FIRST DISTRICT APPELLATE PROJECT

APPELLATE CLAIMS RELATED TO EXPERT TESTIMONY

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INTRODUCTION

Expert testimony plays a significant role in criminal, civil commitment, and juvenile cases and can often be the deciding factor in a case. This presentation provides an overview of the law concerning expert witnesses, highlights some common areas of litigation, and suggests ways to raise errors involving expert testimony on appeal.

OVERVIEW OF LAW RELATED TO EXPERT TESTIMONY

I. Expert vs. Lay Opinion

A. Expert Testimony

Expert opinion testimony is admissible when it relates "to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact" and is "[b]ased on matter … perceived by or personally known to the witness" that is of the type upon which experts reasonably rely. (Evid. Code, § 801.) Evidence Code section 801 only applies to expert testimony in the form of an opinion. (*People v. McDonald* (1984) 37 Cal.3d 351, 366.)

Expert testimony that provides helpful background information may be admissible even if the expert does not opine about the case. (Evid. Code, § 720; See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1301 [child sexual abuse accommodation syndrome admissible to explain victim behavior]; *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 [battered women's syndrome]; *McDonald*, 37 Cal.3d at 369 [eyewitness identification]; *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, 745-750 [chronic homelessness and violence]; *People v. Vu* (1991) 227 Cal.App.3d 810, 813-814 [effects of stress on perception].)

B. Lay Opinion Testimony

Lay opinion testimony is admissible only if the opinion is based on the witness's own perception and is "[h]elpful to a clear understanding" of the witness's testimony. (Evid. Code, § 800.) Unlike experts, lay witnesses cannot opine on matters requiring specialized knowledge.

Lay opinion has been allowed to identify a person from video or photographs (*People v. Leon* (2015) 61 Cal.4th 569, 600) and to explain the demeanor of

another (*People v. Sanchez* (2016) 63 Cal.4th 411, 456). Lay witnesses are also allowed to testify as to their own knowledge of their diseases, injuries, or physical condition. (*Behr v. Redmond* (2011) 193 Cal.App.4th 517, 528.)

II. Admissibility of Expert Testimony

A. Court's Role as Gatekeeper

The trial court acts as a gatekeeper to ensure all testimony meets standard admissibility criteria. (Evid. Code, §§ 402, 350-352.) The Evidence Code provides additional foundational requirements for expert testimony. These requirements include judicial review of the *qualifications* of the expert (Evid. Code, § 720); the *type* of matter on which the expert based the opinion (Evid. Code, § 801); and the *reasons* for the opinion (Evid. Code, § 802). (See *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771; *People v. Rodriguez* (2014) 58 Cal.4th 587, 638.)

Under sections 801 and 802, "the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or 3) speculative." (*Sargon*, 55 Cal.4th at pp. 771-772.)

1. Court Must Exclude Speculative or Irrelevant Expert Opinion

In simpler terms, the court's gatekeeper role is to exclude speculative or irrelevant expert opinion. (*Sargon,* 55 Cal.4th at p. 770; *In re Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 564; *People v. Wright* (2016) 4 Cal.App.5th 537, 545 ["'an expert's opinion based on assumptions of fact without evidentiary support…or on speculative or conjectural factors…has no evidentiary value…and may be excluded from evidence.'"]; *People v. Lucas* (2014) 60 Cal.4th 153, 226-227 [trial court properly excluded expert testimony where expert lacked personal experience with studies measuring reliability of handwriting comparison analysis].)

2. Court Must Not Intervene in Genuine Debates

However, "courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon,* 55 Cal.4th at p. 772*; Daubert v. Merrell Dow*

Pharmaceuticals, Inc. (1993) 509 U.S. 579, 595 [focus "must be solely on principles and methodology, not on the conclusions that they generate"].) A trial court errs when it intervenes in "genuine scientific debates." (*Cooper v. Takeda Pharmaceuticals America, Inc.* (2015) 239 Cal.App.4th 555, 592, citing *People v. Superior Court (Vidal)* (2007) 40 Cal.4th 999, 1014.) And when it weighs the probative value of the expert opinion "rather than merely excluding a clearly invalid and unreliable expert opinion." (*Garner v. BNSF Railway Co.* (2024) 98 Cal.App.5th 660, 677, 682.)

In *Cooper,* the trial court erred by excluding an expert's opinion after too deeply delving into the studies underlying the expert's opinion: "The flaws in the study methodologies were explored in detail through cross-examination and with the defense expert witnesses, and constituted evidence that went to the weight and not the admissibility of Dr. Smith's opinion testimony based on those studies. Those were matters for the jury to decide." (*Cooper*, 239 Cal.App.4th at p. 593; but see *People v. Azcona* (2020) 58 Cal.App.5th 504, 513 [existence of "significant criticism of the expert's methodology…should prompt a trial court to carefully examine what conclusions can reliably be drawn"].)

B. General Admissibility

Expert testimony is subject to the same evidentiary requirements of relevancy and prejudice as non-expert testimony. (Evid. Code, §§ 351, 352.) Expert testimony is relevant and admissible when it assists the factfinder by providing expertise or opinion "sufficiently beyond common experience." (Evid. Code, § 801.)

1. Expert Must Have Some Specialized Knowledge, but Expertise May Overlap with Jurors' Common Experience

If the subject matter of the testimony is a matter of common experience, the expert's testimony is inadmissible because it is not helpful to the factfinder. (See *People v. McDowell* (2012) 54 Cal.4th 395, 427 [defense expert excluded where jurors "could rely on their common sense" to assess the effect of the defendant's abusive childhood on his conduct as an adult].)

However, a jury does not have to be completely ignorant of the expert's subject matter for it to be admissible. (*People v. Brown* (2016) 245 Cal.App.4th 140, 159 [expert testimony "might improve upon or refine the jury's common fund of information"].) "The pertinent question in allowing

expert testimony and expert opinion is whether, even if the jurors have some knowledge of the subject matter, the testimony would assist them." (*People v. Tran* (2020) 50 Cal.App.5th 171, 186.) For example, testimony that "dispel[s] commonly held misconceptions or misguided common sense conclusions" assists the jury. (*People v. Sotelo-Urena,* 4 Cal.App.5th at p. 753, citing *Humphrey,* 13 Cal.4th at pp. 1086-1087.) Expert testimony should not be excluded unless the testimony would not assist the jurors or "would add nothing at all to the jury's common fund of information." (*Rodriguez*, 58 Cal.4th at p. 639.) Expert testimony may be admissible "even if parts of that testimony refer to matters within common knowledge." (*Ibid.*)

2. Expert Testimony Must Be Connected to Disputed Issue

Expert testimony may be inadmissible if it is not sufficiently connected to a disputed issue, even if the testimony is credible and the expert qualified. For example, in *People v. Yang* (2021) 67 Cal.App.5th 1, the trial court abused its discretion by allowing the prosecution to present expert testimony on postpartum mental disorders where there was insufficient evidence that the defendant suffered from such a disorder. "An expert's testimony must have some factual connection to the case in order to be relevant and helpful to the jury." (*Id.* at p. 33; see also *People v. Romero* (1999) 69 Cal.App.4th 846, 848 [expert testimony on sociology of poverty and Hispanic street fighter culture inadmissible as irrelevant to defendant's belief in the need to use force].)

3. Expert Testimony Subject to Probative Value/Undue Prejudice Analysis

A trial court's discretion to exclude evidence under Evidence Code, section 352 extends to expert testimony. (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) In *Richardson,* the trial court excluded the defendant's bathwater expert where the deceased victim was found in a bathtub. (*Id.* at p. 1007.) The Court found that the trial court did not err in finding that the probative value was substantially outweighed by undue prejudice as there were too many unknown variables which made the expert's opinion minimally probative. (*Id.* at pp. 1007-1009.)

C. Qualification as an Expert

A person is qualified to testify as an expert if the person has "special knowledge, skill, experience, training, or education sufficient to qualify" the person as an expert on the subject to which their testimony relates. (Evid. Code, § 720, subd. (a).) The trial court determines if the proposed witness

meets this requirement. (*Rodriguez,* 58 Cal.4th at p. 638.) Qualifications can be established through the witness's testimony or other admissible evidence. (Evid. Code, § 720, subd. (b).) Formal education or training is not required to establish expertise. (See *ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 296 [abuse of discretion where expert disqualified based on lack of formal education and membership in professional organizations].)

Process for Offering and Qualifying as an Expert

1. Proffer: The party offers the witness as an expert in a particular subject. If the opposing party objects to the proposed witness being qualified as an expert, the special qualifications of the proposed witness must be shown before they may testify as an expert. (Evid. Code, § 720, subd. (a).)
2. Voir Dire: Opposing counsel may challenge the qualifications through cross-examination. (Evid. Code, § 721.)
3. Court Ruling: The Court determines if a proper foundation has been laid to designate the witness as an expert in the particular subject. (Evid. Code, § 402.)

"'When a preliminary showing is made that the proposed witness has sufficient knowledge to qualify as an expert under the Evidence Code, questions about the depth or scope of his or her knowledge or experience go to the weight, not the admissibility, of the witness's testimony.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 327-328; *People v. Morales* (2020) 10 Cal.5th 76, 97.)

"'[E]ven when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise.' (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117.) As detailed below, the trial court "acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, 55 Cal.4th at pp. 771–772; see Evid. Code, § 801, subd. (b).)

D. Types of Matter Relied Upon

The trial court is permitted "to determine whether the matter [upon which the expert's opinion is based] is of a *type* on which an expert may reasonably rely." (*Sargon,* 55 Cal.4th at p. 770, original emphasis; Evid. Code, § 801, subd. (b).) Experts may rely on matter reasonably used in their field,

including scientific literature, databases, and personal observations. (See also Evid. Code, § 801.) Two types of matter upon which experts rely—novel scientific methods and hearsay—are discussed below.

1. Novel Scientific Methods (*People v. Kelly* (1976) 17 Cal.3d 24)

In California, the admissibility of new scientific techniques is governed by the *Kelly* test as set forth in *People v. Kelly* (1976) 17 Cal.3d 24. "[T]he purpose of the *Kelly* test 'is to protect against the risk of credulous juries attributing to evidence cloaked in scientific terminology an aura of infallibility.'" (*People v. Alvarez* (2025) 18 Cal.5th 387, citing *People v. Peterson,* (2020) 10 Cal.5th 409, 444; see also *Lucas*, 60 Cal.4th at p. 223 [purpose of *Kelly* test is to "protect the jury from techniques which convey a misleading aura of certainty"].)

The *Kelly* test has three prongs: 1) The new scientific method must be shown to be reliable; 2) the witness testifying must be properly qualified as an expert to give an opinion on the subject; and 3) the proponent of the evidence must show that the correct scientific procedures were used in the case. (*Kelly,* 17 Cal.3d at p. 30.)

Not every subject of expert testimony must satisfy the *Kelly* test. Instead, the test applies to expert testimony that is "based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law." (*Peterson,* 10 Cal.5th at p. 444, citing *Jackson*, 1 Cal.5th at p. 316.) The California Supreme Court has explained that "there is no clear definition of science under this test." (*Lucas,* 60 Cal.4th at p. 223; *People v. Stoll* (1989) 49 Cal.3d 1136, 1155.) Instead, trial courts determining whether *Kelly* applies should "consider whether the technique is one whose reliability would be difficult for laypersons to evaluate." (*Peterson,* 60 Cal.4th at p. 444.)

> The danger of a false aura of certainty is acute where the technique or procedure appears in both name and description to provide some definitive truth which the expert need only accurately recognize and relay to the jury, such that a lay jury might treat the procedure as objective and infallible. The analysis is designed to address scientific evidence or technology that is so foreign to everyday experience as to be unusually difficult for laypersons to evaluate.

> In contrast, when an expert's methods are based on everyday processes of observation and analysis, we trust jurors to rely on their own common sense and good judgment in evaluating the weight of the evidence presented to them.

(*Lucas*, 60 Cal. 4th at p. 224, citations omitted; see also *McDonald,* 37 Cal.3d at pp. 372-373*; In re O.D.* (2013) 221 Cal.App.4th 1001, 1007 [noting that "fingerprint, shoe track, bite mark, or ballistic comparisons" are not subject to *Kelly* because they are based on visual comparisons]; *Stoll*, 49 Cal.3d at p. 1155 [*Kelly* does not apply to psychology expert's testimony]; *Peterson*, 10 Cal.5th at p. 444 [dog trailing evidence not subject to *Kelly* test].)

Once the court decides that the proffered expert testimony relates to the "use of novel scientific methods or techniques [], the proponent of the evidence must demonstrate the technique's reliability" for the testimony to be admissible. (*Peterson,* 10 Cal.5th at p. 444.) As to this first prong of the *Kelly* test, "[t]he technique's reliability [] depends on a showing that it has achieved general acceptance among practitioners in the relevant field." (*Ibid*.) But note that the *Kelly* test must be reapplied where "new evidence is presented reflecting a change in the attitude of the scientific community." (*In re O.D.,* 221 Cal.App.4th at p. 1008.) In that case, the "burden shifts to the opposing party to produce new evidence showing" that the scientific community no longer accepts the technique. (*Azcona*, 58 Cal.App.5th at p. 511.)

The second prong of *Kelly* requires that the witness testifying must be properly qualified as an expert to give an opinion on the subject. (*Kelly,* 17 Cal.3d at p. 30; See Qualification as an Expert II.C., ante.)

The third prong of *Kelly* requires that the "proponent of the evidence [] demonstrate that correct scientific procedures were used in the particular case." (*People v. Buell* (2017) 16 Cal.App.5th 682, 690.) This is a case-specific inquiry, and evidence based on valid scientific procedures and techniques must be excluded if those procedures were not followed. For example, in *People v. Venegas* (1998) 18 Cal.4th 47, 54, the Court held that DNA evidence was improperly admitted where law enforcement's implementation of scientific procedures was "defective."

Once a trial court has admitted evidence based on a new scientific technique and the decision is affirmed on appeal in a published opinion, that decision will become precedent controlling the admissibility of this type of scientific evidence in subsequent trials. (*Kelly*, 17 Cal.3d at p. 32.)

2. Hearsay (*People v. Sanchez* (2016) 63 Cal.4th 665)

An expert may explain the basis for their opinion. (Evid. Code, § 802.) Prior to 2016, experts were allowed wide latitude to testify to hearsay in the context of explaining their expert opinions. This included general hearsay, such as scientific studies and background information about the expert's area of knowledge, and case-specific hearsay, such as witness statements, police reports, and psychological reports. Although an expert could not present case-specific hearsay for its truth, an expert could explain the "facts" relied on to reach their opinion; such evidence was subject to a limiting instruction. (*People v. Sanchez* (2016) 63 Cal.4th 665, 676-679 [explaining common law and statutory treatment of hearsay and expert opinion].)

In *People v. Sanchez,* 63 Cal.4th 665, the California Supreme Court clarified that experts cannot relay case-specific hearsay to the jury in the guise of explaining the basis for the expert's opinion. The Court recognized that when "an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay." (*Id.* at p. 684.) Such testimony violates state evidentiary law unless the statements are independently proven or the hearsay falls under an exception. (*Id.* at p. 686.) In criminal cases, admission of case-specific hearsay may also violate the Confrontation Clause. (*Ibid*.)

Sanchez reshaped the law on expert testimony, particularly for gang experts relying on police reports or informant statements and mental health experts relying on previous reports and records. (See *People v. Perez* (2020) 9 Cal.5th 1 5-7 [noting *Sanchez*'s significant change to the law, including detailed explanation of *People v. Gardeley* (1996) 14 Cal.4th 605 and pre-*Sanchez* rules].) Pre-*Sanchez,* such hearsay was often admitted via expert testimony; post-*Sanchez*, expert testimony requires careful scrutiny for hearsay violations. Further, reliance on hearsay may impact the sufficiency of the evidence analysis as well as admissibility. (See *People v. G.A.* (2023) 93 Cal.App.5th 1126, 1138 [in assessing whether the expert's opinion "provided substantial evidence," court considered expert's "reliance on hearsay in forming his opinion"].)

Sanchez applies to civil commitment proceedings as well as criminal proceedings. (*People v. Jeffrey G.* (2017) 13 Cal.App.5th 501, 504; *Conservatorship of K.W.* (2017) 13 Cal.App.5th 1274, 1282.) However, where proceedings do not implicate the right to confront witnesses under the Sixth

Amendment, that part of *Sanchez* does not apply, and admissibility is analyzed under state law or due process principles only. (See *People v. Bona* (2017) 15 Cal.App.5th 511, 520; see also *J.H. v. Superior Court* (2018) 20 Cal.App.5th 530, 533 [application of *Sanchez* in dependency context].)

Non-case-specific hearsay, like general scientific or medical research or industry standards, is still admissible if relied upon by experts in the field. For example, in *People v. Veamatahau* (2020) 9 Cal.5th 16, the Court found that an expert did not rely on case-specific hearsay when the expert testified that he identified pills possessed by the defendant by comparing the visual characteristics of the pills seized against a database containing descriptions of pharmaceuticals. The expert testified that this procedure was "the generally accepted method of testing for this kind of substance in the scientific community." (*Veamatahau*, 9 Cal.5th at p. 22.)

Even before *Sanchez,* experts have not been permitted to testify to multiple levels of hearsay and the conclusions of other, non-testifying experts. (*People v. Campos* (1995) 32 Cal.App.4th 304, 308 ["An expert witness may not, on direct examination, reveal the content of reports prepared or opinions expressed by non-testifying experts," as "[t]he opportunity of cross-examining the other doctors as to the basis for their opinion, etc., is denied the party as to whom the testimony is adverse"]; *Azcona,* 58 Cal.App.5th at p. 514 [expert improperly told jury that another expert approved his findings].) *Sanchez* reinforced this prohibition on multiple layers of hearsay.

Post-*Sanchez*, courts have clarified the prohibition against expert testimony based on case-specific hearsay in a variety of contexts:

- *People v. Valencia* (2021) 11 Cal.5th 818: Gang expert improperly testified to predicate offenses where expert's knowledge of the offenses was based on police reports and conversations with law enforcement.
- *People v. Cardenas* (S151493, Sept. 5, 2025) 574 P.3d.680: *Sanchez* violation where gang expert relied on police reports and field interview cards to establish gang membership and predicate offenses.
- *People v. Navarro* (2021) 12 Cal.5th 285: Gang expert's opinion that perpetrators of crimes were associated with a specific gang impermissible where opinion was based on review of law enforcement documents.

- *People v. Turner* (2020) 10 Cal.5th 786: Expert on fetal viability improperly related observations made by the non-testifying medical examiner and recorded in the autopsy report and "represented that those facts bolstered her opinion."
- *People v. Presley* (2021) 65 Cal.App.5th 1131: Trial court did not err by hearing case-specific hearsay at court trial, where it is presumed that court properly applied *Sanchez* and disregarded inadmissible material.
- *People v. Camacho* (2022) 14 Cal.5th 77: Officer's testimony that defendant possessed drugs for sale based on another officer's communication that a scale was found in the defendant's car was inadmissible.
- *People v. McVey* (2018) 24 Cal.App.5th 405: Proposed defense expert's testimony properly excluded where it was based on medical records and police reports showing the victim had schizophrenia and was aggressive towards police.
- *Conservatorship of S.A.* (2018) 25 Cal.App.5th 438: In LPS conservatorship proceeding, redacted medical records were admissible under the business records exception to the hearsay rule, and the expert properly testified to the contents of the records. (See also newly amended Welf. & Inst. Code, § 5122.)
- *People v. Lund* (2021) 64 Cal.App.5th 1119: Expert testimony based on Child Protective Services' database of hash values and comparison with files found on defendant's hard drives did not violate *Sanchez* because the hash values were not admitted for their truth.

E. Consideration of the Reasons for the Expert Opinion

Before an expert testifies to their opinion, the court may require the witness "be first examined concerning the matter upon which his opinion is based." (Evid. Code, § 802). As to section 802, the Court in *Sargon* explained:

> This section indicates the court may inquire into the expert's reasons for an opinion. It expressly permits the court to examine experts concerning the matter on which they base their opinion before admitting their testimony. The *reasons* for the experts' opinions are part of the matter on which they are based just as is the *type* of matter. Evidence Code section 801 governs judicial

> review of the *type* of matter; Evidence Code section 802 governs judicial review of the *reasons* for the opinion. 'The stark contrast between the wording of the two statutes strongly suggests that although under section 801(b) the judge may consider only the acceptability of the generic type of information the expert relies on, the judge is not so limited under section 802.'

(*Sargon,* 55 Cal.4th at p. 771.) Thus, when considering the admissibility of expert testimony, the court may inquire into whether the material on which the expert relies actually supports the expert's reasoning and is reliable. (*Ibid.*; *People v. Nieves* (2021) 11 Cal.5th 404, 440 [court properly excluded expert testimony regarding "hearsay it found unreliable, such as defendant's postarrest statements"].)

The following cases illustrate how the material on which the expert relied failed to support the expert's reasoning:

- *People v. Azcona* (2020) 58 Cal.App.5th 504: The trial court erred by admitting expert opinion that the matching marks on bullet casings recovered from two crime scenes showed they were fired from the same gun, "to the practical exclusion of all other guns." The expert based this opinion on having "done numerous studies on the subject trying to see what can happen by random chance." Although there was evidence the casings likely came from the same gun, there was no basis to present this as a scientific certainty. Thus, the expert's conclusion was "a leap too far from what the underlying method allowed."

- *People v. Wright* (2016) 4 Cal.App.5th 537: In an SVP proceeding, the trial court erred by admitting expert opinion that the defendant had "paraphilia not otherwise specified, hebephilia." The Court found that this diagnosis was unsupported as there was "simply too great an analytical gap" between the data and the expert's opinion.

III. Scope of Expert Testimony

A. Expert May Not Testify Beyond Expertise

The scope of an expert's testimony is, naturally, limited by the nature of their expertise. General expertise does not suffice if specific expertise is required. For instance, in *People v. Lara* (2025) 112 Cal.App.5th 1090, the Court found

that although the doctor had generalized expertise as a psychologist, the doctor was not qualified to testify whether the appellant was developmentally disabled for purposes of incompetency under section 1370.1. (*Id.* at pp. 1104-1107.)

Similarly, in *People v. Hogan* (1982) 31 Cal.3d 815*,* the Court found that although the criminalist was undoubtedly qualified to testify about whether the stains on the defendant's clothing were blood and the blood typing of the stains, the criminalist did not have the expertise to determine whether the stains were deposited by "spatters" or "wipes." (*Id.* at pp. 851-853.)

B. Expert May Testify to Ultimate Issue but May Not Supplant the Jury or Opine on Credibility

1. Testimony on Ultimate Issue Allowed

Expert opinion is not objectionable on the basis that it embraces the ultimate issue to be decided by the trier of fact. (Evid. Code, § 805.)

An opinion may be received on a "simple ultimate issue, even when it is the sole one" (e.g. sanity, value) "because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in." (*People v. Lowe* (2012) 211 Cal.App.4th 678, 684, citing *People v. Wilson* (1944) 25 Cal.2d 341, 349 [in SVP trial, expert opinion on why individual meets statutory criteria may be admissible]; *Conservatorship of Torres* (1986) 180 Cal.App.3d 1159, 1163 [in LPS conservatorship trial, expert may testify to individual's inability to meet basic needs due to mental disorder].)

2. Testimony on Guilt or Credibility Not Allowed

Expert opinion cannot invade the jury's role in deciding the case. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183 ["when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them"].) Thus, expert opinion testimony expressing a "general belief" about guilt or credibility is inadmissible. (*Lowe*, 211 Cal.App.4th at p. 684; *People v. Torres* (1995) 33 Cal.App.4th 37, 47-48 [testimony that offenses constituted robberies inadmissible].) Likewise, an opinion based on the same evidence heard by the jury "usurp[s]" the jury's role. (*People v. Rouston* (2024) 99 Cal.App.5th 997, 1012 [officer's opinion that defendant fired a particular shot inadmissible where it was based on viewing video evidence admitted at trial and did not require special expertise].)

Testimony that "has the effect" of vouching for the credibility of a witness is also inadmissible. In *People v. Wilson* (2019) 33 Cal.App.5th 559, the court held that expert testimony about studies of the veracity of children who report sexual abuse was improper because it suggested "to the jury that there was an overwhelming likelihood" the complaining witnesses were truthful. (*Id.* at p. 570.) The court also pointed out that such evidence is not helpful because "it tells the jury nothing about whether *this particular allegation* is false." (*Id.* at p. 571; see also *People v. Lapenias* (2021) 67 Cal.App.5th 162, 176 [CSAAS expert's opinion that it is "rare for children to make false claims of sexual abuse" went beyond permissible scope of his testimony].)

Testimony that functions as vouching must be distinguished from expert testimony that "help[s] the jury assess [witness] credibility," which may be admissible, particularly if it "dispel[s] [] common myths and misconceptions." (*People v. Sedeno* (2023) 88 Cal.App.5th 474, 481 [CSAAS expert testimony on statistics of child sex abuse cases involving perpetrator known to the victim and delayed disclosure admissible]; *McAlpin*, 53 Cal.3d at p. 1299 [child sexual abuse accommodation]; *McDonald*, 37 Cal.3d at p. 355 [eyewitness identification].)

C. Mental State Testimony is Strictly Limited.

1. Testimony on Mental State or Capacity to Form Mental State Not Allowed

In criminal cases, expert testimony on the defendant's mental state and/or capacity to form a mental state is strictly limited. Penal Code, section 28 prohibits expert testimony at the guilt phase as to whether the defendant had the capacity to form a mental state due to mental disorder. (*Nieves*, 11 Cal.5th at p. 441; *People v. Nunn* (1996) 50 Cal.App.4th 1357, 1363.)

Penal Code, section 29 prohibits an expert in a criminal case from opining on whether the defendant, due to mental disorder, had the requisite mental state. (See *People v. Rangel* (1992) 11 Cal.App.4th 291; *People v. San Nicolas* (2004) 34 Cal.4th 614; *People v. Clotfelter* (2021) 65 Cal.App.5th 30, 58 [error to allow prosecution expert to testify that defendant's interactions with a child were "motivated by an . . . abnormal sexual interest" and that he experienced sexual interest in children].) Nor may an expert answer hypothetical questions that are the "functional equivalent" of testimony concerning mental state. (*People v. Bordelon* (2008) 162 Cal.App.4th 1311, 1327; *Nunn*, 50 Cal.App.4th at p. 1364 ["expert may not evade the

restrictions of section 29 by couching an opinion in words which are or would be taken as synonyms for the mental states involved"].)

2. Testimony on Mental Condition and Possible Effects of That Condition Allowed

An expert may provide testimony about the defendant that leads to an inference about the defendant's mental state. "[S]ections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged." (*People v. Herrera* (2016) 247 Cal.App.4th 467, 476, citing *People v. Cortes* (2011) 192 Cal.App.4th 873, 908; see also *People v. Coddington* (2000) 23 Cal.4th 529, 582-583 [opinion that a "form of mental illness can lead to impulsive behavior is relevant" and admissible]; *Sotelo-Urena*, 4 Cal.App.5th 732, 745-750 [chronic homelessness and violence relevant to defendant's belief in the need to use force].)

These prohibitions do not apply to civil commitment cases, where the permissible scope of expert testimony as to mental state is broader. (See, e.g., *Lowe*, 211 Cal.App.4th 678, 684 [SVP trial]; *People v. Bennett* (1982) 131 Cal.App.3d 488, 496-497 [NGI commitment proceedings].)

D. Hypothetical Questions Must Accord with the Evidence, and Experiments Must be Conducted Under Circumstances Substantially Similar to the Original

1. Hypothetical Questions

Experts may opine based on hypothetical questions mirroring case facts, provided they are rooted in evidence. (*People v. Vang* (2011) 52 Cal.4th 1038, 1045-1046.) However, an opinion based on hypothetical facts is inadmissible in the absence of "any foundation for concluding those assumed facts exist in the case before the jury." (*Jennings*, 114 Cal.App.4th at p. 1117.)

When an expert testifies in response to hypothetical questions, the jury must be appropriately instructed. CALCRIM 332 provides: "An expert witness may be asked a hypothetical question. A *hypothetical question* asks the witness to assume certain facts are true and to give an opinion based on the assumed facts. It is up to you to decide whether an assumed fact has been proved. If

you conclude that an assumed fact is not true, consider the effect of the expert's reliance on that fact in evaluating the expert's opinion."

In *Vang*, the Court found that although the gang expert officer could not testify directly whether the defendants committed the assault for gang purposes, he could properly express an opinion, based on hypothetical questions that tracked the evidence, whether the assault, if the jury found it in fact occurred, would have been for a gang purpose. (*Vang*, 52 Cal.4th at p. 1048.) However, a hypothetical may not be used as cover for an expert improperly opining on the real defendant's subjective knowledge and intent. (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658.)

2. Experiments

If relevant, experimental evidence is admissible when the party offering it establishes "that it was conducted under conditions substantially similar to the original occurrence tested" and "that presenting the evidence of the experiment will not consume undue time, confuse the issues, or mislead the trier of fact." (*Lucas*, 60 Cal.4th at p. 228; *Jackson*, 1 Cal.5th. at pp. 342-343 [not necessary that the conditions of the experiment be "identical" to the original occurrence].) In *People v. Jones* (2011) 51 Cal.4th 346, 375-376, the trial court properly excluded video evidence purporting to show the amount of natural light available because the lighting conditions were not sufficiently similar to the original conditions and because video recordings do not accurately reflect the abilities of the naked eye.

Permissible cross-examination may include in-court experiments or challenges to the expert's conclusion, but those questions are subject to the limitations on experimental evidence. (*Lucas,* 60 Cal.4th at p. 228.)

IV. Factfinder Must Independently Evaluate the Expert's Opinion and Reasoning.

A. Factfinder May Reject Expert's Opinion

The jury (or trial court) does not have to accept an expert's opinion, even if it is uncontradicted. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1231-1232*; In re J.S.* (2024) 105 Cal.App.5th 205, 212-213; see also CALCRIM 332 (Expert Witness Testimony).)

> The *fact finder* determines the facts, not the experts. Indeed, the fact finder may reject even a unanimity of expert opinion. To hold otherwise would be in effect to substitute a trial by "experts" for a trial by jury.... The chief value of an expert's testimony ... rests upon the *material* from which his opinion is fashioned and the *reasoning* by which he progresses from his material to his conclusion. Although experts may testify about their opinions, the fact finder decides what weight to give those opinions. This is especially important when the witnesses are not neutral court-appointed experts but experts hired by a party specifically seeking evidence supporting that party's position.

(*In re Scott* (2003) 29 Cal.4th 783, 823, citations omitted.) In *People v. Sword* (1994) 29 Cal.App.4th 614, the Court of Appeal found that the trial court did not abuse its discretion in denying a recommendation for outpatient status unanimously supported by four experts even though the prosecution presented no expert testimony that the individual was dangerous. The "reasons stated by the trial court were legitimate concerns resulting from a thorough review" of the evidence, as the experts had not adequately considered certain factors. (*Id*. at p. 630.)

Likewise, in the cases of conflicting experts, "it generally is not an abuse of discretion for the trial court [factfinder] to give more credit to one expert's opinion than to another's." (*People v. Oneal* (2021) 64 Cal. App. 5th 581, 592–593, citing *People v. Venghiattis* (1986) 185 Cal.App.3d 326, 333.)

B. Rejection of Expert's Opinion May Not Be Arbitrary

Although the finder of fact may reject an expert opinion, the rejection of the uncontroverted expert opinion must not be "arbitrary." (*Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509.) In the following cases, rejection of unanimous expert opinion was found arbitrary:

- *People v. Cross* (2005) 127 Cal.App.4th 63: The Court of Appeal reversed the trial court's denial of outpatient status for an NGI committee where the experts recommended conditional release and "the record [] case revealed no reasons to doubt the adequacy of the experts' knowledge regarding appellant's history or status." (*Id.* at p. 74.) The appellate court noted that no "particular areas of deficiency" were identified by the trial court. (*Ibid.*) "In summary, the factors cited by the trial court in denying appellant's application either are not supported by the record or

are inadequate. They do not constitute nonarbitrary reasons for denying the application based upon the unanimous recommendations of appellant's treatment team." (*Id*. at p. 75.)

- *People v. Duckett* (1984) 162 Cal. App. 3d 1115: The "evidence of appellant's insanity was of such weight and character that a jury could not reasonably reject it." (*Id.* at p. 1120.) "The record of the sanity phase demonstrates that the jury here failed to give great weight to the unanimous expert opinion that appellant was insane. . . . Here there were no circumstances present that would have permitted the jury to reject the expert opinion." (*Id*. at p. 1123.)
- *People v. Samuel* (1981) 29 Cal.3d 489: The Court held that a jury could not reasonably have rejected "persuasive and virtually uncontradicted" evidence proving defendant's incompetence to stand trial and set aside the jury's finding of competence. (*Id.* at p. 493.)

CHALLENGING THE ADMISSION OR EXCLUSION OF EXPERT TESTIMONY ON APPEAL

I. Sufficiency of Evidence

A claim on appeal that the evidence was insufficient in the trial court may require close examination of the expert's testimony and the basis for the expert's opinion.

> [A] conclusion expressed by an expert cannot provide by itself substantial evidence to support a finding unless the basis for the expert's conclusion is itself supported by substantial evidence. Our substantial evidence review must include a critical examination of the material upon which the experts based their conclusions in order to determine whether that material provides substantial support for those conclusions.

(*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 83, citations omitted.)

"[W]hen an expert bases his or her conclusion on factors that are speculative, remote or conjectural, or on assumptions not supported by the record, the expert's opinion cannot rise to the dignity of substantial evidence and a

judgment based solely on that opinion must be reversed for lack of substantial evidence." (*Wright*, 4 Cal.App.5th at p. 545, citations omitted; *Atkins v. City of Los Angeles* (2017) 8 Cal.App.5th 696, 740-742; *Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135 ["The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed."]; *Kennemur v. State of California* (1982) 133 Cal.App.3d 907, 923 ["Like a house built on sand, the expert's opinion is no better than the facts on which it is based."].)

The fact that an expert is qualified does not necessarily mean that their opinion constitutes substantial evidence. For example, in *In re M.S.* (2021) 70 Cal.App.5th 728, a police officer's opinion that an item was a stun gun was insufficient to support the adjudication. Although the officer had the requisite training and expertise, he did not have relevant information about the item and did not explain the reasoning behind his opinion. The officer "failed to provide any evidentiary support for his opinion." (*Id.* at p. 733, citing *People v. Ochoa* (2009) 179 Cal.App.4th 650, 663.)

In the following cases, the expert's opinion did not constitute substantial evidence because it was unsupported by the evidence:

- *People v. Johnson* (2020) 55 Cal.App.5th 96: The expert's opinion did not constitute substantial evidence of dangerousness where the opinion predicting the individual would act out dangerously if unmedicated contradicted the evidence of the individual's behavior when previously unmedicated. (*Id.* at pp. 108-109.)
- *J.N. v. Superior Court* (2018) 23 Cal.App.5th 706: Probation officer's conclusion that minor was unsuitable for rehabilitation in the juvenile justice system was not supported by substantial evidence. "Here, the prosecution did not present any expert testimony concerning the programs available, the duration of any of the programs, or whether attendance would rehabilitate J.N. before termination of the juvenile court's jurisdiction. There was no evidence that demonstrated existing programs were unlikely to result in J.N.'s rehabilitation, why they were unlikely to work in this case, or that they would take more than three years to accomplish the task of rehabilitating J.N." (*Id.* at p. 722.)
- *In re Frank S.* (2006) 141 Cal.App.4th 1192: Insufficient evidence of gang-related purpose where "prosecution presented no evidence other than the expert's opinion regarding gangs in general and the expert's improper opinion on the ultimate issue." (*Id.* at p. 1199.)

- *In re Anthony C.* (2006) 138 Cal.App.4th 1493: Insufficient evidence of NGI committee's serious difficulty controlling his behavior where the expert's opinion appeared to be based on "guesswork" rather than facts.
- *People v. G.A.* (2023) 93 Cal.App.5th 1126: In civil commitment proceeding, expert opinion on current dangerousness was unsupported where expert relied on "factual assumptions he made after reviewing unspecified documents" and prosecution did not "identify or present the documents in question." (*Id.* at p. 1139.)
- *People v. Barnes* (2024) 107 Cal.App.5th 560: The trial court erred by admitting expert opinion that the offense was retaliatory (and thus gang-related) where there was no foundation for the opinion. The evidence that could have formed the basis of the opinion was not admitted following defense counsel's objection.
- *In re Alexander L.* (2007) 149 Cal.App.4th 605: Expert's opinion that a group constituted a gang lacked foundation where the expert testified that he "knew that the gang had been involved in certain crimes." (*Id.* at p. 612.) But "[n]o specifics were elicited as to the circumstances of these crimes, or where, when, or how Lang had obtained the information. He did not directly testify that criminal activities constituted Varrio Viejo's primary activities." (*Ibid.*)
- *People v. Perez* (2017) 18 Cal.App.5th 598: Expert's opinion that defendant shot a gun at a party with the specific intent to promote, further, or assist gang members was "unsubstantiated" where the evidence showed only that the defendant had one nonvisible gang tattoo. (*Id.* at pp. 613-614.)

II. Erroneous Admission of Expert Testimony

Claims that the expert was unqualified, testified beyond the scope of their expertise, or otherwise testified to inadmissible evidence are reviewed on appeal in accordance with general evidentiary principles.

Admission of expert testimony is reviewed for abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 131.) "Where a witness has disclosed sufficient knowledge of the subject to entitle his opinion to go to the jury, the question of the degree of his knowledge goes more to the weight of the evidence than its admissibility." (*People v. Eubanks* (2011) 53 Cal.4th 110, 140, citing *People v. Bolin* (1998) 18 Cal.4th 297, 321-322.) It is "not the role of [the appellate]

court to redetermine the credibility of experts or to reweigh the relative strength of their conclusions." (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1514.) However, error will be found if "the evidence shows that a witness *clearly lacks* qualification as an expert." (*People v. Tuggle* (2012) 203 Cal.App.4th 1071, 1079.)

A claim that expert testimony was improperly admitted is generally forfeited on appeal if no objection was made in the trial court. If the improper expert testimony was not objected to in the trial court, it may be raised via a claim that trial counsel provided constitutionally ineffective assistance of counsel. (See *People v. Julian* (2019) 34 Cal.App.5th 878, 888 [failure to object to inadmissible statistical evidence by CSAAS expert that "tipped the scales in favor of" the prosecution].)

The standard of prejudice for the erroneous admission of expert testimony depends on whether the error violated the appellant's federal constitutional rights or is a violation of state evidentiary law. If it constituted a violation of state law only, reversal is required if it is reasonably probable that a more favorable result would have been reached in the absence of the error. (*People v. Prieto* (2003) 30 Cal.4th 226, 247, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) However, admission of testimonial hearsay in violation of the Confrontation Clause, or intruding on the province of the jury in violation of Due Process, are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Capistrano* (2014) 59 Cal.4th 830, 873; *Sanchez*, 63 Cal.4th at pp. 449-450.)

III. Erroneous Exclusion of Defense Expert Testimony

The erroneous exclusion of a proffered defense expert may, in theory, constitute a violation of constitutional principles if the expert's testimony is "so vital to the defense that due process require[s] its admission." (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) "[E]videntiary error amounting to a complete preclusion of a defense violates a defendant's federal constitutional right to present a defense." (*People v. Bacon* (2010) 50 Cal.4th 1082, 1104, fn. 4.)

However, exclusion of a defense expert is typically analyzed as a potential state law error because of the broad discretion over evidentiary rulings afforded to trial courts. "Although a defendant has the general right to offer a defense through the testimony of his or her witnesses, a state court's application of ordinary rules of evidence—including the rule stated in

Evidence Code section 352—generally does not infringe upon this right." (*People v. Linton* (2013) 56 Cal.4th 1146, 1183; see also *Garcia*, 28 Cal.App.5th at pp. 970-971 [noting application of *Watson* standard to claim of erroneous exclusion of expert testimony]; *Sotelo-Urena*, 4 Cal.App.5th at p. 756.)

It is not an abuse of discretion or denial of due process to exclude defense expert testimony that is irrelevant, speculative, or confusing. (*People v. Cornwell* (2005) 37 Cal.4th 50, 80-82; *Linton*, 56 Cal.4th at p. 1183; *People v. Sanchez* (2019) 7 Cal.5th 14, 46-47.)

A court does abuse its discretion when it excludes relevant, admissible testimony from a qualified defense expert. (*McDonald*, 37 Cal.3d at p. 376 [eyewitness identification expert]; *Stoll*, 49 Cal.3d at p. 1154 [psychologist's assessment of defendant as character evidence]; *People v. Caparaz* (2022) 80 Cal.App.5th 669, 680 [error to limit defense expert's testimony to general explanation of false confessions where expert administered assessments to defendant and found him highly suggestible].) Expert testimony should be "excluded only when it would add nothing at all to the jury's common fund of information." (*McDonald*, 37 Cal.3d at p. 367.)