Filed 9/16/19 P. v. Buenrostro CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JESUS BUENROSTRO, Defendant and Appellant.	2d Crim. No. B288855 (Super. Ct. No. 17CR07993) (Santa Barbara County)

Jesus Buenrostro appeals his conviction by jury for aggravated sexual assault of a child by sodomy (counts 1 & 6; Pen. Code, §269, subd. (a)(3)),[1] by rape (counts 2, 4 & 7; § 269, subd. (a)(1)), by oral copulation (counts 3 & 5; § 269, subd. (a)(4)), and lewd act on a child (counts 8, 9 & 10; § 288, subd. (a)). The victims, appellant's daughters (D1, D2 & D3; counts 1-7) and granddaughters (GD1 & GD2; counts 8-10), were under the age of 14 when they were sexually assaulted. The trial court sentenced

[1] All statutory references are to the Penal Code unless otherwise stated.

appellant to 12 years state prison plus an indeterminate term of 105 years to life. We affirm.

Facts

In 2017, GD1 (age five) reported that appellant touched her vaginal area when her mother was at work. GD1 underwent a Sexual Assault Response Team (SART) exam, said that appellant touched her vaginal area on two occasions, and drew a circle on an anatomical drawing where she was touched. (Counts 8-9.) GD1 also saw appellant touch GD2 on the vaginal area. GD2 went through a full SART exam and told the examiner that appellant touched her "part," referring to her vaginal area. (Count 10.) A video recording of the SART exams was played to the jury.

Counts 1-3

Appellant sexually assaulted D2 between 1998 and 2002 when she was eight to 11 years old (counts 1-3). Appellant touched D2's vagina and breast, forced her to orally copulate him, and put his penis in her vagina on more than one occasion. Following a company Christmas party, appellant drove D2 to an isolated place, raped her, and asked D2 to perform oral sex. Appellant sodomized D2 on another occasion and threatened to harm D2's mother if D2 told anyone. D2 kept a diary of the sexual assaults, but D2's mother found the diary and took it away from her.

Counts 4-7

Appellant sexually assaulted D2's sisters, D3 and D1 (counts 4-7) between 1997 and 2002. When D3 was six to eight years old, appellant touched her breasts and vagina, and forced D3 to have sexual intercourse. (Count 7). Appellant warned D3

that something bad would happen to D3's mother if D3 said anything.

D1 was sexually assaulted when she was eight years old. (Counts 4-6.) D1 said that she was asleep on the floor when appellant pulled down her pants and sodomized her. D1 ran to the bathroom to clean herself and saw blood on the toilet paper. Appellant raped D1 and forced her to orally copulate him on other occasions, and threatened to harm D1 and D1's mother if D1 said anything. When D1 was a teenager, appellant made D1 perform oral sex at the winery where D1 and appellant worked.

On March 23, 2009, the police responded to a domestic disturbance call that appellant was chasing the daughters around the house with a belt. D2 was afraid of appellant, took her baby, and spent the night at a neighbor's house. On March 24, 2009, D1 and D2 went to the police station, reported appellant's sexual abuse, and gave the police written statements. In 2010, the police suspended the investigation after the daughters said they did not want to continue the investigation and had reunited with appellant. In 2017, when the granddaughters reported that they were molested, the police reopened the 2009 investigation.

Prior Unrelated Incidents Offered as Impeachment Evidence

Appellant contends that the trial court abused its discretion in excluding evidence that the daughters made false statements to the police in two domestic disturbance calls. In April 2010, D3 told the police that D2 had been kidnapped by D2's boyfriend. D2 insisted that there was no kidnap but did say that she and the boyfriend argued before leaving the house. D3 later told the police that the boyfriend did not physically force D2 to leave the house.

In a March 2015 incident, appellant's tenant reported that his daughters dragged her out of an apartment and punched and kicked her. D1 told the police that she didn't know what happened. D2 and D3 gave conflicting statements about what happened and pled guilty to misdemeanor battery.

Appellant offered the evidence to show that the daughters had a history of making false statements to the police. The trial court found that the prior incidents, if admitted for impeachment purposes, would "lead[] us down to both a trial within a trial and its prejudicial impact is more than its probative value." It found that testimony about the prior domestic disturbance calls would open a "can of worms" and entail multiple witnesses, multiple police reports, and multiple different stories that no one could prove. The trial court acted well within its discretion in finding that the impeachment evidence would result in the undue consumption of time, confuse the issues, and mislead the jury. (Evid. Code, § 352; *People v. Ayala* (2000) 23 Cal.4th 225, 301 (*Ayala*).)

Appellant claims that he was denied the due process right to present a defense but the routine application of state evidentiary laws does not implicate a criminal defendant's constitutional rights. (*People v. Jones* (2013) 57 Cal.4th 899, 957; *People v. Brown* (2003) 31 Cal.4th 518, 545, fn. 9 [no violation of confrontation clause in excluding impeachment evidence that has marginal relevance].) The defense theory was that the daughters lied about the sexual assaults because appellant would not let them move out and live on their own. Defense counsel, however, made no offer of proof that the domestic disturbance calls were relevant to appellant's guilt, that the daughters' statements to the police were in fact false, or that testimony concerning the

calls would not result in the undue consumption of time or confuse the jury. The trial court stated, "we don't know what statements are correct or what statements are incorrect, and there's no way to prove that without having a trial related to those issues." The trial court did not err in finding that the 2010 kidnap report and the 2015 tenant incident had marginal relevance and would confuse the jury and result in the undue consumption of time. (Evid. Code, § 352; *People v. Bell* (2019) 7 Cal.5th 70, 105.) A trial court has broad discretion to exclude impeachment evidence that could degenerate a criminal trial into a nitpicking war of attrition over collateral credibility issues. (*People v. Lewis* (2001) 26 Cal.4th 334, 374-375 (*Lewis*).) "[A]s long as the excluded evidence would not have produced a ""significantly different impression"" of the witness's credibility, the confrontation clause and related constitutional guarantees do not limit the trial court's discretion" to exclude collateral impeachment evidence. (*People v. Contreras* (2013) 58 Cal.4th 123, 152; *Ayala*, *supra,* 23 Cal.4th at p. 301 [trial court may restrict cross-examination that is repetitive, prejudicial, confusing, or of marginal relevance].)

Appellant asserts that a victim-witness is not entitled to a false aura of veracity but "'[t]he admissibility of any past misconduct for impeachment is limited at the outset by the relevance requirement of moral turpitude. Beyond this, the latitude [Evidence Code] section 352 allows for exclusion of impeachment evidence in individual cases is broad.' [Citations.] . . . '[C]ourts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs the probative value.' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

Each of those factors was at play here. Appellant conceded that D2's and D3's prior conviction for misdemeanor battery was not moral turpitude conduct and it would be difficult to prove who said what during the police investigation of the domestic disturbance calls. (See *People v. Elwell* (1988) 206 Cal.App.3d 171, 175-176 [battery or simple assault not a crime of moral turpitude].) A due process violation occurs where the evidentiary error results in the complete preclusion of defense evidence, but that was not the case here. (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428.) Appellant thoroughly attacked the daughters' veracity and motives at trial. The jury was aware of the family dynamics, the daughters' troubled relationship with appellant, and that the daughters made conflicting statements when they reported the sexual assaults in 2009. Cross-examination of D1, D2 and D3 about the two domestic disturbance calls would not have produced a significantly different impression of their credibility. (*People v. Dalton* (2019) 7 Cal.5th 166, 218 (*Dalton*).) But for the exclusion of the collateral impeachment evidence, it is not reasonably probable appellant would have obtained a more favorable verdict. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227 [applying *People v. Watson* (1956) 46 Cal.2d 818 standard of review].)

Competency of Granddaughters to Testify

Appellant argues that the trial court erred in finding that the granddaughters (GD1, age five; GD2, age six) were competent to testify. We review for abuse of discretion. (*Lewis*, *supra*, 26 Cal.4th at p. 360.) As a general rule, "every person, irrespective of age, is qualified to be a witness . . . ." (Evid. Code, § 700; see Pen. Code, § 1321.) A person, however, may be disqualified as a witness where the witness is incapable of

understanding the duty to tell the truth. (Evid. Code, § 701, subd. (a).) "'Capacity to communicate, or to understand the duty of truthful testimony, is a preliminary fact to be determined exclusively by the [trial] court, [and] the burden of proof is on the party who objects to the proffered witness . . . .' [Citation.]" (*People v. Sanchez* (2019) 7 Cal.5th 14, 31 (*Sanchez*).) "[T]he test is not whether the witness is testifying truthfully, but whether the witness has the capacity to understand his [or her] duty to testify truthfully. [Citations.]" (*In re Crystal J.* (1990) 218 Cal.App.3d 596, 602.)

The granddaughters were questioned at an Evidence Code section 405 hearing to determine their competency to testify. GD1 stated that she was five years old, went to kindergarten, and identified her school and teacher. GD1 agreed to tell the truth and said that if someone said she was eight years old, it would be a lie. GD1's responses and demeanor supported the finding that she understood the duty to tell the truth and was capable of expressing herself. (Evid. Code, § 701, subd. (a)(1).) Appellant complains that GD1 did not know the days of the week and gave nonverbal responses to some questions. But when asked if GD1 was an old man, GD1 responded "No. [¶] [¶] I'm a girl." The trial court found that GD1 understood the difference between truth and lies, "agreed to tell the truth[,] and gave an age-appropriate response when placed in [a] difficult situation." It did not err.

GD2 (age six) answered questions about her age, her school, her grade level, her siblings, and with whom she lives. GD2 understood that it was important to tell the truth and said that she would truthfully answer questions. Appellant complains that GD2 gave inconsistent answers about the stuffed animal she

was holding. GD2 said it was a pink unicorn, that unicorns are real, and that she could see a real unicorn at the zoo. The trial court found that GD2 was confused, "and although she presented less competent, . . . the fact that she doesn't know there aren't unicorns would be like asking a six-year-old about the truth of Santa Claus . . . . [¶] . . . [T]he defense has not satisfied by a preponderance of the evidence that [GD2] is not competent. Jurors have to assess the credibility of witnesses, and child witnesses can only be expected to act in age-appropriate ways, particularly under these stressful circumstances." No abuse of discretion occurred. (See, e.g., *In re Ana* C. (2012) 204 Cal.App.4th 1317, 1326–1329 [no abuse of discretion when trial court found competent a moderately retarded 14-year-old who demonstrated understanding of duty to tell truth despite answering "no" when asked if she knew what it meant to tell the truth or if it was wrong to tell a lie]; *People v. Farley* (1979) 90 Cal.App.3d 851, 868–869 [10-year-old witness competent to testify when she stated she knew the difference between telling the truth and lying, but at times said she would not tell the truth]; see *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1368-1369 [cataloging cases of four and five-year-olds competent to testify].)

"'[T]he fact that a very young witness makes inconsistent or exaggerated statements does not indicate an inability to perceive, recollect, and communicate or an inability to understand the duty to tell the truth,' even if some parts of the child's testimony may be 'inherently incredible.' [Citations.]" (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 960 [rejecting claim that five-year-old was not competent to testify because her testimony was "fantastical"].) Appellant complains

that there are inconsistencies in the granddaughters' testimony but that went to the issue of credibility and was for the jury to decide. (*Sanchez*, *supra,* 7 Cal.5th at p. 32; *People v. Mincey* (1992) 2 Cal.4th 408, 444 (*Mincey*).)

Appellant argues that the admission of evidence of granddaughters' SART statements violated his due process right to confront witnesses. He forfeited the claim by not objecting on that ground.[2] (*People v. Champion* (1995) 9 Cal.4th 879, 918 [due process objection waived]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1116, fn. 20 [same]*; People v. Skiles* (2011) 51 Cal.4th 1178, 1189 [right of confrontation waived].) Appellant further speculates that the granddaughters' testimony may have invoked the jury's sympathy and may have been considered propensity evidence on counts 1-7. The jury, however, was instructed not to let sympathy or prejudice influence its decision (CALCRIM No. 200), and that it must consider each count separately (CALCRIM No. 3515). It is presumed that the jury understood and followed

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[2] Appellant argues that the SART interviews were not admissible because GD2 and GD1 were presumptively not competent to testify and were "unavailable" witnesses within the meaning of Evidence Code section 1360. Appellant, however, stipulated that the SART recordings could be received into evidence, thus forfeiting the issue. Appellant also complains that GD2 told the SART examiner that appellant touched her private part but at trial said that she was not touched. That goes to the issue of credibility, not competency to testify. "Inconsistencies in testimony and a failure to remember aspects of the subject of the testimony, . . . do not disqualify a witness. [Citation.]" (*Mincey*, *supra*, 2 Cal.4th at p. 444.) GD1 saw appellant touch GD2 and the testimony of a single witness is sufficient to support the conviction. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

the instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.)

Prosecutorial Misconduct

Appellant claims that the prosecutor committed prejudicial misconduct in telling the jury: "We[] proved it to you beyond a reasonable doubt, [and] they get an opportunity to rebut it, and they can present a defense."[3] Appellant contends that the

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[3] The prosecution argued that "the burden is absolutely on the People to prove this case to you beyond a reasonable doubt. But it is a rebuttable presumption . . . . [O]nce we've prove[n] it beyond a reasonable doubt, once these girls came in and told you . . . that . . . their father . . . did these things to them, then [the] defense can if they want try to rebut the fact that we've proved it beyond a reasonable doubt and they can present evidence." Appellant did not object, forfeiting the alleged error. Appellant claims that the prosecution told the jury that the charges were proven "*once the prosecution's witnesses testified*" and the presumption of innocence no longer applied. That is not what was argued.

The prosecution further argued: "And as you know, they did present some witnesses, but they did not present any evidence of why, why would those people have come in here, why would his daughters and his granddaughters . . . come in here and . . . ." The trial court sustained a "shifting the burden" objection and ruled that "[y]ou may clarify and continue your argument." The prosecution continued: "So again, what I'm saying is at the point we have proved the case to you beyond a reasonable doubt by the direct evidence of these witnesses, at that point, then [the] defense does have an opportunity to rebut it. They have an opportunity to present a defense." Appellant did not object. Appellant claims that the jury was told that the presumption of innocence was lost and that appellant was no longer presumed innocent. That is not what was argued. The fair import of the prosecutor's argument was that jury should

argument misstates the People's burden of proof but did not object or request a curative admonition, thus forfeiting the error. (*People v. Sapp* (2003) 31 Cal.4th 240, 279; *People v. Dowdell* (2014) 227 Cal.App.4th 1388, 1407-1408 [prosecutor argument that "presumption of innocence is over" forfeited by failure to object].)

Appellant opines that trial counsel's failure to object was ineffective assistance of counsel but such an objection, if made, would have been overruled. (*People v. Memro* (1995) 11 Cal.4th 786, 834 [effective assistance of counsel does not require counsel to make futile or frivolous objections].) It is not misconduct for the prosecution to argue that guilt has been established beyond a reasonable doubt and that the evidence has overcome the presumption of innocence. (*People v. Panah* (2005) 35 Cal.4th 395, 463 [argument that the evidence "stripped away" the presumption of innocence]; *Dalton*, *supra,* 7 Cal.5th at pp. 259-260 [argument that defendant's presumption of innocence "is gone" not misconduct].) In *Booker, supra*, 51 Cal.4th 141, the prosecution argued that the presumption of innocence "'isn't an automatic thing forever. That's why we have a trial. Once the evidence convinces you [defendant] is no longer innocent, that presumption vanishes . . . .'" (*Id.* at pp. 183-184.) Our Supreme Court held that the argument did not lessen the People's burden of proof or imply that defendant was not presumed innocent. (*Id.* at p. 185.) "Although we do not condone statements that appear to shift the burden of proof onto a defendant (as a defendant is entitled to the presumption of innocence until the contrary is found by the jury), the prosecutor here simply argued the jury

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return a verdict in favor of the prosecution based on the evidence presented. (*People v. Booker* (2011) 51 Cal.4th 141, 185 (*Booker*).)

should return a verdict in his favor based on the state of the evidence presented." (*Ibid*.) A prosecutor does not misstate the law by arguing that the trial evidence has rebutted the presumption of innocence. (*Id*. at p. 183.)

Here, the prosecution argued that the People had met their burden of proof, but did not say that the presumption of innocence no longer applied. (Compare, *People v. Cowan* (2017) 8 Cal.App.5th 1152, 1160-1161 [misconduct where prosecution argued that presumption of innocence ended with the reading of the charges]; *Mahorney v. Wallman* (10th Cir. 1990) 917 F.2d 469, 471 [prosecution argued that "presumption is not there any more"].) Assuming, arguendo, that trial counsel was ineffective in not objecting, appellant makes no showing that he was prejudiced or denied a fair trial. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); *People v. Maury* (2003) 30 Cal.4th 342, 389 [prejudice must be affirmatively proved].) Comments on the state of the evidence or on the defendant's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permitted. (*People v. Medina* (1995) 11 Cal.4th 694, 755 (*Medina*).) The jury was instructed on the presumption of innocence and proof beyond a reasonable doubt (CALCRIM No. 220), that nothing that the attorneys say in "closing arguments are evidence" (CALCRIM No. 222), and "[i]f you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CALCRIM No. 200.) Viewing the prosecution's comments in the context of the whole argument and the instructions given, we conclude there was no prejudicial misconduct. (*People v. Centeno* (2014) 60 Cal.4th 659, 667.) "For such remarks to constitute error, . . . it is not enough that the

remarks could be construed as improper. [Citation.] Instead, '[a] defendant asserting prosecutorial misconduct must . . . establish a reasonable likelihood the jury construed the remarks in an objectionable fashion.' [Citations.]" (*People v. Potts* (2019) 6 Cal.5th 1012, 1036.)

Appellant argues that he was denied a fair trial when the prosecution argued that the daughters "told you what happened. Defense can spend as much time as they want pointing out that there were different things that were said in each interview, but the bottom line is that there was absolutely no motive presented, none, of why the girls would come in here and lie to you. If you need some evidence, think about . . . their body language and their anguished tears that they shed on that stand. . . . [¶] Realize how long these girls have been trying to tell what happened to them and get somebody to listen. . . . They told their aunt. They talked to four different police officers back in 2009. They gave written statements . . . . Then they had to talk to more police in 2017. . . . They told the judge at the preliminary hearing. And then they told you. Let their voices finally be heard and let justice by served."

Appellant did not object and forfeited the alleged error. (*People v. Avila* (2009) 46 Cal.4th 680, 710-711.)[4] On the merits, it is not misconduct for the prosecution to comment on a

[4] We reject the argument that the objection was preserved when the trial court granted a pretrial in limine motion that appeals to passion or prejudice are improper. The trial court ruled "[i]f there's a need for a curative instruction, that will be upon request." The contemporaneous objection rule was not waived. (Evid. Code, § 353; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 159-160.) Defense counsel was required to voice an objection to preserve the issue for appeal.

victim's demeanor or lack of motive to lie. (*People v. Perez* (2018) 4 Cal.5th 421, 451.) Nor was the prosecution vouching for a witness. (*Ibid.*; *People v. Rivera* (2019) 7 Cal.5th 306, 336.) Defense counsel told the jury: "Do not let your natural sympathy for the daughters and granddaughters blind you to the glaring problems with their statements and testimony. . . . So do not be swayed by sympathy. Do not ignore the evidence because you feel sorry for someone who took the stand." The jury was instructed not to let bias or sympathy influence its decision and "[i]t is up to all of you, and you alone, to decide what happened . . . ." (CALCRIM No. 200.) On review, it is presumed that the jury understood and followed the instruction. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 857; *Medina*, *supra,* 11 Cal.4th at pp. 759-760 [no prejudice where prosecution asked jury to "'do the right thing, to do justice'" for the victim].) Appellant makes no showing that, but for trial counsel's alleged unprofessional errors, the trial would have resulted in a more favorable outcome. (*Strickland*, *supra,* 466 U.S. at pp. 693-694; *People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

Dueñas - Ability to Pay

Appellant, in a supplemental brief, argues that the trial court erred in imposing a $400 court security fee (§ 1465.8), a $300 criminal conviction assessment (Gov. Code, § 70373) and a $10,000 restitution fine (§ 1202.4) without finding that appellant had the present financial ability to pay. In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), the Court of Appeal concluded that the failure to conduct an ability to pay hearing in a misdemeanor suspended license case violated the due process rights of a homeless probationer. Because appellant failed to object to the $10,000 restitution fine based on an inability to pay,

he cannot be heard to complain that the trial court failed to consider his ability to pay the $400 court security fee and $300 criminal conviction assessment. (*People v. Gutierrez* (2019) 35 Cal.App.5th 1027, 1033.)

Disposition

Appellant's remaining arguments have been considered and merit no further discussion. Our review of the record discloses that none of the purported errors identified on appeal, either singularly or cumulatively, denied appellant a fair trial.

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

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