that counsel's performance was deficient in that it "fell below an objective standard of reasonableness," evaluated "under prevailing professional norms." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 688; accord, *People v. Ledesma*, *supra*, 43 Cal.3d at p. 216.) If counsel's performance has been shown to be deficient, the defendant is entitled to relief only if he can also establish that he was prejudiced by counsel's dereliction. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 691-692; accord, *People v. Ledesma*, *supra*, 43 Cal.3d at p. 217.) In order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) As to these issues, the defendant bears the burden of proof by a preponderance of the evidence. (*People v. Ledesma*, *supra*, 43 Cal.3d at p. 218.)

I. Conduct Falling Below an Objective Standard of Reasonableness

Clarke argues that the testimony of medical experts like Bronston and Sinkhorn had the potential to undermine the prosecution's entire case, and that trial counsel therefore rendered ineffective assistance by failing to investigate and present such evidence concerning the cause and age of T.G.'s injuries. We agree.

From the police reports and his discussions with Clarke, trial counsel must have been aware at the outset that the prosecution's case rested almost entirely on T.G.'s

credibility. Counsel also must have known that, according to Clarke, T.G. was intent on preventing him from acquiring custody of their child. In addition, the police reports and discussions with Clarke must have made counsel aware that T.G. was the only witness to the alleged offenses and that no physical evidence directly corroborated her claims of the assaults with a knife on May 21-22, 2005. T.G. claimed Clarke inflicted the knife wounds during the sexual assault. Clarke claimed he did not cut T.G. with a knife, so he inferred that she must have inflicted the wounds herself. On the basis of that information, reasonably diligent counsel would have investigated to determine whether medical or other scientific evidence might reveal the age of the wounds and whether they were self-inflicted. Clarke's trial counsel, however, conducted no such investigation and consequently came to trial unequipped with any medical or scientific evidence to rebut T.G.'s version of the facts.

The testimony of Clarke's trial counsel at the hearing on the new trial motion provides no reasoned basis for his failure to investigate. Counsel's belief that it was "relatively obvious . . . where [T.G.'s vaginal injury] came from" does not justify his failure to investigate. Ireland, the physician's assistant who conducted the examination of T.G. and testified for the prosecution, was unable to offer an opinion as to the cause of the vaginal injury, so it was not reasonable for counsel to rely on his own assumptions about the cause of the injury instead of investigating and gathering evidence on the issue. And we now know that Sinkhorn, an obstetrician and gynecologist, expressed the opinion that the injury was *not* caused by a knife, though it could have been caused by consensual or nonconsensual intercourse, vigorous wiping, or even Ireland's examination. Trial counsel's further assumption that T.G.'s injuries were "consistent" with both T.G.'s version of the facts and Clarke's theory that the wounds were self-inflicted likewise does not justify counsel's failure to investigate. T.G.'s wounds were the only physical evidence in the case, and counsel had no reason not to investigate that evidence instead of relying on his own lay opinion that the evidence was consistent with all of the parties' theories. And we now know that

Bronston, a physician with extensive training and experience in identifying self-inflicted wounds, expressed the opinion that the wounds were self-inflicted and were *not* inflicted when T.G. claimed they were.

For these reasons, we conclude that the conduct of Clarke's trial counsel fell below an objective standard of reasonableness, because counsel failed to investigate, prepare, and make a reasoned and informed decision on defense strategy and tactics. (*Strickland v. Washington*, *supra*, 466 U.S. at pp. 690-691; *People v. Ledesma*, *supra*, 43 Cal.3d at p. 215). The People's written return to Clarke's petition for writ of habeas corpus contains no arguments to the contrary. Rather, the return argues that trial counsel's failure to investigate and present medical or other scientific evidence was not prejudicial. We thus turn to the second step of the test to determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," keeping in mind that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 694.)

II. Prejudice

The prosecution's case rested entirely on T.G.'s credibility. Her testimony was the only evidence linking her injuries to Clarke's alleged conduct, and there was no other evidence that Clarke committed the charged crimes.

Had Clarke's trial counsel reasonably investigated the physical evidence and consequently called medical experts like Bronston and Sinkhorn to testify at trial, their testimony would have substantially undermined T.G.'s credibility. In Bronston's expert opinion, T.G.'s wounds were not inflicted on the night of May 21-22, 2005, and they were inflicted by T.G. herself. Each of those opinions is flatly inconsistent with T.G.'s account of the events of that night; if either opinion is true, then T.G. would appear to have fabricated her story. Thus, if the jury had heard Bronston's testimony and believed at least one of Bronston's opinions, then the jury would have had good reason to reject T.G.'s testimony in its entirety and acquit Clarke on all counts. We therefore conclude

that Bronston's testimony by itself is sufficient to show that the result of the trial was unreliable and that there is a "reasonable probability that, absent [trial counsel's ineffective assistance], the factfinder would have had a reasonable doubt respecting guilt." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 695.)

Sinkhorn's testimony, though perhaps not sufficient on its own to warrant reversal, adds further to the showing of prejudice. In Sinkhorn's expert opinion, T.G.'s vaginal injury was not inflicted by a knife, and the wounds on her thighs did not appear to have been inflicted in a struggle. Both of those opinions appear to be inconsistent with T.G.'s account of her injuries: She testified that she "felt just burning . . . [i]t just burned" when Clarke allegedly held the tip of the knife at the entrance to her vagina, and she repeatedly testified that her wounds were inflicted while she struggled with Clarke (he cut her "[e]very time [she] tried to fight" and also cut her on the chest "when [she] was struggling"; "I got cuts from the—just from me struggling, like when I was fighting him off"). Sinkhorn's opinions conflict with all of that testimony, further casting doubt on T.G.'s honesty and the accuracy of her account.

This was a close case in that the physical evidence was equivocal and there was no eyewitness other than the victim, so the case turned entirely on the victim's credibility. Also, the jury requested readback of the entirety of T.G.'s and Clarke's testimony regarding the events of May 21-22, 2005, and asked that the 911 tape be replayed, further suggesting that the case was close. Medical evidence from witnesses like Bronston and Sinkhorn concerning the age and cause of T.G.'s injuries would have been highly probative of her credibility, which was the central issue in the case.

For these reasons, we conclude that defense counsel's deficient performance rendered the result of the trial unreliable and that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." (*Strickland v. Washington*, *supra*, 466 U.S. at p. 695.)

The contrary arguments in the written return to Clarke's petition are not persuasive. First, the return argues that Bronston's testimony concerning the age of

T.G.'s wounds would have harmed the defense because it would have contradicted Clarke's own testimony that T.G. self-inflicted the wounds on the night of May 21-22 after Clarke fell asleep. We disagree. Clarke merely *inferred* that T.G. self-inflicted the wounds after he fell asleep, because he saw no wounds other than the older ones on her neck. ("I think she must have did it during the middle of the night because I didn't see those things until after I got arrested and was shown the pictures.") If Clarke had had access to the medical evidence provided by Bronston, then he could reasonably have drawn a different inference, namely, that T.G. had self-inflicted the wounds ahead of time and he had failed to notice them.[4] Thus, the conflict between Bronston's testimony and Clarke's inference would not have harmed the defense. Rather, Bronston's testimony would have directly undermined T.G.'s credibility—if Bronston was right about the age of T.G.'s wounds, then T.G. was not telling the truth about what occurred on the night of May 21-22.

Second, the return argues that Bronston's testimony that the wounds were self-inflicted "would not have been nearly as helpful as petitioner suggests," because Bronston also testified that it was possible that the wounds were not self-inflicted. More precisely, the trial court asked Bronston the following question: "I want you to assume you have a woman that is afraid to move. I want you to assume that you have a man who desires for whatever reason to make these parallel linear cuts. [¶] Are these injuries consistent with that hypothetical?" Bronston answered, "Could be." We reject the return's argument that Bronston's answer rendered his other testimony less helpful to Clarke. Bronston's answer to the court's question had no such impact, because the

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4 The return also argues that it is implausible to suggest that Clarke might have failed to notice the wounds if they already existed. Clarke's trial testimony did not explore the issue, however, because, as a result of defense counsel's failure to investigate, Clarke was not then advocating the theory that T.G. had self-inflicted the wounds in advance. We have reviewed the photographs of T.G.'s wounds and conclude that, with the exception of the older cuts on T.G.'s neck which Clarke *did* notice, the character and location of T.G.'s other wounds leave open the possibility that Clarke may have failed to notice them, particularly depending upon the lighting, T.G.'s state of undress, and other possible factors. It is also worth noting in this regard that Bronston described all of the wounds as "superficial."

court's hypothetical is inconsistent with the testimony of T.G., who repeatedly testified that Clarke inflicted her wounds *while she struggled*. Bronston candidly admitted that he could not absolutely exclude every possible scenario in which the wounds might not have been self-inflicted ("in medicine we never say anything is absolutely or always"). But he unequivocally testified that in his expert opinion, based on extensive training and experience, T.G.'s wounds were self-inflicted. His reaction to the court's hypothetical question—a question that was unsupported by the evidence introduced at trial—does not undermine that opinion.

The return's arguments concerning Sinkhorn are similarly unavailing. Our prejudice analysis relies on just two points in Sinkhorn's testimony, namely, his opinion that T.G.'s vaginal injury was not caused by a knife and his testimony that her other wounds did not appear to have been inflicted in a struggle. The return points out that Sinkhorn admitted that it would be possible, under certain circumstances, for a vaginal injury like T.G.'s to be caused by a knife. As with Bronston, Sinkhorn's admission does not render his testimony unhelpful to Clarke. Sinkhorn testified that in his expert opinion, based on extensive training and experience, the injury was not caused by a knife. His admission that it was nonetheless theoretically possible to cause such an injury with a knife does not undermine that opinion. The remainder of the return's arguments concerning Sinkhorn are merely rebuttals of certain arguments of Clarke's on which we do not rely, so we need not address them.

For all of the foregoing reasons, we conclude that Clarke's petition is meritorious. His trial counsel's performance fell below an objective standard of reasonableness, and it is reasonably probable that, but for counsel's deficient performance, the result of the trial would have been more favorable to Clarke.

III. Substantial Evidence

Our resolution of the foregoing issues makes it unnecessary for us to address all but one of the arguments Clarke raises on appeal. Clarke argues that the convictions are

not supported by substantial evidence and that the charges should therefore be dismissed. We disagree.

"In reviewing the sufficiency of the evidence, we must determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We do not resolve "credibility issues" or "evidentiary conflicts," and the "testimony of a single witness is sufficient to support a conviction" unless "the testimony is physically impossible or inherently improbable." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) Viewing the evidence—principally T.G.'s testimony—in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the charged crimes beyond a reasonable doubt. T.G. testified that on May 19 Clarke assaulted her and attempted to dissuade her from participating in the mediation, and that on May 21-22 he raped her at knife point and committed the other charged offenses.

We therefore reject Clarke's argument that his convictions are not supported by substantial evidence.[5] We express no opinion on any of the other arguments Clarke raises on appeal.

DISPOSITION

With respect to the appeal in case number B203220, the judgment is affirmed. With respect to the petition for writ of habeas corpus in case number B228831, the petition is granted, and the judgment of the Los Angeles County Superior Court in *People v. Daniel Ricardo Clarke*, No. MA035466, is vacated in its entirety. Upon finality of this opinion, the Clerk of the Court of Appeal, Second Appellate District, shall remit a certified copy of this opinion and order to the Los Angeles County Superior Court for filing, and the Attorney General shall serve another copy thereof on

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5 Our conclusion that the evidence introduced at trial was sufficient to sustain the convictions is of course consistent with our conclusion that if Clarke's trial counsel had not rendered ineffective assistance, there is a reasonable probability that Clarke would have obtained a more favorable result.

the prosecuting attorney in conformity with Penal Code section 1382, subdivision (a)(2). (See *In re Jones* (1996) 13 Cal.4th 552, 588.)

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.