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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DWAYNE STANLEY IVEY,

Defendant and Appellant.

D059874

(Super. Ct. No. SCD220783)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

A jury convicted defendant Dwayne Ivey of numerous sexual crimes against a minor child, including five counts of committing a lewd act on a child under the age of 14 (Pen. Code, § 288, subd. (a),¹ counts 1-3, 5 & 6), two counts of sexual intercourse with a child 10 years of age or younger (§ 288.7, subd. (a), counts 7 & 8), two counts of sodomy with a child 10 years of age or younger (§ 288.7, subd. (a), counts 9 & 10), one count of

¹ All further statutory references are to the Penal Code unless otherwise specified.

digital penetration on a child 10 years of age or younger (§ 288.7, subd. (b), count 11), and one count of oral copulation with a child 10 years of age or younger (§ 288.7, subd. (b), count 12). The jury also found true the special allegation, alleged in connection with counts 1 through 3, 5 and 6, that Ivey had engaged in substantial sexual conduct within the meaning of section 1203.066, subdivision (a)(8). Ivey was sentenced to an aggregate prison term of 146 years to life. On appeal, Ivey argues that three acts of alleged prosecutorial misconduct, coupled with the improper admission of inflammatory evidence, denied him a fair trial.²

I

FACTUAL BACKGROUND

A. Prosecution Case

The Participants

T.D. has two daughters (L. and J.) from previous relationships. T.D. married Ivey in 2004 and they produced a daughter (Je.). T.D., Ivey and the three girls lived in an apartment in Lemon Grove (the Lemon Grove apartment) for approximately six months in 2006, and then moved to an apartment on Naranja Street in San Diego (the Naranja Street apartment) where they lived from July 2006 through August 2007. The victim, L., turned 10 years old while the family was living at the Naranja Street apartment.

² Ivey's opening brief also argued his convictions on counts 7 through 12 should be vacated because, under the rule of lenity, section 288.7 should not be applied to offenses against children who had reached their 10th birthday. However, after Ivey filed his opening brief, our Supreme Court issued its decision in *People v. Cornett* (2012) 53 Cal.4th 1261 resolving the issue adversely to Ivey, and Ivey's reply brief acknowledges that *Cornett* is fatal to the lenity claim.

The Lemon Grove Apartment Offenses

L. testified that one night, while the family was living at the Lemon Grove apartment, Ivey woke her up and took her into the bathroom. He lifted her onto the edge of a sink, directed her to pull down her pants, and then put his "private part" in her "over and over again." At one point, L. heard her mother had awakened and was calling for her, and Ivey rushed L. back to her bedroom. Ivey then returned to his bedroom.

Later that same night, Ivey returned to L.'s bedroom, woke her again, and took her back into the bathroom. He had her pull down her pants, placed her on the edge of the tub, and put his "front part" into her "private area." During one of the two bathroom incidents that night, Ivey also had L. put her mouth on his penis and ordered her to orally copulate him, and she complied.

After Ivey finished molesting L. in the bathroom, he took her into the living room and showed her a video of a "grown man doing a 15-year-old girl" on his computer. During the one or two minutes that they watched the video, Ivey had L. touch his "private area." Afterward, he warned her not to reveal what had occurred, and L. never told anyone because she was "scared of what he might do."

Ivey molested L. on other occasions while living at the Lemon Grove apartment. One day, he took her into her bedroom and put a purple dildo into her vagina, telling her it "wouldn't hurt as much if I used my private area." On a different day, he picked her up from school, took her home, and again brought her into his bedroom. He had her take off her pants and then "put his penis in [her] front part, and when he took it out, there was a whole bunch of white stuff that came out," which ended up on the bed. He later directed

her to turn over onto her stomach and then "did it in [her] back part." When he finished, he threatened that "If you tell anybody, I will kill you." There were times she wanted to scream while he was molesting her but could not because he put his hand over her mouth.

The Naranja Street Apartment Offenses

After moving to the new address, Ivey continued to sexually abuse L. On at least two separate occasions when they were alone in the apartment, Ivey put his penis in her anus and into her vagina. On another occasion, he digitally penetrated L. He also forced her to orally copulate him on one occasion in the new apartment. The pattern remained the same as before: he would direct her to take off her pants, direct her to assume various positions, and would cover her mouth to stifle any screams.

The Initial Disclosures

L. eventually told her sister J. about the abuse. They decided to record what happened in J.'s composition book and then show it to T.D. Together, they wrote about the sexual abuse, as well as other misconduct towards them, excerpts of which they read to the jury. Among the additional misconduct was that Ivey watched the girls while they showered, tried to bribe L., and physically abused L. L. also testified that Ivey had once struck her on the head with a belt buckle with sufficient force to draw blood, had struck her in February of 2004, which left a knot on her head, and also injured her in June 2006.

Around the end of August 2007, as they were moving out of the Naranja Street apartment, L. and J. gave T.D. the composition book. By this point, T.D. had already decided to separate from Ivey because it had been a hard four-year marriage and "with all the domestic violence, abuse and just everything, and I'm the only provider, I was done."

After reading the book, T.D. telephoned Ivey and confronted him but he denied the accusations. T.D. testified she elected not to contact law enforcement because she had already moved away from Ivey and "he wouldn't be around [her] kids anymore."

The Involvement of the Authorities

In April 2008 L. moved in with her biological father because she was having behavioral problems at home and school. On March 8, 2009, she came into her father's bedroom, began to cry, and revealed what Ivey had done to her. L.'s father called Child Protective Services, and Detective Williams, a child abuse detective with the San Diego Police Department, was assigned to the case. On March 12, 2009, the day she was assigned the case, Detective Williams arranged to have L. interviewed by Ms. Olguin at the Chadwick Center, and a videotape of that interview was shown to the jury.

In June 2009 police searched Ivey's residence. They found two vibrators and KY Jelly in the master bedroom. They also found numerous pornographic DVD's, including one entitled "18 'n Nasty." The prosecution played a one-minute clip of that video for the jury.³

A pediatrician who conducted a forensic examination of L. testified there were "definitive findings for sexual abuse" involving a transection of the hymen, indicating "definite evidence that there was some form of blunt penetrating trauma." The doctor testified that such a finding is "pretty rare," and that L.'s trauma was actually visible to the naked eye. Among the hundreds of children she had examined in cases involving

³ It is the editorial selections from this video that form the basis for one of Ivey's claims of prosecutorial misconduct.

allegations of sexual abuse, it was the first time she had encountered a child with that presentation.

The Other Crimes Evidence

The jury heard two additional incidents involving Ivey. In March 1999 Ivey raped April B., then 17 years old. She and a friend (Patricia) worked at a commissary. Ivey, along with his friend Phillip and another man, picked the girls up and took them to an abandoned house, owned by Ivey's mother, so they could "hang out." The group consumed alcohol and all but April consumed marijuana. At some point, Ivey and Patricia went into a bedroom together, and April decided she wanted to leave. April used the bathroom and, as she was walking out, Phillip entered and started kissing her. Phillip carried her to a bedroom, put on a condom, and began having intercourse with her. She testified she "didn't want to do that," adding she had "never done anything like that before." When the prosecutor asked her to clarify that remark, she said "I never had sex or anything. I was a virgin." However, Phillip started having sex with her and, upon finishing, Phillip left the room. Ivey then came into the bedroom and, as April was trying to get dressed, Ivey grabbed her and pulled off her pants. She begged to be taken home, but Ivey ignored her, picked her up, placed her back against the wall, and started having intercourse with her. As he did, April said "Please, not again." Ivey then put April on the ground and got on top of her, and April tried to scoot away, but Ivey kept pulling her back towards him. Finally, after April said "dear God, help me," Ivey stopped and left the room, and April was able to leave. The jury was told Ivey had been charged with

forcible rape and felony unlawful intercourse with a minor and had pleaded guilty to the latter charge.

The jury also heard of a November 2005 incident involving Ivey and T.D. During an argument, Ivey threw T.D.'s cell phone against a wall and broke it, and then pinned her onto the bed and began choking and hitting her while their daughter, Je., was in a playpen in the same bedroom. While they struggled, J. called 911. When Officer Czas responded, he saw a fully loaded magazine for a .45 caliber handgun sitting on a television in the same bedroom. After Ivey said he did not know where the gun was, Czas asked T.D. where the handgun was located. T.D. said it was under a cushion of a couch in the same bedroom. Czas found the weapon, which also had a fully loaded clip in it, although no round was chambered in the gun. T.D. testified at trial Ivey threatened to shoot her during the fight, but conceded she had not told Czas of this threat.

B. Defense Evidence

Ms. Barron, a Child Protective Services worker, interviewed L. in June 2006 in response to reports from her school of suspected physical abuse. Barron noticed L. had bruising and scratches but L. denied Ivey had caused the injuries. Ms. Toussaint, another Child Protective Services worker, interviewed L. in May 2007 in response to reports from her school of suspected physical abuse. L. denied Ivey had physically abused her and, in response to Toussaint's question about sexual molestation, also denied she had been sexually molested.

Two of Ivey's sisters and a family friend, who attended a party in May 2008 at which Ivey and L. were present, testified L. appeared to interact normally with Ivey.

Another of Ivey's sisters testified she had seen Ivey and L. at family gatherings and that L. appeared to be acting normally. At a dependency hearing in 2009, J. testified she had never seen Ivey physically abuse L.

II

BASIS FOR APPELLATE CONTENTIONS

Ivey argues the prosecutor engaged in three acts of misconduct: using a booking photo of Ivey during opening argument over which the word "deviant" had been superimposed; playing an excerpt from an adult video (the video excerpt), which included graphic scenes without any foundation for the particular editorial selections included in the video excerpt; and by not insuring that a witness did not reveal (on Ivey's cross-examination of the witness) that Ivey was a suspected gang member. Ivey asserts the cumulative effect of this misconduct, when considered in the context of other inflammatory evidence admitted against him, denied him a fair trial.

A. The Alleged Acts of Misconduct

The PowerPoint Presentation

During the prosecutor's opening statement, the prosecution made a PowerPoint presentation. One of the slides used in the presentation was a photograph of Ivey, which the court described as a "booking photo," and that "booking photos" are "rarely flattering, but this one . . . looked unusually malevolent," on which various words faded in and out by superimposition, including "betrayal," "secrecy," "deviant," and "courage of one little girl to tell." During the prosecutor's opening statement, there was apparently no objection by the defense to this slide. However, several days later, when the defense subsequently

moved for a mistrial based on the showing of the video clip (see *Analysis, post*), the parties also discussed the offending slide from the PowerPoint presentation, with the defense arguing it was relevant when examining the prejudicial impact of the video. The court ruled it would consider amending CALCRIM No. 222, which instructs the jury that opening statements are not evidence, to reinforce that PowerPoint presentations during opening statements are not evidence. The court ultimately instructed the jury that opening statements, including PowerPoint presentations during opening statements, are not evidence. During the hearing on the motion for new trial, the court stated that use of the slide in conjunction with the word "deviant" was misconduct, but it was harmless considering all the evidence.

The Video Excerpt

The prosecution presented an approximately one-minute video, composed of excerpts from the video entitled "18 'n Nasty," seized when police search Ivey's house. The defense raised no contemporaneous objection during the playing of the video excerpt. However, the following day, defense counsel moved for a mistrial (the first mistrial motion) based on the video excerpts. The precise background leading to the video excerpts, and basis for the objection and mistrial motion, is germane.

Prior to trial, the prosecution moved in limine to admit a brief clip from the video entitled "18 'n Nasty." The prosecutor argued the video excerpt was relevant because it corroborated L.'s testimony that Ivey had forced her to watch approximately three minutes of a video that portrayed a dad having sex with his 15-year-old daughter. The court agreed that a clip "consistent with what [L.] described is highly relevant, . . . but we

need to figure out how [to admit it]. Obviously we're not going to have [L.] shown the whole video and say, 'Do you recognize any of this?' That's not what the law is about." The defense argued that, to the extent any part was to be admitted, it should be without sound because L.'s testimony would be that she did not hear the audio but only viewed the video. Thus, to the extent it was being offered for corroboration, "it should be just what L. actually observed, because she didn't hear anything." The court ruled that a video excerpt (without any audio) would be admissible and could be played for the jury, but "I would not allow showing this to the child and say 'Is this what you saw?' I don't think due process or the Sixth Amendment requires the infliction of that kind of further injury on a child."

The prosecution introduced the video excerpt at trial without contemporaneous objection. However, at the end of the day, the court stated the video excerpt had depicted two sex acts that L.'s testimony had not specifically described as being on the video shown to her by Ivey, and the court wanted to set aside time to discuss "the theory of admissibility with respect to that." The following day, the prosecutor raised the issue of the video excerpt. The prosecutor noted the video excerpt, in addition to being relevant to corroborate L.'s testimony, was also admissible to prove one of the charges against Ivey (e.g. displaying lewd material to a minor under § 288.2), which necessitated showing the jury the content of the video. The prosecutor explained she had asked a detective to prepare a clip with random samplings from the video, but the court explained the video excerpt showed two sex acts (involving analingus and aggressive forced oral copulation) not mentioned by L. when she described what the video had depicted, and

asked "[h]ow is that relevant to anything?" The prosecutor, responding to the court's observation L. had not described either act when discussing the video, said L.'s testimony and prior statements did refer to "having S-E-X" and "doing nasty things," and went on to explain the prosecutor "didn't go and show her the video, and [did not ask her] 'Let's talk about act and act and act.' " After the prosecutor acknowledged L. did not specifically state she saw scenes of anilingus or oral copulation, the court (although acknowledging L. had indicated the video showed the man and girl engaged in "S-E-X" and "doing nasty things") observed the video excerpt contained "rather jarring" scenes and asked how the court's ruling allowing a video excerpt for corroborative purposes could "morph into a depiction of [scenes of anilingus and aggressive forced oral copulation]." Defense counsel commented he understood the video excerpt would be limited to showing the ages of the man and girl, but did not think "anything depicting sex" would be shown. The defense argued the material was so shocking that it could not be cured and therefore asked for a mistrial. The court stated that, although it expected its ruling would have allowed a scene depicting sexual intercourse, it "did not envision" its ruling allowing a video excerpt would have included the clips showing the other sex acts, and that it would hold in abeyance the defense's mistrial motion to consider whether the offending parts of the video excerpt were erroneously shown to the jury and, if so, whether an effective remedy could be fashioned to cure the harm.

Following the afternoon recess, the court fully examined the issues raised by Ivey's motion for mistrial. The defense asserted the jury might have been left with the impression that "what they saw in the video is what [Ivey] did to L.," and the acts

depicted were "so vile and so overwhelming that it's going to be hard for them to get past it." The defense noted that, although its interpretation of the trial court's in limine ruling would have barred any sexual acts, "as the court pointed out, perhaps we could have expected intercourse, but that's it." The defense argued the video excerpt, considered in the milieu of the evidence of other offenses by Ivey and the prosecution's use of the "deviant" characterization in its PowerPoint opening statement, had caused irreparable damage to Ivey's ability to obtain a fair trial and a mistrial was necessary. The prosecutor argued that she took responsibility for any error, and acknowledged she should have prescreened the video excerpt for the court and defense counsel but "I didn't [and] [f]or that we're having this argument." In mitigation, the prosecutor noted that L.'s testimony--that she saw "S-E-X" on the video--was a broad term that could encompass any different acts, and also noted L. had told the interviewer from the Chadwick Center she had seen "his private parts, and it going by so fast, and I just saw the dad do- doing what [Ivey] did to me."

The court concluded that, although two of the segments of the video (one of which involved intercourse between the man and the young girl) were admissible, the scenes of analingus and oral copulation were inadmissible and would have been excluded had the court been presented the opportunity to rule on the tape in advance. However, the court decided that, before declaring a mistrial, it would ask the jurors whether they believed they could follow an instruction to ignore the inadmissible scenes and, if the court was satisfied with the jury's answer that it could ignore the two scenes, it would deny the mistrial.

The court then addressed the jury as follows:

"Ladies and gentlemen, you have heard testimony that a video recording . . . was recovered from [Ivey's] home that was consistent with the video that L. states was shown to her by [Ivey]

"The Court--that's I--allowed a clip taken from that video to be shown to you as evidence. The weight of that evidence, of course, is for you to decide.

"Now, the video clip that was shown to you contained some scenes that L. did not describe. . . . [¶] I refer first to the scene in which the adult male, who is the supposed dad in this video, is seen licking the anus of the supposed young girl. The second scene is the one in which the adult male was forcibly inserting or jamming his erect penis into the girl's mouth.

"Now, there's no evidence before this Court that the video that was shown to L. showed either of those two scenes. Frankly, those two scenes should not have been shown to you.

"I am going to order and hereby order that those two scenes be stricken from the evidence. This means that you must not consider those scenes for any purpose in your deliberations. You must evaluate the evidence and do your other duty as jurors as though you had never seen those scenes. In particular, you must not draw any negative conclusions about [Ivey's] character from the fact that he was in possession at some point of a video that showed that kind of conduct.

"Does everybody understand this instruction? Can everybody follow this instruction if it's given to you? I'm seeing all affirmative responses to the first question."

After clarifying that the jury was to disregard only those two scenes, the court continued:

"Now, I'm going to speak candidly to you. We have this saying 'How can you un-ring a bell?' And my question is--I'm going to ask each one of you individually to ask yourself 'Can I disregard that or did I find it so shocking or so'--if not shocking--'impactful that I'm somehow going to be considering it when I view the evidence or

judge the credibility or apply the burden of proof or do all the things that I'm required to do as a juror?'

"Does anybody think that you will not be able to disregard those scenes? Does anybody think you won't be able to put it out of your mind? If so, please raise your hands."

The only juror to express concern, Juror No. 9, responded that "it might be difficult to be able to separate the whole thing It's like just those two scenes from the whole clip, it would be somewhat difficult, in my opinion, to be able to not use those. But honestly I thought that video really didn't say much[,] actually." The court then questioned Juror No. 9 in detail, asking whether viewing those scenes would make him more biased against Ivey than if the scenes had not been shown, or would make it difficult to judge the rest of the evidence just because the juror had viewed those scenes, or whether it would affect the juror's ability to apply the law as instructed by the court. Juror No. 9 answered "no" to each query. The court then asked each juror and both alternates, individually, whether they could follow the instruction to disregard the scenes, and all of them affirmed they could follow the instruction. On the basis of those answers, and after the jury was excused for a recess, the court denied the motion for mistrial.

Two days later, the defense renewed the motion for mistrial. The defense argued the video clip it had received, on a DVD apparently given to the defense before the start of trial, was a clip that contained no sexual acts. The court noted that the clip the defense was describing was "the way it was presented in the PowerPoint in the opening statement." The defense argued that, because it never received the clip ultimately shown to the jury containing the offending scenes, the defense had been misled. The prosecutor

recalled she had given a copy of the offending clip to the defense on the first day of trial but had no receipt.

The court asked "[a]ssuming that you were to use the word that you used, 'misled,' how does that change the mistrial analysis?" After the defense indicated it was "akin to . . . a discovery violation," the court observed that the mistrial analysis remained unchanged, and the issue remained whether there was prejudice to Ivey's right to a fair trial from the two excluded scenes. The court observed it remained satisfied Ivey's right to a fair trial had not be infringed, and therefore denied the motion for mistrial.

The Gang Reference

During trial, the parties litigated whether the jury would be permitted to hear (1) that Ivey was found in possession of a loaded firearm when police responded to the November 2005 domestic violence incident involving Ivey and T.D., and (2) Ivey claimed gang affiliation. The prosecutor argued the gun was probative of why L. and T.D. would have feared Ivey and therefore not have reported Ivey's sexual abuse in a timely manner. The court ruled under Evidence Code section 352 that the gun possession was more probative than prejudicial and permitted that evidence. As to the gang membership, the prosecutor noted April B. had been reluctant initially to report the rape to police because she was afraid Ivey and his cohort were gang members and there would be repercussions if she contacted police. However, the prosecutor agreed that, as long as the defense did not seek to suggest that her initial reluctance to contact police was because the rape did not occur, there would be no need to elicit Ivey's alleged gang membership. The court ruled neither April B. nor T.D. could refer to Ivey's alleged gang

membership but the court would reconsider that ruling if the "door has been opened or a false picture has been painted" by the defense's cross-examination.

During trial, the defense cross-examined officer Czas, the officer who responded to the 2005 domestic violence incident and found the gun, in an apparent effort to show Ivey had never threatened to employ the gun against T.D. The question and answer sequence that elicited the gang reference was as follows:

"[Defense Counsel]: And . . . after you found [the gun], did you . . . show it to [T.D.]?"

"[Officer Czas]: Yes.

"[Defense Counsel]: And other than telling you where she believed the gun would be located, did she make any other remarks about the gun?"

"[Officer Czas]: At that time?"

"[Defense Counsel]: Yes.

"[Officer Czas]: Yes. She told me that [Ivey] possessed a gun for approximately two years, that he used it for protection. He kept it mostly in the house, but sometimes he took it out concealed on his person because he was a Skyline gang member.

"[The Prosecutor]: Objection, your Honor. . . ."

Shortly thereafter, the jury was excused for a recess and the court asked "do we need to do anything with respect to Officer Czas starting to mention something about gang membership?" Defense counsel complained that, although he had asked Officer Czas a "yes" or "no" question, Officer Czas chose to "give out as much information in as short a period of time as he possibly could, including prejudicial information regarding alleged gang affiliation," and argued "I don't necessarily think it was an accident."

Defense counsel asked whether Officer Czas had been admonished by the prosecutor not to mention the gang evidence, and the prosecutor (after noting her surprise that defense counsel allowed the officer to give a narrative answer without interrupting him) stated she did not remind the officer of the ruling because the prosecutor thought "this was a nonissue" because "this wasn't one of the witnesses that I was concerned about and raised in limine that the Skyline issue would come up at all. I thought it was going to come up with [T.D.] and with April because they're the ones that made statements to the officers. . . . [¶] Hinds and Czas I didn't expect at all . . . because they are hearsay recipients of [T.D.] and April who said the word 'Skyline.' [¶] I admonished April and [T.D.] but I never even raised that with Czas and Hinds . . . because . . . it would be a hearsay statement period. So we had the real declarants in court, and those are the ones I was really concerned about."

The court asked defense counsel, "What do you want?" and defense counsel indicated there should be "some sort of an instruction to the jury to ignore that." The court ruled Officer Czas did not deliberately attempt to subvert the court's order nor act in bad faith, and outlined a proposed curative instruction striking the evidence and ordering the jury to disregard the evidence. However, it appears the instruction was never given.

III

ANALYSIS

Ivey contends the prejudicial impact of the prosecutor's misconduct (with respect to the improper video excerpt, the PowerPoint presentation, and the gang reference), which occurred when other inflammatory evidence (the April B. rape and the 2005

domestic violence event in which a gun was present) was also admitted against him,⁴ denied him a fair trial.

A. General Principles

A defendant has a constitutional right to a fair trial (cf. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 84) and prosecutorial misconduct can, when sufficiently egregious, operate to deny the defendant a fair trial. (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

The applicable federal and state standards regarding prosecutorial misconduct are well established. " '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.]' " (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) "Conduct by a prosecutor that does not

⁴ Although Ivey does not assert admission of the April B. rape exceeded the boundaries of the court's discretion, Ivey does assert admission of the domestic violence incident and the presence of the gun during that incident was an abuse of discretion under Evidence Code section 352 and contributed to the denial of a fair trial. However, the court found the domestic violence and gun possession evidence was admissible under Evidence Code section 352 to explain why L. was reluctant to come forward: she had been placed in fear by Ivey's threats and her fear that Ivey would exact retribution was predicated in part on Ivey's willingness to employ violence. The court also found the 2005 incident was admissible to rebut the defense theory for why T.D. delayed reporting the sexual abuse (e.g. because T.D. disbelieved L.'s claim) by proffering an alternative explanation for why she delayed: T.D. was intimidated by Ivey's willingness to use violence against her. Although Ivey asserts the evidence of his threat to kill L. if she told anyone was adequate to establish her fear of him, that evidence did not make the domestic violence irrelevant or cumulative; to the contrary, Ivey's violence and gun possession was relevant because it showed L. had reason to believe Ivey would carry out his threats. We do not conclude admission of the domestic violence and gun possession was an abuse of discretion under Evidence Code section 352.

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." " (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

However, to preserve a claim of misconduct on appeal, a defendant must both object and request a curative admonition (*People v. Montiel* (1993) 5 Cal.4th 877, 914), and failure to do so forfeits the claim of misconduct. (*People v. Silva* (2001) 25 Cal.4th 345, 373.)

When assessing a defendant's claim that the cumulative impact of prosecutorial misconduct denied him or her a fair trial, we keep in mind the oft-stated admonition that a defendant is entitled to a fair trial, not a perfect trial. (*People v. Mincey* (1992) 2 Cal.4th 408, 454; *People v. Johnigan* (2011) 196 Cal.App.4th 1084, 1100-1101.) We must evaluate *whether* there was misconduct; if so, whether the claims of misconduct are *preserved* for appeal; and finally, whether the preserved claims of misconduct were sufficiently egregious that we can conclude the trial was so infected with unfairness to make the conviction a denial of due process.

B. Analysis

The PowerPoint Was Not Misconduct

Ivey's first claim of misconduct--the prosecutor's PowerPoint presentation that used the epithet "deviant"--is without merit. Information presented in an opening statement cannot be charged as misconduct unless the evidence referred to by the prosecutor was so patently inadmissible that the prosecutor is charged with knowledge it could never be admitted (*People v. Dykes* (2009) 46 Cal.4th 731, 762), and a prosecutor has broad discretion to state his or her views as to what the evidence shows and what

inferences may be drawn therefrom, including vigorously arguing the case using appropriate epithets where warranted by the evidence. (*People v Welch* (1999) 20 Cal.4th 701, 752-753.) As long as the remarks are a fair comment on the evidence, the prosecutor is not limited to Chesterfieldian politeness and may use appropriate epithets. (*People v. Harrison* (2005) 35 Cal.4th 208, 244-246 [no misconduct where prosecutor referred to defendant as a " 'proowler,' " an " 'executioner,' " a " 'head hunter,' " and " 'the complete and total essence of evil' "].) Here, the prosecutor had grounds to expect admissible evidence would show at a minimum that, over a several-year period, Ivey forced a young child to have vaginal and anal intercourse, forced her orally to copulate him, penetrated her with a dildo, committed other sexual acts on her, and showed her adult videos. We conclude that, because the epithet "deviant" was not an unwarranted characterization of Ivey's actions, there was no misconduct in the PowerPoint presentation and therefore it does not enter the calculus of whether Ivey was denied a fair trial.

The Gang Reference Was Not Misconduct and Was Forfeited

We also conclude Ivey's second claim of misconduct--the single allusion to Ivey belonging to the Skyline gang--does not enter the calculus of whether Ivey was denied a fair trial because it was neither misconduct nor was it preserved for appeal. First, although the court excluded references to Ivey's gang membership, and it is misconduct for a prosecutor to violate a court ruling by eliciting or attempting to elicit inadmissible evidence in violation of a court order (*People v. Crew* (2003) 31 Cal.4th 822, 839), it was the *defense* whose cross-examination elicited the improper reference, and it was the

prosecutor who objected to interrupt the witness. Certainly, a prosecutor has the added obligation "to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement." (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.) Although the prosecutor apparently did not specifically instruct Officer Czas about the excluded reference, the prosecutor explained that (1) she *did* instruct T.D. and April B. not to mention Ivey's gang status, and (2) Czas "wasn't one of the witnesses that I was concerned about [because] I thought it was going to come up with [T.D.] and April because they're the ones that made statements to the officers. . . . Hinds and Czas I didn't expect at all . . . because they are hearsay recipients of [T.D.] and April[,] who said the word 'Skyline.' " On this record, because the prosecutor had no expectation the defense might induce Czas to give an inadmissible answer during his examination, we do not conclude the prosecutor violated any obligation imposed upon her.

Additionally, because a claim of misconduct is forfeited on appeal if the defendant does not pursue a curative admonition (*People v. Montiel, supra*, 5 Cal.4th at p. 914; *People v. Silva, supra*, 25 Cal.4th at p. 373), we conclude the claim here must be deemed forfeited. Although Ivey's counsel did state a curative admonition would be appropriate, the record is devoid of any suggestion the defense made any effort to pursue that instruction thereafter. " If the point is not pressed and is forgotten, [a defendant] may be deemed to have waived or abandoned it, just as if he had failed to make the objection in the first place.' " (*People v. Obie* (1974) 41 Cal.App.3d 744, 750, disapproved on other

grounds by *People v. Rollo* (1977) 20 Cal.3d 109, 120, fn. 4; accord, *People v. Braxton* (2004) 34 Cal.4th 798, 813-814; *People v. Brewer* (2000) 81 Cal.App.4th 442, 459-462.)

Because we conclude there was no misconduct, and further conclude any claim of harm from the evidentiary error must be deemed abandoned, we exclude the gang reference from any calculus of whether Ivey was denied a fair trial.

The Video Excerpt Did Not Deprive Ivey of a Fair Trial

Based on the foregoing, Ivey's claim that he was denied a fair trial is distilled into whether the erroneous inclusion of the two scenes in the video excerpt so infected his trial with unfairness as to make his conviction a denial of due process. (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.)

Even assuming inclusion of the two scenes in the video excerpt constituted misconduct,⁵ we are convinced that, considering the entire record, Ivey was not denied a

⁵ In Ivey's motion for new trial, the court concluded inclusion of the two scenes in the video excerpt was misconduct because there was no testimony from L. specifically identifying those two scenes as ones she had been forced to watch, and without such testimony the scenes were inadmissible. However, the court's in limine ruling admitting a portion of the video, which the court explained (when it denied one of Ivey's mistrial motions) *did* contemplate that some scenes of a sexual nature would be included to the extent they were scenes L. testified to having viewed, included an implied injunction that L. *not* be forced to view the video, because the court agreed that a clip "consistent with what [L.] described is highly relevant . . . but we need to figure out how [to admit it]. Obviously we're not going to have [L.] shown the whole video and say 'Do you recognize any of this?' That's not what the law is about." This ruling placed the prosecution on the horns of a dilemma. The prosecutor could not establish the requisite foundation, because the court stated L. would not be shown the video to verify which scenes had been shown to her. However, neither could the prosecutor exclude all scenes of a sexual nature, because it was incumbent on the prosecution to prove a substantive offense charged against Ivey (exhibiting lewd material to a minor in violation of § 288.2) as well as a special allegation (alleged in connection with count 3) that Ivey had used obscene matter

fair trial. First, to the extent those scenes were erroneously presented to the jury, the prosecutor's improper editorial decision did not amount to an egregious pattern of conduct rendering the trial fundamentally unfair, but instead " 'constituted an isolated instance in a lengthy and otherwise well-conducted trial' " (*People v. Smithey* (1999) 20 Cal.4th 936, 961.) Second, we are confident the court's extensive and meticulous handling of the evidence cured any harm from the error, because the court (1) gave a particularized explanation to the jury that the two scenes should not have been admitted, (2) instructed the jury that the scenes were stricken and must be disregarded, and (3) conducted an individualized inquiry to each juror that satisfied the court each juror was earnest when the jurors assured the court they could follow the instruction. The trial court below concluded the jury could follow his admonitions, and we defer to that determination if it is fairly supported by the record. (Cf. *People v. Mayfield* (1997) 14 Cal.4th 668, 727 [when trial court decides to excuse juror who expresses death penalty views on voir dire that would prevent or substantially impair performance of the juror's duties, appellate court accepts as binding the trial court's determination as to the prospective juror's true state of mind].) Because the trial court was satisfied by each juror's response, and there is sufficient support for the determination that the jury could

within the meaning of section 1203.066, subdivision (a)(9), in committing count 3. Although the prosecutor's solution to this dilemma could have been more circumspect, we do not necessarily agree that the prosecutor's solution involved " 'intemperate behavior . . . compris[ing] 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] . . . [or] involve[d] ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

adhere to the instructions, the admonition cured any harm from the erroneous admission of the two scenes.

A defendant is entitled to a fair trial, not a perfect trial (*People v. Mincey, supra*, 2 Cal.4th at p. 454), and we conclude that, because the only error was adequately remedied, Ivey was not deprived of his right to a fair trial.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.