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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARTIN ANTONIO VELAZQUEZ,

Defendant and Appellant.

2d Crim. No. B229180
(Super. Ct. No. 2009038845)
(Ventura County)

Martin Antonio Velazquez was found guilty by a jury of assault with intent to commit rape during a burglary (Pen. Code, § 220, subd. (b)),¹ burglary (§ 459), attempted kidnapping to commit rape (§§ 664, 209, subd. (b)(1)), and assault with intent to commit rape (§ 220). We affirm.

FACTS

Grace M.

On July 30, 2008, at 6:45 a.m., Grace M. was walking around a park near her home in Oxnard. As she walked near a white pickup truck, Velazquez stepped out of the passenger side of the truck. He pointed to his wrist and said, "Time, time." As Grace was looking at her watch, Velazquez went behind her back and grabbed her arms. He tried to force her into the truck. She swung her arms, yelled for help and started running. She ran home and called 911.

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

Esmeralda C.

On May 4, 2009, Esmeralda C. was working at a market in Oxnard. At 9:30 p.m., she left the market and entered her car. Velazquez, wearing a black beanie cap with holes cut out for his eyes, opened the car door. He held a rag to Esmeralda's face. Esmeralda tried to get out of the passenger door. Velazquez got in the car and closed the driver's door. He placed the rag over Esmeralda's face as she lay on the seat.

Esmeralda grabbed at Velazquez's face and pulled off the beanie cap. She scratched his face and kicked him. She was able to kick him with one foot and honk the car's horn with the other foot. Eventually Velazquez fled the car, leaving the rag and the beanie cap behind. Esmeralda called the police.

R.M.

On the morning of October 22, 2009, R.M. took her daughter to the school bus stop. R. reentered her home at about 8:00 a.m. and locked the door. She turned and saw Velazquez walk out of her daughter's bedroom. He wore a baseball cap and hooded sweatshirt. Twine was sticking out of his sweatshirt pockets. He had a roll of duct tape in his hands.

R. asked Velazquez who he was and what he was doing in her house. He replied, "I don't have the proper tools to do the job."

R. reached for the locked door, but Velazquez grabbed her from behind. He said, "We're going to do this. We're definitely going to do this." He pulled her down the hallway toward the bedrooms. R. struggled. As they got near an entertainment center, she grabbed a heavy Day of the Dead figurine. She swung it behind her and hit Velazquez in the head several times. He let her go. She turned to face him and struck him in the head with the figurine four or five more times. She could see blood coming from his head. After a further struggle, during which R. managed to kick Velazquez in the groin, he ran out of the house.

R. followed Velazquez outside. She saw him get into a white Ford Explorer. He was having difficulty starting the car. She grabbed a potted palm from her neighbor's yard and threw it at the car, breaking the windshield. Then she opened the

driver's door and beat Velazquez with the palm tree. Eventually Velazquez was able to start the car. As he drove away, R. grabbed a piece of the broken palm pot and threw it at the car, cracking its back window.

The police were able to trace Velazquez's car through a windshield repair company. When the police saw Velazquez's car, the windshield had been replaced, but the back window was still cracked. They arrested Velazquez.

Police Interrogation

Oxnard Police Sergeant Sharon Giles had been a senior officer in the department's sexual assault unit for six or seven years. She had extensive training and experience in interrogating sexual assault suspects. Detective Luis Mancha acted as a Spanish translator for Giles during her interrogation of Velazquez. Mancha advised Velazquez of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436. Velazquez waived his *Miranda* rights. The interrogation was videorecorded.

Giles noticed that Velazquez did not seem aggressive or hostile toward her. Velazquez seemed shy and withdrawn. Giles wanted to build a rapport with him to get him to feel comfortable. To that end, she joked and smiled a lot.

To gain Velazquez's confidence, Giles said things that he would connect with. Velazquez would smile and "sort of giggle." Giles said she was attracted to both men and women and she thought R. had a great body. Giles also said she was a "freak" and liked to be tied up. Velazquez's face lit up and he smiled at her. At times during the interrogation, Giles acted flirtatiously. She put her hand on his knee and spoke close to his face. Giles said such sexual roll playing is not typical of how police behave during an interrogation.

Velazquez admitted that when he entered R.'s house he intended to tie her up and have sex with her. He brought rope and duct tape. He also brought a blanket to cover her mouth so she could not scream. He said he stopped the attack because she was too strong.

Velazquez also talked about his attack on Grace M. He said he tried to get her into his truck to have sex with her.

Finally, Velazquez admitted he attacked Esmeralda C. He had previously seen her in the market where she was employed. He waited for her outside the market. He said they struggled inside her car and that she kept kicking him. He brought a rag to cover her mouth but she was able to push it away. He wanted to do to her what he wanted to do to R.

DISCUSSION

I

Velazquez contends the trial court violated his due process rights by unduly restricting his cross-examination of Sergeant Giles.

During Velazquez's cross-examination of Giles, he asked whether most people who are interrogated by the police as sexual assault suspects laugh, giggle and tell about sexual fantasies. The trial court sustained the prosecution's relevancy objections to a series of such questions.

Velazquez offered to prove that Giles would have testified that his reaction to being interrogated about sexual assaults was not normal. He argues the evidence was relevant to place doubt on the credibility of his admissions. Velazquez believes the jury could have concluded he did not intend to rape his victims.

Evidence is relevant if it has any tendency in reason to prove or disprove a disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.) It is a long stretch between evidence that Velazquez did not act as most people would during his interrogation to the conclusion that he did not intend to rape his victims. If the excluded evidence has any relevancy at all, it is miniscule at best.

In any event, even if the trial court erred, the error was harmless. Contrary to Velazquez's argument, the exclusion of the evidence did not rise to the level of constitutional error. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611 [the mere exercise of discretion under the ordinary rules of evidence does not implicate the federal Constitution].) Accordingly, the error is harmless if there is no reasonable probability the defendant would have obtained a more favorable result in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

It would not take the testimony of Giles for any reasonable juror to determine that Velazquez did not act as most people would during a police interrogation. It requires no imagination to conclude that most people would not laugh, giggle and talk about sexual fantasies with the interrogator. Testimony that Velazquez's behavior during the interrogation was unusual or even bizarre would be nothing more than a statement of the obvious.

II

Velazquez contends the trial court erred in sentencing him to a concurrent term on count 2, instead of staying the sentence on count 2 pursuant to section 654.

The trial court sentenced Velazquez to a life term on count 1, assault with intent to commit rape during a burglary. The court recognized the sentence on count 2, burglary, was subject to section 654. But the court stated orally that the sentence on count 2 would be concurrent with the sentence on count 1. Nevertheless, both the court's minute order and the abstract of judgment show the sentence on count 2 was stayed. The Attorney General concedes the sentence on count 2 is stayed. Because the minute order and abstract show the sentence was stayed, there is nothing to correct.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Nancy L. Ayers, Judge
Superior Court County of Ventura

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