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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.

DAVID ALAN GODDARD,

Defendant and Appellant.

G044956

(Super. Ct. No. 10CF1160)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Affirmed.

Marta I. Stanton, 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, Christopher B. Beesley and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

David Alan Goddard appeals from a judgment after a jury convicted him of numerous sexual offenses. Goddard argues the prosecutor committed misconduct, the trial court erroneously excluded evidence, and there was cumulative error. None of his contentions have merit, and we affirm the judgment.

#### FACTS

T.B. was born in September 1992, and Betty adopted her three years later. When Betty was unable to care for her, then 10-year-old T.B. moved in with Betty's daughter, M.G. Goddard, and their son, B.G. The following year, they moved to Newport Beach. Because M.G. and Goddard decided to home school B.G., they decided to home school T.B. as well. M.G. was a nurse and often worked long hours. Goddard worked as a day trader at a home office. Goddard and T.B. fought often.

When T.B. was 12 years old she had just finished taking a bath and exited the bathroom. Goddard told her to return to the bathroom so he could show T.B. her genitalia. They returned to the bathroom, and he closed the door. He told her to take off her pants and sit on the toilet. Goddard used a small mirror to show T.B. her genitalia. Goddard told T.B. to close her eyes and put her legs on his shoulders. Goddard put his finger in T.B.'s vagina. A few weeks later, T.B. was taking a bath when Goddard entered the bathroom, put soap on his hand, and rubbed T.B.'s vagina; he did the same thing a second time with a washcloth. On another occasion, T.B. finished her bath and Goddard told her to lie down on his bed and put her legs on his shoulders. Goddard licked T.B.'s vagina.

After T.B. turned 13 years old, Goddard continued to touch and lick her vagina a couple times a month. On another occasion, Goddard and T.B. were in his bedroom when he put T.B.'s hand on his penis and stroked his penis with her hand.

When T.B. turned 14 years old, Goddard showed her a pornographic movie.<sup>1</sup> The video depicted a woman performing oral copulation on a man. Goddard took T.B. upstairs and told T.B. to kneel and open her mouth. Goddard put his penis in T.B.'s mouth. This occurred a few times a month. Goddard began having sexual intercourse with T.B. shortly before she turned 15. The first time it happened, Goddard initially did not wear a condom but put one on before he ejaculated inside T.B. From the time T.B. turned 15, every time Goddard would touch T.B. it would inevitably lead to sexual intercourse. Goddard inserted a vibrator into T.B.'s vagina a couple of times.

After the family moved to Santa Ana, Goddard had sexual intercourse with T.B. every couple of weeks for approximately two years. Goddard began having sexual intercourse with T.B. every other day; it occurred in his bedroom, her bedroom, and the living room. Goddard continued to use a vibrator on T.B. On one occasion, they heard B.G. in the house, and Goddard told T.B. to hide in the closet. B.G. was generally home when the abuse occurred. M.G. was at work when the abuse occurred all but one time.

In May 2010, T.B. returned home from Bakersfield after going to the prom with her boyfriend. When M.G. and B.G. left for the store, Goddard told T.B. to put on her prom dress and take off her underpants. Goddard made T.B. bend over and he had sexual intercourse with her until he heard his wife and son return home. Goddard stopped, pulled up his pants, and left.

On the last occasion, Goddard was having sexual intercourse with T.B. on the living room couch. Before Goddard was about to ejaculate, he pulled his penis out of T.B.'s vagina and ejaculated into her mouth. T.B. went to the bathroom and spit out the ejaculate. T.B. was wearing sweatpants.

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<sup>1</sup> T.B. recalled she was 14 years old because it was around the time Goddard caught her stealing money from him.

T.B. told a friend's mother about what Goddard had been doing to her; T.B. used Facebook to tell her. The following day they met in person and talked. T.B. wrote M.G. a letter explaining she was running away but did not give the letter to her. T.B. called M.G. from school and told her what Goddard had been doing to her. M.G. picked up T.B. from school and first took her to social services to see her caseworker and then to the police department.

Officer Stephen Hahm received a call of a possible child molestation and responded to the police station lobby. Hahm found T.B., M.G., and a social worker. As Hahm spoke with T.B., Hahm saw M.G. talking on her cellular telephone; she later told Hahm she was speaking with her husband. After they caravanned to the house, M.G. would not let Hahm inside. M.G. went inside and brought out T.B.'s sweatpants and a pair of underpants; the underpants were wet.

Detective Edward Zaragoza responded to the house and participated in the execution of a search warrant. Zaragoza spoke with T.B. as they walked through the house and T.B. pointed out places where Goddard had touched her. They also spoke outside briefly.

Pursuant to a search warrant, law enforcement officers recovered bed sheets, clothing, towels, and four sex toys. Officers took biological samples from the carpet near the bed and from the carpet leading from the bed to the bathroom. An officer took a sample of Goddard's DNA. A forensic examination of a computer recovered from Goddard's home revealed adult pornographic photographs but no child pornography.

A registered nurse examined T.B. and found no physical injuries. The nurse concluded the examination was consistent with the history as described by T.B.

An amended information charged Goddard with four counts of committing a lewd act upon a child under the age of 14 years (Pen. Code, § 288, subd. (a))<sup>2</sup> (count 1-penetration by foreign object first time; count 2-penetration by foreign object last time; count 3-oral copulation first time; count 4-oral copulation last time), continuous sexual abuse (§ 288.5, subd. (a)) (count 5), two counts of committing a lewd act upon a child (§ 288, subd. (c)(1)) (counts 6 & 7), two counts of unlawful sexual intercourse (§ 261.5, subd. (c)) (count 8-first time & count 9-last time); and two counts of sexual penetration by foreign object of minor (§ 289; subd. (h)) (count 10-first time & count 11 last time). As to counts 1, 2, 3, 4, and 5, the amended information alleged Goddard had substantial sexual conduct with a child (§ 1203.066, subd. (a)(8)).

Before trial, defense counsel made an offer of proof that approximately one day before T.B. reported the offenses she went on Netflix and viewed the title page of the movie entitled Wild Things. Counsel stated Wild Things is a movie about a high school girl who falsely accuses her teacher of molesting her. Counsel argued the movie itself was not relevant but the fact she viewed the title page of the movie the day before she reported the charged offenses was relevant. The trial court reserved ruling on the request to admit the evidence until counsel could produce the document but indicated the evidence appeared to have no relevance and a high degree of prejudice. After counsel produced the Netflix printout of the movie, counsel stated that the preliminary hearing T.B. admitted she had viewed the movie's title page. Defense counsel admitted T.B. received the movie two days after she reported the offenses but could have looked at the title page before because Netflix mails the movies to the subscriber. The prosecutor responded there was nothing in the movie description about the molestation claim being false. The prosecutor added that he questioned T.B. at the preliminary hearing and she stated she wanted to watch the movie because there is a "hot and sexy scene involving

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<sup>2</sup> All further statutory references are to the Penal Code, unless otherwise indicated.

two lesbians kissing, which is what the movie is famous for . . . .” The prosecutor argued it was unduly prejudicial because it went to her viewing habits and the fact she wanted to watch the movie with her girlfriend. The trial court ruled the proffered evidence had no relevance to this case and it was more prejudicial than probative.

At trial, T.B. testified concerning the inappropriate touching as described above. T.B. admitted her relationship with Goddard was strained. She testified that when she was 17 years old, M.G. made her sign a contract requiring her to perform well in school and pass a nursing test or she would lose her privileges. T.B. explained she did not tell anyone what had happened because she was afraid it would break up the family, B.G. would lose his father, and she would have to start over with another family.

On cross-examination, T.B. stated she planned to move to Bakersfield with her boyfriend when she turned 18 years old and never intended to tell anyone what had happened. Defense counsel cross-examined T.B. extensively on why she did not report the abuse to a nurse in 2008 when she had abdominal pain. T.B. stated she thought it was unfair that she had to do chores B.G. did not have to do. T.B. explained Goddard was the disciplinarian and when she would misbehave, he would place her on restriction. She believed restriction was appropriate but Goddard never set a defined time limit, which T.B. thought was unfair. T.B. stated that she could get off of restriction or settle excessive cellular telephone bills by having sexual intercourse with Goddard. T.B. stated that if B.G. knew T.B. was downstairs, he would announce himself before walking downstairs. She claimed there were a few times B.G. walked downstairs right after Goddard and her had finished having sexual intercourse. Defense counsel also cross-examined T.B. extensively on the color of the sex toy she claimed Goddard used.

The prosecutor also offered the testimony of forensic scientist, Julianne Buckenberger. Buckenberger testified she examined T.B.’s underpants but found no genetic evidence. She examined T.B.’s sweatpants and found semen on four areas of the sweatpants. She found sperm on two of the areas located on the inside rear of the

sweatpants and combined the samples for testing. Goddard's and T.B.'s DNA were not excluded as contributors to the stain found in the inside rear of the sweatpants.

Buckenberger also found Goddard's semen on the samples taken from the bedroom carpet.

An undelivered letter T.B. wrote M.G. days before T.B. told M.G. what Goddard had done to her was admitted into evidence.

As relevant to the issues on appeal, the prosecutor argued one piece of important circumstantial evidence was the DNA evidence. The prosecutor argued the DNA evidence in T.B.'s sweatpants and on the carpet near where T.B. stated a sexual act occurred was important circumstantial evidence of Goddard's guilt. The prosecutor commented Goddard had the access and opportunity to commit the charged offenses because M.G. was at work and Goddard worked out of the house as a day trader while T.B. and B.G. were home schooled. The prosecutor later returned to the DNA evidence and stressed the DNA evidence was from Goddard's semen.

The theory of the defense was T.B. fabricated the accusations so she could convince M.G. to let her move to Bakersfield when she turned 18 to live with her boyfriend. Defense counsel argued that not once during the six years T.B. claimed Goddard sexually abused her did either M.G. or B.G. notice any inappropriate conduct. Defense counsel argued it was not surprising Goddard's semen was found in his own bedroom. Counsel also stated that the very small amount of semen found in T.B.'s sweatpants could have been transferred while the sweatpants were in the laundry. Counsel stated though it was telling that semen was not found at the places T.B. claimed the sexual acts occurred.

During rebuttal argument, the prosecutor stated: "Now, I have the burden of proof in this case to prove this case beyond a reasonable doubt. But the defense, just like the People, the prosecution, we can use the subpoena power to call in witnesses to testify. [¶] And in this case, there's been a failure on the defense part --" After defense

counsel objected on the ground the prosecutor was shifting the burden of proof and the court advised the jury it would soon instruct the jury on the relevant legal principles of the case, the prosecutor continued: “There’s been a failure to call logical witnesses. Who would be some logical witnesses that the defense could call to support their theory? What about [B.G.]? He’s 13 years old currently. He was in the house when a lot of these allegations and incidents and crimes occurred. Wouldn’t it be reasonable, a reasonable defense witness to . . . call [B.G.] in to talk about what happened at the house? Yeah, I was upstairs or I was downstairs. I never saw anything. I never heard anything. [¶] And also in that letter that’s submitted into evidence that [T.B.] wrote to [M.G.], it’s clear that [T.B.] has disclosed to [B.G.] what has happened. [B.G.] knows about what has happened because she says, [M.G.], if you want to know what happened, just ask [B.G.] Where’s [B.G.]? Wouldn’t that be a logical defense witness? [¶] What about [M.G.]? What about [M.G.] to describe what a bad teenager [T.B.] was and how she would get in trouble all the time to support the defense theory that she had some motive to fabricate this because she wanted to run off to Bakersfield or to get [Goddard] in trouble because she didn’t like him. Where’s [M.G.]? Wouldn’t she be a logical defense witness to call in support of the defense theory?”

A little later the prosecutor said, “And one interesting thing is, if you look through all the photos that are admitted of the interior of the house, one thing is out of place in one of the photos, it’s the photo of the hallway, and on the counter of the hallway. There’s a bottle of cleaning solution and a rag sitting there out of place, not with other cleaning chemicals, not in the bathroom under the sink, just in the upstairs hallway.” Defense counsel objected based on the ground facts not in evidence, and the trial court admonished the jury that it had to decide the case based on the evidence it heard. Later, but before the jury began its deliberations, defense counsel moved for a mistrial on the ground the prosecutor committed misconduct. The trial court denied the motion.

The jury convicted Goddard of all counts. After a bifurcated bench trial where the trial court found true the substantial sexual conduct enhancement allegations, the court sentenced Goddard to a total term of 18 years in prison.

## DISCUSSION

### *I. Prosecutorial Misconduct*

Goddard argues the prosecutor committed misconduct when he stated Goddard failed to call logical witnesses and improperly commented on the evidence. Neither of his contentions have merit.

“A prosecutor’s misconduct violates the Fourteenth Amendment to the federal Constitution when it ‘infects the trial with such unfairness as to make the conviction a denial of due process.’ [Citations.] In other words, the misconduct must be ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’ [Citation.] A prosecutor’s misconduct ‘that does not render a criminal trial fundamentally unfair’ violates California law ‘only if it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”’ [Citations.]” (*People v. Harrison* (2005) 35 Cal.4th 208, 242.)

“Regarding the scope of permissible prosecutorial argument, ““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.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.’ [Citation.] ‘A prosecutor may “vigorously argue his case and is not limited to ‘Chesterfieldian politeness’” [citation], and he may “use appropriate epithets . . . .”’ [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 951-952.)

“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.] 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. [Citation.]” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

#### A. *Logical Witnesses*

Goddard argues the prosecutor committed misconduct when he shifted the burden of proof to the defense by arguing Goddard failed to produce logical witnesses. We disagree.

“A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. [Citation.] Comments on the state of the evidence or on the defense’s failure to call logical witnesses, introduce material evidence, or rebut the People’s case are generally permissible. [Citation.] However, a prosecutor may not suggest that ‘a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.’ [Citations.]” (*People v. Woods* (2006) 146 Cal.App.4th 106, 112-113.)

Here, Goddard concedes the prosecutor stated the prosecutor had the burden of proof in the case. Goddard also concedes the prosecutor may comment on a defendant’s failure to call logical witnesses. During closing argument, defense counsel argued neither M.G. nor B.G. saw any inappropriate touching over the six years T.B. claimed Goddard abused her. The prosecutor properly responded that if neither M.G. nor B.G. witnessed any inappropriate touching, defense counsel should have subpoenaed them to testify. It is reasonable to foresee M.G. testifying as to Goddard and T.B.’s volatile relationship and how that affected T.B. Additionally, it was certainly reasonable to call as a witness the person who T.B. claimed was home with her and Goddard when the abuse occurred, B.G. The jury heard testimony that if T.B. was not in her room when B.G. walked by, B.G. would announce himself before walking downstairs. Perhaps that is why defense counsel did not call the most logical of all witnesses.

Goddard relies on *People v. Gaines* (1997) 54 Cal.App.4th 821, 824-828, to support his argument. However, *Gaines* involved a case where the prosecutor actually stated he knew what the uncalled defense witness was going to say. The prosecutor told the jury, “Where is Mr. Hicks? . . . Mr. Hicks didn’t testify. That decision was made after the defendant testified, because the defendant slipped and he told some untruths. And Mr. Hicks was going to testify to the contrary.” (*Id.* at p. 824.) Here, the prosecutor did not insinuate he knew how a witness would testify. What the prosecutor did instead was state the defense failed to call the only people who could corroborate his story—his wife, who helped raise the victim, and his son, who spent all day with the victim. The prosecutor’s statements were proper.

*B. Comment on the Evidence*

Goddard contends the prosecutor committed misconduct when he argued facts not in evidence. Not so.

“At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) It is impermissible however, for a prosecutor to “go beyond the evidence in his argument to the jury. [Citation.] To do so may suggest the existence of ‘facts’ outside the record—a suggestion that is hard for a defendant to challenge and hence is unfair.” (*People v. Benson* (1990) 52 Cal.3d 754, 794-795.)

Here, the prosecutor’s statement concerning the photograph of the cleaning solution sitting on the hallway counter was a reasonable response to defense counsel’s closing argument and a reasonable inference that could be drawn from the photograph. During closing argument, defense counsel stressed semen was not found in all the places where T.B. claimed the sexual conduct occurred. Because the case was a credibility dispute between Goddard and T.B., the prosecutor highlighted the power of the DNA evidence. The trial court admitted into evidence a photograph of cleaning solution sitting on the hallway counter. To rebut defense counsel’s assertion there was a dearth of semen

found in the house, the prosecutor implied someone may have used the solution to clean the house. This was proper rebuttal argument. Additionally, it is certainly reasonable to infer from a photograph depicting cleaning solution sitting on a hallway counter that someone used that solution to clean the house. This was a reasonable inference that was drawn from the photographic evidence. (*People v. Rowland* (1992) 4 Cal.4th 238, 278.) The prosecutor did not argue facts that were not in evidence.

We have reviewed all the cases Goddard relies on to argue the prosecutor committed misconduct when he inferred someone cleaned the house with the cleaning solution and this fact explains why officers did not find additional semen samples. The prosecutor did not state how a witness would testify, make any *unreasonable* inferences from the evidence, refer to any evidence that was not properly before the jury, or interject his personal views into argument. The prosecutor responded to defense counsel's argument and asked the jury to draw a reasonable inference from the evidence.

## *II. Exclusion of Evidence*

Goddard asserts the trial court erroneously excluded evidence that around the time T.B. reported the alleged sexual abuse she viewed a movie on Netflix that involved a high school girl accusing her school counselor of raping her. Again, we disagree.

Only relevant evidence is admissible at trial. (Evid. Code, § 350.) Relevant evidence is “evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (Evid. Code, § 210.) Although “there is no universal test of relevancy, the general rule in criminal cases [is] whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution[.]” (*People v. Freeman* (1994) 8 Cal.4th 450, 491.) “As with all relevant evidence, however, the trial court retains discretion to admit or exclude evidence offered for impeachment. [Citations.] A trial court's exercise of discretion in admitting or excluding evidence is reviewable for

abuse [citation] and will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ [Citation.]” (*People v. Brown* (2003) 31 Cal.4th 518, 534.)

Evidence Code section 352, however, authorizes a trial court to exclude relevant evidence. “The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means “evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]” (*People v. Heard* (2003) 31 Cal.4th 946, 976.)

“Under Evidence Code section 352, the court must strike a balance between the probative value of the evidence and the danger of prejudice. The court must consider “the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relative to the main or only a collateral issue, and the necessity of the evidence to the proponent’s case as well as the reasons recited in section 352 for exclusion.’ [Citation.]” [Citation.] A trial court’s discretionary ruling under section 352 will not be disturbed on appeal absent an abuse of discretion. [Citation.]” (*People v. Houston* (2005) 130 Cal.App.4th 279, 304-305.)

Here, evidence Terry viewed the plot summary for and ordered through Netflix the movie *Wild Things* was not relevant to offenses here. First, defense counsel did not adequately establish the evidence’s relevance. Defense counsel asserted the movie is about a girl who falsely accuses her high school counselor of rape. Both the prosecutor and later the trial court noted the Netflix printout did not include the word *falsely*. Although we agree impeachment evidence can be relevant (*People v. Wheeler* (1992) 4 Cal.4th 284, 296), it must first be established that the evidence tends to impeach

a witness. Defense counsel must demonstrate the proffered evidence undermines a witness's credibility for the evidence to be relevant.

Moreover, even were we to conclude the evidence had some relevance, the trial court properly excluded the evidence under Evidence Code section 352. At the preliminary examination, T.B. testified she ordered the movie because she and her girlfriend wanted to watch the movie. T.B. explained the movie "looked really hot and sexy because it had two girls making out." Evidence that T.B. wanted to watch a movie that included a lesbian with her girlfriend would be unduly prejudicial and would only serve to confuse the issues. Assuming for the sake of argument the evidence had any relevance, it is conceivable a homophobic juror could view T.B. in a negative light because she expressed a desire to watch the movie with another woman. Additionally, this evidence could confuse the jury because it could distract them from focusing on the issues in the case. Whether T.B. wanted to watch a provocative movie with another girl was collateral to the issues before the jury.

Finally, the trial court's exclusion of the proffered evidence did not prevent Goddard from presenting a defense. Defense counsel cross-examined T.B. thoroughly about her volatile relationship with Goddard, her erratic teenage behavior that necessitated her signing a written contract to focus on her schoolwork, and her stealing money from Goddard's bank account. The court's exclusion of the movie evidence did not prevent Goddard from offering a vigorous and effective defense and his federal and state due process rights were not implicated by the court's exclusion of the evidence. (*People v. Boyette* (2002) 29 Cal.4th 381, 428 ["excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense"].) Thus, the court properly excluded the evidence.

*III. Cumulative Error*

Goddard contends the cumulative effect of the errors requires reversal. We have concluded there were no errors, and thus, his claim has no merit.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.