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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE RITO FUENTES,

Defendant and Appellant.

E052157

(Super.Ct.No. RIF154233)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the former Tulare Mun. Ct. assigned by the Chief Justice pursuant to
art. VI, § 6 of the Cal. Const.) Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Gary W. Schons, Assistant Attorney General, Peter Quon, Jr., and Lilia E.
Garcia, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Jose Rito Fuentes guilty of two counts of unlawful sexual intercourse or sodomy with a person 10 years of age or younger (Pen. Code, § 288.7, subd. (a), counts 1 & 2) and two counts of oral copulation or sexual penetration with a person 10 years of age or younger (Pen. Code, § 288.7, subd. (b), counts 3 & 4). Defendant was sentenced to a total indeterminate term of 80 years to life with credit of 327 days for time served as follows: an indeterminate term of 25 years to life on count 1; a consecutive indeterminate term of 25 years to life on count 2; a consecutive indeterminate term of 15 years to life on count 3; and a consecutive indeterminate term of 15 years to life on count 4. Defendant's sole contention on appeal is that the prosecutor committed prejudicial misconduct during closing argument. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

Defendant was the ex-stepfather of the victim, 10-year-old Jane Doe. The victim's mother was married to defendant from 2005 to 2008. The victim viewed defendant as her father and called him "Dad." After the divorce, the victim's mother continued to have a sexual relationship with defendant and allowed the victim and her brother to stay overnight with defendant in his home.

In April 2009, the victim's mother went on a three-week trip to Egypt while her children stayed with defendant. On December 10, 2009, the victim told her mother that she did not want to go to defendant's home because defendant had been touching her. The victim eventually revealed the specifics of the sexual abuse to her mother.

The victim recalled that the sexual abuse began in 2009 when she was nine years old while she stayed overnight at defendant's house. She described an incident in which she woke up to find defendant lying in bed with her and her vagina "moist," making her think defendant might have orally copulated her. She recalled another incident where she woke up to find defendant lying on top of her with his penis inserted into her buttocks. She explained that her bottom felt "full." She further recalled an incident where she felt pain when defendant inserted his penis into her vagina. Sometimes during the incidents, defendant touched her chest underneath her clothing. The victim believed defendant sexually abused her about four or five times.

On December 17, 2009, the victim was interviewed by a trained forensic interviewer.¹ The victim described the above-noted incidents to the interviewer.

On December 28, 2009, the victim made two pretext calls to defendant.² During the calls, defendant repeatedly apologized to the victim "for everything." He also said that he had made a "big mistake," and that he loved her and missed her. Additionally, he continually stated, "I didn't try to hurt you," "I don't know what happened," and "I want to fix it up." Defendant also asserted, "I don't know what am I doing that time. . . . Something happened to me. . . . But I never in my life, and I swear, I never behave like this. And I am not a monster I never, never gonna happen again I promise you."

¹ The interview was transcribed and played for the jury at the time of trial.

² The pretext calls were transcribed and played for the jury at the time of trial.

When the victim's mother got on the telephone, defendant, in pertinent part, told her, "I did wrong with her and I have to be held accountable to her and not you uh."

Subsequently, defendant voluntarily went to the police station and spoke to an officer.³ He initially denied the allegations, claiming he was confused and puzzled by them; however, he later admitted to placing his penis inside the victim's anus three times, his fingers inside the victim's vagina about three times, and licking the victim's vagina once. He claimed the incidents occurred in 2009 on three different days at his residence in the master bedroom when the victim was about 10 years old. He further stated that he was "wrong" and "sorry" for what he had done.

At trial, defendant denied the allegations. He claimed that at the time of the police interview, he was not feeling well and "was hearing the voices in [his] head, very loud voices." He further asserted that the voices were telling him to confess.

II

DISCUSSION

Defendant contends that the prosecutor committed prejudicial misconduct during closing arguments by misstating the law, misleading the jurors, and shifting the burden of proof. We disagree.

A. *Additional Background*

During closing arguments, defense counsel asserted: "There is all this talk about medical findings. And the cops are lying to my client saying, We're going to find

³ Defendant's interview was video recorded, transcribed, and played for the jury at the time of trial.

fingerprints and all that stuff. You got nothing. There is no medical evidence in this case of anything on this girl's body. We know she had a doctor's exam because McConnell said she was there. You got nothing. If there was anything—the slightest tear, any history of bleeding, it would be plastered all over this room.”

Defense counsel also emphasized that there was no evidence to show defendant had an unnatural interest in young girls, arguing: “You get to look at this, folks. If this is a guy who is interested in kids but you've never seen it in his entire life—no conviction, no allegations, nothing—and suddenly out of the blue with a prepubescent girl, not someone who is developed yet, he now suddenly has an interest and he has all this opportunity to spend night after night after night with her and it's two, one, three, four times, it doesn't line up. [¶] . . . [¶] Zero evidence—physical evidence of this conduct. Zero. No evidence [defendant] has any interest in young girls, child porn, anything. No prior criminal record, no prior molest allegations.”

In rebuttal, the prosecutor noted that medical evidence in this case was irrelevant because defendant had confessed to the acts. Specifically, the prosecutor argued: “Anything about medical findings is not relevant in this case. [¶] And I submit to you they didn't have to put on a defense. The People are charged with proving a case beyond any reasonable doubt. They—[defense counsel], my colleague, can sit here and eat beef jerky and do crossword puzzles. They have no obligation to put on a defense whatsoever, *but they opted to put on a defense. This defendant chose to take the stand and explain to you what it was.* They have the same subpoena power as the People. They have access to every report, disk. There are no surprises that the People can do. We have an

obligation—a legal obligation to turn over everything to them. If there was something else, they could have put it on to show you some alternative explanation that supported the voices in his head. If some medical—they have the same power to put on something once they decide to put on a case.” Defense counsel did not object to the above statements by the prosecutor.

Later, in regard to defendant’s prior criminal history, the prosecutor stated: “*It’s improper for you to consider this man’s criminal history or lack of criminal history.* Him urging you to think that because he has no criminal convictions in his past that doesn’t—that means he is not a child molester is actually an improper thing for you to consider. *You’re not to consider whether or not this man has any criminal convictions.*”

Defense counsel thereafter objected, stating, “That is improper. It’s evidence in the case.” Defense counsel further noted, “If the reverse were true, he would be all over it.” The prosecutor replied, “No, I would not.” After the court allowed the argument, the prosecutor stated, “Actually, I would not at all. [¶] Criminal convictions—only certain ones you can consider, generally, in this type of case, if there [are] allegations prior of other sexual touching. And there weren’t in this case. And, ladies and gentlemen, [defense counsel] wants to stress that somehow because there are no prior allegations from other kids in this case, he didn’t do these in this case. [¶] Ladies and gentlemen, we don’t know someone is molesting children until they’re caught. And then we understand they are then a child molester. And in this particular case, this man confessed. Evaluate how he testified, what he said, how bogus it is. I felt like I needed to put rubber boots on while this guy was up there because it was getting so thick in here.”

B. *Analysis*

Initially, we agree with the People that defendant forfeited this issue by failing to object to the challenged arguments *and* request a curative admonition. (*People v. Frye* (1998) 18 Cal.4th 894, 969-970, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) To avoid forfeiture of prosecutorial misconduct, a defendant generally “must make a timely objection, make known the basis of his objection, *and* ask the trial court to admonish the jury. [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 553, italics added.) There is an exception to the general rule of forfeiture, however, which applies in the case of futility, incurability, or impracticability. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Defendant does not assert an exception to the forfeiture rule but acknowledges defense counsel failed to object to some of the challenged comments at trial and asserts ineffective assistance of counsel due to the failure to preserve the issue for appeal. Notwithstanding the forfeiture, and to forestall the ineffective assistance of counsel claim, we reach the merits of the claim.

Prosecutorial misconduct is reversible error under the federal Constitution “when it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) A prosecutor’s conduct that does not make the trial fundamentally unfair is misconduct under California law only if it involves the use of deceptive or reprehensible methods to attempt to persuade the trier of fact. (*Ibid.*) To establish prosecutorial misconduct, a defendant need not show that the prosecutor acted in bad faith, but he must show that “the right to a fair trial was prejudiced.”

(*People v. Nguyen* (1995) 40 Cal.App.4th 28, 35.) “In either case, only misconduct that prejudices a defendant requires reversal [citation], and a timely admonition from the court generally cures any harm. [Citation.]” (*People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375.)

“[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 567-568.) The prosecutor is allowed, “in colorful terms, . . . to argue on the basis of inference from the evidence that a defense is fabricated” (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, overruled on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.) We do not look to isolated words or phrases, “we must view the statements in the context of the argument as a whole. [Citation.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

It is misconduct for a prosecutor to mischaracterize the evidence (*People v. Hill, supra*, 17 Cal.4th at p. 823) or misstate the law (*People v. Bell* (1989) 49 Cal.3d 502, 538). But a reversal requires more. “To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.]” (*People v. Brown, supra*, 31 Cal.4th at pp. 553-554.)

Here, the prosecutor’s rebuttal comments, considered in the context of the entirety of both parties’ closing arguments, were not improper. He was merely responding to defense counsel’s closing arguments, and the remarks were fair comments on the state of

the evidence. It was proper rebuttal argument for the prosecutor to note that there was no evidence to support defendant's claim that he was suffering from a mental illness.

Defendant misconstrues the prosecutor's statements as shifting the burden of proof.

There is no indication that the prosecution was absolved from its burden of proof; in fact, the prosecutor explicitly stated, "The People are charged with proving a case beyond any reasonable doubt." The prosecutor was permitted to comment on defendant's failure to call logical witnesses or introduce material evidence supporting his defense that he was hearing voices. (See *People v. Lewis* (2001) 25 Cal.4th 610, 670.) Misconduct claims have been rejected "where the prosecutor criticizes the defense theory of the case because it lacks evidentiary support [citation]." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) He did not argue that defendant was required to present evidence to create a reasonable doubt. Therefore, he did not commit misconduct by improperly shifting the burden of proof to defendant.

Defendant also argues that the prosecutor committed misconduct by misstating the law when he stated that the jury could not consider the lack of defendant's criminal history. We agree. Expert and opinion testimony regarding a defendant's likelihood to commit child molestation is relevant. (See *People v. Stoll* (1989) 49 Cal.3d 1136, 1149, 1152-1155 [expert opinion testimony that the defendant is not a sexual deviant was relevant and permissible in a child molestation case]; *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309 [our high court extended *Stoll* to lay witness testimony, holding that a lay witness could testify that the defendant was not a sexual deviant]; *People v. Ruiz* (1990) 222 Cal.App.3d 1241, 1243-1244 [psychological opinions "may be admitted as character

evidence tending to show that an individual was or was not likely to have committed a particular act”].) Likewise, evidence of a defendant’s acquittal of prior charges is relevant. (See *People v. Mullens* (2004) 119 Cal.App.4th 648, 664-665.) In fact, under Evidence Code section 1102, “[i]n a criminal action, evidence of the defendant’s character or a trait of his character in the form of an opinion or evidence of his reputation is not made inadmissible by [Evidence Code] Section 1101 if such evidence is: [¶] (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.” We therefore agree with defendant’s argument that the prosecutor committed misconduct when the prosecutor told the jury, “It’s improper for you to consider [defendant’s] criminal history or lack of criminal history.”

Defendant also appears to argue that the prosecutor committed misconduct by misleading the jurors when the prosecutor implied that medical evidence existed to support the People’s case or that the jury “should not consider the absence of [medical] evidence.” He also suggests that the prosecutor misled the jurors when he stated that defendant had the power to find and put on evidence concerning his mental health issues.

Defendant’s interpretation of the remarks is inaccurate. While the prosecutor’s statement that medical findings were “irrelevant” was an overstatement, it can be fairly interpreted as an argument that the medical findings were not as important in this case because of the confession. As the prosecutor repeatedly argued, “. . . This is a confession case. He confessed to the crime.” The prosecutor was merely responding to defense counsel’s argument regarding no medical findings on the victim’s body, and pointing out that since defendant had confessed to the crimes, medical findings were not

as important in this case. Furthermore, it is not a fair interpretation of the prosecutor's comments as implying the existence of medical evidence to support the prosecution.

We also reject defendant's claim that the prosecutor misled the jurors when he stated that defendant had the same subpoena "power as the People" to support his mental health issue defense. The prosecutor was simply arguing that there was no evidence to support defendant's claim that he was suffering from a mental illness. The prosecutor's statements were within the realm of reasonable argument, based on the evidence presented at trial, and it was not likely the jury would have misunderstood it as anything other than an argument that there was no evidence to suggest defendant was suffering from a mental health issue or hearing voices. Arguing the absence of material evidence does not constitute prosecutorial misconduct. (*People v. Medina* (1995) 11 Cal.4th 694, 755.)

There are numerous cases that have rejected misconduct claims based upon closing arguments far more inflammatory than anything said in this case. For example, in *People v. Cummings* (1993) 4 Cal.4th 1233, the court found the prosecutor did not commit misconduct when he argued the defendant's failure to present certain records as evidence and argued: "Does this tell us a little something about the ink and octopus and what is going on at the other end of the table I think it should." (*Id.* at p. 1302, fn. 46.) The prosecutor added: "Does that make you wonder what they are doing down there? They are supposed to do that. That is their job. [¶] They are trying to get this man off." (*Ibid.*) The court found the prosecutor did not commit misconduct because the context of the statement was "such that the jury certainly would understand it to be

nothing more than urging the jury not to be misled” (*Id.* at p. 1302; see also *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor’s reference to defense as “smokescreen” not misconduct]; *People v. Young* (2005) 34 Cal.4th 1149, 1193 [prosecutor’s characterization of defense counsel’s argument as “‘idiocy’” was fair comment on counsel’s argument].) Also, in *People v. Stanley* (2006) 39 Cal.4th 913, the court found the prosecutor did not commit misconduct when he argued that defense counsel “‘imagined things that go beyond the evidence’ and told them a ‘bald-faced lie.’” (*Id.* at p. 952.) *Stanley* found the remarks were merely responsive to defense counsel’s argument, and further found “[t]he prosecutor’s argument, although intemperate in tone, did little more than urge the jury not to be influenced by counsel’s arguments, and to instead focus on the testimony and evidence in the case. [Citation.]” (*Ibid.*)

While the prosecutor’s closing rebuttal argument misstated the law when he told the jurors not to consider defendant’s lack of criminal history, defendant’s remaining challenges to the prosecutor’s closing rebuttal argument did not mislead the jury, imply facts not in evidence, or shift the burden of proof to the defense. The prosecutor’s rebuttal argument must be considered in the context of the defense theory, which was to challenge the lack of physical or medical evidence in the case, to show defendant had no prior interest in young girls, and that defendant’s confessions were a result of an underlying mental illness.

Moreover, prosecutorial misconduct does not require reversal unless it subjects the defendant to prejudice. (*People v. Warren* (1988) 45 Cal.3d 471, 480.) “[I]n the absence of prejudice to the fairness of a trial, prosecutor misconduct will not trigger reversal.”

(*People v. Bolton* (1979) 23 Cal.3d 208, 214.) We find the conduct complained of did not cause prejudice under any harmless-error standard. (See *People v. Zambrano* (2004) 124 Cal.App.4th 228, 243 [Fourth Dist., Div. Two] [reasonable probability standard]; *People v. Brown, supra*, 31 Cal.4th at pp. 553-554 [where misconduct amounts to a violation of a defendant's constitutional rights, the harmless beyond a reasonable doubt standard applies].) The prosecution's case against defendant was extremely strong, since defendant had repeatedly confessed to the allegations prior to trial. Therefore, in light of defendant's confessions, incredible explanation for those confessions, the victim's testimony and prior statements to investigators, and defendant's apologies to the victim, defendant cannot show prejudice.

III

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.