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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JAVIER HERNANDEZ RAMOS, Defendant and Appellant.	B232538 (Los Angeles County Super. Ct. No. KA087765)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Affirmed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and Shawn McGahey Webb, Deputy Attorney General, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Javier Hernandez Ramos of two counts of lewd act upon a child, one count of continuous sexual abuse, and one count of sodomy, all against his stepson John Doe. Appellant contends that the trial court erred in denying his motion for acquittal and in instructing the jury on adoptive admissions. He also contends that the prosecutor committed misconduct. We affirm.

STATEMENT OF FACTS

1. Prosecution Evidence

John was born in August 1988. At the time of trial, he was 21. Appellant is John's stepfather. When John was seven, appellant moved in with John and his family. At that time, John, his older brother Joey, his mother Martha, and appellant all resided in the same house. He also had a sister, Jane Doe, who was living with John's grandmother.

Appellant began touching John inappropriately when he was seven. The first incident occurred in the shower when appellant fondled John's genital area. Six to seven months later, appellant asked John to go into his room and lie down on the bed, and he took off John's shorts and fondled him again. John's mother was at work when both incidents occurred. John's mother was a housekeeper and would typically leave for work around 7:00 a.m. and not return until 8:30 p.m. or 9:00 p.m.

Another incident occurred when John was eight, when appellant asked John to massage him, including his upper thigh area. John did so, and appellant slid his own shorts down and put John's hand on appellant's erect penis. He then made John slide his hand up and down.

When John was nine years old, the same thing occurred at least five times -- appellant would ask John to come to appellant's room and touch him. When John was 10 years old, appellant continued to ask John to come into his room and ask John to fondle him, but it occurred less than five times that year. When John was 10 or 11, appellant began to ask John to orally copulate him. The first time occurred when they were lying on appellant's bed. Appellant grabbed the back of John's head, pushed it down to his

erect penis, and told John to orally copulate him. John told appellant several times that he did not want to do it, but appellant kept pushing him until he did it.

When John was 12 years old, John moved out of the bedroom he shared with his brother and into his own room. Appellant started coming into John's room at night and asking John to orally copulate him. This occurred eight to 10 times. One night when John was 12, appellant pushed for more than oral copulation. Appellant first forced John to orally copulate him. He then told John to turn around and penetrated John's anus with his finger and also sodomized John.

When John was 13, he moved in with his father and stayed with his mother and appellant on the weekends. Appellant continued to come to John's room on the weekends and have John orally copulate him. This occurred approximately every other weekend. This behavior continued when John was 14. When John was 15, he moved back into the house with his mother and appellant and had his own room again. At age 15 and 16, appellant continued to come into John's room at night and have him orally copulate appellant. He would also have John fondle him with his hand. These things continued to happen when John was 17, but as he got older, the incidents gradually stopped. John did his best to avoid appellant altogether. The last incident happened when John was 18, and appellant tried to get John to orally copulate him. John refused and hid in the bathroom until appellant left him alone.

John did not tell his mother that appellant did these things to him because he was scared of what would happen if he did. He thought his mother might blame and punish him, and he did not want her to be upset with him or to hurt her. He was very close to his mother until the sexual abuse by appellant came to light. He did not want to lose that bond.

On August 1, 2009, John's sister Jane came to the family home for a visit with her baby. At approximately 1:30 a.m. on August 2, appellant woke up John by tapping his foot. John saw him and said, "No." Appellant tapped him again, and John again said, "No," and then he pushed appellant out of his room. He heard appellant moving around in the house and the garage. He then heard appellant pacing up and down the hallway,

and then what sounded like wrestling coming from the room where Jane was sleeping. He heard Jane say, "Stop. Stop."

Jane said that she was awakened that night when she felt something penetrate her vagina. She saw the silhouette of appellant beside her bed when she awakened. She did not know what it was that penetrated her. She said "stop" to appellant several times when she woke up, and he went to his room. She followed him to his and her mother's room.

John got out of bed and found his sister in his mother's room. Appellant was also in the room on the bed. Jane was very upset and crying, and she told her mother that appellant had touched her. Appellant might have said that he was sleeping and nothing happened, but Jane did not recall exactly what he said, if anything. Her mother did not believe her and said that appellant was just intoxicated.

Appellant, John, Jane, and their mother moved into the living room at some point. The other sibling, Joey, also came to the living room. Jane was crying and yelling. Appellant kept telling Jane to "hit [him]." Jane told him there was no point in hitting him. John also told his mother when they were all gathered in the living room that appellant had been sexually molesting him since he was seven years old. His mother started crying and hyperventilating. John decided to disclose the sexual abuse then because he was afraid for his sister and felt appellant's sexual assaults had to stop.

John left with Jane and her baby, and they drove to a hotel. John called the paramedics for his mother because he felt she needed medical help to calm her down. Jane's husband called the police to the hotel. The police interviewed John at the hotel. During the course of the interview, he described the appearance of appellant's penis to the detective -- it was uncircumcised, had two moles on the shaft, and was somewhat bent when erect. The parties stipulated that appellant's penis was uncircumcised and had two moles on the shaft.

Detective Elizabeth Laub interviewed appellant on August 3, 2009. He denied the allegations that he had touched Jane inappropriately and said that he went to her bed because that was the bed in which he and his wife normally slept when Jane was not

visiting, and he merely touched her on her back to move her. He admitted to the detective that he had allowed John to fondle him and he had fondled John, and that he allowed John to orally copulate him. Appellant said there had been six or seven incidents total from when John was eight to the time he was 16. He said John would offer himself to appellant. Appellant completed a hand written declaration that said as follows:

> "I, Javier Ramos, consider that I have problems with alcohol. I would like to receive help in order to overcome my alcoholism. I know that the fact that I was drunk caused me to disrespect [Jane]. . . . [¶] . . . [¶] . . . I understand that what I remember is that I touched her so that she would move, but I did not rape her. I know that I made a mistake by having touched her and for having been drunk. Also on certain occasion[s] having been inebriated, I allowed [John] to touch me. . . . [¶] . . . [¶] . . . I never performed oral sex on him but I did allow him to do it to me. There was no anal sex. I think . . . it only happened six or seven times. Last time was about four years ago. I regret having caused these problems, and I would like to receive help in order to be able to keep my family."

2. Defense Evidence

On the evening of August 2, 2009, John's mother, Martha, went to bed at approximately 10:30 or 11:00 p.m. A little before midnight she got up and found appellant in the garage talking on the phone. She asked him to come to bed, and he indicated he would after he finished his conversation. Martha went back to bed and fell asleep. Around 1:00 a.m. Jane started shaking her to wake her up. Appellant was in bed next to Martha. Jane was upset and said to Martha, "Mom, Mom, wake up. Wake up. Javier's touching me. He's touching me." Martha testified that she told appellant what Jane was saying, "[a]nd he said 'No,' but he was drunk." They all went to the living room, including John, and John told her that appellant had been molesting him for years.

Appellant testified that he had consumed approximately 20 beers on the night of August 2, 2009, and he was in the garage on the phone with his sister in Mexico. Another sister of his had recently passed away, and he and his family were still grieving. When he got off the phone with his sister, he went into the house and saw what he thought was his wife on one of the beds. It was actually Jane. He tried to move her so that he could get into the bed. He never touched her inappropriately.

When Detective Laub interviewed appellant, he told her the allegations John was making against him were untrue. Detective Laub pressed him for an explanation and told him if he had done it, to accept it. She told him she had been abused when she was a little girl, and that among Latinos, abuse was common. She also told him that if he accepted it, it "was a problem that could end simply." She said he would go home quickly if he accepted John's allegations as true, but if he did not, the matter would be investigated and he would have to go to court. The detective proposed that he write a statement and told him she would help him by presenting it to the judge. She provided appellant with pen and paper and dictated his statement to him.

PROCEDURAL HISTORY

Appellant was charged with one count of sexual penetration by a foreign object (count one), five counts of lewd act upon a child (counts two through six), one count of continuous sexual abuse (count seven), one count of forcible lewd act upon a child (count eight), and one count of sodomy on a person under 18 (count nine). All offenses were alleged to have been against John, with the exception of count one, which the information alleged was against Jane.

Of the nine counts, the jury found appellant guilty of four counts -- two counts of lewd act upon a child (count five for the time when John was 11 and count six for the time when John was 12), the continuous sexual abuse count (for the time when John was 13), and the sodomy count (for the time when John was 16).

The jury was deadlocked on the other five counts. On count one alleging the acts against Jane, the jury was deadlocked at seven for guilty, five for not guilty. On counts two, three, and four -- alleging lewd acts against John when he was eight, nine, and 10, respectively -- the jury was deadlocked at 10 for guilty, two for not guilty. And on count eight alleging forcible lewd act against John when he was 12, the jury deadlocked at 11 for guilty, one for not guilty. The court declared a mistrial on these counts and later dismissed them.

The court sentenced appellant to a total of 16 years eight months in state prison. Appellant failed to file a timely notice of appeal, but we granted his application for relief from default.

DISCUSSION

1. The Trial Court Did Not Err in Denying Appellant's Motion for Acquittal on Count Five

Appellant contends that the court erred in denying his motion for acquittal on count five for lewd act upon a child. Appellant argues there was insufficient evidence that the lewd act occurred when John was 11, as alleged in the information. We disagree.

The purpose of a motion for acquittal under Penal Code section 1118.1 is to identify as soon as possible the few instances in which the prosecution fails to make even a prima facie case. (*People v. Stevens* (2007) 41 Cal.4th 182, 200.) The court must determine whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination. (*Ibid.*) The standard applied by the court is the same as that applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction -- that is, "'"whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged."'" (*Ibid.*) We review a trial court's ruling on a motion for acquittal as a question of law subject to de novo review. (*Ibid.*)

The information alleged that the lewd acts on which count five was based occurred on or between August 8, 1999, and August 7, 2000. John having been born on August 8, 1988, he was 11 years old during the acts alleged in count five.

The record contains sufficient evidence that the lewd acts alleged in count five occurred when John was 11. John's testimony consisted of the following:

> "[PROSECUTOR:] Now, before we get to 12, let's stick with 10 and 11 years old. Was there ever a time when the defendant asked you to have oral sex with him?
>
> "[JOHN:] Yes.
>
> "[PROSECUTOR:] And how old were you when that started?

"[JOHN:] Ten, eleven.

"[PROSECUTOR:] And you would have turned 11, again, if I do my math right, August . . .1999?

"[JOHN:] Yes."

The prosecutor then questioned John about the details of the first instance when appellant had John orally copulate him. The prosecutor returned to John's age after that:

"[PROSECUTOR:] Now, after this occasion when was the next time that something inappropriate happened between you and the defendant?

"[JOHN:] When I was 12.

"[PROSECUTOR:] So the next time that you had oral sex with the defendant was when you were 12?

"[JOHN:] Yes.

"[PROSECUTOR:] When you were at the age of 11 did any other occurrences occur?

"[JOHN:] Not that I can remember.

"[PROSECUTOR:] So as far as your recollection today, the oral sex began when you were about 11 years old; is that correct?

"[JOHN:] Yes.

"[PROSECUTOR:] And at ten years old, going back when you were ten, I don't know if you already answered this, and I apologize if you have. How many times would you say that the defendant would call you into his bedroom and fondle you? Or ask you to fondle him I should say. Would it be once a month, every other month, every week?

"[JOHN:] About I would say at least once a month.

"[PROSECUTOR:] *Now, you turned 11 years old and that is when you stated the oral sex happened, correct?*

"[JOHN:] *Yes.*

"[PROSECUTOR:] After that incident of oral sex there was no incident of fondling, masturbation, or any other things that occurred when you were 11 years old?

"[JOHN:] Not that I can remember." (Italics added.)

While John's statements were initially unclear regarding whether the oral copulation happened when he was ten or 11, or "about" 11, he then agreed with the prosecutor's statement that it happened when he was 11. John's testimony was sufficient evidence that the oral copulation occurred when he was 11. (*People v. Jones* (1990) 51 Cal.3d 294, 316 [molestation victim need only confirm "*the general time period*" in which the alleged acts occurred ("e.g., the summer before my fourth grade") to assure the acts were committed within the applicable limitations period].)

2. The Trial Court Did Not Err in Instructing the Jury on Adoptive Admissions

Appellant contends that the evidence did not support an instruction on adoptive admissions (CALCRIM No. 357) because he denied touching Jane when accused, and alternatively, that the instruction was overbroad because the court should have limited it to Jane's accusations, rather than allowing it to apply also to John's accusations. A challenge to the propriety of particular jury instructions raises an issue of law that we review de novo. (*People v. Martinez* (2007) 154 Cal.App.4th 314, 324.) Applying this standard, we find no error.

Evidence Code section 1221 is an exception to the hearsay rule. It holds that "[e]vidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Thus, if a person is accused of a crime under circumstances that fairly afford the person an opportunity to hear the accusation and reply, and the person fails to speak or makes an evasive or equivocal reply, both the accusation and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt. (*People v. Riel* (2000) 22 Cal.4th 1153, 1189.) The circumstances, however, must not lend themselves to an inference that the person was relying on the constitutional right to remain silent. (*Ibid.*)

A direct accusation in so many words is not essential for the adoptive admission exception to apply. (*People v. Riel, supra,* 22 Cal.4th at p. 1189.) Further, to warrant admissibility, "'it is sufficient that the evidence supports a reasonable inference that an

accusatory statement was made under circumstances affording a fair opportunity to deny the accusation; whether defendant's conduct actually constituted an adoptive admission becomes a question for the jury to decide.'" (*Id.* at p. 1189-1190.) The trial court has a sua sponte duty to instruct on adoptive admissions if such evidence is admitted. (*People v. Vindiola* (1979) 96 Cal.App.3d 370, 383.)

Here, the prosecutor requested CALCRIM No. 357, and the court so instructed the jury as follows:

> "If you conclude that someone made a statement outside of court that accused the defendant of the crime and the defendant did not deny it, you must decide whether each of the following is true:
>
> "1. The statement was made to the defendant or made in his presence;
>
> "2. The defendant heard and understood the statement;
>
> "3. The defendant would, under all the circumstances, naturally have denied the statement if he thought it was not true;
>
> "AND
>
> "4. The defendant could have denied it but did not.
>
> "If you decide that all of these requirements have been met, you may conclude that the defendant admitted the statement was true.
>
> "If you decide that any of these requirements has not been met, you must not consider either the statement or the defendant's response for any purpose."

Appellant has forfeited his contention that the court should have limited the instruction so that it applied only to Jane's accusations and not to John's. He did not object on this basis in the trial court or request a narrowed instruction.[1] (*People v. Millwee* (1998) 18

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[1] Appellant's only objections to the instruction were that Jane's accusation was too vague because she said appellant "touched" her but did not accuse him of sexual penetration, and also that appellant was intoxicated at the time of the accusation.

Cal.4th 96, 129.) Still, we consider the contention on the merits because of appellant's alternative argument that counsel was ineffective in failing to raise the objection.

The court not only did not err, it had a duty to give CALCRIM No. 357 because of the evidence that John accused appellant in appellant's presence. The evidence was that John accused appellant of molesting him when appellant, Martha, Jane, and Joey were all gathered in the living room after the incident with Jane. John, Jane, Martha, and Joey all testified that appellant was in the living room when John made the accusation. There was no evidence that appellant denied those allegations at the time or said anything in response. Appellant testified in his own defense and did not claim to have responded to the allegations. Whether appellant's conduct constituted an adoptive admission was a question of fact for the jury to decide, and to do that, the court needed to instruct the jurors on the law of adoptive admissions.

Under these circumstances, appellant has not shown ineffective assistance of counsel. The record illuminates a reasonable explanation for counsel's failure to object to the instruction -- there was sufficient evidence to support the inference of an adoptive admission, and the jury required guidance on the law. We must therefore reject the ineffective assistance of counsel claim. (*People v. Jackson* (1989) 49 Cal.3d 1170, 1188.)

As to Jane's accusation that appellant touched her, appellant argues that the evidence showed he denied touching her. Assuming solely for the sake of argument that the instruction should not have applied to her accusation, we find no prejudice. The jury deadlocked on the single count relating to Jane and the court ultimately dismissed it.

3. The Judgment Should Not Be Reversed for Prosecutorial Misconduct

Appellant contends the prosecutor committed prejudicial misconduct when she referred to him as a "monster" in opening statement. Appellant has forfeited the contention, and in any event, we disagree.

A. Background

The prosecutor's opening statement consisted in part of the following:

"Good morning, ladies and gentlemen. Ladies and gentlemen, recently I was baby-sitting my four-year-old niece. Now, I may be biased, but I think she's adorable. She's sweet, she's bright, and she's funnier than anyone I know.

"Recently, she spent the night at my house, and I also found out that she's deathly afraid of the dark. She woke me up every five minutes saying there were monsters under her bed, in the closet, or outside the window in her room. I can't say that I blame her for being afraid of monsters considering I'm one of the biggest cowards when it comes to horror movies; but, as she grows up, she will outgrow her fears, much as I did, and move on with her life.

"But in this case, you're going to hear about a child monster who he couldn't grow out of, who he couldn't leave behind, and who he couldn't close the door on, a child monster that lurked in his home for years, a child monster that was welcomed into his home by his own [mother], a child monster that resided, not under his bed but in his bed. That monster you will see and hear about is the defendant who sits here before you."

The prosecutor went on to describe the evidence underlying the counts against appellant, including many of the specific incidents John would later describe in his testimony. She returned to the "monster" theme after describing the evidence:

"That was the last of the sodomy for awhile; but the fondling, the oral copulation, and the masturbation continued until John Doe was 17 years old. For the past ten years, John Doe had to live with a real life monster. And even after it stopped, John Doe still didn't tell anyone, and he'll tell you why. . . . [¶] . . . [¶]

" . . . John Doe, who had been very close to his mother, who had been protecting her from the devastating [*sic*] of finding out that she had married a monster and brought the monster in to live with her three children, was the one -- as you will see here, the one that was left devastated because the mother chose the defendant over him.

"And, ladies and gentlemen, by the end of this case, you will see why the defendant is worse than any monster that Hollywood could create, worse than the bogeyman, worse than Dracula, the vampire, et cetera, you name it. Because when the bogeyman, Dracula, the vampire, et cetera, they can go away when you turn off the TV. They can go away when you finish that movie. They go away when you close that book. But for ten long years, John Doe could never get rid of that monster, and he will never be rid of the nightmares that he had endured with that man."

Defense counsel asked to approach the bench after the prosecutor concluded her opening statement. He moved for a mistrial based on the prosecutor's characterization of appellant as a "monster." The prosecutor argued that, if he felt the characterization was prejudicial, he could have objected when she first used the term, but he did not. In addition, she argued that the characterization was not inflammatory. The court denied the motion but "ask[ed] counsel to defer any characterizations in terms of monsters, animals, or what have you," and noted "the objection should be raised promptly." Defense counsel stated that the reason he did not object was because he "thought maybe it would just be a momentary comment, but I came and made my motion because that was a comment that counsel made throughout opening . . . ."

B. Analysis

"A prosecutor's rude and intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' [Citations.] But 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 court or the jury."'" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.)

"Instances of prosecutorial misconduct may be raised as errors on appeal only if they are objected to in timely fashion at trial or if the harmful effect of the misconduct could not have been obviated by a timely cautionary instruction by the trial court." (*People v. Villa* (1980) 109 Cal.App.3d 360, 364; see also *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "'The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial. . . . In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice.'" (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

We hold that appellant has forfeited his claim of prosecutorial misconduct. The law requires a *timely* objection to the alleged misconduct, and appellant's objection was untimely in that it came only after the prosecutor had used the monster analogy at length and had completed her opening statement. This case illustrates the soundness of the forfeiture rule and specifically the requirement of a timely challenge. Had appellant objected when the prosecutor first used the analogy, the court would have had the opportunity to admonish the jury, instruct counsel to cease using the term, and forestall repeated use of the term and the compounding of any prejudice. Instead, the jury heard the analogy referenced numerous times.

Appellant contends that a short delay in objecting does not forfeit the contention and relies particularly on *People v. Vance* (2010) 188 Cal.App.4th 1182. In *Vance*, the Court of Appeal criticized the Attorney General's argument that "an objection must be made at the very outset of assertedly improper comments, and only at the very beginning, lest the power to object be effectively lost." (*Id.* at p. 1198.) We are not endorsing such an argument here and simply note that this case is distinguishable from *Vance*. Defense counsel in *Vance* objected early on during the prosecutor's objectionable remarks -- although perhaps not at the earliest possible opportunity -- and he continued to do so "repeatedly and insistently" when the court sustained the objections and the prosecutor continued to make similar remarks. (*Id.* at pp. 1193-1196, 1198.) The *Vance* court rejected an inflexible forfeiture rule that requires an objection at the earliest mention of objectionable material and held that the defendant had not forfeited his prosecutorial misconduct claim. (*Id.* at p. 1198.) Appellant, by contrast, not only failed to object at the outset, he failed to object at all during the comments.

Even had appellant not forfeited the claim, we would reject it on the merits. Appellant contends that the monster analogy was unduly inflammatory and prejudiced the jury against him. But the monster analogy was no more inflammatory than the prosecutor's summation of what John's testimony would show, or John's own extensive and detailed testimony describing the instances of oral copulation, sodomy, and other lewd acts appellant perpetrated against him as a child. There was simply no innocuous

way to describe appellant's acts. In view of the totality of the circumstances, we cannot say that the prosecutor's monster analogy deprived appellant of a fair trial. Nor was there a reasonable possibility that the jury would have reached a more favorable verdict, had the prosecutor not used the analogy. (*People v. Harris* (1989) 47 Cal.3d 1047, 1080; *People v. Gionis* (1995) 9 Cal.4th 1196, 1220.)

DISPOSITION

The judgment of conviction is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.