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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS A. VELA, Defendant and Appellant.	B279287 (Los Angeles County Super. Ct. No. BA424910)

APPEAL from a judgment of the Superior Court of Los Angeles County. George G. Lomeli, Judge. Affirmed.

Winston Kevin McKesson for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found Luis A. Vela (defendant) guilty of repeatedly molesting two of his step-granddaughters, and the trial court sentenced him to prison for 55 years to life. On appeal, defendant challenges the sufficiency of the evidence, asserts that the trial court erred in placing time limits on voir dire, and contends that the prosecutor committed misconduct during closing argument. Because none of these arguments warrants reversal, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Michelle L. (Michelle) and Ashley L. (Ashley) are sisters. Defendant is their step-grandfather.

A. *Acts Involving Michelle*

1. *First incident*

When Michelle was five years old, she lived in an apartment with her parents and sister in the same complex as her grandmother and defendant. One afternoon, while Michelle was at defendant's apartment and while her grandmother was away, defendant sat down next to Michelle on the sofa as she watched cartoons in the living room, put his hand between her legs and began to rub her vaginal area through her pants. Defendant then forcibly placed her onto the ground, removed her pants and underwear, and inserted his erect penis into her anus. As he was doing this, he was watching a video playing on his computer that depicted a naked adult woman having sex, and told Michelle, "If you had boobs, I would do that to you." After a minute or two, defendant removed his penis without ejaculating and let Michelle get up.

Michelle then walked away from defendant and into the kitchen. He followed, with his erect penis sticking out of the unzipped fly of the pants he had pulled up. Defendant pushed

Michelle onto one of the chairs in the kitchen, and proceeded to insert his erect penis into her vagina and to thrust into her. He stopped after one or two minutes, when he heard his wife's keys in the door.

Michelle retreated to the apartment's bathroom, and found both her anus and vagina sticky with her own blood. She placed her bloodied underwear in the trash, and did the same with the pair she wore the next day. Michelle was in excruciating pain for the next several days.

2. *Second incident*

A few months later, defendant approached Michelle, pressed his crotch against her shoulder and then her stomach, and gyrating in a circular motion each time. Both of them were fully clothed.

3. *Third incident*

A few months after that, defendant wrote Michelle a note asking, "Will you be my girlfriend?" When Michelle started to walk away from him with the note in her hand, defendant took it back and shredded it.

4. *Further conduct*

Defendant subsequently tried to kiss Michelle on the mouth whenever she would come to visit her grandmother.

B. *Acts Involving Ashley*

1. *First incident*

When Ashley was five years old, defendant sat next to her while she was watching cartoons on the sofa. He took his penis out of his pants and asked her to touch it. When she refused, he grabbed her hand and placed it on his penis.

2. *Second incident*

Another time when she was five years old, defendant once again sat next to Ashley on the sofa. He then placed his hands down her pants, beneath her panties, and touched her vagina "skin-to-skin." He tried to insert his finger inside her vagina, but she struggled against him. He ended up just moving his finger "up and down." After he removed his hand from her pants, he placed his fingers in his mouth.

3. *Third incident*

When Ashley was 13 years old, defendant offered her $20 if she would go into the closet with him and show him her breasts. She declined.

4. *Further incidents*

Defendant regularly tried to kiss Ashley on the lips whenever her visits with her grandmother and defendant ended. When she was 13 years old, he smacked her buttocks through her clothes while she was laying on her grandmother's bed and talking on her phone. And another time, he held his hands out in front as if to squeeze her breasts, but did not touch them because she backed away from him.

C. *Reporting the Incidents*

Michelle first reported defendant's abuse to a friend in January 2014. The friend told his parents, who alerted the authorities. Michelle subsequently explained the abuse to the clinical social worker who responded to the call, as well as to the police. Michelle had not told anyone else prior to that time—not Ashley, not her mother, not her father (who had physically abused Michelle), not her grandmother, and not the social workers or medical professionals who had interviewed her when she was involuntarily detained for suicidal ideation in 2011 and

2012. To the medical professionals, Michelle had specifically denied being the victim of any sexual abuse.

Ashley first reported defendant's abuse to the social worker who had interviewed Michelle. At first, Ashley denied any sexual abuse, but after a 20 minute break in the interview, detailed the abuse she suffered at defendant's hands. Ashley then reported the abuse to a responding police officer. Prior to this point, however, Ashley had not told anyone else about the abuse.

II. Procedural Background

The People charged defendant with (1) two counts of sexual intercourse or sodomy with a child 10 years old or younger (Pen. Code, § 288.7, subd. (a))[1] for the anal and then vaginal penetration of Michelle; (2) sexual penetration of a child under 14 by a foreign object (§ 289, subd. (a)(1)(B)) for defendant's placement of his finger inside of Ashley's vagina; and (3) two counts of committing a lewd act on a child under the age of 14 (§ 288, subd. (a)), one for the remaining sexual acts involving Michelle and one for the remaining sexual acts involving Ashley. The People further alleged that defendant's crimes involved multiple victims within the meaning of the One Strike Law (§ 667.61, subd. (c)).

The matter proceeded to trial. A jury found defendant not guilty of sexual penetration by a foreign object, and hung 11 to 1 (in favor of guilt) on the other four counts.

The matter proceeded to a second trial on the remaining counts. Defendant testified, denying any sexual abuse. Defendant's wife testified that neither Michelle nor Ashley were

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

ever alone with defendant. Defendant's niece testified that defendant had never molested her. The jury convicted defendant, and found the multiple victim allegation to be true.

After denying defendant's motion for a new trial, the trial court sentenced defendant to prison for 55 years to life. Specifically, the court imposed a sentence of 25 years to life for the anal penetration count, to be followed by two consecutive sentences of 15 years to life for the lewd act counts; the court imposed but stayed a 25-years-to-life sentence for the vaginal penetration count.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Sufficiency of the Evidence

Defendant argues that insufficient evidence supports his convictions. In evaluating this claim, we ask whether the record "'contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Sufficient evidence supports each of the four counts because Michelle and Ashley testified to the sexual conduct underlying each count.

Defendant raises two categories of arguments.

First, he argues that the evidence is insufficient because it consists solely of the "self-serving statements [of] the victims," without any corroboration from other percipient witnesses or any physical evidence (such as Michelle's bloody underwear or the note he gave her). For more than a century, however, it has been the law that "[i]n California[,] conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix."

(*People v. Poggi* (1988) 45 Cal.3d 306, 326; *People v. Gammage* (1992) 2 Cal.4th 693, 700, citing *People v. Akey* (1912) 163 Cal. 54.)

Second, defendant asserts that the testimony of Michelle and Ashley is insufficient because they were not credible witnesses because (1) they did not report his sexual abuse until many years later, (2) they could not remember the month, date, or day of the week he sexually abused them, and (3) their testimony conflicts with the testimony of other witnesses (such as defendant's wife and niece as well as defendant himself).

We reject these assertions. To begin, we may not second-guess a jury's conclusion that a witness is credible unless the witness's testimony is """"unbelievable per se""""—that is, unless it is "physically impossible or inherently improbable." (*People v. Jones* (2013) 57 Cal.4th 899, 963; *Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.) Neither is true here.

Even if we ignored this restriction on appellate review, defendant's specific attacks on Michelle's and Ashley's credibility lack merit. To explain why they did not report defendant's abuse sooner, the People called an expert witness who testified how child victims of sexual abuse, who believe the abuse is their fault and who fear they will not be believed if they report it, will sometimes delay in telling others of the abuse. Defendant counters that this expert testimony does not "fit" Michelle because Michelle had no qualms about reporting the physical abuse she suffered at the hands of her father. Defendant's argument conflates a minor's willingness to report physical abuse with her willingness to report sexual abuse; it was well within the jury's province to draw a distinction between the two. The inability of Michelle or Ashley to remember exact dates also does

not undermine their credibility; they were each five years old during most of the incidents, and those events occurred at least nine years before they testified. And the fact that their testimony conflicts with the testimony of other witnesses is of no moment because, in conducting substantial evidence review, we resolve all conflicts in the testimony in the light most favorable to the verdicts. (*People v. Szabo* (1980) 107 Cal.App.3d 419, 428; *In re Marriage of Dick* (1993) 15 Cal.App.4th 144, 156.)

II. Limitation On Voir Dire

Defendant next contends that the trial court was wrong to place time limits on counsels' questioning of prospective jurors during voir dire.

A. *Pertinent Facts*

1. *Initial voir dire*

The trial court started voir dire by seating 24 prospective jurors and asking them a standard set of questions, including (1) their city of residence; (2) their employment; (3) the employment of any other adults in their household; (4) their prior jury service; (5) whether any of their family or friends had been the victim of a serious crime, including a sex crime; (6) whether any of their family or friends had been accused of a crime; (7) whether they had qualms about believing the testimony of law enforcement officers; (8) whether they had bad prior experiences with law enforcement; (9) whether there was anything about the pending charges that would make it difficult for them to be fair; (10) whether they would be able to handle explicit sexual terms; (11) whether they understood and would apply the presumption of innocence; (12) whether they understood and would honor the privilege against self-incrimination; and (13) whether they had

any other reason to believe they could not be fair. On occasion, the court would ask follow-up questions.

The court then allowed the defense and prosecution to question the jurors, and gave them each 15 minutes to do so.

Following that questioning, the parties moved to excuse jurors for cause and exercised peremptory challenges.

2. *Second and third rounds of voir dire*

To fill the spots vacated due to the exercise of challenges, the court seated another 13 prospective jurors. The court repeated its standard questions along with any pertinent follow-up questions. Then the defense and prosecution were granted another 10 minutes per side to question the new jurors.

Following that questioning, the parties moved to excuse jurors for cause and exercise peremptory challenges.

To fill the spots vacated due to the second round of challenges, the court seated another 14 prospective jurors. The court again repeated its standard questions along with any pertinent follow-up questions. Each side was then given a further five minutes to question the new jurors.

Following that questioning, the parties exercised peremptory challenges before agreeing to a panel. The parties then stipulated to four alternate jurors.

B. *Analysis*

The People assert that we need not reach the merits of defendant's challenge to the trial court's voir dire time limits because he did not object to the limitation before the trial court. We disagree. When advised of the 15-minute limit, defendant told the court, "I didn't have enough time to question." That is sufficient to preserve the issue for appellate review.

On the merits, the law at the time of trial provided that trial courts in criminal cases had the discretion to set "maximum" "time" limits for attorney questioning of prospective jurors.[2] (Former Code. Civ. Proc., § 223 ["In a criminal case, . . . the court may specify the maximum amount of time that counsel for each party may question an individual juror, or may specify an aggregate amount of time for each party . . . ."]; Cal. Rules of Court, rule 4.201 [requiring court to "permit counsel to conduct supplemental questioning as provided in Code of Civil Procedure section 223"]; see generally *People v. Edwards* (1991) 54 Cal.3d 787, 830 [voir dire rulings reviewed for an abuse of discretion].) The law further provided that any abuse of discretion in setting those time limits "shall not cause any conviction to be reversed unless the exercise of that discretion has resulted in a miscarriage of justice." (Former Code Civ. Proc., § 223.) In this context, a limitation on voir dire results in a miscarriage of

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2 On January 1, 2018, a change in this law took effect. Under this new law, a trial court in a criminal case may "not impose specific unreasonable or arbitrary time limits or establish an inflexible time limit policy for voir dire." (Code Civ. Proc., § 223, subd. (b)(2), added by Stats. 2017, ch. 302, § 2) We may not apply that new statute here because: (1) application of a statute governing voir dire procedures *after* a trial has taken place is a retroactive application of that statute (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 289); and (2) retroactive application of such a statute is permitted only if the Legislature has "expressly so declared" (Code Civ. Proc., §3), and here it has not. In any event, the new statute would not alter the result because it also predicates relief upon a showing that any time limit resulted "in a miscarriage of justice" (Code Civ. Proc., § 223, subd. (g)); as explained in the text, defendant has not shown a miscarriage of justice.

justice only "if the questioning [ultimately allowed by the court] is not reasonably sufficient" "to ferret out the possible biases or prejudices of individual jurors," thereby resulting in a denial of the Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial. (*People v. Chapman* (1993) 15 Cal.App.4th 136, 141-142; *People v. Holt* (1997) 15 Cal.4th 619, 661; *People v. Carter* (2005) 36 Cal.4th 1215, 1250-1251.)

Although the better practice, even under the law in effect at the time of trial, is not to place inflexible time limits on attorney voir dire (particularly time limits of 15 minutes a side to question an initial panel of 24 prospective jurors), we need not decide whether the trial court abused its discretion in departing from this better practice because its time limits did not result in a miscarriage of justice, as there was sufficient time to "ferret out" the prospective jurors' biases and prejudices. The trial court itself questioned each panel of prospective jurors, and each side then had a total of 30 minutes to ask follow up questions (that is, an initial 15-minute period followed by supplemental 10- and 5-minute periods). All told, the voir dire process lasted more than four hours. In this respect, the voir dire procedures in this case are hard to distinguish from the procedures upheld in *People v. Asbury* (2016) 4 Cal.App.5th 1222 (*Asbury*). There, a trial court presiding over a murder trial questioned prospective jurors and left each side just 25 minutes to ask follow-up questions; *Asbury* concluded that there was no miscarriage of justice. (*Id.* at pp. 1227-1232.) As in *Asbury*, defendant here does not identify any biased juror who remained on the jury and does not explain what additional questions over and above what he already asked would have ferreted out further bias or prejudice. (Accord, *People*

v. Carpenter (1997) 15 Cal.4th 312, 354 [no miscarriage of justice where "'defendant did not claim that any juror was incompetent, or was not impartial'"].)

Defendant raises four further arguments.

First, he contends that the trial court in his first trial allowed unlimited questioning, and he obtained an acquittal on one count and a hung jury on the remaining counts; the time limits on questioning in this case, he infers, contributed to the guilty verdicts in this case. We disagree, as nothing but speculation casually links the time for juror questioning with the outcomes in these two trials.

Second, defendant posits the courts should be loathe to set limits in cases (such as sex crime cases) where the crimes are serious, the sentences are long, and the prospective jurors are reluctant to talk about their personal experiences with such crimes. Again, we agree that the better practice is not to impose such limits for such cases. But the departure from the better practice, even where these three considerations are present, does not automatically translate into a miscarriage of justice. The first two considerations do not, given that *Asbury* upheld a more restrictive time limit for a murder case where the defendant was sentenced to 40 years in prison. (*Asbury*, *supra*, 4 Cal.App.5th at pp. 1227-1232.) And the last consideration was negated by the trial court's specific questioning of the jurors about their prior experiences with sex crimes (and which questioning did not count against the parties' time limits).

Third, defendant urges that time limits should be per se invalid, citing *People v. Hernandez* (1979) 94 Cal.App.3d 715, 720 [trial court should not "set[] a rigid time limit in advance"] and Code of Civil Procedure section 222.5, which prohibits time limits

for juror questioning in civil trials. *Hernandez* was superseded by the version of Code of Civil Procedure section 223 in effect at the time of defendant's trial (see *People v. Avila* (2006) 38 Cal.4th 491, 535 [noting supersession of *Hernandez*]), and section 222.5, by its terms, does not apply in criminal cases.

Lastly, defendant asserts that the trial court's time limits were arbitrary (and hence an abuse of discretion) because the court offered up no reason for them. However, this argument goes only to whether there is an abuse of discretion, not whether there is a miscarriage of justice. For support, defendant cites *People v. Dorsey* (1974) 43 Cal.App.3d 953, 965-966, but *Dorsey* upheld a trial court's inquiry of a panel of 12 prospective jurors en masse.

III. Prosecutorial Misconduct

Defendant contends that the prosecutor engaged in misconduct during his closing argument.

A. *Pertinent Facts*

When cross-examining defendant, the prosecutor asked him about a recorded call that he made to his sister from the jail. Defendant admitted that he asked his sister to have his wife write a letter indicating that Michelle and Ashley had "com[e] over to [the wife's] apartment under the cover of night . . . to threaten her" because such a letter would "help [his] case." The prosecutor did not introduce the tape of that or any other call and did not introduce any portion of the transcription of any call.

During closing arguments, defendant's attorney argued that "nothing in these phone calls" showed defendant "telling [his wife]" to testify that he was "never around these little girls," that "he wasn't present," or that "she was there and this never happened." "Nowhere did [defendant] say," the attorney went on,

"I want her to lie about what these girls are claiming against me."

In the final rebuttal argument, the prosecutor responded to defense counsel's statements about the jailhouse calls, twice stating: "[N]owhere in those calls does the defendant, as he's talking to family members, ever say, gosh, I didn't do this." Defendant objected, asserting that defendant *did* deny his guilt during one of the calls. The trial court agreed, and ordered the prosecutor to "go up and [tell the jury] there's a section in the phone call where I stand corrected, he did deny it." The prosecutor did just that, telling the jury: "In the transcript, there's one section where [defendant] makes a statement that—I'm not sure exactly what the wording was, but that he didn't do it. Nowhere in his testimony was that ever brought out."

Defendant moved for a new trial based on the prosecutor's misstatement, but the trial court denied that ground for a new trial because the court had been "able to clear up" the misstatement during the trial.

B. *Analysis*

Conduct by the prosecutor may violate a defendant's right to due process under either the federal or state Constitutions. Conduct violates *federal* due process if it """"infects the trial with such unfairness as to make the conviction a denial of due process."""" (*People v. Adams* (2014) 60 Cal.4th 541, 568.) Conduct violates *state* due process if """"only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]"""" (*Ibid.*) These standards must be considered against the backdrop that "'a prosecutor is given wide latitude to vigorously argue his or her

case and to make fair comment upon the evidence.'" (*People v. Dykes* (2009) 46 Cal.4th 731, 768.)

Defendant asserts that the prosecutor committed two species of misconduct—namely, (1) that he referred to facts outside the record and (2) that he got those facts wrong.

With respect to the first claim, it is misconduct to refer to information outside of the trial record. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, overruled in part on other grounds by *People v. Williams* (2010) 49 Cal.4th 405.) And it is undisputed that the prosecutor argued that the tapes of the jailhouse calls *as a whole* contained no denial of guilt by the defendant—even though the whole of the tapes (or their transcription) were never admitted into evidence. It is nevertheless unclear whether this by itself constitutes misconduct because it was in response to *defendant's* argument that *also* referred to the statements on the tapes beyond those elicited during defendant's cross-examination. Because "[r]ebuttal argument must permit the prosecutor to fairly respond to arguments by defense counsel" (*People v. Bryden* (1998) 63 Cal.App.4th 159, 184), the fact that the prosecutor strayed beyond the record may not, by itself, constitute misconduct. (Accord, *People v. McDaniel* (1976) 16 Cal.3d 156, 177 [argument that may constitute misconduct in the abstract is not misconduct when responsive to a defense argument].)

With respect to the second claim, "it is misconduct to misstate [the] facts." (*People v. Collins* (2010) 49 Cal.4th 175, 230.) It is undisputed that the prosecutor got the facts wrong when he stated that nowhere on the jailhouse calls did defendant deny committing the crime.

Even if we accept that the prosecutor's misstatement regarding the tapes constituted *both* types of prosecutorial

misconduct, that misconduct does not warrant reversal. Reversal is mandated only when it is reasonably probable that the jury would have reached a more favorable result had the misconduct not occurred. (*People v. Crew* (2003) 31 Cal.4th 822, 839-840.) A different result is not reasonably probable in this case because the prosecutor—at the court's insistence—corrected his misstatement of the evidence. That correction suffices to erase any prejudice arising from the misconduct. (*People v. Fuiava* (2012) 53 Cal.4th 622, 685-686 [no prejudice when court corrects prosecutor's misstatement of evidence]; *People v. Redd* (2010) 48 Cal.4th 691, 752 [no prejudice when prosecutor corrects his own misstatement of fact].) Defendant argues that the prosecutor's misstatement, once uttered, is a bell that cannot be unrung; the law is to the contrary.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ