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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.

VICTOR TEODORO ORTEGA,

Defendant and Appellant.

G050328

(Super. Ct. No. 12NF3220)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Ronda G. Norris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Anthony DaSilva and Peter Quon, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court sentenced defendant Victor Teodoro Ortega to two consecutive state prison terms of 25 years-to-life after a jury found him guilty on two counts of forcible rape with findings that he personally used a weapon in committing each crime and committed the offense against multiple victims. On appeal, defendant contends the trial court committed reversible error in allowing the prosecution to elicit from one complaining witness on direct examination that she had no criminal record. We conclude any error in admitting this testimony was, at most, harmless error and affirm the judgment.

FACTS

Around midnight one evening in late October 2007, A.D. was working as a prostitute along Harbor Boulevard near Hazard Avenue. A man driving a white truck with a camper shell pulled to the curb. A.D. opened the passenger-side door, asked the man if he “wanted a date,” and began to enter the vehicle. The man reached over and pulled her into the truck and then drove off at a high rate of speed. According to A.D., the man held an ice pick to her neck and said, “I want your panocha.” After driving for several minutes, the man pulled into a deserted commercial area, walked around the vehicle, reentered it, and raped A.D. as she sat in the truck’s passenger seat. During the rape the man held either an ice pick or a knife against her. At one point he also choked A.D. After ejaculating, the man then ordered A.D. to get out of the truck and drove away. A. D. flagged down another motorist who called the police.

Several police officers interviewed A.D. and then transported her to a hospital where a nurse conducted a sexual assault examination. At trial, A.D. admitted lying to the officers by claiming to be a tourist accosted and dragged into the truck at the corner of Harbor Boulevard and Katella Avenue as she returned to her hotel from a convenience store.

A.D. described the man who raped her as Hispanic, short with black, curly hair in a pony-tail. She failed to identify anyone as the man who raped her when shown a photographic lineup in 2011 and was unable to identify defendant as the perpetrator at trial.

The parties stipulated that in 2013, A.D. paid to use a public shower stall at a travel plaza in Wesley, California. After several minutes A.D. began banging on the shower stall door. She told the employee and a police officer that she heard the voice of a man named Jackson in the stall next to her and that Jackson was attempting to kill her. No one was found in the adjacent shower stalls and the concrete walls separating them prohibited sound from passing between the stalls.

The woman named as the complaining witness in the second rape charge was M.S. She was an unwilling participant at trial. The court had to issue a bench warrant to obtain her appearance in court.

On the stand, M.S. testified that in the early morning hours one day in late May 2009, she and her then boyfriend went to a strip club located on Harbor Boulevard in Santa Ana. Upon their arrival the couple learned the club was closed. The two argued for a short time and then went in separate directions looking for their car. A police officer who later questioned M.S., testified she did not mention the strip club and told him she was walking northbound along Harbor Boulevard at a location approximately 50 yards from the club's location.

According to M.S., as she walked along the street, a truck she variously described as tan, beige, or white in color, pulled up cutting her off. She identified defendant as the person driving the truck. He forced M.S. into the vehicle. Claiming she was "buzzed" from drinking that night and because she blocked out some of the incident, M.S. initially was unclear on how defendant forced her into the truck. On further questioning, she testified that she believed he reached over, grabbed her jacket, and pulled her into the vehicle. The police officer who questioned M.S. testified she said the

truck pulled into the driveway of a parking lot and, after she walked in front of it, the passenger door swung open and the driver pulled her into the vehicle.

After dragging M.S. into the truck, defendant drove off at a high rate of speed. He held a sharp metal object against her ribs. Although M.S. never saw the object, she believed it was a knife. M.S. testified she attempted to open the passenger door a few times, but defendant threatened her and placed the knife against her neck. According to the officer who interviewed M.S., she said the suspect was not driving fast and she denied attempting to get out of the truck.

M.S. claimed defendant parked the vehicle, said “I want some pussy,” climbed over the center console, and raped her. During the rape, defendant also choked her. M.S. repeatedly denied consenting to having sex with defendant.

After the rape, M.S. claimed she grabbed her jacket, jumped out of the truck, and locked herself in the bathroom at a nearby gas station. She then called her boyfriend who picked her up. M.S. testified that she wanted to go home, but her boyfriend insisted on taking her to a hospital. According to M.S., the two drove to two hospitals, one being the Los Alamitos Medical Center, but found each hospital’s emergency room closed. They eventually ended up at Long Beach Memorial Hospital. At trial, the parties stipulated that in May 2009, the Los Alamitos Medical Center’s emergency room was open 24 hours a day.

Officers from the Santa Ana Police Department took M.S. to Anaheim Memorial Hospital where a sexual assault examination was conducted. M.S. testified she became upset with the police officers because they repeatedly asked her if she was raped. The officer who interviewed M.S. agreed she became “upset” during the questioning, and described her as “a little short tempered,” and “bothered by some of the questions” he asked.

A nurse who examined M.S. at the hospital testified M.S. denied that she consumed any alcohol within the past 12 hours. The nurse did not see any abrasions, scratches, cuts, or bruises on M.S.'s body.

Forensic scientists with the Orange County Crime Laboratory obtained DNA profiles from semen samples collected from A.D. and M.S. The results were entered into a data base and it was then determined the semen was provided by the same man. Subsequently, the results from both cases matched the DNA profile obtained from defendant.

In late 2012, the police questioned defendant. He admitted once owning a white truck that he had recently sold to a cousin. Although he initially denied it, defendant eventually acknowledged he picked up prostitutes along Harbor Boulevard in Santa Ana. But he continued to deny forcing any woman to have sex with him. After further questioning, defendant admitted engaging in sexual intercourse with A.D. in return for \$80. He claimed that during intercourse she became upset because he was taking too long. Defendant acknowledged he then used a screwdriver to force A.D. to continue having intercourse.

The defense called two witnesses. A clinical psychologist concluded defendant's IQ placed him in "the mild mental retardation stage," explaining that meant he had "impaired judgment" and was "subject to misinterpret[ing] information." An obstetrician/gynecologist who reviewed the sexual assault reports and photographs of both A.D. and M.S., testified the pictures did not show any bruising on either woman and A.D.'s wounds were not consistent with being cut by a knife. He also claimed the photographs of M.S. did not indicate a weapon was used on her.

DISCUSSION

Background

The defense's theory of the case was that defendant's sexual encounters with A.D. and M.S. were consensual and the complaining witnesses were lying about being forcibly raped by him. During opening statement, defense counsel summarized what he believed would be the testimony of each complaining witness, emphasizing the discrepancies in their descriptions of the sexual encounters. He then concluded: "Ladies and gentlemen, you're going to hear about some things[;] prostitution, pimps, privacy, violence[,] secrecy, a world that we're not used to. There are reasons why these girls are saying this stuff. But their stories don't make any sense for anybody who has any sort of logic in their brain because [defendant] didn't rape them."

During direct examination, M.S. testified without objection that she was not a prostitute or working "as a street girl." Over a relevancy objection, the prosecutor asked M.S. if she had any convictions for prostitution. M.S. responded, "I have no convictions for nothing." The prosecutor then asked, "You have no criminal history, do you?" Defense counsel again objected and requested a side bar conference where he moved for a mistrial on the same ground. The trial court overruled the objection and denied the motion for the following reason: "[I]n the defense opening statement, although it was not explicitly stated, there was a very strong inference made before this jury that this particular witness may have been engaging in prostitution. Based upon that presentation that accelerates the allegations that this witness not only has no convictions for prostitution, but she has no criminal record"

Defendant contends the trial court's decision to allow the prosecution to elicit testimony that M.S. did not have any convictions for prostitution or other crimes was an abuse of discretion because it constituted inadmissible character evidence. The Attorney General responds that defendant forfeited this claim by not objecting on the

ground of inadmissible character evidence and, in any event, M.S.’s lack of any criminal convictions was admissible “as evidence pertaining to her credibility as a witness.”

M.S.’s Lack of a Criminal Record

Initially, we reject the Attorney General’s forfeiture argument. To render a challenge to the erroneous admission of evidence cognizable on appeal, Evidence Code section 353, subdivision (a)¹ requires a timely objection or motion to exclude the evidence that “make[s] clear the specific ground of the objection or motion.” But to avoid exalting form over substance the statute’s timely and specific objection “requirement must be interpreted reasonably, not formalistically.” (*People v. Partida* (2005) 37 Cal.4th 428, 434.) Thus, “[t]he circumstances in which an objection is made should be considered in determining its sufficiency.” (*People v. Williams* (1988) 44 Cal.3d 883, 907.)

In *People v. Williams, supra*, 44 Cal.3d at page 906, the Supreme Court held an unsuccessful relevancy objection to uncharged conduct evidence (§ 1101, subd. (b)) sufficed to preserve the defendant’s right to challenge the admissibility of the evidence on appeal. “Although defendant did not identify the specific nature of his objection or state that the evidence would show an uncharged crime, and the People made no offer of proof, the prosecutor’s opening statement to the jury had already made clear the nature of the evidence to be introduced.” (*Williams*, at pp. 906-907.) Thus, “[w]hen, as here, the People have already made it clear that the evidence will show the commission of an uncharged crime, and the defendant objects on grounds that the People have not shown that the evidence is relevant to any issue in the case, the objection is sufficient.” (*Id.* at p. 907; *People v. Felix* (1999) 70 Cal.App.4th 426, 431.)

¹ All further statutory references are to the Evidence Code.

Here, defense counsel argued M.S.'s "[l]ack of criminal history is completely irrelevant" and "outside the bounds of anything that should be brought up in front of a . . . jury." The trial judge overruled the objection, declaring comments by defense counsel in opening statement that purportedly inferred M.S. "may have been engaging in prostitution," justified the prosecution in eliciting evidence she did not have a criminal record. From this exchange, we conclude defendant's "objection [was] made in such a way as to alert the trial court" that M.S.'s lack of a criminal record was not admissible on any relevant issue presented in this case. (*People v. Williams, supra*, 44 Cal.3d at p. 906.)

On the merits, "[e]vidence of a person's character or a trait of his character is relevant in three situations: (1) When offered on the issue of his credibility as a witness; (2) when offered as circumstantial evidence of his conduct in conformity with such character or a trait of his character; and (3) when his character or a trait of his character is an ultimate fact in dispute in the action." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1179; see §§ 1100, 1101, subd. (c).)

The third scenario is not at issue in this case. M.S.'s status as a person who has never been convicted of a crime was not an ultimate issue at trial. The second scenario also appears to be inapplicable. Section 1102 and subdivision (b) of section 1103 are clearly inapt because both concern evidence of a defendant's character. Subdivision (a)(2) of section 1103 only allows the prosecution to offer character evidence to prove a crime victim's conduct if it "rebut[s] evidence adduced by the defendant." M.S.'s lack of a criminal record was brought out on direct examination. Subdivision (c)(5) declares "[n]othing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782." (Italics added.) The testimony at issue here was intended to bolster M.S.'s credibility. Further, the Attorney General makes no attempt to uphold the admission of M.S.'s lack of criminal convictions testimony under either of these statutes.

Defendant claims the evidence was also inadmissible under the first scenario; to bolster M.S.'s credibility. He relies on section 790, which prohibits the admission of "[e]vidence of the good character of a witness . . . unless evidence of his bad character has been admitted for the purpose of attacking his credibility."

In response, the Attorney General argues M.S.'s lack of a criminal record was admissible to bolster her credibility under section 785. It provides, "[t]he credibility of a witness may be attacked or supported by any party, including the party calling him." Further, citing cases construing the California Constitution's truth-in-evidence clause (Cal. Const., art. I, § 28, subd. (f)(2) [formerly subd. (d)]), the Attorney General argues the statutory limitations on the use of character evidence and specific instances of conduct to support or attack a witness's credibility (§§ 786, 787, & 790) are no longer applicable in criminal prosecutions. (*People v. Harris* (1989) 47 Cal.3d 1047, 1081-1082 [truth in evidence clause "effected a pro tanto repeal of . . . section 790"]; *People v. Stern* (2003) 111 Cal.App.4th 283, 297-298 [holding the same true as to sections 786 and 787]; *People v. Taylor* (1986) 180 Cal.App.3d 622, 631; but see *People v. Harrison* (2005) 35 Cal.4th 208, 229 [citing section 790 in a post-Proposition 8 criminal case].) Thus, the Attorney General concludes "in a criminal trial, a witness' credibility may be attacked or supported with evidence of character traits other than honesty or veracity so long as those traits are relevant to the witness' believability."

But to be admissible the evidence must still be relevant (§ 351), i.e., have a "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) Section 780 contains a nonexclusive list of factors a trier of fact "may consider in determining the credibility of a witness . . . to prove or disprove the truthfulness of his testimony" It does not mention lack of a criminal record and the Attorney General cites no other authority for the proposition the lack of a prior criminal conviction for prostitution or other offenses is relevant to bolster a witness's credibility.

At trial, defense counsel acknowledged M.S.'s denial that she was a prostitute or a "street girl" was relevant to the issue of whether she consented to sexual relations with defendant. But the question of whether M.S. had been previously convicted of prostitution or any other crime does not appear to be relevant to the issue of consent or her credibility. Although there do not appear to be any California decisions on point, cases in other states have recognized testimony by an unimpeached witness or one accused of an offense to the effect that he or she has never been charged with or convicted of a crime is inadmissible character evidence. (*Welch v. State* (Fla.Ct.App. 2006) 940 So.2d 1244, 1246 [holding "it was error for the trial court to allow the State to question the confidential informant on direct examination about her lack of felony charges"]; *State v. Bedker* (Wis.Ct.App. 1989) 440 N.W.2d 802, 806 ["it does not follow from the fact that the person has never been convicted of a crime that the person is law-abiding" because "[l]awless persons may avoid convictions"]; *Wrobel v. State* (Fla.Ct.App. 1982) 410 So.2d 950, 951 [citing cases]; *Chicago v. Lowy* (Ill.Ct.App. 1976) 353 N.E.2d 208, 212 ["It is not permissible to prove good character by showing that the accused had never been previously arrested, charged, prosecuted or convicted of a crime"].)

To justify M.S.'s lack of criminal conviction testimony, the Attorney General relies on the comments by defense counsel in his opening statement. Only two California civil cases have mentioned the issue of whether comments during opening statement justify the introduction of rebuttal evidence by an opposing party. (*Winfred D. v. Michelin North America, Inc.* (2008) 165 Cal.App.4th 1011, 1027 [recognizing split of authority in other jurisdictions, but concluding, "[c]onsistent with the position of the parties, we assume for purposes of appeal that an opening statement may, in some circumstances, open the door to otherwise inadmissible evidence"]; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 600-604 [reference to a party's willingness to take a lie

detector test in opening statement; party denied taking a test on the stand and trial court cured any error by disallowing further inquiry on the subject[.]

It is doubtful whether defense counsel's opening statement justified the prosecution in eliciting testimony M.S. had no criminal record on direct examination. Federal courts have generally held comments in opening statement open the door to allowing the other party to introduce evidence on the subject mentioned. (*U.S. v. Magallanez* (10th Cir. 2005) 408 F.3d 672, 678; *U.S. v. Croft* (9th Cir. 1997) 124 F.3d 1109, 1120.) But decisions in other states have rejected this approach on the basis "comments made by counsel during opening statements in a criminal prosecution are not evidence." (*State v. Trotter* (2001) 632 N.W.2d 325, 336; *State v. Donovan* (1997) 698 A.2d 1045, 1048; *State v. Faison* (1991) 411 S.E.2d 143, 147-148; *Bynum v. Commonwealth* (Va.Ct.App. 1998) 506 S.E.2d 30, 34.) California law is to the same effect. (*People v. Stoll* (1904) 143 Cal. 689, 693 ["an opening statement is never evidence of any character, or of anything".]) Thus, we are not convinced defense counsel's opening statement comments opened the door to M.S.'s testimony she led a crime-free life to bolster her credibility.

In any event, even if the trial court abused its discretion in allowing M.S. to testify that she had never been convicted of a crime, the error was harmless. "[T]he erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citations.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)

Although the testimony of both A.D. and M.S. contained discrepancies and inconsistencies, each complaining witness provided a very similar description of how she was accosted by defendant and raped by him. Each witness testified defendant stopped his truck near her location along Harbor Boulevard, reached over and pulled her into the vehicle. A.D. described the truck as white in color, while M.S. said it was tan, beige, or white. Each witness said he drove away at a high rate of speed holding a weapon against her body while threatening to hurt her if she tried to get out of the truck. In each case, defendant mentioned his desire for the victim's genitalia. In both instances, upon reaching a deserted area, the defendant raped his victim in the truck's front passenger seat, choking them. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1161-1162 [jury may use evidence of charged sexual offense proven beyond a reasonable doubt to show defendant's propensity to commit another charged offense in the same case].)

As noted, defendant acknowledged M.S.'s denial that she was a prostitute or a "street girl" was permissible testimony. The further testimony that she had no criminal record was short. Nor did the prosecutor emphasize M.S.'s crime-free testimony. The prosecutor mentioned it only once during closing argument, and then followed up by stating that "even if she did, he can't do that (i.e., rape) to her" Rather, the prosecutor's argument emphasized the similarities in the testimony given by A.D. and M.S. concerning the person who raped them and manner in which he carried out the sexual assaults. The prosecutor also relied on defendant's acknowledgement that he owned a white truck, and his eventual admission he drove along Harbor Boulevard seeking women for sex.

To support a finding of prejudice, defendant argues the prosecutor "personally vouched for [M.S.] during closing argument." This contention lacks merit. First, defendant forfeited the issue by failing to object on this ground at trial. (*People v. Linton* (2013) 56 Cal.4th 1146, 1207.) Second, "Impermissible vouching occurs 'where the prosecutor places the prestige of the government behind a witness through personal

assurances of the witness's veracity or suggests that information not presented to the jury supports the witness's testimony.” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1167, overruled on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) But “[p]rosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper ‘vouching.’” (*People v. Medina* (1995) 11 Cal.4th 694, 757.) The prosecutor’s reference to M.S. testifying “truthfully” with “[n]othing to hide” and “[n]othing to gain” “properly relied on facts of record and the inferences reasonably drawn therefrom.” (*Ibid.*)

Consequently, the admission of M.S.’s testimony that she had no criminal convictions for prostitution or any other offense did not amount to prejudicial error.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.