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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA ALEXANDER LOPEZ, Defendant and Appellant.	B236151 (Los Angeles County Super. Ct. No. BA368435)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig J. Mitchell, Judge. Affirmed.

Vanessa Place, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Joshua Lopez and Raquel A. (Raquel) were friends and members of the same tagging crew, an association of graffiti writers. On January 7, 2010, defendant sent Raquel a text message inviting her to come smoke marijuana with him. They went first to a motel in Los Angeles, and Raquel waited outside while defendant went in. When he returned, he said the rooms were too expensive. The pair then went to a secluded stairwell in the Mira Vista Projects. When defendant attempted to kiss Raquel, she leaned back and turned her face away. Defendant, who was much larger than Raquel, pinned her down and removed her pants. He inserted his erect penis into her vagina, causing her severe pain, and had rough intercourse with her. After approximately two to three minutes he withdrew, tried to turn her over, and licked her vagina. He then reinserted his penis into her vagina and repeated the rough intercourse for approximately one minute more.

When defendant stopped, Raquel retrieved her clothes and left, later sending him a text message in which she accused him of raping her. A passing motorist noticed her crying and asked what was wrong. She told him she had been raped and asked to be taken to a friend's house. Four days later, she went to the Arroyo Vista Family Health Center complaining of pain in her lower abdomen. She told Dr. Than Ma, the examining physician, that defendant had raped her. Dr. Ma noticed mild redness on the upper part of Raquel's vulva but discovered no vaginal tears or other injuries. She opined at trial that had there been any tearing on the day of the rape, she would have expected to see some sign of it, even if the tearing had healed. Dr. Ma reported the rape to police.

Detective Maribel Rizzo of the Los Angeles County Sheriff's Department conducted an interview of defendant, a recording of which was played for the jury. Defendant denied raping Raquel but admitted to having intercourse with her, claiming it was spontaneous and partly consensual. He said Raquel did not consent at first to intercourse but consented to him licking her vagina. He had intercourse with her anyway for a short time, but then stopped. She then consented, and he resumed.

Relating the sequence of events several times during the interview, he said: "No she told me. No, she doesn't want to do this. I'm like, 'ok'. And I went and she saw that I was going to do it and she goes 'no, no, no.' and I barely stuck it in and she goes, 'ah, just finish what you were doing.' [¶] And then . . . we'll never talk after this. I never want to talk to you anymore . . . "; "I got a little too excited and I stuck it in and that's when she said 'no' and then after that she was just matter of fact 'just finish what you're doing and we'll never speak of it again' and that's what I did"; "She told me she didn't want to have sex. That's what she said—she didn't want to have sex. And then [¶] . . . [¶] I did and then at that she just said, 'oh you know as a matter of fact, just finish what you're doing'"; "She said she didn't want no sex in the beginning of everything. I told, like I stuck it in there. Then after that she goes, okay, just finish everything off."

When asked why Raquel would accuse him of raping her, defendant said, "Cause I was a rough one probably. Like, I was probably like, not rough like holding her down, but like rough in the sex . . . ."

Defendant was charged with one count of forcible rape pertaining to the first sexual penetration (Pen Code, § 261, subd. (a)(2); count 1),[1] one count of forcible oral copulation (§ 288a, subd. (c)(2); count 3), and a second count of forcible rape pertaining to the second penetration (count 2).

At trial, defendant testified Raquel agreed to let him perform oral sex on her and told him if he "turn[ed] [her] on," then "it will lead to sex. Raquel told him "No" only after he had inserted his penis, so he withdrew it. She then told him to continue what he had been doing, and he reinserted his penis and continued the intercourse. He did not hold her down, use force, or take her clothes off.

The jury found defendant guilty of rape on count 1, deadlocked on count 2, and found him not guilty of forcible oral copulation. He was sentenced to the middle term of six years in prison.

Defendant appealed.

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[1] Undesignated statutory references are to the Penal Code.

DISCUSSION

Defendant's sole contention on appeal is that erroneous admission of rebuttal evidence violated his right to due process.

Dr. Ma, Arroyo Vista health center physician, testified that upon examining Raquel she discovered mild erythema, or redness, on the right upper part of her vulva. On cross-examination Dr. Ma testified she discovered no vaginal tears or bruising. On re-direct, Dr. Ma testified that after four days she would expect any vaginal tearing to have healed. On re-cross she testified that if there had been tearing that had healed, she would expect to see some indication of the injury. She saw no such indication on Raquel

On final redirect examination the prosecutor asked, "Did it surprise you that you did not see any tearing on Raquel A. given that she told you she'd been raped four days ago? [¶] . . . [¶] Did you think that was unusual that there was no tearing on Raquel because she had told you she'd been raped four days ago?"

Dr. Ma, who had never before performed a sexual assault examination, answered, "*Yeah. Because this is my first case of—yeah I have no case—*." (Italics added.)

At this point the prosecutor interrupted, "So you don't know if tearing would be normal or not normal if an exam [is] done four days after a rape, right?"

Dr. Ma answered, "Yes."

There were no further questions, and Dr. Ma was dismissed.

Following Dr. Ma's testimony, the prosecutor informed the court she wanted to call Julie Lister, a sexual assault examination (SART) nurse, to give expert testimony. The SART nurse would testify that approximately half of all rape victims experience no vaginal tearing. Even if there were vaginal tearing, it would generally be visible only upon close examination under magnification. The SART nurse would testify she would not expect signs of vaginal tearing to be visible four days after a rape.

Defense counsel objected on timeliness grounds. The trial court ruled the prosecution could not call the SART nurse, stating, "The court will not permit Miss Lister to testify in the People's case in chief. If I believe based on potential testimony of Mr. Lopez that the nature of a consensual act of intercourse as opposed to one that is

accomplished through rape becomes an issue, then the court is likely to allow Miss Lister to testify as a rebuttal witness."

After the defense rested, the court permitted Nurse Lister to testify as a rebuttal witness over defendant's objection, stating Lister's testimony would "clarif[y] the physical findings" of Dr. Ma.

Lister testified it is important that any sexual assault examination occur as near in time as possible to a assault, preferably within 72 hours, because the genital and anal areas heal quickly. Even when examinations are performed within 72 hours of the assault, vaginal tearing is observed only about half the time, and even then only with the use of a colposcope, a device that provides both illumination and magnification. Lister testified, "Women in the child bearing age have [the] female hormone estrogen on board which makes the genital area very compliant, accommodating, stretchy, elastic, distensible, capable of allowing a penile vaginal penetration without an injury." She would not necessarily expect to see vaginal tearing even in the case of either rough penile vaginal sex or a sexual assault. When an exam is performed four days after an assault, the chance of observing vaginal injury would be lessened because vaginal injuries heal quickly, much like the mucous membrane in the mouth. Lister testified, "And any of you who have had an injury from eating really crusty French bread or cheese pizza that was too hot and burned your mouth, within, really a day or two, it's typically healed."

Lister testified she reviewed Dr. Ma's findings and found them to be "consistent with the history," i.e., consistent with Raquel's report of having been raped. Even if the examination had taken place the day of the assault, Dr. Ma's findings would be consistent with either a forcible rape or rough sex.

After trial, defendant moved for a new trial on the ground that Nurse Lister's testimony was improper rebuttal evidence.

The trial court denied the motion, as follows:

"I obviously heard the testimony of the case in chief witness called by the People, Dr. Ma . . . . [¶] It became clear on direct examination and abundantly clear on cross-examination that Dr. Ma had limited experience in treating sexual assault victims. [¶]

The court permitted the People to call the rebuttal witness Miss Lister. Given the fact that [defense counsel] in the cross-examination of Dr. Ma certainly undermined the experience of Dr. Ma, her ability to posit convincing representations before the jury. [¶] And this court permitted the People to call a rebuttal witness simply to allow the prosecution to respond to what the court perceived as very effective cross-examination by the defense. [¶] Nurse Lister's testimony did not materially change any representation by Dr. Ma [but] was called when it became abundantly clear to everyone that Dr. Ma based on her limited experience, the nature of her practice, was not best suited to render an opinion as to whether or not injuries would have been present at the time of the examination. [¶] And consequently I do not believe the People should be denied an opportunity when a witness is shown lacking during the case in chief, that the People should be denied an opportunity to call in a witness to respond to deficiencies that are exposed most clearly during cross-examination." The court further stated, "[I]t is important to note . . . that Nurse Lister did not offer any testimony that was materially different from Dr. Ma, namely, that injuries would not necessarily be present. [¶] . . . [¶] The People . . . simply saw the need to rebut the lack of familiarity that Dr. Ma seemed to present, particularly acute during cross-examination, and it is for that reason that the court permitted Nurse Lister to be called as a rebuttal witness."

Defendant argues the trial court erred in permitting Lister to testify. We agree.

After the People have offered their evidence in support of a charge and the defendant has offered evidence in support of the defense, the prosecution may offer "rebutting testimony only, unless the court, for good reason, in furtherance of justice," permits the offer of evidence upon the prosecution's original case. (§ 1093, subd. (d).) "When the case of the People is closed and the defense is in, the remainder of the People's case is limited to evidence in rebuttal of that produced by the defense and should be so limited by the court, except where a proper showing is made for reopening the case in chief for the receipt of further evidence. The People have no right to withhold a material part of their evidence which could as well be used in their case in chief, for the sole purpose of using it in rebuttal." (*People v. Rodriguez* (1943) 58 Cal.App.2d 415,

419.) An error in admission of evidence pursuant to section 1093 is reviewed for abuse of discretion. (*People v. Carrera* (1989) 49 Cal.3d 291, 323.)

Clearly, Lister was called to offer material evidence as part of the prosecution's case in chief, not rebuttal evidence. The prosecution requested leave during its case in chief to call Lister, admitting the purpose was to clarify the testimony of Dr. Ma, and the trial court admitted the testimony expressly for this purpose. After trial, the court confirmed that Lister's testimony was admitted to rehabilitate Dr. Ma's testimony.

No part of Lister's testimony rebutted any of defendant's evidence.

"[P]roper rebuttal evidence does not include a material part of the case in the prosecution's possession that tends to establish the defendant's commission of the crime. It is restricted to evidence made necessary by the defendant's case in the sense that he has introduced new evidence or made assertions that were not implicit in his denial of guilt. [Citations.] A defendant's reiterated denial of guilt and the principal facts that purportedly establish it does not justify the prosecution's introduction of new evidence to establish that which defendant would clearly have denied from the start." (*People v. Carter* (1957) 48 Cal.2d 737, 753-754.)

Defendant introduced no new evidence making Lister's testimony necessary and made no assertions not already implicit in his denial of guilt. If Dr. Ma was discredited during cross-examination, the prosecutor was required to rehabilitate her testimony during its case in chief or not at all. It was an abuse of discretion to permit Lister to testify after the defense had rested.

But the error was harmless under any standard.

Defendant was convicted on one count of forcible rape. Forcible rape is an act of sexual intercourse with a person who is not the spouse of the perpetrator, accomplished "against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).) The element of force refers to the means by which nonconsensual sexual intercourse is effected, not the forcefulness of the intercourse itself.

The only issues during trial were whether Raquel consented to having sex with defendant and whether the intercourse was accomplished by means of force. (There is no allegation that defendant used violence, duress, menace or fear of immediate bodily injury to accomplish the rape.) Even interpreting Dr. Ma's testimony in a light favorable to defendant, she said at most that when examining Raquel she expected to see vaginal tearing, was "surprised" to discover none, and found the lack of tearing to be "unusual." She did not say that absence of tearing implied there was either consent to the intercourse or lack of force within the meaning of the rape statute (or within any other meaning). The most the jury reasonably could have concluded from Dr. Ma's testimony was that the sex itself was not so rough or violent as to cause tearing. If there *had been* vaginal tearing the jury might have reasonably concluded the sex itself was forceful, which might reasonably imply it was nonconsensual. But absence of tearing had no tendency in reason to prove the converse.

Lister's testimony therefore did not rehabilitate Dr. Ma's testimony, as there was nothing deficient about it. Lister merely empirically confirmed the logical proposition that absence of tearing was irrelevant to whether Raquel consented or defendant used force.

Defendant argues Lister's testimony was prejudicial because it unduly suggested to the jury that the medical evidence supported Raquel's version of events over defendant's. This was not the gravamen of Lister's evidence, which was only that absence of vaginal tearing was "consistent with" rape. Although couched in affirmative terms, the evidence was essentially neutral: Absence of vaginal tearing does not imply either consent or lack of force. Confirmation that a logically irrelevant fact (or absence of one) is also empirically irrelevant, cannot be prejudicial.

DISPOSITION

The trial court's judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.