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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. MARC GITELMAN, Defendant and Appellant.	B267825 (Los Angeles County Super. Ct. No. KA106849)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed as modified.

Doris M. LeRoy, 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, Assistant Attorney General, Steven D. Matthews and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Marc Gitelman appeals from his conviction for three sex crimes, contending the trial court made numerous prejudicial evidentiary errors and the prosecutor committed misconduct. We disagree, and therefore affirm the judgment with a slight modification.

BACKGROUND

Gitelman, age 44, was a tae kwon do instructor in Nevada whose students included teenage girls. In an information filed in Los Angeles, he was charged with one count each of unlawful sexual intercourse and oral copulation with Yasmin Doe, a person under 18 years old (Pen. Code, §§ 261.5, subd. (c), 288a, subd. (b)(1)),[1] and one count of commission of a lewd or lascivious act involving Kendra Doe, a child (§ 288, subd. (c)(1)). Trial was by jury.

Three complaining witnesses, including the two victims, testified. Brianna Doe testified she had sexual encounters with Gitelman for two years beginning in 2007 when she was 15 years old. While attending a tae kwon do tournament in Fresno, he kissed and orally copulated her in his hotel room. When she was 16 years old, they had sexual encounters at tournaments across the country, including California, and in an equipment room in Nevada. The last encounter occurred in 2009, when Brianna was 17, at a tae kwon do tournament that Gitelman's school hosted onboard a cruise ship. Brianna and Gitelman then had a serious falling out over her failure to help with administrative tasks at the tournament, and she later left his training program because of the sexual abuse.

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[1] Undesignated statutory references will be to the Penal Code.

Yasmin Doe, another of Gitelman's former students, testified that in May of 2010, when she was 16 years old, she traveled with him, Kendra Doe, and a third female student to an invitational tournament in Long Beach. On their first night there, Gitelman invited the three students to his hotel room, where they drank alcohol. Gitelman kissed Yasmin's thighs and fondled her buttocks under her shorts. They had frequent sexual encounters over the ensuing months while attending tournaments around the country. In November 2010, Gitelman, Yasmin, and Krystal Doe, age 24, engaged in three-way oral and vaginal sex at a campsite in Arizona. During a break in a seminar in Long Beach in May 2011, Gitelman and Yasmin went to the hotel parking lot, where he smoked a cigarette. They then went to Gitelman's truck in the back row of the lot, where Yasmin orally copulated and had sexual intercourse with him. (These are the charged offenses as to Yasmin.) Yasmin testified she and Gitelman had sexual encounters three or four times a week in his studio, his car, and his house, the last occurring around June of 2013, when she was 19.

Kendra Doe testified that in 2010, when she was 15, she traveled with Gitelman from Las Vegas to the City of Industry for a tae kwon do festival. While in a hotel room in California, Gitelman touched her breasts and vagina and rubbed her clitoris with his fingers (this is the charged offense as to Kendra), and also fondled Krystal Doe, who was lying on the bed beside Kendra. At Gitelman's studio back in Nevada, he strapped Kendra into an exercise machine designed for working the inner thighs, then performed oral sex on her, inserted sex toys into her vagina, and had sexual intercourse with her. A month or two later, Kendra, Gitelman and Krystal performed oral sex on one

another in what Kendra described as a "weird triangle," which evolved into intercourse. Early the following year, Kendra left Gitelman's studio.

Gitelman denied all the allegations. He testified that on the cruise ship in 2009, Brianna and Kendra were instructors as well as students, and were required to assist with the tournament. Two other students, Kyle and Spencer (Gitelman's stepson) were also required to help. Instead, the four accessed drinks left half-finished by other passengers, and hid from the adults. Gitelman became upset with and disciplined them, which caused "a massive amount of defiance." Brianna left his program shortly thereafter. She approached Gitelman in 2013, upset over a recent breakup with her then boyfriend, and inquired whether he was dating anyone. He informed her he was dating Yasmin, who was by then 19.

A jury convicted Gitelman of all three charges, and he was sentenced to serve four years and four months in prison. He timely appealed.

DISCUSSION

I. Exclusion of Evidence of Brianna's and Kendra's Romantic Relationships

In a prosecution for unlawful sexual intercourse, evidence of a complaining witness's "sexual conduct" is inadmissible to prove consent but may be admitted to challenge the witness's credibility if the defendant first files a written motion accompanied by an affidavit explaining the need for the evidence, and the court finds the evidence is both relevant and not unduly prejudicial. (Evid. Code, §§ 782, subd. (a), 1103, subd. (c)(1 & 5).) Here, the prosecution moved before trial to exclude evidence of any victims' or witnesses' sexual conduct until such time as

Gitelman made an offer of proof concerning the relevance of the evidence. During oral argument on the motion, it was revealed that on the cruise ship in 2009, Brianna, Kendra, Spencer and Kyle were discovered in a cabin, undressed and under the influence of alcohol and drugs. The trial court granted the prosecution's motion to exclude reference to any sexual conduct by Brianna or Kendra. Gitelman does not contest that ruling.

However, Gitelman contends the trial court erred when it extended its ruling to evidence that Kendra was dating Spencer, Gitelman's stepson, and that Brianna was dating Kyle. We disagree.

At trial, Brianna Doe testified on direct examination that by 2013, her boyfriend blamed her for the abuse she suffered at Gitelman's hands. She confronted Gitelman in March of 2013, but was upset to learn he was by then openly dating Yasmin, who was 19 years old. During cross-examination, Gitelman's counsel attempted to elicit testimony from Brianna that part of the shipboard argument between Gitelman and herself—and part of the reason for her current accusations against him—was that she felt Gitelman disapproved of her "partying" with her boyfriend aboard the cruise ship "and not doing what they normally would do, which is showing up on time, helping set up for the tournament." The trial court sustained the prosecution's objection on the ground that evidence that Brianna was with her boyfriend aboard the ship was irrelevant and violated the court's pretrial exclusion of evidence of any witness's sexual conduct.

At sidebar, the trial court expressed concern that any discussion of the women's boyfriends would reveal that Brianna and Kendra were sexually active. Gitelman's counsel represented that he wished to establish only that Brianna was

fabricating her accusations because she resented Gitelman's disapproval of her spending time with her boyfriend on the cruise rather than helping with the tournament; he did not intend to reveal the sexual nature of the relationship. The trial court rejected the argument, stating, "I don't care if she's sleeping with Santa Claus[]. We're not going down that road. [¶] You can ask her if she violated the team rules with the alcohol and not following the training regulations. But we're not going anywhere into these other areas."

In accordance with its ruling prohibiting reference to Brianna's boyfriend, the court later ordered stricken both Gitelman's testimony that Brianna "decided to go with her boyfriend to [another] school and take a different path," and another witness's testimony that Brianna left Gitelman's school "because of her boyfriend at the time."

The court made a similar ruling regarding Kendra. Gitelman offered evidence that Kendra was dating his stepson and had written the following in a timeline of events: "My first boyfriend was [Gitelman's] stepson, who I met, he disapproved, which tore his stepson away." Gitelman's counsel explained he wanted to establish that Gitelman's interference with the relationship was relevant to Kendra's credibility. The trial court stated Gitelman could mention that Kendra and his stepson were friends, but not that they were dating. The court further ordered that the reference to her boyfriend in the timeline be stricken.

During closing statements, the prosecution argued, "You know what the big problem the defense never answered for you? What is their motive? Why are these girls lying? They can't tell you. Because there is no motive. Because they're telling you the truth."

"A defendant generally cannot question a sexual assault victim about his or her prior sexual activity." (*People v. Bautista* (2008) 163 Cal.App.4th 762, 781; accord, *People v. Fontana* (2010) 49 Cal.4th 351, 362.) For example, a defendant cannot introduce evidence of specific instances of the victim's previous sexual conduct with persons other than the defendant to prove the victim consented to the sexual acts alleged. (Evid. Code, § 1103, subd. (c)(1).) But evidence of past sexual conduct may be admissible to impeach the victim's credibility. (Evid. Code, § 1103, subd. (c)(5); *People v. Chandle*r (1997) 56 Cal.App.4th 703, 708.) The term "sexual conduct" for these purposes "encompasses any behavior that reflects the actor's or speaker's willingness to engage in sexual activity. The term should not be narrowly construed." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 334.)

Evidence Code section 782 provides that a defendant seeking to adduce a victim's sexual conduct to impeach credibility must file a written motion accompanied by an offer of proof in the form of an affidavit explaining the relevancy of the evidence. If the court finds the offer to be sufficient, it shall permit the defense to question the complainant out of the presence of the jury. If the court finds the proposed evidence is relevant and not unduly prejudicial, it shall permit the evidence to be introduced. (Evid. Code, § 782, subd. (a); *People v. Chandler*, *supra*, 56 Cal.App.4th at p. 708; *People v. Daggett* (1990) 225 Cal.App.3d 751, 757.)

"'A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion.'" (*People v. Bautista*, *supra*, 163 Cal.App.4th at p. 782.)

Here, Gitelman's defense counsel studiously avoided making any reference to Brianna's and Kendra's past sexual conduct, and repeatedly acknowledged such evidence could not be introduced until such time as he complied with the procedure set forth in Evidence Code section 782. He argues evidence that Brianna and Kendra were in romantic relationships did not necessarily reflect on their willingness to engage in sexual activity.

We agree, to a point. "Evidence Code section 782 is designed to protect victims of molestation from 'embarrassing personal disclosures,'" (*People v. Bautista*, *supra*, 163 Cal.App.4th at p. 782), not from disclosure of a romantic relationship. But the trial court was nevertheless within its discretion to exclude evidence disclosing the romantic nature of Brianna's and Kendra's relationships because its probative value was outweighed by the danger it would expose the women's sexual conduct.

Gitelman theorized that Brianna left his school not because of his abuse, as she claimed, but because her boyfriend induced her to do so. Therefore, he argues, the existence and identity of the boyfriend were necessary to impugn her credibility. We disagree. Gitelman was free to elicit that Brianna's friend induced her to leave his studio. But the additional fact that the friend was a boyfriend would have been gratuitous, adding nothing. On the other hand, if the boyfriend was identified as Kyle, who was known to have misbehaved on the cruise ship along with Brianna while under the influence of alcohol, the jury could easily have inferred the behavior involved sexual conduct.

Similarly, Gitelman theorized that Kendra fabricated accusations against him because she felt he interfered with her

relationship with Spencer. But he was free to inquire into those matters. The court excluded only evidence that the relationship was that of a boyfriend and girlfriend, which was irrelevant and could have led to the inference that the pair's misbehavior aboard the cruise ship in 2009 involved sexual conduct.

A "trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) Here, we cannot conclude the court's decision to exclude evidence concerning Brianna's and Kendra's boyfriends was irrational or arbitrary.

Even if the trial court erred in precluding disclosure of the nature of Brianna's and Kendra's relationships, any error was harmless because no reasonable probability exists that the verdict would have been different.

A judgment may be reversed due to an erroneous exclusion of evidence only if it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (Evid. Code, § 354; *People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Guiton* (1993) 4 Cal.4th 1116, 1130.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.)

Here, nothing prohibited Gitelman from exploring the intensity of Brianna's and Kendra's friendships or showing the extent to which Kyle influenced Brianna or to which Kendra resented Gitelman for disrupting her relationship with Spencer. Gitelman argues that the emotions of someone in a romantic relationship are more intense than in a platonic one, and can give rise to greater feelings of resentment toward anyone who

disrupts them and therefore to a greater motive to retaliate by making false accusations. We appreciate the nuance, but if the jury rejected Gitelman's theory that Brianna and Kendra resented his interference with their friendships, it would reject the theory even had it known the friendships were romantic.

II. Exclusion of a Defense Reenactment Video

The charged offenses pertaining to Yasmin occurred during a break in a tae kwan do seminar in Long Beach, during which Yasmin testified she and Gitelman went to the parking lot, smoked a cigarette, then engaged in oral and vaginal sex in Gitelman's truck. Gitelman denied the accusation and offered a video depicting a 10-minute reenactment in which he exited the Long Beach Marriott Hotel to the side entrance to smoke, then went to his truck in the parking lot, and then, as his counsel explained, stayed "in the pick-up truck for a couple of minutes moving things around" before walking back to the seminar. Trial counsel said the video would serve as a backdrop to Gitelman's testimony concerning the occurrence—"I would be asking questions of Mr. Gitelman as the video is playing and as he recounts his recollection of what occurred that Friday afternoon at this venue"—but did not explain what probative value it would have.

The trial court sustained the prosecution's objection to the video on the ground that it had little probative value and would likely generate confusion, as no evidence established (1) that breaks in the forms seminar in Long Beach were 10 minutes long, (2) that Gitelman and Yasmin could not have taken a longer break, (3) that the layout inside the hotel on the day of the tournament was similar to that depicted in the video, or (4) that Gitelman's truck was parked in the same place, a factoid he

admitted he could not remember. The court stated Gitelman could describe the events orally and use still pictures to depict the scene.

On appeal, Gitelman argues the trial court erred in excluding the video because it would have demonstrated that the events Yasmin recounted could not have occurred within the confines of a 10-minute break from the forms seminar. We disagree.

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Nevertheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that would cause the jury to "prejudge" a person on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) We review the trial court's decision on whether evidence is relevant and not unduly prejudicial for abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, the video of Gitelman reenacting a 10-minute break in a seminar in Long Beach would have had little if any probative value. Nothing in the record supports his assumption on appeal

that the offenses could not have occurred within 10 minutes (an assumption he did not express when introducing the video at trial). And although Gitelman observes on appeal that breaks in the tournament were 10 minutes long, the actual evidence was that participants were given "like" 10 minutes, and there was no evidence that Gitelman and Yasmin (or anyone) complied with the limit.

But the possibility for confusion was clear. As defense counsel described it, the video showed Gitelman "in the pick-up truck for a couple of minutes moving things around." That couple of minutes in the truck, along with appellate counsel's intimation that the offenses of oral copulation and underage sex could not have been committed in the time depicted, leads to the suggestion that the offenses could not have been committed in the span of a couple of minutes, a proposition unsupported in either reason or fact, and one that neither Gitelman's defense nor appellate counsel has seriously espoused. Such a suggestion could only have confused the jury.

Given that Gitelman was permitted to relate the events at issue by way of his testimony, accompanied if he wished by still photographs, we conclude it was well within the trial court's discretion to exclude the video.

III. Uncharged Acts Involving Yasmin and Kendra

Yasmin testified that in November 2010, she, Gitelman, and Krystal Doe, age 24, engaged in three-way oral and vaginal sex in a campsite in Arizona. Kendra testified that she, Gitelman and Krystal performed oral sex and intercourse on one another. Kendra also testified that at Gitelman's studio in Nevada, he took off her clothes, strapped her into an exercise machine and inserted sex toys into her vagina.

Gitelman contends the trial court erred in declining to exclude inflammatory testimony about multiparty sex and sex toys because its probative value was substantially outweighed by its unduly prejudicial effect. We disagree.

In a criminal action where the defendant is accused of a sexual offense, the jury is permitted to consider evidence of the defendant's propensity to commit sexual offenses, so long as the evidence is not made inadmissible by Evidence Code section 352. (Evid. Code, § 1108, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1164.)

Here, Yasmin's and Kendra's testimony about multiparty sexual encounters with Gitelman and Krystal Doe was relevant to their credibility. When two witnesses describe separate but similar events, it is unlikely the details will match if the descriptions are fabricated. That the details of Yasmin's and Kendra's stories were similar suggests the witnesses were truthful. The testimony was also relevant to show that the charged offenses actually occurred. Because it is unusual for a 44-year-old man and a 16-year-old girl to engage in a sexual encounter, the prosecution was burdened to explain what normalized the practice in the minds of the participants. Gitelman's willingness to engage in multiparty sex suggests he perceives intimacy unconventionally, which rebuts the presumption that he adheres to conventional norms. And the presence of an older student—serving possibly as a groomer, a normative model, or even a protector—could explain how the teacher was able to overcome his much younger student's natural reservations.

Gitelman argues the evidence of multiparty sex was irrelevant because those acts were dissimilar to the charged

offenses. We find the dissimilarity to be superficial. The charged offenses occurred after Gitelman leveraged his role as trusted companion and mentor to overcome his students' reservations. In the uncharged acts he additionally leveraged the calmative and normative influence of an older student, to the same effect. That he engaged in the latter acts tends in reason to show he was able to commit the charged offenses.

Gitelman argues the evidence of multiparty sex was extraordinarily inflammatory and unduly prejudicial because it would have overborne the sensibilities of the jurors and compelled them to convict him for the uncharged acts even if the charged offenses were unproven. We disagree. Sexual contact between a trusted mentor and a decades-younger student, a minor, is so unusual and disturbing of itself that the addition of a second student to the scenario is unlikely to be significantly more inflammatory.

The same considerations pertain to Kendra's testimony about Gitelman using devices during their sexual encounters. Use of such devices is not discordant with—and no more inflammatory than—the charged offense.

The probative value of evidence concerning multiparty sex and the use of devices was not outweighed by its prejudicial effect.

IV. Admission of a Witness's Opinion of the Truth of the Students' Accusations

Barbara Snyder, from whom Gitelman was divorced in 2012, testified that during the last few years of their marriage she would find articles of women's clothing not belonging to her in their laundry. Gitelman would tell her that students had left the clothing at the studio. After learning of Yasmin's accusations

on Facebook, Snyder disbelieved his explanation, and she wrote a letter to USA Taekwondo, the sport's national governing body, accusing Gitelman of inappropriate behavior with his students. On cross-examination, the defense questioned Snyder about the disarray of her finances after she separated from Gitelman, presumably to suggest she bore animus toward him, and therefore had reason to falsely accuse him. On redirect, the prosecutor asked Snyder why she wrote the letter. She testified, "Because I believed the girls the moment I saw Yasmin's statement . . . ." The trial court overruled defense counsel's motion to strike the response as irrelevant.

Gitelman contends the trial court erred in failing to order the testimony stricken as improper lay opinion.

A witness cannot express an opinion concerning the guilt, innocence, or truthfulness of a defendant. (*People v. Torres* (1995) 33 Cal.App.4th 37, 46; *People v. Melton* (1988) 44 Cal.3d 713, 744 ["Lay opinion about the veracity of particular statements by another is inadmissible on that issue"].) But Gitelman forfeited his argument by failing at trial to object to Snyder's statement on the ground it constituted improper lay opinion. (*In re Seaton* (2004) 34 Cal.4th 193, 198.) In any event, the argument is without merit because Snyder's statement was not admitted as an opinion about Yasmin's veracity but to rebut the defense's suggestion that Snyder's accusations against Gitelman were founded on personal resentment.

V. Hypothetical Situations Posed to Defense Character Witnesses

Gitelman called six witnesses to testify as to his good character. On cross-examination, the prosecutor asked each witness if his or her good opinion of Gitelman would change if he

or she discovered the accusations against him were true. Gitelman argues a hypothetical question of this nature may only assume the existence of accusations, not the truth of them. For example, Gitelman argues, a prosecutor may ask whether a defense character witness's opinion would change if the witness knew the defendant had been accused of wrongdoing, but may not ask the witness to assume the accusation is true. Gitelman cites no authority in support of the argument, and we have discovered none.

When a character witness testifies that a defendant's reputation for honesty and integrity is such as to make the truth of accusations against him unlikely, the prosecution may test the credibility of the witness by asking whether the opinion would change if the witness knew of a specified hypothetical fact. (See *People v. Qui Mei Lee* (1975) 48 Cal.App.3d 516, 527.) No principle supports permitting the hypothetical to the posit only the existence of an accusation but not the truth of one. If a jury should know whether a character witness will overlook an accusation, it should know whether the witness will overlook guilt itself.

VI. Lay Opinion Concerning the Victims' Appearance

To rebut Yasmin's and Kendra's testimony that Gitelman served them alcohol in a hotel room at a tournament in 2010, defense counsel called Karen Jacquez, another student's mother, who was also at the tournament, to testify as to the women's appearance the next day. Jacquez testified she observed nothing out of the ordinary about them. Defense counsel then asked whether Jacquez had ever observed anyone who appeared to be suffering from a hangover. The prosecution objected that the question called for improper lay opinion. The trial court

sustained the objection. Gitelman argues the court erred in cutting off Jacquez's testimony, but he concedes this error standing alone was not prejudicial.

A lay person is capable of observing that someone shows no signs of a hangover. The foundation for such an observation can be established by asking if the witness has ever observed someone who was suffering from a hangover. (See *People v. Navarette* (2003) 30 Cal.4th 458, 493-494 [foundation for lay opinion about intoxication can be established by asking whether the witness has ever seen someone who was intoxicated].) Whether such an observation tends in reason to establish the absence of a hangover goes to the weight of the observation, not its admissibility. The trial court therefore erred in cutting off Jacquez's testimony. The error was nonprejudial, however, because Jacquez had already testified she observed nothing out the ordinary about Yasmin and Kendra, which means she observed no sign of a hangover.

VII. Gitelman's Opinion as to why the Victims Would Accuse Him

During Gitelman's testimony, he denied he molested Yasmin and Kendra in his hotel room in 2010. Defense counsel then asked why he thought the women would lie about the events. The prosecution's objection that the question called for speculation was sustained, a ruling Respondent concedes was error.

Any error was nonprejudicial. Throughout trial, Gitelman explored the foundation of Yasmin's, Kendra's, and others' accusations at length. He hypothesized that the women resented him for disciplining them, interfering with their relationships, and being inattentive or unfaithful, and he speculated they and

Brianna were manipulated into colluding to present a unified but fabricated story. When asked by the prosecutor whether he thought the witnesses against him were lying, Gitelman said, "I believe they were manipulated into the situation and it blossomed from that point." Gitelman offers no indication what more he could or would have said had he been permitted to answer this one question.

VIII. Argumentation

During cross-examination, the prosecutor asked Gitelman, "What did you do to allow seven people to lie about you?" Defense counsel objected that the question was argumentative, while Gitelman simultaneously answered, "I can break each one down for you, if you would like. I'd be happy to do so." Defense counsel then moved to strike the answer. The court ruled the answer would stand, after which the prosecutor indicated she had no further questions.

Gitelman argues the court erred in permitting the prosecutor to ask an argumentative question. The argument is without merit.

An argumentative question is one designed not to elicit information from the witness but to inform the jury of the questioner's position on a matter, i.e., to make "a speech to the jury masquerading as a question." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.) "An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*Id.* at p. 384) But a trial court has no power to prevent the asking of a question absent a timely objection. Here, defense counsel failed to object

to the prosecution's argumentative question until after it had been posed and answered.

IX. Evidence Concerning Kendra's Ability

Kendra testified that she performed poorly at the tournament the day after Gitelman served her alcohol in his hotel room. When reminded that she had taken a silver medal, Kendra testified the result was "purely out of luck," as she was never very good at tae kwon do, notwithstanding Gitelman's continuous praise.

To rebut the implication that Gitelman disingenuously exaggerated Kendra's ability in order to groom her for a sexual relationship, defense counsel asked him about her final match at the tournament. Gitelman identified Kendra's opponent and stated she was a high level athlete. The prosecutor objected that the testimony was irrelevant, and the trial court sustained the objection.

Gitelman argues the trial court erred in excluding this testimony, but concedes that the error standing alone was not prejudicial.

Evidence is relevant if it tends in reason to prove or disprove a material fact. (Evid. Code, § 210.) Here, the prosecution intimated that Gitelman exaggerated Kendra's athletic ability as a way to groom her for sexual abuse. His testimony that Kendra lost to a worthy opponent had no tendency in reason to establish her relative athletic ability. The testimony was therefore irrelevant to rebut the evidence that Gitelman exaggerated Kendra's athletic ability.

X. Hearsay Text Message

Melissa Walter, a defense witness, testified her children attended Gitelman's tae kwon do school. The prosecutor asked if

it were true that she told her husband, Craig Walter, that Gitelman lied to her multiple times, and she decided to remove her children from the school and look for another school. Melissa denied she had ever told her husband Gitelman lied to her, and denied deciding to remove her children from his school.

Gitelman argues the text message was inadmissible hearsay, but concedes the error standing alone was not prejudicial.

"'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Hearsay is inadmissible unless an exception applies. (*Id*. at subd. (b).)

Here, Craig's text message contained statements made outside of court by a nonwitness. It was offered to prove the truth asserted by Craig in the message, that his wife disapproved of Gitelman and his school. It was therefore inadmissible.

Respondent argues the text message was not admitted for the truth of its contents, but only to impeach Melissa. The argument is without merit, as the message would have no tendency to impeach Melissa if it was not considered for its truth. Respondent argues the message was admissible under an exception to the hearsay rule applicable to a witness's prior inconsistent statements. (Evid. Code, § 1235.) The argument is without merit because Craig was not called as a witness.

XI. Prosecutorial Misconduct

During closing arguments, the prosecutor made four statements that Gitelman argues constituted misconduct. The prosecutor said: (1) Gitelman testified he "distinctly remembered" that an uncalled witness observed certain events

and would be able to exonerate him, yet never produced the witness; (2) "You would be confused" if you were in the victims' shoes; (3) "we get" that Snyder (the ex-wife) would finally realize Gitelman was a predator; and (4) the reason Gitelman was on the stand "for six or seven hours is because they know that the longer they leave him up there talking to you, the more he can try to ingratiate himself with you. The more he can try to pander to you." Gitelman objected to none of these statements, but had objected on several prior occasions that the prosecutor mischaracterized evidence during closing argument. The objections were uniformly overruled.

Gitelman argues these statements constituted misconduct in that they respectively (1) mischaracterized the evidence (he testified he only thought the witness observed certain events, but was uncertain); (2) inflamed the jurors by implying their allegiance and commonality with the victims; (3) impermissibly vouched for Snyder's veracity; and (4) denigrated Gitelman and defense counsel.

Respondent preliminarily argues Gitelman forfeited his misconduct claim by failing to object to the prosecutor's comments or seek a jury admonishment. Generally, a defendant may not complain on appeal of prosecutorial misconduct absent a timely objection at trial and a request that the jury be admonished to disregard the impropriety, unless an objection or request for admonition would have been futile or the harm could not have been cured. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) On this record, nothing suggests either that a proper objection would have been overruled or an immediate jury admonition ineffective. Gitelman was required to assert a timely and specific objection, and his failure to do so forfeits his claim of

prosecutorial misconduct on appeal. (*People v. Turner* (2004) 34 Cal.4th 406, 421.) However, Gitelman also argues his attorney's failure to object to the prosecutor's misconduct constituted ineffective assistance. An ineffective assistance claim may be raised for the first time on appeal. (*People v. Fosselman* (1983) 33 Cal.3d 572, 581.)

A prosecutor's misconduct violates due process if it infects a trial with unfairness. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the court or jury. (*Ibid.*) If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument and determine whether there is a reasonable likelihood the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) A prosecutor may fairly comment on and argue any reasonable inferences from the evidence. (*People v. Samayoa* (1997) 15 Cal.4th 795, 837.) But a prosecutor may not suggest the existence of facts outside of the record by arguing matters not in evidence (*People v. Benson* (1990) 52 Cal.3d 754, 794-795); mischaracterize the evidence (*People v. Hill* (1998) 17 Cal.4th 800, 823); vouch for the credibility of a witness (*People v. Boyette* (2002) 29 Cal.4th 381, 433), or appeal to the jury's sympathy, passion, or prejudice (*People v. Fields* (1983) 35 Cal.3d 329, 362). Although a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." (*Berger v. United States* (1935) 295 U.S. 78, 88.)

Here, there is no reasonable likelihood the jury would have construed or applied any of the remarks complained of in an objectionable fashion. First, the distinction between Gitelman having "distinctly remembered" that an uncalled defense witness could exonerate him versus only thinking the witness could exonerate him is so minor that it is unlikely the jury's decision whether to fault him for failing to call the witness would hinge on it. Second, the prosecutor's invitation to the jury to empathize with the victims ("You would be confused" too), and the call to appreciate Snyder's experience ("we get" her situation), merely put into words the tacit purpose of closing argument. Every attorney arguing to a jury implicitly appeals for understanding and credence. It is unlikely that expressing that appeal overtly would sway a juror actually to side with a party where absent the verbalization the juror would not. Finally the prosecutor's observation that Gitelman took a long time trying to win over the jury was wholly unremarkable. "'The prosecutor is permitted to urge, in colorful terms, that defense witnesses are not entitled to credence . . . [and] to argue on the basis of inference from the evidence that a defense is fabricated . . . .'" (*People v. Boyette*, *supra*, 29 Cal.4th at p. 433.)

XII. Cumulative Error

Gitelman contends that even if any of the claimed errors individually do not mandate reversal, the cumulative effect of such errors denied him his right to a fair trial.

A "series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill*, *supra*, 17 Cal.4th at p. 844.) However, "[l]engthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear

showing of a miscarriage of justice." (*Ibid.*; see *Bruton v. United States* (1968) 391 U.S. 123, 135 ["'A defendant is entitled to a fair trial but not a perfect one'"].)

We discern three minor errors. The trial court erred in (1) precluding Jacquez from testifying whether she had ever observed someone suffering the effects of a hangover; (2) precluding Gitelman from offering an opinion as to why Yasmin and Kendra would lie about the events in his hotel room in 2010; and (3) admitting Craig Walter's text message containing hearsay statements that impeached Melissa Walter's testimony about her approval of Gitelman and his school.

Each of the errors was harmless in itself, and on this record did not combine to result in an unfair trial. First, as discussed, Jacquez was permitted to testify that she observed nothing out of the ordinary about Yasmin and Kendra in 2010 after Gitelman purportedly plied them with alcohol. Further testimony that the women did not appear to be experiencing hangovers would have added nothing. Second, Gitelman had ample opportunity throughout trial to explain why he believed Yasmin and Kendra were untruthful. The court's foreclosing one instance of such testimony detracted nothing from the jury's understanding of his position. Third, the fact that at some time in the past a parent disapproved of a teacher and his school for unstated reasons had only minimal relevance to the credibility of that witness's current opinion, and even less to the central issue at trial.

In sum, the errors were de minimus individually and cumulatively, and their effect was too slight to warrant reversing the judgment of guilt.

XIII. Clerical Error in the Judgment

The abstract of judgment states that Gitelman's conviction for commission of a lewd or lascivious act involving a child constitutes a serious or violent felony. It does not. (See §§ 1192.7, subd. (c) [defining serious felonies] & 667.5, subd. (b) [defining violent felonies].) We will therefore order that the abstract be corrected.

DISPOSITION

The judgment is modified to reflect that violation of section 288, subdivision (c)(1) does not constitute a serious or violent felony. In all other respects the judgment is affirmed. The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect the judgment as modified and forward a copy of it to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED.

CHANEY, J.

I concur:

JOHNSON, J.

I will be filing a dissent.

ROTHSCHILD, P. J.