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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
REYNALDO GUZMAN,  
  
Defendant and Appellant.

C065525  
  
(Super. Ct. No.  
09F07253)

After a jury convicted defendant Reynaldo Guzman of forcible rape (Pen. Code, § 261 subd. (a)(2)),<sup>1</sup> the trial court sentenced him to the upper term of eight years in prison. Defendant contends on appeal that (1) the trial court prejudicially restricted his cross-examination of the rape victim, and (2) he was deprived of a fair trial due to

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

prosecutorial misconduct during closing arguments. Defendant fails to establish that any prejudicial error occurred at trial. Accordingly, we will affirm the judgment.

#### BACKGROUND

The victim, A.A., testified with the assistance of an interpreter. She related that she had a two-year relationship with defendant, during which time they rented separate rooms in the same house. A.A. told defendant she was going to move around May 2009, and she formally ended the relationship in July 2009, when she began dating another man.

On the morning of September 23, 2009, defendant approached A.A. as she was starting her car outside of her daughter's elementary school. He walked up and told her "this was it, that this [was] as far [as she] went." Defendant pushed her into the passenger seat as he got into the driver's seat. He locked the doors and told A.A. that today would be her last day in the world.

Defendant drove to an empty dirt lot and put the car keys in his pocket. He asked why she had traded him for another man. Defendant patted his waistband and told A.A. he had a weapon with two shots, one for her and one for him. A.A. was scared. Defendant leaned in and hugged her, at which point she could feel a weapon. He kissed her even though she told him to leave her alone and tried to turn her head away. A.A. asked defendant to let her go because she had to go to work. When he did not cooperate, she lied to him and told him she wanted to get back

together with him. This calmed him down and prompted him to talk about their relationship.

Defendant and A.A. conversed for about two hours, during which A.A. answered his questions about problems with their relationship. He made her swear they would get back together and said he would not let her go until they had sex. A.A. said she had to go to work. Defendant responded by taking a gun from his waistband, placing it under the driver seat, getting out, and taking A.A. into the backseat of the car. A.A. repeatedly told him she did not want him to touch her or to have sex. She tried to resist defendant but was scared that he would kill her. Defendant was stronger than A.A., and he pulled down her pants and underwear. He raped her while she pleaded with him to stop and tried to push him away.

When defendant finished, he got out of the car to urinate. A.A. grabbed the gun and removed the bullets. She also got out of the car to urinate, at which point defendant saw that she had the gun. They struggled, and he took the gun and bullets away from her. Defendant reloaded the weapon. In an effort to be released, A.A. lied and told defendant she would see him later. She drove him to his car and then drove to her boyfriend's house. A.A. told her boyfriend what had happened and he called 911.

Detective Nathan Wise and Deputy William Granados were dispatched in response to the 911 call. Detective Wise was surveilling defendant's home when he saw him leave his house and place something in the trunk of a car. Wise detained defendant.

Granados arrived and searched the car. Granados found a loaded two-shot pistol in the trunk.

Detective Juan Hidalgo interviewed defendant in Spanish, and a transcript of the interview was read to the jury. Defendant initially told the detective that he had gone to the school with A.A. and had wanted to take her home afterwards. A.A. did not want to go with him, however, and they ended up driving to the parking lot where they talked and then had sex. Defendant denied he forced her to undress and have sex with him, or that he had a gun. He claimed A.A. moved into the backseat on her own and undressed herself. Defendant told Detective Hidalgo that he never forced A.A. to go with him or threatened to kill her; he only told her it was her last chance to return to him.

Later, defendant agreed to tell Detective Hidalgo the truth. Defendant went to A.A.'s daughter's school because A.A. would not answer her phone. He brought a pistol loaded with two bullets even though he knew this would make her think that he meant her harm. After defendant opened A.A.'s car door, he may have forced her into the passenger seat "a bit." He knew that A.A. would not deny him when she saw the gun, and that she only had sex with him because of the gun. Defendant told Detective Hidalgo that, even though he told A.A. that one bullet was for her and one was for him, she was not scared and knew he was kidding. Defendant conceded that he had threatened A.A.

Defendant told the detective that A.A. had called him later that afternoon and confronted him about forcing her to have sex

with him and threatening her with a gun. He told her that he had done it out of love. Defendant stated that A.A. was "telling the truth" about the incident. However, even though he threatened her and had a gun, he did not think he raped her because she did not resist.

The jury convicted defendant of rape (§ 261, subd. (a)(2)), but did not find true the enhancements that he kidnapped A.A. (§ 667.61, subd. (e)(1)), that the movement increased the risk of harm to her (§ 667.61, subd. (d)(2)), or that he personally used a deadly weapon in the commission of the offense (§§ 667.61, former subd. (e)(4), 12022.3, subd. (a)).

#### DISCUSSION

##### I

Defendant contends the trial court abused its discretion in limiting his ability to cross-examine A.A. regarding her immigration status and potential bias, which would have undermined her credibility. We disagree.

The right of confrontation and cross-examination is guaranteed by the confrontation clause of the Sixth Amendment and *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678 [89 L.Ed.2d 674, 682-683] (*Van Arsdall*)), and "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." (*Davis v. Alaska* (1974) 415 U.S. 308, 316-317 [39 L.Ed.2d 347, 354] (*Davis*)). "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to

show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' [Citation.]" (*Van Arsdall, supra*, 475 U.S. at p. 680 [89 L.Ed.2d at p. 684]; *People v. Carpenter* (1999) 21 Cal.4th 1016, 1050-1051.)

However, not every restriction of cross-examination is a constitutional violation. (*People v. Carpenter, supra*, 21 Cal.4th at pp. 1050-1051.) "[T]he federal Constitution guarantees an opportunity for effective cross-examination, not a cross-examination that is as effective as a defendant might prefer. [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1172.) The routine application of state evidentiary rules does not ordinarily implicate a defendant's constitutional rights. (*People v. Solomon* (2010) 49 Cal.4th 792, 841; *People v. Hovarter* (2008) 44 Cal.4th 983, 1010.) "In particular, notwithstanding the confrontation clause, a trial court may restrict cross-examination of an adverse witness on the grounds stated in Evidence Code section 352" (*People v. Quartermain* (1997) 16 Cal.4th 600, 623), and the trial court retains wide latitude in restricting cross-examination that is harassing, repetitive, prejudicial, confusing of the issues, or of marginal relevance. (*Van Arsdall, supra*, 475 U.S. at p. 679 [89 L.Ed.2d at p. 683]; *Taylor v. Illinois* (1988) 484 U.S. 400, 410 [98 L.Ed.2d 798, 811] [a defendant does not have an unfettered right to present testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence].)

Prior to trial, the People moved to limit cross-examination of A.A. regarding her immigration status. Defense counsel opposed the motion, arguing that because her illegal status had impeachment value and a bearing on her potential bias, he had the right to cross-examine her about such matters. For example, she might be testifying favorably for the prosecution to prevent being deported.

The prosecutor responded that he had not made any promises to the victim about her immigration status, and had not discussed obtaining a U-Visa.<sup>2</sup> The prosecutor suggested that an Evidence Code section 402 hearing might be appropriate to explore the matter.

The trial court ruled that whether A.A. was cooperating with the prosecution because she believed she would receive favorable treatment was relevant to her state of mind. The trial court appointed counsel for A.A. and held an Evidence Code section 402 hearing to explore the issue.

At the hearing, A.A. invoked her Fifth Amendment rights when asked if she was a United States citizen. She denied having any discussions with the prosecutor or law enforcement regarding her citizenship status. A.A. said she did not have

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<sup>2</sup> Under federal immigration regulations (8 C.F.R. § 214.14 (2012)), an illegal alien who is the victim of certain criminal offenses, including rape or sexual abuse, can apply for a "U-Visa" providing temporary relief from deportation, and acquire temporary non-immigrant legal status if local law enforcement authorities certify that the alien would be of assistance in an investigation or prosecution.

any expectation that the prosecutor or law enforcement would provide assistance with her citizenship status if she testified.

The trial court observed that, given A.A.'s denials, defense counsel did not have a good faith belief that she had been offered, or had an expectation of, assistance with her immigration status. Accordingly, the trial court ruled that defense counsel could not question A.A. on this matter pursuant to Evidence Code section 352. Although the prosecutor argued that the jurors could be prejudiced by the fact of her illegal status due to the strong opinion some people held about illegal immigration, the trial court said this alone did not necessarily outweigh defendant's Sixth Amendment right to confrontation and cross-examination. Rather, the trial court concluded that the collateral information defense counsel hoped to pursue "sends us down a track or a path that has nothing to do with the issues in this case." The trial court's ruling was without prejudice to defense counsel raising the matter again.

Prior to A.A.'s testimony, defense counsel advised the trial court that police reports indicated A.A. possessed false documents, including two resident alien cards and a social security card. Defense counsel said this demonstrated that she was committing fraud on an ongoing basis. Defense counsel argued that his client's confrontation rights required that he be permitted to question A.A. about the documents. The prosecutor asserted that this was impeachment on a collateral issue and would lead to questioning about matters upon which A.A. would have the right to invoke her Fifth Amendment

privilege. Defense counsel responded, "The idea of being able to cross-examine a witness on issues of whether or not they are being truthful is key to -- for the jury to be able to determine whether or not they're telling the truth today. And a significant period of time has passed since she told . . . the district attorney about her status. So arguably, there is a significant interest that she has or could have accumulated about, or concern about, her status in this country and whether or not this proceeding is going to have an impact on her ability to remain." Defense counsel believed that her testimony "may be" tainted by her status in this country.

The trial court reiterated its ruling under Evidence Code section 352, stating that the path defense counsel wished to take "detracts so greatly from the ultimate issues in this case and takes us down a path that really minimizes the issues that the jury has to look at in this case." The trial court intimated that A.A.'s possession of false resident alien and social security cards had minimal probative value with respect to her veracity regarding the rape, and her state of mind regarding any offers of assistance had been established in the 402 hearing; she had been offered no assistance and had no expectation of assistance. The trial court concluded the proffered evidence was more prejudicial than probative, would confuse the issues, and would lead to undue consumption of time. Accordingly, defense counsel could not ask A.A. or any other witness about the false documents or her resident status.

Defendant now reasserts on appeal that A.A. is an illegal immigrant who "stood to gain legal immigration status by accusing [defendant] of rape . . . and [then] cooperating in the investigation and prosecution" and who also possessed fraudulent resident alien and social security cards, evidencing a willingness to engage in fraudulent acts for her own benefit. Defendant argues the preclusion of cross-examination regarding matters bearing on A.A.'s credibility was prejudicial because the verdicts demonstrate that the jury did not find her completely credible. The jury did not believe that defendant kidnapped A.A. or used a gun in raping her. Defendant contends that if the jury had known A.A. was an illegal alien and had something to gain from testifying on behalf of the prosecution, it is likely the jury would have further discounted her testimony and acquitted defendant of rape.

Defendant relies on *Davis, supra*, 415 U.S. 308 [39 L.Ed.2d 347] to support his claim of constitutional error, but *Davis* is distinguishable. In *Davis*, a safe stolen in a burglary was found near the home of a juvenile, who was a key prosecution witness. The juvenile told the police he had seen one of the defendants where the safe was found. The juvenile was on probation for burglarizing two cabins. The defendant sought to show that the witness was concerned about his own probationary status and made a hasty identification to shift suspicion away from himself. (*Id.* at pp. 310-311, [39 L.Ed.2d at pp. 350-351].) Although the defendant was permitted to ask if the witness was biased, he was unable to bring out any facts,

including the fact of the juvenile court adjudication and probation, that would have tended to show lack of impartiality. (*Id.* at p. 318, [39 L.Ed.2d at p. 355].) The trial court's ruling limiting cross-examination was based on a state statute limiting the admissibility of juvenile records. (*Id.* at p. 311 [39 L.Ed.2d at p. 351].) The Supreme Court held that the significant limitations placed on defendant's ability to cross-examine the key witness violated defendant's right to confrontation, which right was paramount to the state's interest in preserving the anonymity of juvenile offenders. (*Id.* at pp. 318-320, [39 L.Ed.2d at pp. 355-356].)

Unlike in *Davis*, an evidentiary hearing was conducted in this case establishing that there was no evidence of promised or anticipated favorable treatment by the prosecutor, and hence no evidence that A.A. was motivated to testify falsely to obtain a U-Visa and prevent her deportation. The trial court properly prevented defense counsel from conducting this line of inquiry.

Although a defendant is entitled to elicit evidence favorable to his or her defense, a defendant is not entitled to engage in a fishing expedition based on a speculative showing such evidence *might* exist. (See *People v. Gallego* (1990) 52 Cal.3d 115, 197 [no abuse of discretion by failing to allow defendant to conduct fishing expedition to attempt to discover good cause when no independent basis to believe good cause exists].) ""The trial court has broad discretion in determining the relevance of evidence [citations] but lacks discretion to admit irrelevant evidence."" [Citation.]"

(*People v. Thornton* (2007) 41 Cal.4th 391, 444.) No abuse of discretion arises where the foreclosed line of inquiry is not likely to produce evidence relevant to the issues presented and the trial court, not the jury, determines at the outset whether evidence is relevant. (*People v. Dyer* (1988) 45 Cal.3d 26, 48, 50; accord, *People v. Brown* (2003) 31 Cal.4th 518, 545, fn. 9 [trial court did not violate confrontation clause in precluding impeachment with evidence of marginal relevance].)

Under the circumstances, the trial court did not err in precluding cross-examination concerning whether A.A. had a motive to falsely testify that she was raped in hopes of getting a U-Visa or other immigration assistance. (*People v. Dyer, supra*, 45 Cal.3d at p. 48, 50 [absent evidence that unrelated charges against witnesses were dismissed or reduced as part of a bargain with the prosecution, thereby furnishing a possible bias or motive to testify against the defendant, the fact the charges were dismissed or reduced before witnesses took the stand was irrelevant and trial court did not err in restricting cross-examination].)

Defense counsel also wanted to question A.A. about the fraudulent immigration documents and her immigration status, asserting that it demonstrated that she was committing fraud on an ongoing basis and had a bearing on her truthfulness. Defense counsel wanted to ask her whether she came to the country illegally; whether she used the services of another person to do so; whether she possessed falsified documents such as social security cards and resident alien cards; whether she had

received services from a government agency as a result of her presence in the country; whether she had lied on any applications; whether she worked at a job in the United States; and "any other questions that would have flowed or come out as a result of her responses." The trial court precluded him from doing so under Evidence Code section 352.

Under Evidence Code section 352, a trial court "may and should" exclude evidence that involves "undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler* (1992) 4 Cal.4th 284, 296-297, fn. omitted.) The statute is designed to "prevent criminal trials from degenerating into nitpicking wars of attrition over collateral credibility issues." (*Id.* at p. 296.) To that end, the trial court has broad discretion to exclude impeachment evidence, and its decision to do so will only be disturbed "on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

The trial court did not abuse its discretion in determining that the probative value of questioning A.A. about the documents and her status as an illegal immigrant was outweighed by the undue consumption of time and confusion of the issues such questioning would entail. There is no question that A.A.'s veracity was an important issue in the case. But absent evidence that A.A. knew about U-Visas before she reported the rape, her illegal alien status made it less likely she would

falsely report a rape because this would bring her to the attention of the authorities and potentially lead to her deportation. The fact she had false resident alien documents and a false social security card had only minimal relevance regarding whether she was lying about being raped. The exclusion of impeachment evidence "which has only slight probative value on the issue of veracity does not infringe on the defendant's right of confrontation." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 350.)

In addition, questioning A.A. about her immigration status would cause confusion of issues and create an undue consumption of time. The breadth of counsel's proposed questions indicates that the issue could become a trial within a trial on a collateral matter. Under the circumstances, the trial court's decision to preclude questioning in this area did not violate defendant's right of confrontation.

## II

Defendant also contends that the prosecutor committed misconduct during closing argument when he impugned defense counsel while challenging the defense theory of consensual sexual intercourse.

A prosecutor is given wide latitude to vigorously argue the case, may make remarks based on the evidence and inferences drawn from the record, and may use appropriate epithets and harsh and colorful language. (*People v. Hill* (1998) 17 Cal.4th 800, 819; *People v. Arias* (1996) 13 Cal.4th 92, 162; *People v. Earp* (1999) 20 Cal.4th 826, 862-863.) However, the prosecutor

should not impugn the integrity of defense counsel or suggest defense counsel has fabricated a defense. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; *People v. Hawthorne* (1992) 4 Cal.4th 43, 59.)

““‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.”” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]’ [Citation.] “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) “In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In the present case the prosecutor argued: “If the defendant didn’t have that gun, [A.A.] wouldn’t have to beg for her life. If the defendant didn’t have that gun, [A.A.] wouldn’t have to beg to see her daughter again. If the defendant didn’t have that gun, [A.A.] ain’t gonna have sex with

this man again. [¶] Now, in a few moments defense is going to get up here and in the twisted, upside down, inside out bizarre world that defense attorneys live in, they're going to argue consent. They're going to argue that she consented. And how is their argument going to flow? Listen to this. She wanted to leave. She wanted to see her daughter again and she was gonna say whatever it was it was gonna take to make him let her go, so she lied to him and said, I'm going to get back together with you. And she was willing to do anything, including having sex with the man, in order to be let go. So, therefore, she consented. [¶] In the fantasy land that they live in, they want you to believe that bringing a gun is part of wooing a woman, that it's foreplay, that somehow it's romantic, that maybe perhaps on next Valentine's Day you're gonna have a card that has a picture of a gun and the words, 'I have two bullets, one for you and one for me.' [¶] When the defense gets up here and they say that to you and they make those arguments of consent, I want you to ask this question: Is the defense's argument based upon reason, logic and common sense? And if the answer is no, then the defendant does not have a reasonable belief that [A.A.] consented."

Defendant contends that the prosecutor's argument was misconduct because the comments were inflammatory, maligned defense counsel's character, and implied that defense counsel fabricated evidence. But defendant failed to raise such an objection at trial, and an admonition would have cured any harm. Under the circumstances, the claim is forfeited on appeal.

(*People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.)

In any event, there was no prejudicial misconduct. While we do not condone disparagement of the defense function or the defense bar, the record does not indicate a reasonable likelihood that the jury applied the prosecutor's comments in an objectionable fashion. The comments were aimed at the lack of persuasive force for a consent defense. The prosecutor did not accuse defense counsel of fabricating a defense or factually deceiving the jury. (*People v. Stitely* (2005) 35 Cal.4th 514, 560; *People v. Bemore, supra*, 22 Cal.4th at p. 846.)

The California Supreme Court has concluded that similar questionable comments did not cross the line into misconduct. (E.g., *People v. Zambrano, supra*, 41 Cal.4th at pp. 1154-1155 [no misconduct in disparaging defense counsel's argument as a "'lawyer's game'"]; *People v. Cook* (2006) 39 Cal.4th 566, 613 [prosecutorial reference to defense's "'heavy spin'" on the evidence was not misconduct]; *People v. Stitely, supra*, 35 Cal.4th at pp. 559-560, [argument that jurors should avoid "'fall[ing]' for" defense counsel's "'ridiculous'" and "'outrageous'" attempt to allow defendant to "'walk' free" by claiming he was guilty only of second degree murder]; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215-1216 [argument that defense counsel was talking out of both sides of his mouth and that this was "'great lawyering'"]; *People v. Breaux* (1991) 1 Cal.4th 281, 305-306 [argument that law students are taught to create

confusion when neither the law nor the facts are on their side, because confusion benefits the defense]; *People v. Bell* (1989) 49 Cal.3d 502, 538 [argument that defense counsel's job is to "'confuse'" and "'throw sand in your eyes,'" and that counsel "'does a good job of it'"].)

Here, as in the cases cited above, the prosecutor did not improperly attack defense counsel's integrity, only the merits of his trial tactics and arguments. This was not misconduct.

DISPOSITION

The judgment is affirmed.

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MAURO, J.

We concur:

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RAYE, P. J.

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HULL, J.