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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. HENRY LUGO, Defendant and Appellant.	B275245 (Los Angeles County Super. Ct. No. ZM012142)

APPEAL from a judgment of the Superior Court of Los Angeles County. Anne H. Egerton, Judge. Affirmed.

Gerald J. Miller, 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, Zee Rodriguez and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Henry Lugo (defendant) appeals from the judgment adjudicating him to be a sexually violent predator (SVP) pursuant to Welfare and Institutions Code sections 6600 et. seq. (the SVP Act or SVPA). Defendant contends the trial court erred in denying his motion for a mistrial. Defendant asserts the prosecutor committed misconduct when he questioned one of the prosecution's expert witnesses about the effect of a sustained petition and also when he asked that expert if the defense expert witness had made any unethical statements in his report. We find no misconduct by the prosecutor, and no prejudice from the erroneously admitted evidence of the conditions of defendant's confinement. The trial court did not abuse its discretion in denying defendant's motion for a mistrial. We affirm the judgment.

BACKGROUND

Defendant was first charged with sexually abusing a neighbor's child in Germany in 1975. The victim was a five-year-old girl. Defendant initially claimed he did not touch the child. In 2014, defendant stated that "[i]t was just oral sex."

In 1987, defendant was convicted in California of 15 counts of committing lewd acts on a child in violation of Penal Code section 288. The charges involved three victims who were around 10 or 11 years old at the time of the crimes: Monica, Denise and Marcus. Monica and Marcus were the children of defendant's next-door neighbor. Defendant took Monica and Marcus to Disneyland and the zoo and gave them treats, a practice often referred to as "grooming." Denise was a friend of the two children. Defendant was also convicted of two counts of taking sexually explicit photographs of Monica and Marcus. He was sentenced to 32 years in prison, but released on parole on April 29, 2006.

In July 2006, defendant went to an event at a senior citizens center. He became friendly with a five-year-old boy, and placed his arms on the boy's shoulders while showing him how to use defendant's camera. Defendant asked the boy if he wanted to see defendant's bicycle, and the two walked toward the exit. Defendant put his bicycle into a car, and the boy's father ran up and picked up his son. Defendant was found to have violated his parole by having a camera and failing to stay away from children, and was returned to custody.

In August 2007, the People filed a petition seeking to have defendant adjudged a SVP. In September 2007, following a probable cause hearing, the court ordered defendant remanded to the custody of the Department of Mental Health pending trial. In 2011, the court ordered new evaluations and a new probable cause hearing.

Defendant had a stroke in 2012 which affected his cognitive abilities.

A new probable cause hearing was held on October 20 and November 6, 2014, and defendant was ordered to remain in the custody of the Department of Mental Health pending trial. This trial followed in 2016.

At trial, the prosecution presented the testimony of two experts, Dr. G.P. Sims and Dr. Steven Jenkins, to prove that defendant met the criteria of a SVP: (1) he committed specified sex crimes against multiple victims and (2) he had a diagnosed mental disorder and, as a result, was a danger to the health and safety of others because it was likely that he would engage in sexually violent predatory criminal behavior. (Welf. & Inst. Code, § 6600, subd. (a).) The defense expert, Dr. Christopher Fisher, agreed that defendant satisfied these two criteria, although he diagnosed defendant's mental disorders differently than did the prosecution's experts.

Dr. Sims had evaluated defendant several times and produced reports in 2013, 2014, 2015 and 2016. He diagnosed defendant with pedophilic disorder, delusional disorder, cognitive disorder and antisocial personality disorder. In Dr. Sims's opinion, the combination of pedophilic disorder and antisocial personality disorder predisposed defendant to commit criminal sexual acts. Dr. Sims believed defendant had volitional impairment because he repeatedly engaged in behavior for which he suffered sanctions.

Dr. Jenkins evaluated defendant five times, beginning in 2007. He diagnosed defendant with a pedophile disorder, a delusional disorder and a neurocognitive disorder. Dr. Jenkins opined that defendant's mental disorders predisposed him to commit sexual acts with children and affected his ability to control his behavior. He did not learn from his 1987 convictions.

Dr. Fisher evaluated defendant in 2011 and 2015 and diagnosed him with pedophilia, delusional disorder, narcissistic personality disorder and cognitive disorder. When Dr. Fisher evaluated defendant in 2011, he did not believe these disorders impaired defendant's ability to control his sexual behavior because he "had not exhibited or displayed any behavioral traits of pedophilia in many years." Thus, Dr. Fisher did not believe defendant satisfied the second criterion at that time. By 2015, Dr. Fisher found that defendant's "cognitive capacity, including his ability to manage and control his sexual behavior in an appropriate way, had declined to the point that . . . I thought that those two together were sufficient to say, yeah, now this is a mental disorder that he's having more problems controlling."

Due in part to his different diagnosis, Dr. Fisher opined that defendant could safely be released to the care of his son, and could seek general mental health assistance at the Veterans Administration if necessary. The People's experts, however, testified that it was necessary to keep defendant in a

secure facility to ensure the health and safety of others. (See *People v. Grassini* (2003) 113 Cal.App.4th 765, 776-777.)

Dr. Sims and Dr. Jenkins both acknowledged that defendant received low scores on actuarial risk assessments such as the Static 99, which are designed to measure the risk of sexual re-offense in the future, but opined that the tests did not accurately reflect defendant's risk. They pointed out that a big factor in the risk reduction score was defendant's age. Both believed that other factors demonstrated defendant presented a substantial danger of sexually re-offending in the future if released into the community. Both opined it was necessary to keep defendant in custody in a secure facility to ensure the health and safety of others.

Dr. Sims relied on defendant's lifelong untreated deviant sexual interest in children. During defendant's last 10 years in prison, defendant committed 18 rules violations. These violations led Dr. Sims to conclude defendant was preoccupied with sex during this period and had difficulty controlling his impulses. Defendant expressed no remorse for his past actions. To the contrary, a search of his residence in 2006 uncovered a book defendant had created entitled "It Is Time: Lugoisms, A Sexual Revolution and Religious Revolution." The book expressed defendant's belief that sexual activity with children should not be punished, or should be punished less. The book contained vivid descriptions of sex with children, which Dr. Sims characterized as pornography and viewed as further evidence that defendant had a pedophilic disorder. Defendant refused treatment for pedophilia while in the custody of the Department of Mental Health. He displayed no concern about staying away from children. In recent years, defendant had displayed disorganized and sometimes aggressive behavior. He had gone missing from his unit on five occasions over four months in 2014. In Dr. Sims's opinion,

defendant had an inadequate release plan, which relied on being monitored 24 hours a day by his son and accessing general mental health services through the Veterans Administration.

Dr. Jenkins also noted defendant had a strong sexual interest in children, believed what he did was normal, refused to participate in sex offender treatment, did not cooperate with the conditions placed on him in a structured setting and had difficulty managing his behavior in a highly secure custody setting. In a less secure custody setting, there would be less supervision and defendant would pose a very high risk of being able to act on his sexual impulses. In the unstructured home setting proposed by defendant, it would not be possible to effectively supervise him 24 hours a day, with the consequence that he could venture unsupervised into the community. Dr. Jenkins believed defendant's age and (possibly stroke related) dementia made him more dangerous because they further reduced his ability to control his sexual urges.

Defense expert Dr. Fisher did not believe it was necessary to keep defendant in custody. He gave a great deal of weight to defendant's advanced age, which he believed significantly reduced the risk defendant would re-offend. Dr. Fisher also believed defendant's cognitive disorder involving dementia reduced the risk he would re-offend. Although the dementia made defendant more impulsive, it also destroyed his ability to engage in the "grooming" of children as he had done in the past. In Dr. Fisher's opinion, defendant was not capable of the long-range planning involved in "grooming." Dr. Fisher saw no significance to defendant's parole violation, which he viewed as essentially a technical violation. In Dr. Fisher's view, defendant was in a location (a senior center) where he had permission to be and the

child had approached defendant. Defendant had no history of abducting unknown children to have sex.

DISCUSSION

During Dr. Sims's testimony about the defense expert's report, Dr. Sims mentioned that defendant was subject to an indeterminate life confinement with annual reviews. Defendant also claims that in that same testimony, Dr. Sims characterized the defense expert as "unethical." The prosecutor later elicited testimony which emphasized that the life term was subject to an annual review by the court. Defendant maintains the prosecutor committed incurable misconduct in eliciting this testimony and the trial court erred in denying his motion for a mistrial.

I. "Unethical" comments

Defendant contends the prosecutor committed misconduct by eliciting testimony from Dr. Sims that defense expert Dr. Fisher had acted in an "unethical" manner. Respondent contends defendant forfeited the claim by failing to object.

Defendant did not make a substantive contemporaneous objection to the series of questions and answers about Dr. Fisher's report when Dr. Sims testified on May 12. It was only on May 19 that defendant requested a misconduct instruction based on the use of the word "unethical" in the May 12 exchange.[1]

Although proceedings under the SVPA are civil, the principles and standards governing prosecutorial misconduct apply in SVP proceedings. (See, e.g., *People v. Shazier* (2014) 60 Cal.4th 109, 127-153 [considering claims of prosecutorial misconduct in SVP trial].)

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[1] The next court day after May 12 was May 16, and the next after that was May 19, 2016.

In order to preserve a claim of prosecutorial misconduct for appeal, the defendant must object and request a curative admonition in the trial court. (*People* v. *Ochoa* (1998) 19 Cal.4th 353, 427; *People v. Avena* (1996) 13 Cal.4th 394, 442.) Assuming the use of the word "unethical" was improper, a timely objection would have given the court the opportunity give an appropriate admonition at the first use of the word and to prevent additional uses of the word. Thus, the claim is forfeited. (*People v. Bemore* (2000) 22 Cal.4th 809,844-846 [prosecutor gave closing arguments in the afternoon; defendant, who raised misconduct claim the next morning, forfeited the issue].)

Assuming the argument were not forfeited, we would see no prejudice from the use of the word "unethical" in the prosecutor's questions and no misconduct on the part of the prosecutor. Dr. Sims initially used the word "unethical" to describe evaluators who began an evaluation with a preconceived interest in the outcome. His testimony was general and referred to both prosecution and defense evaluators. It appears the prosecutor simply picked up this terminology in asking follow-up questions about Dr. Fisher's report. Dr. Sims, however, did not adopt the use of the word "unethical" in connection with the report. He used the word "inappropriate" to describe the report's references to defendant's best interests or highest quality of life. Thus, the jury did not hear testimony from the prosecution's expert that the defense expert was "unethical." Dr. Sims's explanation of what he meant by "inappropriate" was mild: he opined that Dr. Fisher's recommendation concerning what was best for defendant was outside the scope of an SVP evaluation and was not legally relevant.[2] At

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[2] The relevant testimony may be summarized as follows: After reviewing the qualifications of prosecution expert Dr. Sims, who had been hired by the State of California to perform SVP evaluations, the prosecutor asked Dr. Sims if he was biased, and Dr. Sims replied, "There are not incentives or

disincentives for us in our workload if we find someone positive or negative. So we're legally just trying to objectively apply the criteria of the SVP law." Dr. Sims opined that "if you had a personal bias . . . where you were going into an evaluation, hoping to find a person meets criteria or hoping a person did not meet criteria, you would be conducting yourself **unethically** and probably should remove yourself from that type of evaluation altogether and not do that particular type of evaluation." (Emphasis added.)

The prosecutor then asked about the position of defense evaluators. Dr. Sims replied, "Again, the same ethical restraint would hold if you went in hoping to find that the person was negative. Let's say, if you were working for the defense, and, therefore, you were hoping to get hired by that defense attorney in the future so that you would make more money or something, that would be an **unethical** type of behavior and you should probably cease and desist from doing that particular type of evaluation." (Emphasis added.)

The prosecutor next asked if Dr. Sims had found "something that [he] would consider as **unethical** and improper" (emphasis added) in the report by defense expert Dr. Fisher. Dr. Sims replied, "There was one sentence in Dr. Fisher's report that does not legally belong in a forensic psychological evaluation report because it was making a valid [*sic*] judgment about the placement of Mr. Lugo and saying that a particular placement would be better. It was insinuated it would [be] better for Mr. Lugo to be in this particular environment versus this particular environment, which is legally beyond the bailiwick of the court. . . . So I thought that sentence was inappropriate because it said something along the lines of it would [be] better if Mr. Lugo was released to [a family member's] custody than remain in the hospital for the rest of his days or something to those lines. That is not really part of a professional evaluation, this type of report. The request is to answer the criteria that you are asked . . . . What would be best for the individual is really beyond the scope of the evaluation."

The prosecutor then said, "Tell us then why that is inappropriate and legally **unethical** in an evaluation such as is being asked here." (Emphasis added.) Dr. Sims replied, "Well, it does not answer the question that is being asked. That is why it is inappropriate." He explained, "The question of would the person have the highest quality of life—what institution or what disposition would afford the person with the highest quality of life in the remainder of their time here on earth is beyond the scope of your evaluation and not legally relevant to what you are doing." The prosecutor asked if Dr. Sims had been trained that it was "inappropriate" to put this information "in an evaluation such as this," and Dr. Sims agreed he had. The prosecutor moved on to questions about Dr. Sims's own reports.

most, this was a permissible attack on the credibility of a witness, not an attack on defense counsel or the honesty of defense tactics. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1337-1338 [prosecutor may challenge truthfulness of witness but may not imply defense counsel was personally dishonest or fabricated a defense].)

To the extent defendant contends that even the use of the word "inappropriate" would constitute misconduct, defendant is mistaken. In the trial court, defense counsel relied on *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888 (*Ghilotti*) to argue that it was permissible for an evaluator to look at a release plan. Dr. Sims's point, however, was that an evaluator should not consider what treatment or release plan was best for the SVP, or would give him the highest quality of life. This is consistent with the *Ghilotti* court's reminder that treatment evaluation could only be made in light of the SVPA's "compelling protective purposes." (*Id.* at p. 929.)

As the trial court noted in denying defendant's motion, SVP trials are "a battle of these experts and what one of them considers unethical, you know, another one may disagree with. So that all goes to argument."

II. Conditions of confinement

Before trial, the People moved to exclude any evidence that defendant would be subject to an indeterminate term in a state hospital if the jury found him to be a SVP. The motion requested the court to admonish all witnesses of the exclusion. The trial court later noted defendant seemed to agree with the motion, and the parties informally agreed to exclude any such reference.[3]

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[3] The minute orders for May 6 and 9, 2016, state that the "[Evidence Code section] 402 motions are heard and ruled upon as more fully reflected in the notes of the court reporter." Defendant points to no such references. Respondent states that it was unable to locate any such references in the

During trial, the prosecutor questioned Dr. Sims about Dr. Fisher's report, and Dr. Sims made two spontaneous statements about the report which referred to defendant spending the rest of his life in a hospital: (1) the report said "something along the lines of it would [be] better if Mr. Lugo was released to [a family member's] custody than remain in the hospital for the rest of his days or something to those lines" and (2) the report considered "what institution or what disposition would afford the person with the highest quality of life in the remainder of their time here on earth."[4]

Defendant did not object to these remarks. Defense counsel later explained that she viewed them as relatively benign.

When Dr. Sims's testimony resumed a few days later, the district attorney revisited an aspect of Dr. Sims's testimony, asking if, hypothetically, in a report someone said "the results had to do with some kind of lifetime commitment, . . . would that be false?" Dr. Sims replied, "It could potentially be true, but you wouldn't know that unless you had a crystal ball and could see into the future." The prosecutor then asked, "So what a sustained petition actually does is what?" Defense counsel's objection was sustained, and her request for a side bar was denied. The prosecutor then asked, "[I]s it a true statement that it is an involuntary commitment to mental health for treatment with annual reviews to the court? Is that what happens with a sustained petition?" Defense counsel again objected but was overruled. Dr. Sims replied, "Yes, that's what happens."

Defendant moved for a mistrial on the basis of these new questions. The court tentatively denied the motion, stating that it appeared the

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reporter's transcript. We are likewise unable to find any such references. The court later stated that it was not certain it ruled on the motion.

[4] These statements are set forth in context in footnote 2, *ante*.

prosecutor was trying to correct or clarify Dr. Sims's volunteered statements about life confinement and that the response was an accurate statement of the law. The court indicated defendant could submit additional authority on the issue if he wished.

Later that same day, the court stated it had read *People v. Rains* (1999) 75 Cal.App.4th 1165 (*Rains*), which held it was error for a jury to be informed that if a defendant were found to be a SVP, he would be committed to a hospital for two years and receive treatment.[5] The court indicated it would strike Dr. Sims's testimony. Defendant argued that a mistrial was necessary.

The next day, the court told the jury, "Dr. Sims early in his testimony made a couple of references to something about, you know, Mr. Lugo staying in the hospital and so on. You are not to consider in any way what will or will not happen to him as a result of your finding the petition true or not true. In other words, your sole job is to decide whether the People have proved by the end of the trial, have proved the allegations in their petition beyond a reasonable doubt. What happens as a result of your findings is up to the court based on the law, and it is something you are not to consider, talk about, think about, or take into consideration in any way. So I am striking Dr. Sims's sort of musings and statements about that. I am ordering, respectfully, that everybody disregard anything he may have said on that subject."

At the close of evidence, defense counsel again moved for a mistrial or, in the alternative, that the jury be instructed on prosecutorial misconduct. The trial court denied the motion for a mistrial, finding that any prejudice from the indeterminate term references was cured by the court's admonition

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[5] This was the procedure for SVP confinement at the time of the *Rains* case.

to disregard the testimony. The court permitted additional argument. Defense counsel represented that the admission of the evidence had altered her cross-examination of Dr. Sims and other tactics. In effect, she believed that cross-examining Dr. Sims would show that SVP's are not necessarily released on annual review and that people died before being released.[6] The prosecutor represented that he did not intend to elicit the original statements from Dr. Sims, and that he believed he had told Dr. Sims not to refer to confinement. After hearing the additional argument, the court again denied the mistrial motion.

The trial court also denied defendant's request for an instruction on prosecutorial misconduct. The court found that Dr. Sims "blurted out" his original statements and that although the prosecutor should have raised the issue of correcting the statements outside the presence of the jury, the additional questioning of Dr. Sims did not rise to the level of misconduct.

A. *Applicable law*

At the time of defendant's 2016 trial, the jury was required to determine if it was necessary to keep defendant in custody in a secure facility to ensure the health and safety of others. Defendant was permitted to, and did, offer expert testimony that defendant's disorder could be managed effectively in the community. (See *Ghilotti, supra,* 27 Cal.4th at p. 927.)

The conditions of confinement to a secure facility are not relevant to a jury's determination of whether a defendant satisfies the criteria for a SVP. (See *Rains, supra,* 75 Cal.App.4th at p. 1170 [experts erroneously permitted to testify defendant would receive a civil commitment to a psychiatric

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6 Defense counsel also argued she had "to be able to rehabilitate the release plan in showing that Mr. Lugo with his release plan doesn't, —isn't dangerous in the future." The court replied that she still had the opportunity to do that when Dr. Fisher testified.

hospital which was subject to review every two years].)[7] The erroneous admission of such evidence is reviewed to determine if it is reasonably probable defendant would have received a more favorable result in the absence of the evidence. (*Ibid.*)

A prosecutor commits misconduct under the United States Constitution when his conduct infects the trial with such unfairness as to render the subsequent conviction a denial of due process; he commits misconduct under California law when the conduct involves deceptive or reprehensible methods employed to persuade the trier of fact. (See, e.g., *People v. Smithey* (1999) 20 Cal.4th 936, 961.) It is improper for a prosecutor to intentionally elicit inadmissible testimony. (*Ibid.*)

"A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.)

B. *Analysis*

The trial court found credible the prosecutor's statement that he believed that he had instructed his witnesses not to mention the lifetime commitment, and that he did not expect Dr. Sims to mention it in response to his questions. Given that the prosecutor had sought to exclude any references to a lifetime commitment, the prosecutor's assertions are

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[7] When *Rains* was decided, the jury did not determine whether it was necessary to confine the defendant to a secure facility. The jury decided if the defendant had suffered the qualifying convictions and if he had "'a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.' (§ 6600, subd. (a).)" (*Rains, supra*, 75 Cal.App.4th at pp. 1169-1170.)

plausible. Thus, there was no misconduct in the prosecutor's initial questioning of Dr. Sims.

The prosecutor's follow-up questions on the next court day were designed to elicit further details of the lifetime confinement. While those details were not relevant evidence, the court viewed the prosecutor's questioning as an attempt to clarify the correct law on lifetime commitments. Although the court believed it would have been better for the prosecutor to discuss the issue with the court rather than attempting to correct the problem on his own, the court did not find the conduct rose to the level of misconduct. Thus, the court, in effect, found the prosecutor was not using a deceptive or reprehensible method to persuade the jury.

Nevertheless, as the trial court belatedly realized, it was error to permit the jury to learn of the conditions of confinement which result from a finding that a defendant is a SVP. Defendant contends the measures adopted by the trial court "were inadequate to cure the situation, and that the trial court, therefore, erred in denying [defendant's] request for a mistrial or, at the very least, for an admonition regarding prosecutorial misconduct."

The trial court did not abuse its discretion in denying defendant's motion for a mistrial. Testimony about the conditions of defendant's confinement did not irreparably damage defendant's chances of receiving a fair trial. To the contrary, there is no reasonable probability defendant would have received a more favorable outcome in the absence of Dr. Sims's testimony. (See *Rains, supra*, 75 Cal.App.4th at p. 1170 [erroneous admission of conditions of confinement evidence is examined to determine whether it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error].)

That testimony was brief and not inflammatory. From the beginning of the trial, the jury was aware that if they found it was necessary to confine defendant in a secure facility, that facility would be a part of the mental health system where he would receive treatment. The jury was aware defendant was currently in a hospital and worked with a treatment team daily. Thus, the only new information in Dr. Sims's testimony was the conditions of the confinement.

The testimony about the conditions of confinement was, on balance, neutral. A jury might, as the prosecution feared, be reluctant to find a defendant to be a SVP knowing it meant a lifetime commitment. The possibility that defendant would be released if his situation changed would seem, at most, to offset any negative effects of a lifetime commitment. Defendant contends the testimony that defendant's confinement would be subject to an annual review would cause the jury to decide to abrogate its responsibilities and find defendant to be a SVP in order "to 'punt' the matter over to hospital authorities, who presumably possessed greater expertise regarding matters involving mental illness." Defendant reads too much into Dr. Sims's testimony. He stated that there would be an annual review by the court, not that hospital authorities would have the final say. The jury may well have envisioned another trial. Regardless of how the jury understood the concept of review, there is no reason to believe the jury would have taken lightly the prospect of confining defendant for even one additional year even if Dr. Sims's testimony had not been stricken. This is particularly true in light of defendant's advanced age.

Dr. Sims's testimony was stricken, however, and the trial court's admonition was low-key and very effective. It was later supplemented by standard jury instructions. CALJIC No. 222 reminded the jury that if the

court "ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose." CALCRIM No. 3550 reminded the jury that "[y]ou must reach your verdict without any consideration of what will happen to Mr. Lugo based on your verdict." CALJIC No. 200 told the jury not to let bias, sympathy or prejudice influence its decision. The evidence was very strong that defendant needed to be in a secured facility. The prosecution experts provided detailed and convincing evidence that defendant retained a strong and unrepentant interest in sex with children, despite his advanced age. They also pointed to incidents which demonstrated his inability to control his impulses even while in custody. In contrast, the defense expert focused primarily on defendant's age and cognitive impairment to conclude that defendant was not likely to re-offend and so could be released to the custody of his son. He opined defendant's dementia rendered him incapable of engaging in the sort of child sexual abuse he had done in the past, which involved the grooming of children. The defense expert did not explain why defendant would not re-offend in the future using simpler and more direct techniques. This was a particularly telling omission in light of defendant's parole violation, which involved responding to the unexpected presence of an unknown child at a senior center by attempting to lure the child into his car.

To the extent defendant argues in the alternative that an instruction on prosecutorial misconduct would have been effective, we note that claim undercuts his argument that a mistrial was required. (Mistrials are appropriate for incurable error. (*People v. Bolden, supra,* 29 Cal.4th at p. 555.)) Further, defendant does not explain how or why an instruction on prosecutorial misconduct would make a jury better able to follow an instruction from the court to disregard the testimony concerning his

conditions of confinement. If anything, it seems an instruction that the prosecutor acted improperly to place evidence before a jury would make the evidence seem highly significant and more difficult to disregard, not less.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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