Filed 4/30/15 P. v. Dominguez CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. LEONARD DOMINGUEZ, Defendant and Appellant.	B254240 (Los Angeles County Super. Ct. No. SA073160)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark E. Windham, Judge. Affirmed.

Edward J. Haggerty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General and Pamela C. Hamanaka, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

More than 32 years after Sandra Phillips' partially unclothed body was found in her apartment, Leonard Dominguez ("defendant") was charged with her murder. Defendant appeals the jury's verdict of second degree murder (Penal Code § 187, subd. (a)) on several grounds, none of which warrants reversal. We accordingly affirm the conviction and prison sentence of 15 years to life.

FACTS AND PROCEDURAL HISTORY

I. The crime

On the afternoon of Monday, April 9, 1979, Sandra Phillips (Phillips) was found on the bedroom floor of her apartment, face-down with her pants and pantyhose down around her ankles. She was "ice cold." The bedroom was in disarray, but jewelry still adorned her body. The television blared. Phillips worked as an "outcall" prostitute who catered to wealthier clientele. The friends who went to check on her—and who discovered her body—were the same ones who warned her not to bring her clients back to her apartment. She had been strangled to death.

II. The investigation

The coroner fixed the time of Phillips' death between 10:40 pm on Saturday, April 7, 1979, and 10:40 am on Monday, April 9, 1979. Phillips left a friend's house near midnight on Saturday night, and was found in the same clothes. Investigators collected several samples—vaginal, anal, oral and pubic hair. The vaginal samples contained "a lot" of sperm. The coroner opined that the sperm were deposited close to the time of Phillips' death, in part because the sperm would have drained from the vaginal canal had Phillips been up and around.

The police had no suspects, so they placed the samples in a freezer.

Twenty-one years later, in 2000, police lab technicians extracted DNA from the sperm found in the vaginal sample, and uploaded the DNA profile to the national DNA database. In 2007, soon after defendant's DNA was collected, the database got a "hit"; defendant's DNA matched the DNA of the person who deposited the sperm collected from Phillips. Investigators from the Los Angeles Police Department's "cold case" unit thereafter interviewed defendant. At first, defendant said he did not recognize a

photograph of Phillips, but subsequently said she looked "familiar" and ultimately admitted to having sex with her. He denied involvement in her murder, stating that he had befriended her at an antique shop, that they had met up for sex at a hotel, and that he dropped her off on a street corner.

III. The prosecution

The People charged defendant with first degree murder (Penal Code § 187, subd. (a)), with rape and burglary special allegations (*id.*, §§ 190.2, subd. (a)(17), 261, 460). The information also alleged that defendant had inflicted great bodily injury (*id.*, §§ 12022.7, subd. (a), 1203.075). Following a trial, the jury convicted defendant of second degree murder and found the great bodily injury allegation to be true. Defendant moved for a new trial, but the trial court denied the motion, dismissed the great bodily injury enhancement, and sentenced defendant to state prison for 15 years to life.

Defendant timely appeals.

DISCUSSION

I. Evidentiary issues

A. Testimony of Dr. Astrid Heger

Because defendant admitted during his police interview that he and Phillips had sex, the primary issue at trial was not *whether* they had sex, but *when*. The prosecution urged that defendant was the killer because the quantity of sperm found in Phillips' vaginal canal and the manner of her death (strangulation) each indicated Phillips had sex "shortly before [her] death." Defendant argued that his sexual relations with Phillips preceded her death by a period of time sufficiently lengthy that an unknown assailant could have come into her apartment, engaged in sex acts without ejaculating or leaving any other biological trace, and then killed her.

In its case-in-chief, the People called Dr. Astrid Heger (Dr. Heger). Dr. Heger acknowledged that she was not an expert in crime lab procedures, in quantifying sperm, or in establishing the time at which sexual intercourse took place based on the results of a subsequent sexual assault examination. Instead, she offered two opinions based on her experience as the executive director of the University of Southern California Violence

Intervention Program and the thousands of sexual assault examinations she had personally performed in that role: (1) the sexual assault victims she examined, nearly 80 percent of the time, did not exhibit any visible signs of vaginal trauma (due to the resilience of vaginal tissue); and (2) the sexual assault victims who walked into her clinic for an examination "rare[ly]" have "a lot of sperm" in their vaginal canals. After Dr. Heger finished testifying, defendant moved to strike her testimony, and the trial court denied what it viewed as a "pro forma" motion.

Defendant argues that the trial court should have stricken the testimony because Dr. Heger's opinion regarding her observations of the quantity of sperm remaining in the vaginal tracts of the women who walk into her clinic (1) does not satisfy the minimum criteria for the admissibility of expert testimony outlined in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747 (*Sargon*), and (2) is beyond Dr. Heger's scope of expertise. We review both questions for an abuse of discretion. (*Id.*, at p. 773 [*Sargon* standards]; *People v. Montes* (2014) 58 Cal.4th 809, 861 [qualifications].) Defendant also cites *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579; to the extent he is suggesting that Dr. Heger's testimony was based on a scientifically invalid technique, his argument is forfeited because not adequately briefed or argued (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830), and is without merit because California does not follow *Daubert* (*People v. Leahy* (1994) 8 Cal.4th 587, 612), and because the "general acceptability" test used for new scientific techniques does not apply to opinions "based on . . . clinical experience with . . . abuse victims" (*People v. Harlan* (1990) 222 Cal.App.3d 439, 448-449; cf. *People v. Stoll* (1989) 49 Cal.3d 1136, 1161 ["general acceptance" test applied "to new, novel or experimental 'scientific' evidence not previously accepted in court"].)

The People argue that defendant has forfeited any challenge to Dr. Heger's testimony by not objecting to her opinions or qualifications until after she was done testifying. Although defendant certainly cannot fault the trial court for not conducting a pretrial hearing on the validity of Dr. Heger's opinion that defendant never asked for, defendant's motion to strike sufficiently preserved the substance of his current challenge

on appeal that we may address it on the merits. (Accordingly, defendant's argument that his counsel was constitutionally ineffective lacks merit because our consideration of this issue on the merits obviates any prejudice from counsel's allegedly incompetent failure to object.)

In *Sargon*, our Supreme Court reaffirmed that Evidence Code sections 801 and 802 confer upon trial courts a "substantial 'gatekeeping' responsibility" to "exclude expert testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative." (*Sargon*, *supra*, 55 Cal.4th at pp. 769, 771-772.) This gatekeeping inquiry is a "'circumscribed'" one designed to "exclude 'clearly invalid and unreliable' expert opinion" (*id.*, at p. 772); it "does not involve choosing between competing expert opinions" (*ibid.*).

The trial court did not abuse its discretion in allowing Dr. Heger's testimony to stand. Defendant's multifarious attacks on Dr. Heger's opinion and qualifications boil down to the contention that Dr. Heger uses different protocols in looking for motile sperm (namely, a suspension liquid, no stains, and 30-times magnification) than the protocols used by crime labs to quantify sperm (motile or not), such that (1) Dr. Heger's opinion is unfounded, and (2) her qualifications, inapt. This argument misapprehends the basis of Dr. Heger's opinion. Dr. Heger opined, in pertinent part, that she "rare[ly]" saw "a lot" of sperm in the vaginal canals of the women who walked into her clinic. Dr. Heger did not base her opinion on any testing or quantification of sperm she undertook with regard to the vaginal swabs collected from Phillips. Instead, she used the quantification results from tests conducted by the crime lab technicians—and they told her that the quantity they observed in Phillips' swab rated a "3+" on a "0" to "4+" scale; and that a "3+" rating meant "a lot" of sperm. Because Dr. Heger "rare[ly]" saw "a lot" of sperm in active and upright sexual assault victims, her opinion enabled the People to argue that Phillips was killed by her sexual partner and to refute defendant's position that she was killed by an unknown assailant hours after walking home from the street corner where defendant dropped her off.

Given this testimony, Dr. Heger's use of a different technique for looking for motile sperm and her lack of experience with crime lab procedures are irrelevant to her opinion, and do not call into question the key opinion she offered—namely, that few women who are up and around will have "a lot" of sperm in their vaginal canals. To be sure, Dr. Elizabeth Ann Johnson (Dr. Johnson) testified for the defense that, based on a United Kingdom-based study, women can still have a lot of sperm in their vaginal canals even hours after sex. But the choice as to which opinion to credit—Dr. Heger's clinical experience-based opinion or Dr. Johnson's study-based opinion—is not a question of admissibility for the court under *Sargon*, but rather a question of weight for the jury.

Moreover, the admission of Dr. Heger's testimony was not prejudicial because she was one of many expert witnesses for the People who elsewhere testified that (1) a 3+ rating corresponds with "a lot" of sperm, (2) gravity drains sperm from a woman's vaginal canal if she is active and upright, and, perhaps most critically, (3) Phillips' death occurred soon after she had sex. Indeed, Dr. Johnson herself agreed on the first two points.

For all these reasons, the admission of Dr. Heger's testimony does not warrant a new trial.

B. Evidence of bondage

Phillips' body was found with a scarf; one end of the scarf was around her left wrist, and the other end was beneath her right hand. Police also discovered nine photographs in her apartment depicting Phillips engaged in bondage activity, including photographs of her wearing leather bondage attire, bound and gagged (at times with a rubber ball and gag), hog-tied, and engaged in oral sex. While disavowing any intent to prove that any particular person was her killer, defendant sought to admit the photographs and to argue that her body was found in a position that "suggested some light bondage," reasoning that her killer must have known her and of her predilection for bondage. The trial court excluded this evidence and argument, reasoning that (1) the photographs were not relevant because they did not tend to prove anyone in particular committed the crime and because any probative value was substantially outweighed, under Evidence Code

section 352, by the danger that they would inflame the jury's prejudice, "devalue[] the humanity" of Phillips, and confuse the jury because the photos did not preclude defendant as the killer, and (2) the scarf was only "sort of suggestive" of bondage, rendering defendant's contention that the killer must have been someone who knew her and of her penchant for bondage "quite a leap."

Defendant contends that the exclusion of this evidence and argument runs afoul of the evidentiary rules governing the admission of evidence of "third-party culpability" (as well as his constitutional rights to present evidence under the Fifth, Sixth, Eighth and Fourteenth Amendments), and entails an erroneous balancing of factors under section 352. Defendant's constitutional claims turn on whether the evidence was properly excluded under the Evidence Code (*People v. Panah* (2005) 35 Cal.4th 395, 482, fn. 31), and questions of admissibility under the Code, including the trial court's balancing under section 352, are reviewed for an abuse of discretion. (*People v. Elliott* (2012) 53 Cal.4th 535, 581 [admission of third-party culpability evidence]; *People v. Lewis* (2001) 26 Cal.4th 334, 373-374 [section 352].) There was no abuse here.

When a defendant seeks to offer evidence that a third party committed the charged crime, the trial court's decision whether to admit the evidence depends upon (1) "whether the evidence could raise a reasonable doubt as to the defendant's guilt" and (2) "whether it is substantially more prejudicial than probative under Evidence Code section 352." (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368 (*McWhorter*).) To raise a reasonable doubt, the evidence must do more than suggest that a third party "has a motive or opportunity to commit the crime"; instead, "there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*People v. Hall* (1986) 41 Cal.3d 826, 833; *McWhorter*, at pp. 367-368.)

The trial court did not abuse its discretion in concluding that the evidence and argument defendant proffered did not meet this standard. As a threshold matter, defendant's disavowal of any intent to establish that any particular person killed Phillips all but mandates exclusion because "[t]hird party culpability evidence that does not identify a possible suspect is properly excluded." (*People v. Brady* (2010) 50 Cal.4th

547, 559; *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1136-1137 [excluding evidence because it did not link an "identifiable third party" to the charged crime]; but see *United States v. Stever* (9th Cir. 2010) 603 F.3d 747, 753-755 [evidence that drug cartels cultivate others' land without permission admissible to show defendant did not plant the marijuana on his property].)

Even if we overlook the anonymity of the third party, the evidence here does not directly or circumstantially link anyone to Phillips' death. There is no physical evidence that anyone else was in Phillips' apartment, and defendant candidly admits that the scarf's placement at most "suggests some light" bondage. Defendant asserts that the requisite link has been shown because (1) the photos and scarf together indicate the killer knew Phillips and knew of her interest in bondage, and (2) defendant was respectful of women and thus would not have engaged in bondage. Neither argument is persuasive: Defendant knew Phillips well enough to have sex with her, and respect and consensual sexual behavior, including bondage, are not mutually exclusive. Defendant points us to *Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1176-1178, overruled in part on other grounds by *Payton v. Woodford* (9th Cir. 2003) 346 F.3d 1204, and *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754, 761. But those cases each involved a substantially greater link. In *Thomas*, the defendant sought to introduce evidence that the main prosecution witness against him, and in whose car the victim's body was found, had evaded the police for two months; in *Lunbery*, the defendant sought to introduce evidence that a specific third party had confessed to the charged murder.

Finally, the trial court's balancing under section 352 was not irrational: The evidence that the killing was related to bondage was weak, thus rendering the photos and the argument based on the scarf's placement of marginal relevance. A trial court could rationally conclude that this relevance was outweighed by the prejudice and confusion flowing from the graphic photos.

C. Videotape of trash can liner incident

During a break in his interview with the "cold case" detectives, and after they told him they wanted to collect a "confirmatory" DNA sample from the inside of his cheek,

the video camera in the interview room recorded defendant walking to the trash can, ripping off a piece of the plastic liner, and inserting it against the inside of his cheek. The trial court allowed the People to play this portion of the video as evidence of defendant's attempt to interfere with the DNA test. Defendant took the stand at trial, and explained that he was trying to line his cheek from a sharp tooth, but also conceded that he never told the detectives about his tooth, never told his jailors about the tooth after the interview, and never sought dental assistance after his postinterview release from custody. Defendant argues that the trial court abused its discretion in admitting this portion of the video under Evidence Code section 352 because his conduct was both ambiguous and futile. (*People v. Lucas* (2014) 60 Cal.4th 153, 268 [abuse of discretion review for section 352].)

There was no abuse of discretion. The video depicts defendant inserting the liner against his check; this conduct, while scientifically futile, can reasonably be seen as an effort to disrupt the upcoming cheek swab and, so viewed, is probative of his consciousness of guilt. Because it not otherwise unfairly prejudicial, the trial court's ruling admitting the video's snippet is not an abuse of discretion.

Defendant argues that his conduct was not probative because it was ambiguous, and he cites *People v. Leon* (2001) 91 Cal.App.4th 812, 814-817. In *Leon*, the court held that the trial court erred in admitting testimony that the defendant was seen opening and closing his fingers over his crotch (but not touching his penis or exhibiting an erection) while the victim in a sex crimes case was testifying. (*Ibid.*) The court reasoned that defendant's conduct was ambiguous as to whether it was sexual at all. (*Ibid.*) *Leon* is distinguishable because defendant in this case does not dispute what he was doing—lining his cheek. What he disputes is the reason why—was it an attempt to disrupt the upcoming DNA test or a response to a sharp tooth? Allowing the jury to evaluate the competing reasons for this conduct was entirely appropriate. Defendant's related due process argument fails for the same reason. (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920 [due process violated if inference to be drawn is impermissible].)

II. Instructional error

In response to defendant's use of the trash can liner and his denial of involvement in the killing during his interview, the trial court instructed the jury with two consciousness of guilt instructions—CALCRIM 362 and CALCRIM 371. Consistent with CALCRIM 362, the jury was instructed: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself." Consistent with CALCRIM 371, the jury was instructed: "If the defendant tried to alter evidence that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Defendant argues that these instructions violate due process because (1) they erect an impermissible inference, and (2) they relieve the People of their burden to prove all elements beyond a reasonable doubt. We assess the constitutionality of jury instructions de novo (see *People v. Lopez* (2011) 198 Cal.App.4th 698, 708), and reject defendant's constitutional challenges.

Both CALCRIM 362 and CALCRIM 371 are instructions that permit, but do not require, the jury to draw a particular inference. "Permissive inferences violate due process only if the permissive inference is irrational." (*People v. Goldsmith* (2014) 59 Cal.4th 258, 270; *People v. Wiidanen* (2011) 201 Cal.App.4th 526, 533 ["'A permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury.'"], quoting *Francis v. Franklin* (1985) 471 U.S. 307, 314-315.) An inference is rational if it can be said with "'"substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 179; *Leary v. United States* (1969) 395 U.S. 6, 36.)

The California courts have consistently rejected challenges like defendant's to these CALCRIM instructions or to the CALJIC jury instructions that preceded them. (See *People v. Howard* (2008) 42 Cal.4th 1000, 1021 [affirming constitutionality of CALCRIM 362); *People v. Nakahara* (2003) 30 Cal.4th 705, 713 [affirming constitutionality of CALJIC 2.03, the predecessor to CALCRIM 362]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1222-1224 (*Jackson*) [affirming constitutionality of CALJIC 2.03 and CALJIC 2.06, predecessors to CALCRIM 362 and CALCRIM 371, respectively]; accord, *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1155, 1158-1159 [affirming constitutionality of flight instruction].)

Defendant argues that CALCRIM 362 and CALCRIM 371 differ from their CALJIC forerunners insofar as the CALJIC instructions permit the jury to infer the defendant's "consciousness of guilt" (see CALJIC 2.03 and CALJIC 2.06),[1] while the CALCRIM instructions permit the jury to infer that the defendant "was aware of his guilt" (CALCRIM 362, CALCRIM 371). To be sure, a jury is not allowed to infer a defendant's guilt from his making of inconsistent statements. (*Turner v. Marshall* (9th Cir. 1995) 63 F.3d 807, 820, overruled on other grounds by *Tolbert v. Page* (9th Cir. 1999) 182 F.3d 677 [instruction is constitutionally problematic if it "state[s] that inconsistent statements constitute evidence of guilt"]; *United States v. Di Stefano* (2d Cir. 1977) 555 F.2d 1094, 1104 ["False exculpatory statements are not admissible as evidence of guilt, but rather as evidence of consciousness of guilt."].) However, neither CALCRIM 362 nor CALCRIM 371 commit this sin because their plain language permits

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1 In full, CALJIC 2.03 provides: "If you find that before this trial, [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which he is now being tried, you may consider that statement as a circumstance tending to prove a consciousness of guilt. However, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

In pertinent part, CALJIC 2.06 provides: "If you find that [the] defendant attempted to suppress evidence against himself in any manner, such as by destroying [or] concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide."

an inference that the defendant "was aware of his guilt"—rather than a direct inference of guilt. In this respect, the difference between CALJIC's "consciousness of guilt" and CALCRIM's "aware[ness] of . . . guilt" is purely a difference in semantics, not a difference in meaning. In fact, both CALJIC and CALCRIM instructions specifically inform the jury that this evidence "cannot prove guilt by itself." Although CALCRIM 362 states that the jury may infer that the defendant "was aware of his guilt of the crime . . . [and may] consider it in determining his guilt," this reference to the determination of guilt is tied to a finding of *awareness of guilt* and, given the admonition against using false statements to determining guilt directly, does no more than "'inform the jury . . . that it may at least consider the evidence'" in deciding the case. (*People v. McGowan* (2008) 160 Cal.App.4th 1099, 1104.)

Defendant further argues that CALCRIM 362 and CALCRIM 371 unconstitutionally relieve the People of their burden to prove every element of the charged crime beyond a reasonable doubt. This argument has been rejected by our Supreme Court numerous times (*People v. Arias* (1996) 13 Cal.4th 92, 141-142; *Jackson*, *supra*, 13 Cal.4th at p. 1224; *People v. Crandell* (1988) 46 Cal.3d 833, 870-871), and defendant offers no reason why this precedent should be revisited, even if we could. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

III. Prosecutorial misconduct

A. Closing argument

During his closing argument, defense counsel argued that he "felt bad" for one of the People's lab technicians who "fumbled through his paperwork." During her rebuttal argument, the prosecutor contended that defense counsel knew that the technician suffered from Parkinson's disease. Defense counsel objected that no evidence of the technician's diagnosis of Parkinson's disease had been admitted, and the trial court sustained the objection. The prosecutor then commented that Dr. Johnson, the defense expert witness, "went independent. Some people say unemployed, but she went independent." Defense counsel again objected that this was improper argument, and the trial court—without explicitly ruling on the objection—advised the jurors that their

recollection controlled and that the arguments of counsel were not evidence. Defendant argues that these two comments by the prosecutor during rebuttal argument constitute prejudicial prosecutorial misconduct warranting reversal. We disagree.

Prosecutorial misconduct can violate federal or state guarantees of due process. Federal due process is denied if the conduct "'"'infects the trial with such unfairness as to make the conviction a denial of due process.' [Citation.]"'" (*People v. Adams* (2014) 60 Cal.4th 541, 568 (*Adams*).) Due process under state law is denied "'"'only if [the prosecutor's conduct] 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.' [Citation.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 768.)

To begin, defendant has not preserved his prosecutorial misconduct claims. To preserve such claims, a defendant must not only object, but must also "'"ask the trial court to admonish the jury to disregard the improper argument"'" except where an admonition would be "inadequate to cure any harm." (*Adams*, *supra*, 60 Cal.4th at p. 569; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 840.) Defendant argues that an admonition would have been ineffective here, but the cases he cites as analogous either do not involve prosecutorial misconduct at all (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033 [probation conditions]), or involve far more egregious incidents of misconduct than the two comments at issue in this case (*People v. Wagner* (1975) 13 Cal.3d 612, 619 [prosecutor asked character witness questions to put the information in the questions before the jury, rather than to obtain answers]; *People v. Johnson* (1981) 121 Cal.App.3d 94, 102-104 [prosecutor argued to jury his personal belief that a witness was lying].)

Defendant's claims lack merit in any event (and our consideration of this claim on the merits effectively precludes defendant's related claim that his counsel was constitutionally ineffective for not properly preserving this issue). The prosecutor's reference to Parkinson's disease was misconduct because it referred to information

outside the record. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948, overruled on other grounds by *People v. Williams* (2010) 49 Cal.4th 405; *People v. Benson* (1990) 52 Cal.3d 754, 794-795.) But misconduct warrants reversal only if it is prejudicial. (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1585.) Here it was not because (1) the trial court sustained defendant's objection, (2) the jury was advised that the arguments of counsel were not evidence, and, most significantly, (3) the prosecutor's comment was a single sentence regarding the credibility of one of many lab technician witnesses. Defendant further argues that the prosecutor's comment made defense counsel appear callous for criticizing a witness for behavior attributable to an illness. A prosecutor commits misconduct by vilifying or denigrating opposing counsel (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184 [misconduct to imply defense counsel fabricated evidence]; *People v. Thompson* (1988) 45 Cal.3d 86, 112 [misconduct to argue that defense counsel did not believe his own witness]; *United States v. Young* (1985) 470 U.S. 1, 10 [misconduct to engage in personal attacks on counsel]), but the comment here at most made counsel appear insensitive. The comment was not appropriate, but not the stuff of reversible error.

The prosecutor's comment regarding Dr. Johnson's employment status also does not warrant reversal. Whether it constitutes a fair inference from the evidence or improper argument, it was not prejudicial for the same reasons set forth above with respect to the prosecutor's other comment.

The prejudicial effect of the prosecutor's two comments is no greater when they are considered together.

B. Destruction of evidence

The coroner's office collected Phillips' blouse, bra, pants, pantyhose, and the bedsheet on which she was lifted from the crime scene, but were unable to locate them decades later when defendant was identified as a suspect. After the verdict was returned, defendant moved for a new trial in part on the ground that the prosecution team's destruction of this evidence violated due process. The trial court denied the motion, finding that the evidence was at most "potentially exculpatory" and that defendant had

not established that the prosecution team had destroyed the evidence in bad faith. Defendant argues that this ruling was erroneous. The standard of review for such claims is unsettled (*People v. Velasco* (2011) 194 Cal.App.4th 1258, 1262), but we reject defendant's claim even under a de novo review standard.

Even if we overlook defendant's forfeiture of this issue by waiting until his new trial motion to raise it for the first time (*People v. Gallego* (1990) 52 Cal.3d 115, 179-180), defendant's claim is without merit. When it comes to the destruction of evidence, due process creates tiered protection: If the destroyed evidence was "potentially useful" to the defense when destroyed, due process is offended only if the prosecution team acted in bad faith; but if its exculpatory value was "apparent" at the time of destruction, bad faith is effectively established. (*People v. Lucas* (2014) 60 Cal.4th 153, 221-222.) Once bad faith is established or presumed, the inquiry turns to whether the destruction was prejudicial. (*Ibid.*)

Defendant asserts that the clothing and bed sheet had apparent exculpatory value (thus satisfying any bad faith requirement), but the gravamen of his argument is that additional testing of that evidence would have been helpful. Consequently, a showing of bad faith was required. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 57 [due process mandates a showing of bad faith when "no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant."].) Defendant has not carried that burden. (Accord, *People v. Farnam* (2002) 28 Cal.4th 107, 165-167 [state did not properly preserve biological evidence collected from a victim, such that it deteriorated before the "cold case" was brought to trial; no bad faith].) Defendant argues that a showing of recklessness will suffice, but the authority he cites involves the definition of bad faith applicable in deciding whether a tort action can overcome the bar against deficiency judgments. (See *Evans v. California Trailer Court, Inc.* (1994) 28 Cal.App.4th 540, 553.) It has no application here.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.

HOFFSTADT

We concur:

_____, P. J.

BOREN

_____, J.

CHAVEZ