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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN DAVID CARLIN,

Defendant and Appellant.

G044752

(Super. Ct. No. 09WF1103)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

John L. Dodd, 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, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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After a jury found defendant John David Carlin guilty of one count of committing a lewd act on a child under 14 (Pen. Code, § 288, subd. (a)), the court suspended imposition of sentence and placed him on probation, including 365 days in jail. The basis of defendant's appeal is prosecutorial misconduct based on four statements made in closing argument. He argues the court erred by failing to admonish the jury and denying motions for mistrial and new trial. We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

When J.V. was 10 she lived with her mother and defendant, who was mother's boyfriend, in defendant's condo. One evening J.V., mother, and defendant were sitting in the condo's Jacuzzi; no one else was there. After about 20 minutes mother left to attend a class. After mother left, defendant moved from where he had been sitting across from J.V. next to her.

He began rubbing her arm, then held her like a baby, saying "everything was going to be okay." J.V. moved away from defendant, telling him to stop, but defendant went near her again, repeating that everything would be okay. Then he held her "like a baby," touched and squeezed her buttocks on top of her bathing suit and kissed her cheek. She told him to stop. He then asked her to open her mouth; when she refused he kissed her lips two times, again saying everything would be okay. She was embarrassed and told him to stop; she then moved away from him. When other people came out and went into the pool, J.V. went into the house. When she came back outside police were there.

Trent G. resided in the same condo complex. On the same day as the incident between defendant and J.V. he and his girlfriend Cassandra L. and others with them pulled up in a car near the Jacuzzi and saw a couple kissing on the lips. Cassandra L. described it as "a lover's embrace," observing that the female was sitting on the male's

lap with her legs over to one side. Trent G. joked “that maybe they need[ed] to get a room.” As the group approached the couple they noticed the female was a young girl. Trent G. and Cassandra L. were able to identify the male as defendant. When they neared the Jacuzzi the girl got off defendant’s lap and moved away. During the 50 minutes they remained in the pool area they saw no more contact between the couple.

As the group was leaving the pool area they decided to call the police and report what they had seen. Defendant heard their comments and said, “Why don’t you mind your own business” and Trent G. replied, “I live here, pervert. I’m going to call the cops.”

When police officer Ben Jaipream responded to the call he first spoke to J.V. who told him defendant was her mother’s boyfriend. He then spoke to Trent G. who told him he had seen defendant kissing J.V. and that he and defendant had had words when defendant learned he was going to contact police.

Jaipream then spoke to J.V. Although she originally denied anything had happened, when told she was not in trouble, she reported that defendant had kissed her, and that “she felt weird” and “didn’t like it.” She said that when defendant asked her to open her mouth she said no but then did it anyway. She also stated she told defendant to stop many times. She also told him defendant had touched her buttocks.

The CAST (Child Abuse Services Team) interview between J.V. and Adriana Ball was recorded and the DVD was shown to the jury. J.V. again reported defendant touched and squeezed her butt when they were in the Jacuzzi. She also said he kissed her head and, after asking her to open her mouth, kissed her lips.

Defendant testified in his own behalf, stating that when he and J.V. were alone in the Jacuzzi after her mother had left, J.V. told him she was upset about an event at school. He told her everything would be okay and kissed her cheek and her forehead. Although she sat on his lap, he never touched her chest or her stomach. He had no sexual intent during this incident. When some adults came to the pool area they exchanged

some disparaging remarks. After the police came he told them he might have kissed J.V.'s cheek.

In rebuttal officer Keith Phan testified he interviewed defendant the day of the events in question before defendant spoke to Jaipream. When Phan asked defendant if anything had happened with J.V. in the Jacuzzi, he replied they had just been swimming. He said nothing about arguing with anyone. When defendant spoke to Jaipream, he denied kissing J.V. or that she was on his lap. Questioned again at the police station he said, "I didn't molest anyone," but later admitted he had kissed her on the lips.

DISCUSSION

Defendant challenges four statements made by the prosecutor during closing argument, claiming they constituted misconduct and violated his right to confrontation. He argues the court should have admonished the jury and granted his motions for mistrial and for a new trial based on the alleged misconduct.

1. Applicable Law

"When a claim of misconduct is based on the prosecutor's comments before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citations.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) "In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 772.) "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such "unfairness as to make the resulting conviction a denial of due process." [Citation.] By contrast, our state law

requires reversal when a prosecutor uses ‘deceptive or reprehensible methods to persuade either the court or the jury’ [citation] and “‘it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct’” [citation].” (*People v. Davis* (2009) 46 Cal.4th 539, 612.)

2. *Challenged Statements*

a. Argument About J.V.’s Mother

The first challenged argument by the prosecutor is as follows: “[J.V.] didn’t even report this. . . . She was afraid to tell her mom, doesn’t think she will be believed. . . . Because we hear from . . . [Trent G.] who doesn’t know they have that relationship, that that mother runs up and tries to say she was the one kissing [defendant]. That’s the kind of mother [J.V.] has.” After defense counsel objected as the grounds of facts not in evidence, the court held a sidebar.

Defendant’s lawyer argued the evidence of mother’s statement to Trent G. was admitted for a limited purpose, to support Trent G.’s identification of J.V. as the person he had seen defendant kissing. This argument, he contended, was an attempt to use the statement as character evidence against mother. The defense emphasized the evidence came in for a different non-hearsay purpose.

The prosecutor responded that mother’s statement was admitted to show J.V.’s home environment, not for a hearsay purpose. She pointed to J.V.’s testimony that she did not tell her mother because she would not have believed her. The prosecutor also noted it went to J.V.’s credibility because she would be criticized for failing to tell her mother and the prosecution needed to present an explanation.

The court overruled the objection, explaining that the evidence of the type of person J.V.’s mother was came in through different ways, including J.V.’s statement to the CAST interviewer that she did not tell her mother because she would not have believed her.

On appeal defendant asserts the prosecutor mischaracterized the evidence in an attempt to mislead the jury. He emphasizes the mother's statement she was the one kissing defendant was not admitted to show she was a bad mother. Although a prosecutor "may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation]' [citation]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 181), she has "wide latitude to vigorously argue . . . her case and to make fair comment upon the evidence, including reasonable inferences or deductions that may be drawn from the evidence[]" [citation]" (*People v. Dykes, supra*, 46 Cal.4th at p. 768).

Even if, because the evidence of mother's statement to Trent G. was admitted for a different purpose, the prosecutor should not have argued it, her comment to the jury did not prejudice defendant. The prosecutor had the right to make such an argument based on J.V.'s comments she did not tell her mother for fear she would not be believed. Contrary to defendant's claim, nothing in the challenged statement suggests mother was negligent in leaving J.V. in defendant's care or that there may have been similar incidents in the past.

Nor are we persuaded by defendant's reliance on Evidence Code section 1101, subdivision (a), that evidence of a person's character may not be used for proof of conduct. But the comment did not go to mother's conduct; it only went to her failure to believe J.V. As noted, the prosecutor did not argue mother was negligent in allowing defendant to keep care of J.V.

Defendant did not meet his burden of proof to show the comment so infected the trial as to make it unfair or that but for the comment there was a reasonable probability of a different result.

b. Argument Regarding CAST Interview

When discussing J.V.'s CAST interview, the prosecutor stated, "You can tell the social worker thinks there's something more and can't get to everything with

her.” After a recess defense counsel objected there was no evidence to support the statement and asked the court to admonish the jury to disregard it. The prosecutor responded that during the interview, the social worker asked J.V. if she was alright and whether anything else had happened.

After viewing the videotape, the court stated that the comment could be interpreted to mean defendant had committed lewd acts with J.V. in the past or had had sex with her and could encourage the jury to speculate. The court refused defense counsel’s request for an admonition and ruled the prosecutor could clarify her meaning in further argument. She did so, stating “I’m not talking about something that happened before out of her or more on a different date out of her. I’m talking about her knowing that independent witnesses talked about more kissing and she was trying to get to that. . . . That’s what we are talking about, this date of May 20th, 2009.”

This clarification explained the prosecutor’s meaning and cleared up any misconception her original argument may have caused, eliminating any unwarranted speculation. Thus, we reject defendant’s argument the original statement suggested he had molested J.V. in the past or had committed acts more serious than those he was charged with.

c. Argument That Sometimes Abuse is Never Disclosed

During her argument regarding J.V.’s failure to disclose to the social worker the entirety of the incident as reported by other witnesses, she stated, “So she doesn’t want to talk about . . . the other kisses. . . . The social worker says, ‘Are you okay?’ Her demeanor is very reserved. Some people never disclose abuse. I don’t know, it’s probably somewhere in between. There was more kissing than just one peck on her lips”

Again, after a recess, defense counsel objected to the statement that some people never reveal abuse, claiming it was both outside the scope of evidence and beyond

ordinary knowledge. He noted there had been no expert testimony regarding child sexual abuse syndrome. The prosecutor responded that it is commonly known victims often did not report abuse and no expert testimony was needed to support her argument. The court, while agreeing the statement could have been taken out of context, found it was proper so long as the prosecutor clarified the statement. It allowed her to “readdress this issue and talk about it as it relates to this case.” It advised defense counsel that if he did not believe the further statement sufficiently explained the prosecutor’s meaning it could ask for a sidebar. It again denied defense counsel’s request for an admonition.

When the prosecutor readdressed the issue she stated, “We all know from general experience that people sometimes don’t report crimes that happened to them. And here we’ve got a sexual assault situation, information that happened to [J.V.] that she’s uncomfortable and embarrassed about. Defense talked to her about, well, when you went home did you tell your mom[.] No. She explained why.” Defense counsel did not object or request a sidebar.

Defendant here repeats his claim this statement suggested the jury should speculate he had abused J.V. in the past. He also claims child abuse accommodation syndrome may not be argued absent expert testimony and the prosecutor’s argument was based on her own experience and thus misconduct.

The court suggested the original statement could have been taken out of context, but when the prosecutor clarified it did not suggest she was speaking of prior abuse. Nor does the record support the claim the prosecutor was arguing child abuse accommodation syndrome. We agree the clarified comment was based on a matter of general knowledge, which is a proper basis for argument. (*People v. Harrison* (2005) 35 Cal.4th 208, 248.)

d. Argument Defendant Would Have Continued the Acts if Not Interrupted

Finally, defendant challenges the argument “[a]nd really if we didn’t have any other people there that happened to pull up and see the kissing, we wouldn’t be here because [J.V.] probably never would have told or until it got to be something worse and then it would still be just her in an environment where her mom doesn’t believe her.” But as the Attorney General points out, defense counsel did not object to this argument. The statement he did object to, after the same recess as described above, was that “if other people weren’t there, this would go on and would continue.” He claimed this was an argument about “future dangerousness, not about the facts of the case.” Defendant’s attempt in his reply brief to overcome this failure to object fails. Without an objection this claim is forfeited. (*People v. Souza* (2012) 54 Cal.4th 90, 122.)

In any event, the argument is without merit. Defendant maintains the argument he raises in his brief also suggests future dangerousness. But as to that point the trial court, refusing to admonish the jury, directed the prosecutor to clarify the argument, which she did. She first reminded the jury that nothing the lawyers said in argument is evidence. She then argued that defendant’s conduct in the Jacuzzi had been escalating, despite J.V.’s resistance, and what stopped it was the other people entering the pool area. Neither of the arguments had anything to do with whether defendant would have committed other acts in the future. And it was a reasonable inference from the evidence that defendant ceased only because the others arrived.

3. Failure to Admonish

We do not agree the court erred in failing to admonish the jury about the alleged improper arguments. As we discussed, if any of them were misconduct, they were sufficiently clarified in further argument. Further, the court and prosecutor herself explained to the jury on several occasions that argument was not evidence. Moreover, the jury was instructed with CALCRIM No. 222 stating that only testimony is evidence,

not anything said by the lawyers. We presume the jury followed the instructions.
(*People v. Fuiava* (2012) 53 Cal.4th 622, 716.)

4. Motions for Mistrial and New Trial, Prejudice, and Cumulative Error

The court has broad discretion when deciding a motion for new trial and it should be granted only when there is no chance the defendant received a fair trial. (*People v. Williams* (2006) 40 Cal.4th 287, 323.) And denial of a motion for new trial falls within the court's considerable discretion; we will not reverse absent a clear abuse of that discretion. (*People v. Carter* (2005) 36 Cal.4th 1114, 1210.) Because there was no misconduct or the prosecutor's ambiguous statements were sufficiently clarified, the court did not abuse its discretion in denying the motions. For the same reason there was neither prejudice nor cumulative error. Defendant has not shown the trial was unfair or that absent the statements it is reasonably likely the result would have been different.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.