

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

IVAN SAPP,

Defendant and Appellant.

E053834

(Super.Ct.No. FSB041030)

OPINION

APPEAL from the Superior Court of San Bernardino County. Arthur Harrison, Judge. Affirmed.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Ivan Sapp, defendant and appellant (defendant), appeals from the judgment entered after a jury found him guilty as charged on two felony counts—penetration by a foreign object in violation of Penal Code section 289, subdivision (a)(1) (count 1) and lewd and lascivious conduct in violation of Penal Code section 288, subdivision (c)(1)¹ (count 2). John Doe was the alleged victim of both counts. The jury also returned true findings on various special allegations and prior conviction sentence enhancements, the details of which are not relevant to this appeal. Based on the jury’s guilty verdicts and true findings, the trial court sentenced defendant to serve a total term of 18 years in state prison.

This appeal is defendant’s second; in the first (E031057) we reversed his conviction on the noted charges because the trial court had wrongly denied defendant his constitutional right to self-representation.² Defendant contends in this appeal that we should again reverse his conviction because the prosecutor committed misconduct during closing argument by referring to defendant as a hardened, experienced criminal. Defendant concedes his trial attorney did not object to the prosecutor’s argument. He contends, however, that his motion for mistrial was sufficient to preserve the issue for

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

² In addition to defendant’s two appeals, the district attorney appealed the trial court’s order in this second trial dismissing an allegation under section 667.61, subdivision (a) based on prejudicial jury misconduct (case No. E048051). Consequently, this is our third encounter with this case.

review on appeal and that an objection would have been futile. Alternatively, defendant contends that his trial attorney was ineffective for failing to object.

We disagree with each of defendant's assertions, and therefore we will affirm.

FACTS

On April 15, 1999, at approximately 6:00 a.m., 15-year-old John Doe was jogging in San Bernardino near his home when defendant approached and asked him for some spare change. John replied that he did not have any spare change and continued jogging. Defendant came up behind John and put his hands around John's throat. As he choked him, defendant dragged John down a side street. There, defendant sexually assaulted John by fondling and kissing him. Defendant also put his hand down John's sweatpants and inserted a finger in John's rectum.

John struggled and got free. After hitting defendant in the face, he ran home and called 911. John's parents were driving him to a hospital when John spotted defendant. John got out of the car to confront him while John's father went after defendant with a steering wheel locking device called the Club. While his father chased defendant, John called the police who arrested defendant around 7:30 a.m. John identified defendant as the person who had attacked him.

While being driven to the police station, defendant told the arresting officers that John was lying and that defendant had never seen John before. Defendant claimed he had been walking down the street when someone started chasing him and hitting him with a Club. At the police station, defendant asked what he was being charged with and an

officer told him he had been arrested for kidnapping and fondling the victim. Defendant said he had nothing to do with it and that the victim was lying. When officers tried to bag defendant's hands to preserve evidence, defendant asked what they were doing, and when the officers explained, defendant said they would not find anything under his fingernails.

Defendant then asked what would happen if they found some bits of the victim's clothing under defendant's fingernails. The officers responded that would show defendant had been in the area. Defendant then told the officers that John had approached him while he was waiting for a bus and offered him \$10 to "play with each other's dicks." As they were walking toward defendant's house, John started to push defendant around, and defendant grabbed John's clothes in an effort to get away.

The parties stipulated that no DNA evidence from John Doe was found on defendant's hands; that scratches observed on John Doe's body were from physical injury and trauma; and when examined on April 15, 1999, a medical doctor observed mild redness to John Doe's anal opening.

At trial, defendant testified that he had been waiting for the bus when he saw John Doe and asked him if he had change for \$10. According to defendant, John hit defendant in the head with a soda can and spit in defendant's face. Defendant grabbed John and twice threw him into a fence after which John ran away. A short time later, John and his father drove by and started to chase defendant with the Club. Defendant escaped, but several hours later when defendant was again at the bus stop, John and his father returned and again chased defendant and started hitting him with Club devices. Defendant denied

that he made any statement to the police after his arrest other than that he wanted to remain silent and that he had never seen John Doe before.

Additional facts will be recounted below as pertinent to our resolution of defendant's claim on appeal

DISCUSSION

Defendant's only claim in this appeal is that the prosecutor committed misconduct during closing argument by referring to defendant as a hardened, experienced criminal based on defendant's admission during his trial testimony that he had been convicted in 1992 of grand theft and in 1989 of assault with force likely to produce great bodily injury. We disagree.

A. Additional Facts

In arguing that defendant's testimony at trial was not believable, the prosecutor made the following argument: "Well, aside from the outrageous absurdities of the account itself, to use some language [defendant] himself might use, he has a compelling need to lie. He has a compelling need to make something up to save himself. He is, as he admitted on the stand, basically a hardened, experienced criminal. He's been around the corner. ¶ His tune changes with each verse. By which I mean when he first started talking to Officer Thompson, his story was he knew nothing about the kid until after this adult had been chasing him. ¶ Then his story changed. Once the bags were put on his hands he thought there might be something to catch him with, then his story changed to, 'Well, the kid approached me and asked me if I wanted to do some fondling together.'

[¶] And then in court, now that he's had time to prepare a little something more elaborate, his story is he is sitting, minding his own business and he asks a youngster for change and then the young kid punches him. The story changes with each verse." In his rebuttal argument, the prosecutor responded to defense counsel's argument regarding the absence of DNA evidence on defendant's hands by arguing that defendant had plenty of time "to wash his hands and clean his fingernails. Especially if there is something [*sic*] like him who has had experience and will be thinking about those kinds of things."

Defendant's trial attorney did not object to either statement. Instead, after closing arguments were completed, he moved for a mistrial based on his view that the prosecutor had improperly used defendant's criminal history to persuade the jury defendant was a bad guy and therefore must have committed the crimes in this case. The prosecutor, in turn, argued that he had not violated Evidence Code section 1101, which prohibits the use of character evidence to prove conduct, and had only used defendant's prior felony convictions to argue defendant's lack of credibility. The trial court found that the prosecutor's argument was fair comment on the evidence and denied defendant's mistrial motion.

B. Analysis

"In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury. [Citations.] But the defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a

showing of the prosecutor's subjective good faith. [Citation.] To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*People v. Price* (1991) 1 Cal.4th 324, 447.)

Defendant did not make a timely objection and did not request an admonition in this case. Defendant contends an objection would have been futile because it would only have emphasized the offending argument which in turn would have caused the jury to focus on defendant's criminal history. Under these circumstances, defendant contends that a motion for mistrial was the better procedure and if the trial court had found misconduct, the court could have admonished the jury or given an additional instruction.

Defendant's justification for not objecting effectively consumes the rule; it excuses in nearly every conceivable situation the requirement that defendant object and request an admonition in order to preserve a claim of prosecutorial misconduct for review on appeal. Defendant did not timely object and request the jury be admonished to disregard the purportedly offending argument. Therefore, he has not preserved the issue for review on appeal.

But even if we were to conclude that defendant's motion for mistrial is an adequate substitute for a timely objection, we would reject defendant's claim on the merits. The prosecutor did not improperly argue that defendant's prior convictions were relevant as evidence of his propensity to commit the crimes. As set out above, the

prosecutor argued the prior convictions, first, to persuade the jury that defendant was not credible and therefore they should not believe his testimony. Next, the prosecutor referred to defendant's criminal experience to explain why defendant did not have any of the victim's DNA on his hands—because someone with his experience would know to wash his hands. Both uses of prior crimes evidence are appropriate.³

In short, the prosecutor did not use defendant's prior felony convictions improperly. Therefore we reject defendant's prosecutorial misconduct claim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

KING
J.

MILLER
J.

³ The trial court also instructed the jury that they could only use evidence that a witness had been convicted of a felony to determine the credibility of the witness.