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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RODNEY IAN OSMAN,

Defendant and Appellant.

B275890

(Los Angeles County
Super. Ct. No. SA089466)

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

Doris M. LeRoy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, 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.

Defendant Rodney Ian Osman was convicted by a jury of oral copulation of an unconscious person (Pen. Code, § 288a, subd. (f)). The trial court placed Osman on five years of formal probation on the condition he serve five days in county jail with credit for time served. On appeal Osman contends, citing Evidence Code section 1103, subdivision (c)(4),¹ the trial court improperly excluded evidence of the victim K.T.'s prior sexual relationship with a man to rebut evidence at trial suggesting K.T. would not have initiated physical contact with Osman because she was a lesbian. Osman also contends the prosecutor's closing argument was misleading. We affirm.

FACTUAL BACKGROUND

A. The People's Case

At about 5:30 p.m. on November 9, 2013 K.T. went to Nikki's bar in Venice with Meghan Squires and Erik Dupuis to watch a football game. Squires and Dupuis lived together as a couple. They were friends of Carly, K.T.'s girlfriend, who lived in Alabama. K.T. had moved to Los Angeles a few months earlier.

Over the course of the evening, K.T. had about five drinks. K.T., Squires, and Dupuis sat at a table. A little before 7:00 p.m. K.T. and Squires went to the bar to order additional drinks before the happy hour ended. Osman, who was at the bar, leaned over and introduced himself. K.T. put down cash for her drink, then returned to their table. After K.T. walked away, Osman paid for their drinks. Squires returned to the table, and then Osman

¹ All undesignated statutory references are to the Evidence Code.

joined K.T., Squires, and Dupuis at their table. He “was trying to act friendly and make conversation,” talking mostly with Squires and Dupuis. K.T. was annoyed he had joined them and interfered with their plan to watch the game. As a result, she “didn’t interact with him a ton.”

When Osman asked K.T. how she knew Squires and Dupuis, K.T. responded that she knew them through her girlfriend. She clarified she meant a “romantic partner,” not just a friend. Osman made comments to K.T. expressing disapproval of homosexual relationships, which made K.T. feel uncomfortable. During their conversation Osman also mentioned he was a former gang member, had been to jail, and had an AK-47. These comments also made K.T. feel uncomfortable.

A little after midnight K.T., Squires, and Dupuis decided to leave the bar, and walked to the exit. By this time Osman had moved to another table. Squires and Dupuis went to say goodbye to Osman while K.T. waited by the exit. K.T. believed Squires or Dupuis invited Osman to come to their apartment to join them for a drink. Squires testified she did not invite Osman to come back with them, but rather, he just “followed along.”

K.T. went with Squires and Dupuis to their apartment because her cell phone was almost dead, and she did not feel safe walking home alone at night without a working phone. While they walked to the apartment, Osman offered his arm for K.T. to put her arm through, but she pulled away, and walked next to Squires instead.

When they got to the apartment, Squires made drinks for everyone, and they sat around. K.T. drank some of her drink, but she did not feel intoxicated. Squires and Dupuis lived in a small one-room studio apartment. At some point Squires fell asleep on

her bed. K.T. then went to sleep on the longer side of an L-shaped couch. K.T. was wearing a dress and a cardigan, and had a blanket covering her body from her shoulders to below her feet. She was in a fetal position on her left side with her knees bent and her legs tucked in. When K.T. fell asleep, Osman was sitting on the other side of the L-shaped couch; Dupuis was sitting or standing between K.T. and Osman.

Dupuis suggested to Osman multiple times that he should leave, but Osman responded that he was too drunk, and asked if he could stay on the couch and sober up. Dupuis let him stay. Dupuis later went to sleep in the bed next to Squires. According to Dupuis, at that time K.T. was asleep and Osman was sitting on the shorter side of the couch. K.T. “was kind of taking up most of the longer leg” of the couch.

K.T. woke up to the feeling of a tongue on her vagina. Osman was behind her on the couch and her underwear had been pushed to the side. She used her feet to push Osman’s face away from her genital area. She stood up quickly, and told him to leave. He asked her something like, “Why do you have to be that way?” or “Are you having fun?” He then shrugged and left the apartment.

K.T. was upset and crying. At around 3:00 a.m. K.T. texted Carly, saying, “Carly, help. Please wake up. Please, Carly, please wake up. Please help me, please.” She then called Carly, and told her what happened and how scared she was. Carly suggested K.T. tell Squires what happened and get a rape kit at the hospital. When Squires woke up, she found K.T. “hysterically crying, inconsolable.” Squires talked to Carly to find out what happened. Squires and Dupuis then drove K.T. to a rape

treatment center. The center conducted a medical examination, and collected swabs from K.T.'s genital area.

Quang Nguyen, a criminalist with the Los Angeles Police Department, testified she analyzed samples from the sexual assault evidence kit. Nguyen's analysis of the anal swab revealed a mixture of DNA of at least two individuals, including K.T. and an unknown male. Nguyen opined that Osman could not be excluded as a possible contributor to the DNA mixture, and that "it's a trillion more times likely that . . . Osman is the second contributor in the DNA mixture profile versus a random individual." As to the external genital swab, K.T. was included as the major contributor to the mixture, but the other contributor could not be determined.

B. *The Defense Case*

Osman testified that on the evening of November 9, 2013 he arrived at Nikki's bar between 6:00 and 7:00 p.m. He ordered a drink at the bar. K.T. and Squires were standing next to him, and he had a conversation with them. At some point he walked with K.T. and Squires to their table, and met Dupuis. Osman sat down with them, and spent most of the evening with the three of them. He could not recall making any comments about being a gang member or owning an AK-47. He recalled hearing that K.T. had a girlfriend and was a lesbian. He did not recall saying anything to suggest he had a problem with homosexuals. It appeared to him that everyone at the table was having fun, and no one seemed uncomfortable.

Over the course of the night Osman had four or five drinks. Around midnight, while he was talking with another group of friends, Squires or Dupuis waved at him to come over to their

table. When he walked over, they told him they were going home. One of them—he believed it was Squires—invited him to their apartment for a drink. They left together, and walked about three blocks to the apartment where Squires and Dupuis lived.

At the apartment Squires made them all drinks, and they all talked. Osman sat down on the long side of the couch. Dupuis was moving around, and sat in different places. K.T. sat on a chair on the other side of a coffee table. At some point Dupuis said something about “wrap[ping] it up” for the evening. However, Osman was feeling a little intoxicated, and planned to leave as soon as he felt better. Dupuis agreed Osman could stay longer.

Squires was the first one to go to sleep. At that time Osman was sitting on the longer side of the couch; K.T. was on the chair. Osman talked with K.T. and Dupuis. When Dupuis went to bed, K.T. was lying on the longer side of the couch; Osman was sitting on the shorter side. K.T. was covered by a blanket, and he had one as well. He did not know whether K.T. was asleep. Osman felt K.T. rub his arm with her foot. He responded by rubbing her calf and her upper thigh. He then knelt down and started orally copulating her. He had his tongue in her vagina. He did not believe she was asleep at that time.

About 30 seconds later K.T. said, “Stop,” and he stopped. K.T. did not kick him off of her. Osman responded by saying something like, “What’s wrong?” She said, “No. Just leave.” Osman got up and left.

K.T. called Osman a few days later. It started out cordial. However, it seemed like K.T. was trying to get him to admit he had sexual intercourse with her. Osman told her three or four

times that “nothing like that happened,” meaning sexual intercourse, and that he did not touch her. He told her nothing happened because it seemed like she was trying to get him to say something happened that didn’t, and he became “very defensive and scared.” Osman later spoke with the police about the incident. He told them he did not do anything sexual with K.T.

C. *Rebuttal*

Los Angeles Police Department Detective Claudia Castruita interviewed Osman on March 27, 2014. Osman told her he remembered meeting a group of people at Nikki’s bar and going home with them. He did not remember anything else about that night. Another detective showed Osman a photograph of K.T. Osman said he could not identify K.T. from the photograph. He denied doing anything sexual with the woman in the photograph or anyone that night. He did not recall speaking with K.T. on the telephone after that night.

K.T. testified she met with the police at the police station on November 15, 2013 to make a recorded pretext call to Osman. The purpose of the call was to get Osman to make incriminating statements. In the call she said she was worried about sexually transmitted diseases and being pregnant. Osman told her not to worry because they did not do anything like that. K.T. also testified that from where she was sleeping on the couch, she would not have been able to reach out and touch Osman with her foot. Even if she had stretched her legs out, she would have been three or four feet away from him.

DISCUSSION

A. *The Trial Court Properly Excluded Evidence Regarding K.T.'s Prior Sexual Relationship with a Man*

1. *Proceedings Below*

K.T. testified she was in a romantic relationship with Carly, and that she told Osman this. The evening of the incident she did not flirt with Osman, and was not interested in him. The prosecutor later asked Dupuis on direct examination, “[D]id you ever see [K.T.] in any way flirt with [Osman]?” Dupuis answered, “I did not.” This was followed by, “Did you ever see [K.T.] appear to be interested in [Osman] at all?” Dupuis answered, “I did not.” The prosecutor then asked, “Have you ever seen [K.T.] appear interested in any man?” Dupuis answered, “No.” Defense counsel objected as not relevant, but the trial court overruled the objection. Dupuis answered, “I’ve never seen her interested in any man.”

Defense counsel on cross-examination asked Dupuis whether he was “aware that the last time [K.T.] had a sexual relationship with a man was two years before this?” The prosecutor objected on the grounds of relevance, lack of foundation, and hearsay. Defense counsel stated, “He opened the door, your honor.” The trial court sustained the objection, and told the jury to disregard the question.

After a sidebar conference, the trial court found there was sufficient foundation for Dupuis’s testimony and that the testimony was relevant given the evidence introduced by the People that K.T. was a lesbian and had not shown interest in any man. The court added, however, “it would seem that first you would inquire what he does know about her past.” The court

then asked defense counsel if she had a reason to believe K.T. had a prior relationship with a man.

Defense counsel responded that K.T. had stated to a detective that the last sexual contact she had with a man was two years prior to the incident. The trial court concluded the information was relevant for the “limited purpose of refuting [K.T.’s] likely lack of interest and consent.” Over the prosecutor’s objection, the trial court allowed defense counsel to ask Dupuis if he knew whether or not K.T. “had ever had a sexual relationship with a man.” Dupuis answered, “I was not aware.”

The issue arose again when the prosecutor indicated she would be calling K.T. as a rebuttal witness. The prosecutor objected to any questions about whether K.T. had sexual relations with a man on the grounds of relevance and the rape shield laws. After further argument, the trial court ruled, “I think that it’s fair under these circumstances to allow whether there is a relationship with a man two years ago or so and not whether it was—nothing about sex specifically.” Defense counsel clarified whether she could ask K.T. if she had “some kind of a dating relationship.” The trial court agreed, and ruled based on “basic fairness” that defense counsel could inquire about “the dating relationship but not sexual relationship.” However, defense counsel did not ask K.T. any questions about a prior relationship with a man.

2. Applicable Law and Standard of Review

Osman contends that in light of Dupuis’s testimony elicited by the prosecutor that he never saw K.T. interested in a man, defense counsel should have been allowed to question K.T. “concerning her sexual relationship with a man in the relatively

recent past,” pursuant to section 1103, subdivision (c)(4). He argues this was relevant to whether K.T. initiated a physical encounter with Osman by reaching out with her foot and rubbing his arm.

We review the trial court’s ruling on the admissibility of evidence of prior sexual conduct for an abuse of discretion. (*People v. Fontana* (2010) 49 Cal.4th 351, 370 [trial court did not abuse its discretion in excluding evidence of the victim’s consensual sexual conduct with her boyfriend the day of an alleged sexual assault]; *People v. Bautista* (2008) 163 Cal.App.4th 762, 782 [“A trial court’s ruling on the admissibility of prior sexual conduct will be overturned on appeal only if [the] appellant can show an abuse of discretion”]; *People v. Chandler* (1997) 56 Cal.App.4th 703, 711 [same].)

“Under California’s rape shield law, specific instances of a complaining witness’s sexual conduct are not admissible to prove consent by the complaining witness in a prosecution for specified sex offenses.” (*People v. Fontana, supra*, 49 Cal.4th at p. 354; see § 1103, subd. (c)(1) [“opinion evidence, reputation evidence, and evidence of specific instances of the complaining witness’ sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness”].)

As the Supreme Court in *Fontana* noted, in holding that evidence of sexual conduct of an alleged victim is admissible “under very strict conditions,” “[t]he Legislature’s purpose in crafting these limitations is manifest and represents a valid determination that victims of sex-related offenses deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. [Citations.] By affording

victims protection in most instances, these provisions also encourage victims of sex-related offenses to participate in legal proceedings against alleged offenders. [Citations.]” (*People v. Fontana, supra*, 49 Cal.4th at p. 362.)

Section 1103 sets forth a number of exceptions to the general rule that evidence of the victim’s prior sexual conduct is inadmissible. Section 1103, subdivision (c)(4), provides that in a prosecution for certain sex offenses, including Penal Code section 288a at issue here, “[i]f the prosecutor introduces evidence, including testimony of a witness, or the complaining witness as a witness gives testimony, and that evidence or testimony relates to the complaining witness’ sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the prosecutor or given by the complaining witness.”²

² The People contend Osman forfeited his argument under section 1103, subdivision (c)(4), because he failed to comply with section 782, subdivision (a), which requires filing of a motion with an affidavit filed under seal supporting a claim of prior sexual conduct, citing *People v. Chandler, supra*, 56 Cal.App.4th at p. 708, *People v. Rioz* (1984) 161 Cal.App.3d 905, 918, and *People v. Sims* (1976) 64 Cal.App.3d 544, 553-554. However, each of these cases involved evidence of the victim’s prior sexual conduct used to attack the victim’s credibility under the code section now codified as section 1103, subdivision (c)(5). (See *Chandler, supra*, at pp. 707-708 [trial court improperly excluded evidence that victim previously exchanged sex for drugs to attack her credibility in a rape case]; *Rioz, supra*, at p. 914 [holding on retrial defendant must comply with section 782 procedure to introduce evidence of victim’s prior conviction for prostitution to attack her credibility]; *Sims, supra*, at pp. 553-554 [trial court

“[S]exual conduct” in the context of section 1103 “encompasses any behavior that reflects the actor’s . . . willingness to engage in sexual activity.” (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334, 335 [court considered whether victim’s interest in her brothers’ bath and watching Playboy channel constituted sexual conduct, but concluded the evidence was not relevant and was properly excluded under section 352]; accord, *People v. Casas* (1986) 181 Cal.App.3d 889, 895, 897 [concluding evidence that victim offered to have sexual intercourse for money reflected her willingness to engage in “sexual conduct” under section 1103, but was properly excluded because the asserted facts were “improbable” and only slightly relevant to attack the victim’s credibility]; see also *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456 [term “sexual conduct” should be “interpreted broadly,” but does not include allegedly false prior complaints of rape].)

properly excluded evidence that victim took pregnancy test within two weeks of alleged rape to attack her credibility where defendant did not comply with section 782].) Section 1103, subdivision (c)(5), provides, “Nothing in this subdivision shall be construed to make inadmissible any evidence offered to attack the credibility of the complaining witness as provided in Section 782.” Here, Osman sought to admit evidence of K.T.’s prior sexual relationship with a man based on the People’s introduction of evidence Osman argued related to K.T.’s prior sexual conduct, not to attack K.T.’s credibility. Thus, the requirement in section 1103, subdivision (c)(5), that the party seeking introduction of evidence of sexual conduct to attack a complaining witness’s credibility must comply with section 782, does not apply here.

In addition, section 1103, subdivision (c)(4), only applies where the testimony elicited by the prosecutor “relates to” the victim’s sexual conduct. As the Fourth District held in *In re Wright* (1978) 78 Cal.App.3d 788, in rejecting the petitioner’s argument that he should be allowed to introduce new evidence that the victim had sexual intercourse with four other men around the time of the alleged rape, the victim’s testimony at trial that she had a boyfriend and did not negotiate with petitioner over money for sex on the night of the rape was “not sufficiently related to [the victim’s] sexual conduct to open up the subject of her sexual conduct with men other than petitioner.” (*Id.* at p. 806.)³ Further, the new evidence “would not tend logically or naturally to discredit or rebut any fact elicited by the prosecution in the examination alluded to.” (*Id.* at p. 807.)

3. *Dupuis’s Testimony Did Not Relate to K.T.’s “Sexual Conduct”*

The prosecutor in this case did not elicit testimony relating to K.T.’s “sexual conduct” within the meaning of section 1103. Specifically, the prosecutor elicited testimony that Dupuis never saw K.T. “in any way flirt with [Osman],” “appear to be

³ The court in *Wright* considered the exception for evidence that rebuts testimony relating to the victim’s sexual conduct introduced by the prosecutor under section 1103, subdivision (2)(c). (*In re Wright, supra*, 78 Cal.App.3d at pp. 806-807.) In 1998, this provision was moved to section 1103, subdivision (c)(4). (Stats. 1998, ch. 127, § 1, p. 827.) As part of the 1998 amendment, former section 1103, subdivision (c)(4), allowing evidence “to attack the credibility of the complaining witness as provided in Section 782,” was moved to section 1103, subdivision (c)(5). (Stats. 1998, ch. 127, § 1, p. 828.)

interested in [Osman] at all,” or be “interested in any man.” This evidence suggested that K.T. had no interest in dating a man, but did not bear on her “willingness to engage in sexual activity.” (See *People v. Franklin*, *supra*, 25 Cal.App.4th at p. 334.)

Further, the trial court here addressed Osman’s desire to rebut the People’s portrayal of K.T. as someone who was not interested in a romantic relationship with a man, and thus would not have initiated a physical encounter with Osman. The court allowed defense counsel to ask Dupuis if he knew whether K.T. “had ever had a sexual relationship with a man.” Dupuis answered, “I was not aware.” The court later allowed defense counsel to ask K.T. whether she had “some kind of dating relationship” with a man. However, defense counsel elected not to ask K.T. any questions about a prior relationship with a man.

In light of the questions allowed by the trial court, any additional inquiry into whether K.T. had a prior “sexual relationship” with a man two years ago was not “sufficiently related” to whether K.T. had an interest in Osman that would have led her to touch his arm with her foot. (See *In re Wright*, *supra*, 78 Cal.App.3d at p. 806.)

Accordingly, the trial court properly excluded any testimony by K.T. as to a prior sexual relationship with a man.

B. *The Prosecutor Did Not Mislead the Jury in Her Rebuttal Argument*

Osman contends the prosecutor misled the jury in her rebuttal argument by stating that K.T. was not interested in men even though the prosecutor knew K.T. had told a police detective she had sexual contact with a man two years before the incident.

As the Supreme Court held in *People v. Jackson* (2016) 1 Cal.5th 269, ““A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” [Citation.] When a claim of misconduct is based on the prosecutor’s comments before the jury, as all of defendant’s claim are, “the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.”” [Citation.]” (*Id.* at p. 349.)

Here, the prosecutor argued that even if Osman “misread the signals of how much [Squires and Dupuis] liked him,” “[t]hat’s a completely different thing than, hey, I’m going to lick the vagina of the sleeping woman who’s shown no interest in me all night, didn’t exchange phone numbers with me. Also, by the way, she’s a lesbian, not interested in men at all.” The prosecutor later noted there was no evidence that K.T. was dressed provocatively or flirted with Osman. “To the opposite, she’s not interested in men at all and certainly wasn’t interested in the defendant.”

As a threshold matter, Osman did not object to the prosecutor’s argument at trial, and thereby forfeited any argument of prosecutorial misconduct. (*People v. Jackson, supra*, 1 Cal.5th at p. 349 [““To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely and specific objection [at trial] and ask the trial court to admonish the jury to disregard the improper argument””].)

Osman contends he was excused from objecting at trial in light of the trial court's ruling excluding evidence of K.T.'s prior sexual relationship with a man, arguing, "[t]here is no reason to suppose . . . the trial court would have found the prosecutor's argument objectionable." However, a failure to object is excused "only if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct." (*People v. Jackson*, *supra*, 1 Cal.5th at p. 349.)

Osman has made no showing that an objection to the argument would have been futile. While the trial court limited evidence of past conduct to a dating relationship, the court never ruled or suggested the prosecutor could argue that K.T. was not interested in men. Further, by failing to object, defense counsel did not give the trial court an opportunity to correct any potential error. As the Supreme Court held in *People v. Seumanu* (2015) 61 Cal.4th 1293, "The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice." [Citation.] (*Id.* at p. 1328.)

Moreover, even if Osman did not forfeit this argument, the prosecutor did not mislead the jury in her argument. The evidence at trial established that K.T. was in a romantic relationship with a woman at the time of the incident, and was not interested in Osman. Dupuis similarly testified, "I've never seen her interested in any man." Osman could have introduced evidence that K.T. had been in a dating relationship with a man two years earlier, but elected not to do so. Therefore, the prosecutor's argument that K.T. was a lesbian and was not interested in men was consistent with the testimony at trial.

As the Fourth District held in *People v. Reyes* (2016) 246 Cal.App.4th 62, in concluding that the prosecutor did not commit prosecutorial misconduct by arguing in her rebuttal that the victim did not consent to having sexual intercourse with the defendant because she was gay, the alleged victim’s “claimed sexual orientation was in evidence. It was not improper, nor did it violate any pretrial evidentiary ruling . . . for the prosecutor to draw a deduction from that fact . . .” (*Id.* at p. 74.) The trial court had excluded evidence that the alleged victim “‘wanted [sex] to happen,’” citing the rape shield law. (*Id.* at p. 71.)

In this case, as in *Reyes*, it was a reasonable inference for the prosecutor to draw from the evidence at trial that because K.T. was a lesbian at the time of the incident and not interested in men, she did not initiate sexual contact with Osman by rubbing his arm with her foot.

DISPOSITION

The judgment is affirmed.

FEUER, J.*

We concur:

ZELON, Acting P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.