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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANIBAL EDUARDO DIAZ,

Defendant and Appellant.

D060401

(Super. Ct. No. RIF151505)

APPEAL from a judgment of the Superior Court of Riverside County, Mark E. Johnson, Judge. Affirmed.

The appellant in this case was convicted of committing forcible sex acts on his girlfriend. We agree with appellant the prosecutor made an argument to the jury which was improper because it shifted the burden of proof to appellant. However, in light of substantial evidence the sex acts were not consensual, including physical evidence observed shortly after the acts occurred and the victim's initial and credible account of what happened to her, as well as the trial court's accurate instructions on the presumption

of innocence and reasonable doubt, the prosecutor's argument was not prejudicial. Thus we reject appellant's contention the prosecutor's argument entitles him to a new trial, either on the grounds the trial court did not sua sponte instruct the jury with respect to the erroneous portions of the prosecutor's argument or because appellant's counsel failed to object to the argument.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Initial Report*

Shortly before 10:00 a.m. on May 3, 2009, the victim in this case, Gina P., went to the Morena Valley Police Station and told police officers that on the previous evening her boyfriend, appellant Anibal Eduardo Diaz, raped her. At the police station Gina was upset, crying and emotional.

In a videotaped interview, Gina stated she had gone to Diaz's house at approximately 8:00 the previous evening and Diaz smelled of alcohol and seemed drunk. According to Gina, while they were eating dinner they got into an argument and Diaz jumped over the table and began choking her and hitting her hands and face. When Gina told him to leave her alone and walked into the kitchen, Diaz followed her and hit her in the head with his fist. Gina then told Diaz she was tired and wanted to rest. Diaz responded and told her to go home. Gina replied she did not want to go home and instead she went to his bedroom and sat down on the bed.

Diaz came into the bedroom, told Gina to lie down and removed Gina's underpants. Gina told Diaz she did not want to have sex. Diaz responded by saying

either "you have to have sex bitch" or "Okay, bitch, let me do this with you." Gina again said "no." Notwithstanding Gina's verbal resistance, Diaz put his finger in Gina's anus and, while holding her arms down, forced his penis in her anus. Gina told Diaz he was hurting her and he hit her in the head. Gina then went to the bathroom where Diaz again hit her repeatedly. While she was in the bathroom she leaned against the lid of the toilet tank and it broke. Gina left the bathroom and went back to a second bedroom and pretended to go to sleep. Diaz went back to the kitchen and continued drinking. In the morning she took a shower and told Diaz she was glad he had violated her because now she was leaving him. Gina found her clothes near her car in the garage and left.

2. Medical Examination

Following Gina's interview at the police station, she was instructed to go a hospital in Murietta, more than 20 miles away, so that a Sexual Assault Response Team (SART) examination could be performed. Gina drove herself to the hospital and, although appearing tearful and troubled, presented herself to a nurse for the SART examination.

According to the nurse, a SART examination is extremely intrusive and typically lasts four hours. The nurse has performed over 250 SART examinations. The nurse testified that because of their intrusiveness and length, many individuals leave before their examinations are complete. Gina did not leave her examination and refused to answer only one question. When the nurse asked Gina if she had been threatened, Gina responded by stating that she did not want to answer because she had children and was concerned about their well-being.

Gina told the nurse that on the previous evening her boyfriend hit her on the head with a closed fist, slapped her, choked her, and penetrated her anus with his finger and penis. She complained of headaches, rectal and anal pain, pain on her face and neck pain.

In examining Gina, the nurse observed and documented bruising on Gina's left armpit, a deep bruise on her clavicle, two slap marks on her face, and broken capillaries on the upper left side of her face which were consistent with choking. The nurse found two injuries in and around Gina's anus. On the left interior side of Gina's gluteal tissue, near the labial fold, the nurse observed a reddened and blanched area approximately three inches by four inches. According to the nurse, such injuries are usually caused by pressure. When the nurse examined Gina's rectum with an anal scope, she observed a reddened, raised, swollen abrasion two inches inside the rectum and covering approximately one-sixth of the left side of the rectal wall. The injuries the nurse observed were consistent with Gina's report of being beaten and raped.

3. Diaz's Statement to Police

On the afternoon of May 3, 2009, police officers went to Diaz's home and spoke with him. He agreed to go to the police station with them. At the police station, and after giving him his *Miranda* rights, police questioned Diaz about what had happened the previous evening. Diaz told the officers Gina came to his home around 8:00 p.m., they had some wine, prepared dinner and ate. Diaz told the officers he and Gina got into an argument while they were eating. The argument ended, they did the dishes, listened to music, made love and then started arguing again. Diaz told the police that when he went

into the bathroom, Gina followed him and pushed him. Diaz told the police officer that he pushed back on Gina; however, in his statement to police Diaz flatly denied hitting Gina, stating: "No, like I said so. I don't wanna get in trouble and that's stupid." According to Diaz, Gina grabbed the top of the toilet tank and it broke. Diaz and Gina then went to separate bedrooms and went to sleep. According to Diaz, at some point he told Gina that he wanted her to leave and take her stuff and that he was tired of fighting. In the morning, Gina left Diaz's home.

Diaz was arrested and charged with forcible sodomy and forcible penetration with a foreign object. (Pen. Code,¹ §§ 286, subd. (c)(2), 289, subd. (a)(1).

4. *Gina's Trial Testimony*

At trial some months later, Gina recanted her allegation that she had not consented to Diaz's sexual acts. In the version of events she provided at trial, Diaz had been drinking when she arrived, and they had sex in the kitchen. They then ate dinner and had an argument during dinner. However, when the argument ended, they went to the bedroom and had consensual sex a second time. After they had sex, she went into the bathroom to clean up. Diaz followed her and they had another argument. Diaz pushed her and grabbed her, she tried to hit him, tripped, fell against the toilet and broke the top part of the toilet tank. She then went to another room and fell asleep.

¹ All further statutory references are to the Penal Code.

At trial Gina testified that in the morning when she woke up she found Diaz had packed up all of her clothing and put it on the hood of her car. Diaz ordered her to leave and she told him, "You're going to pay for it." She then went to police and made a false report.

5. Diaz's Trial Testimony

Diaz testified at trial. The version of events he provided the court was different in a number of respects from the version he provided police officers on the day after his encounter with Gina. Under the version he provided at trial, Gina came to his house around 7:00 p.m., took a shower, came into the kitchen and they had sex in the kitchen. Later, while they were eating dinner he and Gina got into an argument. The argument ended, they watched television and had sex a second time. Gina then went into the bathroom and took another shower. Diaz went into the bathroom and they got into another argument. Gina screamed at Diaz and tried to hit him. Diaz slapped Gina and held her. Diaz then let her go, she fell against the wall, grabbed the top of the toilet tank to break her fall and the top broke. They both went to separate bedrooms and fell asleep.

According to Diaz, in the middle of the night he decided to end his relationship with Gina. He took all of her belongings and put them on her car. When Gina woke up and saw what Diaz had done, she told him he "would pay for it" and left. Diaz denied ever forcing Gina to have anal sex and denied placing his fingers in her anus.

6. *Instruction and Argument*

The trial court instructed the jury on the presumption of innocence and reasonable doubt with CALCRIM No. 220.² The trial court also instructed the jury on conflicting evidence with CALCRIM No. 302, which states: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

In his rebuttal argument, the prosecutor made the following statements: "What is reasonable doubt here? You must accept the reasonable interpretation and reject the

² CALCRIM No. 220 states: "The fact that a criminal charge has been filed against the defendant[s] is not evidence that the charge is true. You must not be biased against the defendant[s] just because (he/she/they) (has/ have) been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt [unless I specifically tell you otherwise]. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant[s] guilty beyond a reasonable doubt, (he/she/they) (is/are) entitled to an acquittal and you must find (him/her/them) not guilty."

unreasonable interpretation Beyond a reasonable doubt simply means the prosecution's interpretation is reasonable and the defense's interpretation is unreasonable. . . . One's reasonable and one's unreasonable. Which one is reasonable as you sit there right now?

"Let's talk about all the reasons the defense argument is unreasonable. And before we talk about this, I want it to be very, very clear so you folks know what we're talking about. In order for you to find the defendant not guilty, you must all individually and collectively agree everything the defense said is true. And we're going to go through this list, and your list may be longer than mine. This is just a list that I came up with.

"For you to find the defendant not guilty, meaning his story is reasonable, you must first find that the victim made the whole story up in the time it took her to drive from the defendant's house to the police station. You must accept that to find him not guilty. [¶] . . . [¶]

"To find the defendant not guilty, you also -- on top of thinking the victim made this whole story up, including every single detail, you also must determine that she drove to the hospital in Murrieta by herself and didn't change her mind at all on the way. Hey, it's a long drive down here. Is it worth really making the story up and going through this? To find him not guilty, you must think she did that. . . . [¶] . . . [¶]

"Not only that, ladies and gentleman, to find the defendant not guilty, you have to assume everything that she told you was the truth when she testified in court."

The jury found Diaz guilty of both forcible sodomy (§ 286, subd. (c)(2)) and forcible penetration with a foreign object (§ 289, subd. (a)). Diaz was sentenced to a term of three years on the sodomy conviction and sentencing on the foreign object conviction was stayed under section 654.

DISCUSSION

As we indicated at the outset, Diaz contends the prosecutor's argument was improper. He further contends the trial court should have sua sponte instructed with respect to the error and his counsel rendered ineffective assistance of counsel in failing to object to the argument. Although we agree the argument was improper, on this record it was not prejudicial. Thus neither the trial court's failure to instruct nor counsel's failure to object require that we reverse the judgment of conviction.

I

"[T]he *prosecution* must prove every element of a charged offense *beyond* a reasonable doubt. The accused has *no* burden of *proof* or *persuasion*, even as to his defenses." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1214-1215; see also *People v. Hill* (1998) 17 Cal.4th 800, 831-832.) In *People v. Gonzalez*, a death penalty case, the prosecutor asserted that " '[t]he defense has to create a reasonable doubt The reasonable doubt has to be created by the defense. They have not created any reasonable doubt. Confusion, yes, but reasonable doubt, no.' " (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1214.) The court found that arguably this statement did not shift the burden of proof: "The remark was proper if it meant only that the prosecution had proved

premeditated murder of a peace officer beyond a reasonable doubt, and that the weakness of the defense response had left the record devoid of any basis for reasonable doubt. The remark was improper if meant to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*Id.* at p. 1215.)

Because in *Gonzalez* no objection to the prosecutor's argument had been made at trial, the court found that in any event the issue could not be raised as a direct claim on appeal: "[T]imely objection, admonition, and instruction would have cured any prejudicial confusion" (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1215.) The court also rejected any notion the prosecutor's argument would support a claim of ineffective assistance of counsel: "The jury received accurate standard instructions that the People bore the burden of proving defendant guilty beyond a reasonable doubt, and that he was presumed innocent until proven guilty. [Citations.] No instruction stated or implied that defendant bore any burden of proof or persuasion. Defense counsel in his closing argument reread CALJIC No. 2.90 and repeatedly emphasized the People's 'very, very, very high burden.' The evidence that defendant was guilty as charged was highly persuasive." (*Ibid.*) Hence, applying the deferential standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, the court found "counsel's failure to object to the prosecutor's 'reasonable doubt' argument does not undermine confidence in the guilt verdict." (*People v. Gonzalez, supra*, 51 Cal.3d at p. 1215; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1133; *People v. Williams* (2009) 170 Cal.App.4th 587, 635: "It is improper for the prosecutor to misstate the law generally, and in particular, to attempt

to lower the burden of proof. [Citation.] However, we do not reverse a defendant's conviction because of prosecutorial misconduct unless it is reasonably probable the result would have been more favorable to the defendant in the absence of the misconduct. [Citation.]".)

II

Here, the prosecutor was in error in repeatedly stating that, in order to acquit Diaz, the jury had to unanimously agree with each detail of Diaz's version of events, and in particular with Gina's trial testimony. Diaz bore no such burden. (See *People v. Gonzalez, supra*, 51 Cal.3d at pp. 1214-1215; *People v. Hill, supra*, 17 Cal.4th at pp. 831-832.) Arguably, what the prosecutor meant to convey was that, consistent with CALCRIM No. 302, in resolving the conflict between the version of events Gina provided on the morning after the assault and the version she and Diaz provided at trial, the jury should adopt the version which, under all the circumstances was more reasonable and convincing. However, the prosecutor's mode of expression plainly went beyond what is permissible under CALCRIM No. 302, especially his contention that the jury could not acquit unless it accepted in their entirety Diaz and Gina's respective trial testimony. In order to acquit Diaz, the jury needed only to conclude that given the widely divergent accounts of what happened, there was a reasonable doubt as to whether the sex between Diaz and Gina was consensual. (See *People v. Hill, supra*, 17 Cal.4th at pp. 831-832.)

However, as in *People v. Gonzalez*, because no objection to the argument was made at trial, the prosecutor's erroneous argument cannot be the basis for a direct attack on appellant's conviction. As in *People v. Gonzalez*, a timely objection would have permitted the trial court to admonish the prosecutor and properly instruct the jury. Implicit in the holding in *People v. Gonzalez*, which requires an objection to arguments which improperly shift the burden of proof, is rejection of the notion that there is any sua sponte duty to instruct when such arguments are advanced. Thus, contrary to Diaz's argument, the trial court had no sua sponte duty to instruct the jury as to the erroneous aspects of the prosecutor's argument.

We also reject Diaz's contention his counsel was ineffective in failing to object to the prosecutor's argument. Although the prosecutor's argument was improper because it placed the burden of proof on Diaz, on the other hand the prosecutor could, as he did, nonetheless properly compare the conflicting version of events and attack Diaz's version and Gina's trial testimony as unreasonable and implausible. (See CALCRIM No. 302.) We also note that as in *People v. Gonzalez* the jury was properly instructed as to reasonable doubt and the burden of proof. Most importantly, however we find no prejudice here because the version of events Gina gave police officers on the morning after the assault was confirmed by substantial physical evidence and her conduct that day. We note there is no real dispute Gina was a victim of a brutal physical attack. In particular, the broken capillaries on Gina's face are fairly vivid corroboration of her initial claim that Diaz choked her, and the bruising under her arm pits and on her clavicle are

corroboration of her initial claim that Diaz had held her arms down while he raped her. In addition, the SART nurse observed that Gina had slap marks on her face consistent with her initial claims that Diaz hit her. Importantly, there was evidence of bruising in and around Gina's anus and rectum consistent with forced sexual penetration. Taken together this physical evidence is powerful confirmation of Gina's initial report of what happened to her, in which Diaz was both the physical and sexual aggressor.

In addition to the physical evidence, Gina's behavior on the morning after the attack corroborated her initial statement. She not only went on her own to the police station, but she travelled from there by herself 20 miles to a hospital where, without complaint, she endured a lengthy and intrusive SART examination. This conduct is far more consistent with someone who has been the victim of a brutal attack than someone attempting to manufacture a false claim.

While there was a wealth of evidence which corroborated Gina's initial report, Diaz's credibility was undermined by virtue of his inconsistent portrayals of what occurred. Although Diaz flatly denied striking Gina when he was interviewed by police on the afternoon after the assault, at trial, after undeniable physical evidence that he struck Gina had been presented, Diaz admitted slapping her in the bathroom. Moreover, while in Diaz's initial account he and Gina only had sex once—after dinner—at trial Diaz stated they had sex once before dinner in the kitchen and again a second time after dinner. Diaz's failure to fully describe to police both sexual encounters strongly suggests

his trial testimony was manufactured in an apparent attempt to portray Gina as being in a very amorous mood on the evening in question and likely to have consented to sex.

In sum, given the volume of physical and behavioral evidence which supported Gina's initial version of events and Diaz's lack of credibility, those portions of the prosecutor's argument which improperly shifted the burden of proof to Diaz in no sense undermine our confidence in the jury's guilty verdict. (See *People v. Gonzalez, supra*, 51 Cal.3d at p. 1215.)

DISPOSITION

The judgment of conviction is affirmed.

BENKE, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.