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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANKLIN BARRIOS,

Defendant and Appellant.

H039190

(San Benito County

Super. Ct. No. CR-11-02013)

Defendant appeals from a judgment arising out of sex crimes against his stepdaughter. We will strike defendant's conviction on one of the five counts, as mandated by Supreme Court precedent (the People concede this is necessary), order changes to a minute order and the abstract of judgment (the People also concede this must be done), and otherwise affirm the judgment.

PROCEDURAL BACKGROUND

A jury convicted defendant Franklin Barrios of continuous sexual abuse of a child under age 14 (Pen. Code, § 288.5, subd. (a)) and four counts of forcible lewd or lascivious acts on a child under age 14 (*id.*, § 288, subd. (b)(1)). The trial court sentenced defendant to a term of 32 years in state prison.

FACTS

Y.L. testified that defendant first began touching her sexually when she was in first grade and six years old. He touched her on the buttocks, in her pubic area, and on her chest. She remembered the details of one such touching at age six: he touched her sexually under her clothes in her mother's bedroom in the daytime while her younger brothers were in the same room, playing with toys and evidently too young to grasp what was occurring. When she was six, defendant touched her sexually "[a] lot of times." When she was seven, defendant also "touched me in the private," again meaning on the buttocks, in her pubic area, and on her chest, with skin-to-skin contact. This happened in her bedroom at night, sometimes when they were alone but other times with her younger brothers in the room. Defendant warned her not to tell anyone. He touched her sexually 15 times a week when she was seven. When this happened, her mother would be "at school or working." Similar abuses occurred when she was eight, still about 15 times a week. Finally, he sexually abused her in the same way around Thanksgiving when she was 10 years old and in fourth grade. In this last abuse, which was causing pain in her buttocks and resulted in vaginal bleeding, she told him to stop but he ignored her. Other sexual touchings had also been painful, because "he usually did it really hard."

Y.L. told her biological father, her aunt, and her grandmother about these abuses starting at age six. She reported them to her grandmother again at ages seven, eight, and nine. Her grandmother advised her, when she was six years old, to tell a teacher or the police. Y.L. did not report the abuses to her mother.

When she was age 10, the police learned of the abuses and visited her at school.

The grandmother testified with the aid of a Spanish interpreter. She told the jury that she lived in a separate residence from Y.L., her mother, and defendant, and that she could see that Y.L. was afraid to leave the grandmother's residence and return home. Y.L. told the grandmother that defendant had, according to the interpreter's evaluation of the word *pica*, grabbed or pressed her pubic area, an account the grandmother believed at the

time. Y.L. also told her grandmother about the incident that resulted in vaginal bleeding. “[A] lot of blood is what the little girl said or was saying,” the grandmother testified. The grandmother testified “I don’t remember” when asked if she reported the molestations to anyone.

A Sexual Assault Response Team (SART) examination returned no results. Y.L. also underwent a Child Abuse Response Team (CART) interview. The jury watched a video recording of the interview. In the interview, Y.L. said matter-of-factly that she might be in foster care because of defendant, who “comes in and touches me at night” “in my—what do you call it?—my private place.” The account Y.L. gave in the CART interview largely comported with her testimony in court. For example, defendant’s sexual abuses of her began when she was six years old and she told her grandmother about them—she mentioned the latter fact repeatedly—and also told her aunt on one occasion. The number of times it happened was possibly at variance from her trial testimony: he would sexually abuse her after entering her bedroom about three times a week and, from the time the abuse started to when it stopped, he molested her somewhere between 50 and “[m]ore than a hundred” times.

Defendant presented no evidence, but defense counsel cross-examined prosecution witnesses and argued to the jury that defendant was not guilty.

DISCUSSION

I. Claims of Prosecutorial Misconduct and Ineffective Assistance of Counsel Regarding the Prosecutor’s Argument and an Instruction Not Given

Defendant claims that his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and under state law were violated by an instance of prosecutorial misconduct. He also claims that counsel was ineffective for failing to object to the misconduct and to seek an instruction that would have told the jury to disregard his decision not to testify.

A. Background

In rebuttal to the defense argument the jury had just heard, the prosecutor began her argument with these words: “Ladies and gentlemen, absolutely no competent evidence has been presented during the course of this trial to refute the allegations or to refute what has been presented by the testimony of [Y.L.], the testimony of her grandmother, the testimony of her mother, the testimony of [two other witnesses]. [¶] There’s been no competent evidence to refute the elements of the charged crimes. Nothing has been presented.”

B. Forfeiture

Defendant did not interpose an objection to these comments, and for this reason, the People argue that the claim was not preserved for review.

“ ‘As a general rule[,] a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.’ ” (*People v. Hill* (1998) 17 Cal.4th 800, 820.) “ ‘Because we do not expect the trial court to recognize and correct all possible or arguable misconduct on its own motion [citations], defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds of proper comment, argument, or inquiry.’ ” (*People v. Wilson* (2008) 44 Cal.4th 758, 800.)

Invoking recent Supreme Court cases not directly addressing the issue, older Supreme Court cases, and Court of Appeal cases, defendant makes a number of arguments that the claim is deemed to have been preserved for review despite defense counsel’s failure to speak up when the opportunity existed to do so. We do not discern that any exception to the above-described rule applies and think the Supreme Court would take a dim view of any lack of adherence to recent pronouncements directly on point, and so we disagree with those arguments. Nevertheless, defendant is correct that it is well to address such claims on the merits even when not preserved for review (see

People v. McDowell (2012) 54 Cal.4th 395, 436 [despite its forfeiture “we choose to discuss the merits of defendant’s claim that the prosecutor misstated the process for determining punishment”]), because ineffective assistance of counsel claims either are or likely will be raised, resulting in the same inquiry as if an objection had been interposed. A “defendant whose counsel did not object at trial to alleged prosecutorial misconduct [may] argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel.” (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) Defendant presents an ineffective assistance of counsel claim here. We will therefore address the claim on its merits and apply a gloss of ineffective assistance of counsel analysis to determine whether defendant is entitled to a remedy.

C. The Claims Considered on Their Merits

The law of prosecutorial misconduct, in the face of a claim of misconduct under the federal Constitution or state law, is well-settled. “ ‘ “When a prosecutor’s intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated.” ’ [Citations.] ‘ “Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury.” [Citation.]’ ” (*People v. Shazier* (2014) 60 Cal.4th 109, 127.) To prevail on a claim of prosecutorial misconduct based on remarks to the jury, defendant must show a reasonable likelihood that the comments caused the jury to act improperly or erroneously. (See *ibid.*)

As for a defendant’s entitlement to relief if prosecutorial misconduct has occurred, we apply the following legal standards: With regard to due process, we will not speak of

prejudice; if there is a due process violation, prejudice is a part of the violation.¹ With regard to state law, the *Watson* standard of prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 836) applies: “Misconduct that does not constitute a federal constitutional violation warrants reversal only if it is reasonably probable the trial outcome was affected.” (*People v. Shazier, supra*, 60 Cal.4th at p. 127.)

As we discuss below, the prosecutor committed an instance of misconduct under our Supreme Court’s interpretation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). We conclude, however, that, unfortunate though the occurrence was, the misconduct did not give rise to a due process violation or prejudice under state law.

The prosecutor’s remarks, made in the heat of closing arguments, constituted *Griffin* error. (*Griffin, supra*, 380 U.S. at p. 615.)

Griffin holds that “error is committed whenever the prosecutor or the court comments upon defendant’s failure to testify.” (*People v. Vargas* (1973) 9 Cal.3d 470, 475.) Defendant did not testify—indeed, he presented no case-in-chief—and under

¹ On this point, the United States Supreme Court has undertaken different approaches. One view is that either there is or is not a due process violation, such a violation being generally understood, with regard to trial errors, to be a defect that rendered the trial fundamentally unfair. (See *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 790.) Thus, if there is a due process violation, “[i]t is unnecessary to add a separate layer of harmless-error analysis” (*Kyles v. Whitley* (1995) 514 U.S. 419, 436, fn. 9.) “[O]nce a reviewing court applying [a review for materiality] has found constitutional error there is no need for further harmless-error review.” (*Id.* at p. 435.) Elsewhere, however, the high court has intertwined the consideration of prejudice and due process violations. “[I]f Banks succeeds in demonstrating ‘cause and prejudice,’ he will at the same time succeed in establishing the elements of his . . . due process claim.” (*Banks v. Dretke* (2004) 540 U.S. 668, 691.) Still elsewhere, the court has implied that an inquiry into both a due process violation and prejudice is valid appellate procedure. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 187 [“we therefore express no opinion on whether the prosecutor’s actions amounted to a due process violation, or whether any such violation would have been prejudicial”].) The applicable standard may depend on the type of due process claim; for example, the due process claim addressed in *Kyles* contains a materiality component and so prejudice analysis may be superfluous.

Griffin “it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf.” (*People v. Hughes* (2002) 27 Cal.4th 287, 371 (*Hughes*); accord, *People v. Bradford* (1997) 15 Cal.4th 1229, 1339 (*Bradford*).)²

Defendant committed these crimes either when he was alone with Y.L. or when she was with younger brothers too young to perceive what was occurring. The SART examination produced no useful evidence. The only person who could have offered testimony countering Y.L.’s accusations was defendant himself. In these circumstances, arguing that there was no useful defense evidence constituted *Griffin* error, under the principle articulated in *Hughes, supra*, 27 Cal.4th 287, and *Bradford, supra*, 15 Cal.4th 1229.

In both *Hughes* and *Bradford*, the court found no *Griffin* error. In both cases, however, the high court relied on circumstances that do not exist here. In *Hughes, supra*, 27 Cal.4th 287, there were defense expert witnesses who testified on certain matters the prosecutor raised in closing argument (*id.* at p. 374), so any testimony by the defendant would not have been the sole focus of the prosecutor’s remarks. Regarding other topics the prosecutor in *Hughes* addressed, “Under the defense theory of the case, defendant was in an unconscious state during the killing, and hence could not be expected to have provided answers to the prosecutor’s questions, even had he taken the witness stand.” (*Id.* at p. 373.) In *Bradford, supra*, 15 Cal.4th 1229, “the lack of evidence . . . might have been presented in the form of physical evidence or testimony other than that of defendant.” (*Id.* at p. 1340, italics deleted.)

² The foregoing two decisions illustrate the point that *Griffin* applies both to direct and indirect prosecutorial comments on a defendant’s failure to testify on his or her own behalf. (*People v. Mincey* (1992) 2 Cal.4th 408, 446.)

Although we find *Griffin* error, we find no due process violation and no prejudice under state law. Regarding due process, even taking into account defendant's point that the prosecutor had "the last word" before the jury began to deliberate, the comments did not render the trial fundamentally unfair. The jury was instructed, under CALCRIM Nos. 103 and 220, that defendant was presumed to be innocent and that the prosecution had to prove his guilt beyond a reasonable doubt. The instruction is presumed to have carried more weight than the prosecutor's argument. " 'We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' " (*People v. Thornton* (2007) 41 Cal.4th 391, 441.)³ Regarding prejudice under state law, we have read the record and are struck by the evident lucidity (as best it can be determined from documents), attention to detail, and lack of major inconsistency in Y.L.'s testimony and her CART interview.⁴

³ We acknowledge defendant's point that the jury was not instructed, under CALCRIM No. 355, that a criminal defendant has "an absolute constitutional right not to testify." "Do not consider, for any reason at all, the fact the defendant did not testify. Do not discuss that fact during your deliberation or let it influence your decision in any way." (*Ibid.*) We shall say more about this in our discussion of ineffective assistance of counsel, *post* 11-12. We also acknowledge defendant's point that the jury was instructed under CALCRIM No. 226, which invited the jury to consider whether "other evidence proved[d] or disprove[d] any fact about which the witness testified." In our view, however, any rational juror would always consider whether other evidence militated for or against testimony, so that instruction was inconsequential.

⁴ Defendant notes defense counsel's comments outside the jury's presence that "this court saw the difficulty with which the victim had testifying today" and worried whether the jurors would "say there are very many inconsistencies." The first comment could refer, however, to the victim's emotions in relating unpleasant events involving intimate parts of her body; at one point during Y.L.'s testimony the prosecutor said, "I know this is hard for you. If you need a break, just let the judge know, OK?" As for the second point, Y.L. was inconsistent about the precise number of sexual abuses defendant committed over half of her lifetime, but overall, her testimony and her CART interview were remarkably consistent, especially for someone of her age.

There is no reasonable likelihood that, had the prosecutor not committed *Griffin* error, the outcome would have been more favorable to defendant. He is not entitled to relief.

Defendant next argues that the prosecutor's remarks shifted the burden to him to prove his innocence. He notes that the prosecutor kept referring to his failure to "refute" Y.L.'s accusations and the crimes and points to dictionary definitions that to refute something means to disprove or rebut it.⁵ Of course, defendant had no legal obligation to disprove anything. That said, the question is whether there is a reasonable likelihood that the jury relied on this rather formal, classical definition. "Refute" has been extended in common parlance to mean to challenge, oppose or disagree with some circumstance on the ground that it is baseless⁶ and we think the prosecutor meant it that way, i.e., that defendant had presented no evidence to counter the prosecution case. This she was entitled to do. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence" (*Bradford, supra*, 15 Cal.4th at p. 1340), and "comments by the prosecution during closing argument noting the absence of evidence contradicting what

⁵ For example, the Oxford English Dictionary's definitions for "refute" include these: "To prove (something) to be false, esp[ecially] by means of argument or debate" and "To prove (a person) to be wrong." (Oxford English Dict. (3d ed. 2000; online version Sept. 2014) <<http://www.oed.com/view/Entry/161157?rskey=09W07O&result=3#eid>> (as of Feb. 23, 2015).) Defendant cites similar definitions from other dictionaries.

⁶ Again to quote the Oxford English Dictionary, "refute" may mean "To reject (an allegation, assertion, report, etc.) as without foundation; to repudiate." The entry notes that this use was "Criticized as erroneous in usage guides in the 20th cent[ury]. In many instances it is unclear whether there is an implication of argument accompanying the assertion that something is baseless" (Oxford English Dict. (3d ed. 2000; online version Sept. 2014) <<http://www.oed.com/view/Entry/161157?rskey=09W07O&result=3#eid>> (as of Feb. 23, 2015).)

was produced by the prosecution . . . and the failure of the defense to introduce material evidence . . . cannot fairly be interpreted as referring to defendant’s failure to testify.” (*Id.* at p. 1339.) Surely she knew not to argue that defendant had a burden of proof and had failed to meet it. We see no reasonable likelihood that the jury understood the references otherwise.⁷ We also reiterate that the jury was instructed that he was presumed innocent. As alluded to, we view that instruction as carrying greater weight than any untoward prosecutorial remarks. (*People v. Thornton, supra*, 41 Cal.4th at p. 441.)

Defendant also claims that his trial counsel rendered ineffective assistance by failing to object to the prosecutor’s remarks and ask for the jury to be instructed on CALCRIM No. 355 (see fn. 3, *ante*).

⁷ Defendant points out that in *Bradford* the court found no impermissible attempt to shift the burden of proof, but did so in part because “[t]he prosecutor did not allude to the lack of *refutation* or denial by the sole remaining witness, defendant, but rather to the lack of evidence, which might have been presented in the form of physical evidence or testimony other than that of defendant.” (*Bradford, supra*, 15 Cal.4th at p. 1340, italics added and original italics deleted.) The court made a similar observation in *People v. Lewis* (2001) 25 Cal.4th 610, 670. *Bradford*, and arguably *Lewis*, were referring to refutation in the formal, classical sense, however. As explained, we discern no reasonable likelihood that a jury would have understood the prosecutor’s references here to a failure to “refute” her case as necessarily meaning defendant’s failure to prove his innocence, as opposed to the state of the evidence leaving little or nothing to contradict the prosecution case.

Defendant also points out that in *People v. Hill, supra*, 17 Cal.4th 800, it was said to be misconduct when the prosecutor argued, “[t]here must be some evidence from which there is a reason for a doubt.” (*Id.* at p. 831, italics deleted.) The court stated the prosecutor “committed misconduct insofar as her statements could reasonably be interpreted as suggesting to the jury she did not have the burden of proving every element of the crimes charged beyond a reasonable doubt.” (*Ibid.*) The court also surmised that it was possible the prosecutor “was claiming there must be some affirmative evidence demonstrating a reasonable doubt.” (*Ibid.*) We do not interpret the remarks of the prosecutor here as doing either thing.

“ ‘To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.’ [Citations.] ‘ ‘Finally, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ ” [Citation.] ‘It is the defendant’s burden on appeal [. . .] to show that he or she was denied effective assistance of counsel and is entitled to relief. [Citations.] “[T]he burden of proof that the defendant must meet in order to establish his [or her] entitlement to relief on an ineffective-assistance claim is preponderance of the evidence.” [Citation.]’ ” (*In re Hill* (2011) 198 Cal.App.4th 1008, 1016.)

“On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.)

We can discern no explanation for defense counsel’s failure to object to the prosecutor’s remarks that constituted *Griffin* error. Counsel would appear to have acted deficiently. There is, however, no reasonable probability that the outcome would have been more favorable to defendant had counsel objected. As stated, Y.L.’s testimony and CART interview were compelling. The prosecution case did not rest solely on her accounts, but also on the grandmother’s testimony that Y.L. told her defendant had

sexually abused her. In sum, the prosecution case was strong and, evidently, little could be offered to counter it. For lack of prejudice, there was no ineffective assistance of counsel.

With regard to counsel's evident decision not to have the jury instructed on CALCRIM No. 355 (see fn. 3, *ante* p. 8), this ineffective assistance of counsel claim cannot be resolved on direct appeal. Defense counsel may have wished not to call to the jury's attention the fact that he did not testify. To the extent defendant argues such a decision could never be satisfactory, the law is otherwise. Too many unknown variables may influence such a decision.

II. Other Claims, on Which the Parties Agree

The People agree with defendant's claims that (1) his conviction for continuous sexual abuse under subdivision (a) of Penal Code section 288.5 must be stricken; (2) a \$120 fine must be stricken from the sentencing-hearing minutes and the abstract of judgment; and (3) an order for AIDS testing must also be stricken from them. In each case, we agree with the parties.

With regard to the first claim, because subdivision (c) of Penal Code section 288.5 "mandates the charging of continuous sexual abuse and specific sexual offenses, pertaining to the same victim over the same period of time, only in the alternative, [the People] may not obtain multiple convictions in the latter circumstance." (*People v. Johnson* (2002) 28 Cal.4th 240, 248.) The multiple Penal Code section 288 charges all alleged conduct that occurred within the time alleged for the section 288.5 charge. Thus, the section 288.5 conviction cannot be sustained.⁸ Defendant does not seek resentencing on the counts for forcible lewd or lascivious conduct, and so we will strike the section

⁸ Because we grant defendant the remedy he seeks with regard to this substantive claim, it would be superfluous to address the ineffective assistance of counsel claim he presents alongside it, and we do not do so.

288.5 conviction without a remand. (See *People v. Torres* (2002) 102 Cal.App.4th 1053, 1057-1061.)

With regard to the second claim, because the trial court did not mention the fine under subdivision (a) of Penal Code section 290.3 during the sentencing hearing at which it pronounced judgment, it cannot be given effect.⁹ (See *People v. Walz* (2008) 160 Cal.App.4th 1364, 1367, fn. 3.) Unlike the situation in *People v. Morales* (2014) 224 Cal.App.4th 1587, 1594, the fine is not automatic, but instead rests on a court determination that the defendant has the ability to pay it; therefore, we may not simply correct the judgment to impose it. For all we know, the court may have thought defendant could not pay the fine and so declined to impose it during sentencing. Rather than remand for a clarification of that question (see *People v. Walz, supra*, 160 Cal.App.4th at pp. 1370-1371), judicial economy is served by correcting the abstract of judgment to remove the fine.

With regard to the third claim, the trial court did not order AIDS testing when it pronounced judgment, nor would it have been apposite to do so, inasmuch as there was no substantial evidence that defendant exposed Y.L. to the human immunodeficiency virus. (See Pen. Code, § 1202.1, subs. (a), (e)(6).) The imposition must be removed from the abstract of judgment.

DISPOSITION

The judgment is modified to strike defendant's conviction of violating subdivision (a) of Penal Code section 288.5. The superior court is directed to prepare an amended minute order and abstract of judgment accordingly. It is also directed to amend the minute order and abstract of judgment to remove a \$120 fine purportedly imposed

⁹ The sentencing-hearing minutes and abstract of judgment invoke Penal Code section 290 as the basis for the fine, but the parties agree that the court employee could have had in mind only section 290.3. As stated, the trial court itself never addressed the fine issue during the sentencing hearing.

pursuant to Penal Code section 290 and an order for AIDS testing. The superior court is directed to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.