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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. MAURICIO FRANCO, Defendant and Appellant.	B233565 (Los Angeles County Super. Ct. No. TA113290)

APPEAL from a judgment of the Superior Court of Los Angeles County. Pat Connolly, Judge. Affirmed.

Daniel G. Koryn, 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, Senior Assistant Attorney General, Susan Sullivan Pithey and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Mauricio Franco was convicted, following a jury trial, of one count of committing a lewd act on his daughter, a child under the age of 14, in violation of Penal Code section 288, subdivision (b). The trial court placed appellant on three years formal probation.

Appellant appeals from the judgment of conviction, contending that the trial court erred in admitting his confession and excluding evidence of the reason the victim was in custody at the time of trial, and also erred in failing to instruct the jury on battery. Appellant further contends that the prosecutor committed misconduct in closing argument and there is insufficient evidence to support his conviction. We affirm the judgment of conviction.

Facts

By July 2010, twelve-year-old F. had run away from home to a friend's house about five times. On July 12, 2010, F. again ran away to a friend's house and spent the night. The next morning she called appellant, who is her father, and told him where she was. F.'s mother came and picked her up. After F. had something to eat, her mother took her to the Huntington Park Police Station, so that F. could be taken "off the system."

F. and her mother returned home. Moments later, detectives from the Huntington Park Police Department came to their house. F. told the detectives that appellant had touched her in the summer of 2009. She said that she had been in a truck with him on the way to a swap meet, when he pulled the truck to the side of the road and touched her vagina over her clothing. When they reached the swap meet, appellant bought F. a cell phone. She had been asking appellant to buy her one for some time.

The detectives took F. to the police station, where she gave Los Angeles County Sheriff's Deputies the same information about appellant. Her sister, A., told deputies that F. had told her about the swap meet incident in the summer of 2009.

F. next met with Jacqueline Gonzalez, a children's social worker with the Department of Children and Family Services. F. gave Gonzalez the same information she had given to the deputies. She added that she was shocked when appellant touched

her. Appellant said that he was just kidding, and instructed F. not to tell her mother. F. also told Gonzalez that appellant had touched her in a similar manner several times after the swap meet incident.

A. also spoke with Gonzalez. She initially denied knowing anything about the swap meet incident. Later, she admitted that F. had told her about the incident. F. made her promise not to tell anyone because she was afraid appellant would be arrested.

Appellant was arrested that same day, July 13. F. was aware of the arrest.

On July 16, Los Angeles County Sheriff's Detective John Carlin visited F. Detective Carlin discussed with F. the difference between the truth and a lie. F. understood that lying was bad. Detective Carlin told F. that the truth was really important and that he only wanted to hear the truth. F. agreed to tell the truth. She then stated that on the way to a swap meet, appellant had parked the truck on a side street and rubbed his hand over her jeans on her vagina. She told him that she did not want him to touch her. He acted like he was playing a game or joking. Appellant touched F. the same way about five other times. F. mentioned to the detective that she had told her sister A. about the touching.

Detective Carlin then spoke with A., who said that F. had told her that appellant touched her inappropriately in 2009. F. told A. that appellant had agreed to buy her a cell phone if she let him touch her. F. was crying when she spoke with A.

Detective Carlin then asked F. if there had been an incident involving a cell phone. F. said that she had asked appellant to buy her a cell phone and he agreed to do so if she let him touch her.

F. was later called to testify in family court. She denied that appellant had touched her. At the preliminary hearing in this matter, F. also denied that appellant had touched her.

At trial, F. again denied that appellant had touched her. She testified that the detectives who came to her house after she ran away threatened to arrest her if she did not give them a good reason why she had run away, so she lied and told them that appellant

had touched her. The detectives led her to believe that they would talk to appellant and then everything would be over. She did not think that appellant would get into trouble.

F. acknowledged that she had run away several times after appellant's arrest, while he remained in custody. She did so because she did not like it when her mother told her "no." F. testified that she was unaware that appellant called her vagina her "huevito." She understood "huevito" to mean "egg."

Detective Carlin testified that on July 16, he interviewed appellant through a Spanish language interpreter, Deputy Susan Rosales. A tape of this interview was played for the jury.

During the interview, Detective Carlin asked appellant whether he knew why he had been arrested. Appellant said he understood "more or less." Officers told him he had been arrested for touching his daughter while they were playing, but he "never touched her." Detective Carlin told appellant he already knew what happened because F. had taken, and passed, a lie detector test.[1] Appellant admitted playing with F., but continued to deny touching her. Detective Carlin told appellant that the lie detector test was infallible, and he knew about the time appellant agreed to buy F. a cell phone if she let him touch her in her "private area." Appellant said he remembered the incident but that it was a "big error." Appellant said he and F. were in his truck when she asked him to buy her a cell phone at a swap meet. He told her he would buy the cell phone if she let him "eat the huevito," meaning that he would grab the huevito with his hand and eat it. Appellant was referring to F.'s vaginal area by the term "huevito." F. said, "Yes." After appellant gave F. a cell phone, he asked, "And my huevito, honey?" F. said, "Here it is." Appellant said, "I'm going to eat it" and demonstrated that he touched F.'s vagina over her jeans and then brought his fingers to his mouth and pretended to eat it. Appellant understood it was bad to touch his daughter. He admitted he had made a mistake and said he was "very, very sorry." However, he did not hurt F. and he had no malicious intent.

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[1] F. had not actually taken a lie detector test. The detective's statement was a ruse.

Detective Carlin told appellant that he knew F. was not lying. Appellant responded, "Me neither. I'm – I'm telling the truth."

Detective Carlin then told appellant that F. said there were other incidents of touching. Appellant said he and F. played together, but there were no other similar incidents in which he touched her vagina. If he had touched her, it was inadvertent and during the course of their play. Appellant asked Detective Carlin to tell F. he was very sorry.

Appellant testified in his own defense at trial. Appellant was born in Mexico and attended elementary school there. He attended, but did not complete, the third grade. Appellant was 55 years old at the time of trial. F. and A. lived with appellant and their mother, G.G. Appellant worked at a wrecking yard, removing transmissions and engines from cars. He was the family's sole means of support.

Appellant's relationship with F. was "fine" prior to his arrest. On three or four occasions, F. left the house without permission. Her mother called the police every time.

Appellant never touched F. in a sexual manner. He specifically denied rubbing her vagina. He did not make a deal with her to buy her a cell phone if she let him touch her. F. had a cell phone, but it was not connected.

Appellant explained that when F. was young she was very thin and he teased her by calling her "my little boy" and demanding that she give her "little balls" to him. Appellant would hold his hand out to F. and she would pretend to put something into it. Appellant would then raise his hand to his mouth as though to eat the object F. had given him.

Appellant repudiated his confession to Detective Carlin, explaining that he was in jail for four days before Detective Carlin interviewed him and informed him of F.'s accusation. Appellant initially denied having touched F. Eventually, however, he made the admissions heard in the taped interview. Appellant explained that he only admitted touching F. because he was afraid Detective Carlin was going to hit him. His fear was based on a prior incident in which a police officer held a gun to his head and the fact that Detective Carlin kept moving closer and closer to him during the interview. In addition,

Deputy Rosales repeatedly gestured to appellant that he should repeat whatever Detective Carlin was saying.

Discussion

1. Confession

Appellant contends that the trial court erred prejudicially in admitting his confession, and further contends that this error violated his constitutional right to due process and against self-incrimination. Specifically, he contends that the trial court erred because the *Miranda*[2] warnings were not given in a language which appellant could understand and consequently, under the totality of the circumstances, appellant could not and did not make a voluntary, knowing, and intelligent waiver of his right against self-incrimination.

Before being subject to custodial interrogation, a suspect must be warned of his *Miranda* rights. (*People v. Tate* (2010) 49 Cal.4th 635, 683.) Once he has received these warnings, he is "free to exercise his own volition in deciding whether or not to make a statement to the authorities." (*Oregon v. Elstad* (1985) 470 U.S. 298, 308.) A defendant's waiver of his rights is valid if it is knowing, intelligent and voluntary. (*People v. Tate*, *supra*, 49 Cal.4th at p. 683.) To determine if a waiver is valid, courts examine the totality of the circumstances, including the background, experience and conduct of the suspect. (*People v. Davis* (2009) 46 Cal.4th 539, 585-586.)

In reviewing a trial court's determination of the validity of a *Miranda* waiver, we accept the court's determination of disputed facts if supported by substantial evidence. We independently decide whether the challenged statements were obtained in violation of *Miranda*. (*People v. Davis*, *supra*, 46 Cal.4th at p. 586.)

Respondent contends that appellant has forfeited this claim by failing to raise it in the trial court. We agree.

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

Appellant's counsel never even hinted in the trial court that appellant's limited English prevented him from understanding his rights. Accordingly, he has forfeited this claim. (See *People v. Polk* (2010) 190 Cal.App.4th 1183, 1194 ["unless a defendant asserts in the trial court a specific ground for suppression of his or her statements to police under *Miranda*, that ground is forfeited on appeal, even if the defendant asserted other arguments under the same decision"]; see also *People v. Ray* (1996) 13 Cal.4th 313, 339.)

Were we to consider this claim, we would reject it, for the very fundamental reason that appellant's rights were read to him in Spanish. Further, a Spanish interpreter was present during the entire interview and translated every statement and question by Detective Carlson into Spanish. There is no merit at all to appellant's claim.

We note that appellant states in his opening brief that the trial court "failed to adequately consider Officer Rosales's inability to properly interpret such statement." To the extent that appellant contends that there were deficiencies in Officer Rosales's interpretation skills, appellant has also forfeited this claim by failing to raise it in the trial court. Further, were we to consider this claim, we would reject it. On appeal, appellant has not identified any specific deficiencies in the interpretation. There is nothing in the record before us to show any such deficiencies.

Appellant does repeat one claim he made in the trial court. He contends that the transcript shows that he replied, "Now?" when advised of his right to an attorney and that this showed confusion about his rights.

Respondent points out, as the prosecutor did in the trial court, that appellant's transcript does not show that appellant replied, "Now?" It shows that appellant replied, "Yes."[3] Respondent is correct. The transcript reads as follows:

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[3] Appellant's confession was taped, and each party prepared its own transcript of that tape. The trial court reviewed only appellant's transcript in deciding appellant's motion. Respondent's transcript, which is part of the record on appeal, shows that same "Yes" response.

Officer Gonzalez: "You have the right to have an attorney present here while we talk. Do you understand that?"

Appellant: "Yes."

Officer Gonzalez: "If you want an attorney but don't have the money, the court will give you one before we talk."

Appellant: "Yes."

Appellant has not in any way responded to this correction in his reply brief. He simply repeats that his reply, as shown in the transcript, was "Now?" It was not. Accordingly, we reject that portion of appellant's claim which is based on his claimed response of "Now?" to the attorney advisement.

As the trial court recognized, appellant's transcript does show a "Now?" response by appellant, but that response made to a different advisement, one about the right to remain silent. Officer Gonzalez said, "I'm going to read you your rights – your rights, so you understand." Appellant replied, "Go ahead." Officer Gonzalez then stated, "And then you -- you're going to answer. You have the right to – to not speak. Do you understand that?" Appellant replied, "Now?" Then appellant laughed. Officer Gonzalez then explained, "You're going to – you have to indicate 'yes' or 'no', because, uh, I have to hear your words. Okay?" Appellant replied, "No, well, I mean –" Officer Gonzalez then repeated, "You – no – you have the right not to speak. Do you understand?" Appellant replied, "Yes."

To the extent that appellant is referring to this exchange, we see no error in the trial court's finding that "there may have been some confusion," but found that "it is cleared up by the questions and answers, and then specifically by the answers that are given by the defendant." We see no error in the court's ruling.

The initial statement by Officer Gonzalez was contradictory. She both told him that he had the right not to speak, then asked if he understood that right, which called for him to speak. Appellant's response of "Now?" followed by laughter, indicates that he did in fact comprehend what the officer was saying, and found the contradiction humorous.

Officer Gonzalez then explained that appellant had to reply "yes" or "no." We agree with the trial court that this cleared up the contradiction.

2. Sufficiency of the evidence

Appellant contends that the evidence is insufficient to support the jury's verdict because the victim delayed disclosing appellant's act, her accusation was uncorroborated by physical evidence and was inherently improbable, and she recanted her accusation, and also because the victim's sister did not believe her and appellant's confession was involuntary and uncorroborated. He further contends that his constitutional right to due process was violated by this unsupported conviction. There is substantial evidence to support the verdict.

In reviewing a challenge to the sufficiency of the evidence, "the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment." (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

"Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.)

F.'s statements before trial that appellant touched her inappropriately, although later repudiated, are substantive evidence that appellant committed a lewd act. (See, e.g., Evid. Code, § 1235; *California v. Green* (1970) 399 U.S. 149, 153-164.)

The direct evidence of a single witness is sufficient to sustain a conviction unless the testimony is physically impossible or inherently improbable. (See, e.g., *People v. Watts* (1999) 76 Cal.App.4th 1250, 1259; see also Evid. Code, § 411.) There is nothing physically impossible or inherently improbable about F.'s statements.

There is no requirement that F.'s account of appellant's wrong-doing be corroborated by physical evidence, or any kind of evidence at all. Further, her statements *were* corroborated, by appellant's confession, which as we explain, *ante*, was properly admitted into evidence. F.'s statement was also partially corroborated by A.'s statement that appellant had purchased a cell phone for F.

Appellant's claim that F. delayed disclosing the lewd act and that F.'s sister did not believe her are simply requests that we find F. not credible. The determination of F.'s credibility was a task for the jury, and the jury found her credible. We are not free to reweigh the evidence.

Since there is substantial evidence to support appellant's conviction, there was no violation of his constitutional right to due process. (*People v. Osband* (1996) 13 Cal.4th 622, 690.)

3. F.'s custody

Appellant contends that the trial court abused its discretion in limiting his cross-examination of F., and that this error deprived him of his constitutional rights to present a defense. Specifically, he contends that the trial court should have allowed him to question F. about the reason she was in custody at the time of trial. We see no abuse of discretion, and no violation of appellant's constitutional rights.

Only relevant evidence is admissible. (Evid. Code, § 350; *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

Trial courts have broad discretion to determine the relevance of evidence. (*People v. Smithey* (1999) 20 Cal.4th 936, 973.)

Here, F. originally told police that she ran away from home because appellant touched her vagina. F. continued to run away after appellant was arrested, however. At the time of trial, F. was in custody for committing battery on her mother and sister. Appellant viewed F.'s statements, running away and battery as "sort of like a pattern of

like rebellion against her parents, meaning if she doesn't get what she wants from her parents, there is a repercussion from that." Thus, counsel wanted to cross-examine F. about her continued running away and the battery she allegedly committed against her mother and sister.

The trial court viewed the running away and the battery as two separate issues. The court ruled that appellant could question F. about the continued running away, as it was clearly relevant to her credibility. The court found that evidence of the battery was not relevant to F.'s credibility. We agree.

Evidence that a witness has been convicted of a felony is relevant and admissible to impeach the witness's credibility. (Evid. Code, § 788.) Similarly, evidence that the witness engaged in criminal conduct amounting to a misdemeanor is potentially admissible for impeachment purposes if the conduct involves dishonesty or moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 288, 295-297.) In contrast, evidence that a witness has merely been arrested is not admissible for impeachment. (*People v. Medina* (1995) 11 Cal.4th 694, 769; *People v. Balderas* (1985) 41 Cal.3d 144, 192-193; *People v. Williams* (2009) 170 Cal.App.4th 587, 610.)

There is no evidence in the record showing whether F. was awaiting trial or had been convicted, the precise nature of the offenses she was charged with or whether the offenses were misdemeanors or felonies. Appellant has not cited, and we are not aware of, any cases holding that a witness's act of committing a battery on another person reflects on the witness's credibility. Common sense indicates that it does not. The trial court did not err in finding the evidence not relevant.

Appellant did not argue in the trial court that the exclusion of F.'s custody would violate his constitutional rights to present a defense. Respondent contends that appellant has thus forfeited his claim.

Assuming for the sake of argument that appellant did not forfeit this claim, we would find no violation of his constitutional rights. The exclusion of irrelevant evidence does not violate a defendant's right to present a defense, or any other constitutional right. (See *People v. Moore* (2011) 51 Cal.4th 1104, 1142 [exclusion of irrelevant evidence did

not violate defendant's constitutional rights]; *People v. Rundle* (2008) 43 Cal.4th 76, 133, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390.)[4]

4. Instruction on battery

Appellant contends that the trial court erred in failing to instruct the jury, sua sponte on battery, which appellant contends is a lesser included offense of lewd acts on a child. He further contends that this error violated his constitutional rights to due process and a fair trial.

As appellant acknowledges, there is a split of authority on whether battery is a lesser included offense of committing a lewd act on a child. The Sixth District Court of Appeal has held that battery is not a lesser included offense. (*People v. Santos* (1990) 222 Cal.App.3d 723, 738.) The First District Court of Appeal has held that battery is a lesser included offense of committing a lewd act. (*People v. Thomas* (2007) 146 Cal.App.4th 1278, 1293.) This issue is now pending before the California Supreme Court. (*People v. Shockley*, review granted Mar. 16, 2011, S189462; see also *People v. Gray*, review granted Dec. 15, 2011, S197749 [grant/hold behind *Shockley*].)

We will assume for the sake of argument that battery is a lesser included offense. We see no reasonable probability or possibility that the jury would have convicted appellant of battery if they had been instructed on this offense. Appellant was alleged to have touched F., over her clothing, in F.'s vaginal area. Appellant's defense was a denial that any touching occurred. He did not contend that touching occurred, but was not

[4] Appellant appears to believe that the trial court excluded the evidence under Evidence Code section 352, which weighs the probative value of evidence against the probability that, inter alia, the evidence will unduly consume time or create substantial danger or undue prejudice. We understand the court as excluding the evidence because it was not relevant, a circumstance controlled by Evidence Code section 350.

sexual.[5] Thus, if touching occurred, it was a lewd act. If the jury believed appellant, there was no touching and no crime.

5. Prosecutorial misconduct

Appellant claims that the prosecutor committed two instances of prejudicial misconduct during rebuttal closing argument. Specifically, he contends that the prosecutor offered her own personal opinions on why appellant was guilty and F. recanted her allegations.

"A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'"" (*People v. Cook* (2006) 39 Cal.4th 566, 606.) "Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those actions do not result in a fundamentally unfair trial." (*Ibid.*)

Any reference by the prosecutor to facts not in evidence is misconduct. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Thus, "[a] prosecutor may not express a personal opinion or belief in the guilt of the accused when there is a substantial danger that the jury will view the comments as based on information other than evidence admitted at trial." (*People v. Mincey, supra,* 2 Cal.4th at p. 447.)

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[5] There is nothing in the record to support an inference that appellant touched F.'s vaginal area for a non-sexual reason. Appellant did claim that he had played a "game" with F. when she was younger in which he would pretend that she was a boy who had testicles. Appellant would say that he was going to eat her testicles, and would hold out his hand. F. would pretend to put them in his hand and he would pretend to eat them. Appellant's description of this "game" did not involve touching F. Thus, even assuming that this game would provide a non-sexual explanation for appellant's statement that about eating F.'s huevito (his nickname for her vagina), it does not provide one for his actually touching F.'s vagina. Touching was not part of the "game."

a. Recanting

Appellant first claims misconduct in the following portion of the argument, related to F.'s recantation of her accusations against appellant:

"[F.] told the police officers [appellant] had touched her. She told the Department of Children and Family Services that he had touched her. She told the detective before the case was even filed that he had touched her. But then when she had to go to family court and say it in front of him, when she had to come here for the preliminary hearing to this criminal court and say it to a judge in front of him, when she had to get up on the stand and say it in front of him, to point out her father, to identify him on the record and then say yeah, that's the guy who likes to touch my vagina, calls it a huevito, pretends to eat it, it's no wonder, it's no wonder she couldn't say that here." The prosecutor then turned to a discussion of F.'s delayed disclosure. The prosecutor argued, "when she finally discloses when she's prompted by some questions, to say it again and then to keep saying it. [¶] And she says now, you know, I didn't know what would happen. But she said it still after he was arrested. And she never called the detective to say hey, you know what. Made it up. She saw the detective in court for the first date the preliminary hearing was set and it got continued. . . . She could have gone up to [the detective and] said, hey, you know what? Listen. Big mistake. She didn't. It's not until she has to sit on a stand in front of her father and say what happened to her that she can't find those words, that she would rather take the responsibility on herself."

Appellant objected that the argument assumed facts not in evidence, but was overruled. At the conclusion of closing arguments, appellant's counsel asked the court if he could "clarify" his objections. The court agreed. Counsel contended that the prosecutor had argued that "it was not until F. first took the stand [at the] preliminary hearing that she first stated the allegation against her father is not true." The court responded that it did not remember the prosecutor "actually saying that." The prosecutor stated, "I said Children's Court first and then preliminary hearing." Appellant's counsel explained that he was referring to testimony by F. that she had told her attorney in Children's Court that appellant did not do it. This testimony had been stricken by the

court. Appellant contended that the prosecutor's argument that F. first recanted in court was contrary to that stricken evidence.

F.'s (stricken) testimony about her attorney was as follows:

Appellant's counsel: "And in [Children's Court] you also told the judge and the court that he – your dad didn't touch you?"

F.: "Yeah."

Counsel: "All right. And in that Children's Court you were given your own lawyer, right?"

F.: "Yeah."

Counsel: "And you told your lawyer that your dad didn't touch you?"

F.: "Yeah."

It is not possible to tell from this testimony when F. told her attorney that appellant did not touch her, or what the circumstances were surrounding F.'s statement. It is certainly possible that F. made the statement to her lawyer during the Children's Court proceedings, while her father was present in court.[6] Given this ambiguity, we see nothing improper about the prosecutor's argument. The gist of the prosecutor's argument was that F. recanted when faced with her father in court. That was what the admitted evidence showed. The stricken testimony cited above does not contradict that evidence. The prosecutor did not commit misconduct.

Even assuming that the prosecutor had a duty to refrain from commenting on specifics of F.'s recantation unless she could point to evidence which conclusively established the first time F. recanted, we would see no reasonable probability or possibility that this error contributed to the verdict. In fact, if the jury understood the prosecutor's argument as being that F. only recanted on the witness stand, this argument

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[6] Other inferences from the testimony are also possible. The record was not developed, because the court found that on its face F.'s statements to her attorney were covered by attorney-client privilege and appellant did not proffer any facts that would take the statement outside the privilege.

could as easily count in appellant's favor as against appellant. It was only on the witness stand that F. was under oath to tell the truth.

b. Denial of responsibility

Appellant also sees misconduct in the following remarks, made by the prosecutor after she had discussed appellant's confession, "And is anyone really surprised that when he got up on the stand he said no, I didn't do it? I mean, we wouldn't be having a trial if he was willing to say that. He said it then. He said it before the charges were filed. But now here he is at trial. Everything to lose, and he needs you desperately, desperately he needs you to believe something preposterous."

Appellant contends that this argument improperly told the jury not to believe appellant's testimony because he was accused of committing a crime. The trial court found that the prosecutor was arguing only that appellant had a motive to lie, and that this was proper argument.

On appeal, appellant expands his argument and contends that the prosecutor's comments impliedly denigrated the presumption of innocence and the requirement that his guilt be proved beyond a reasonable doubt.

Appellant chose to take the stand and contradict his earlier statements, and so placed his bias, interest and motive in issue.

A defendant who has taken the stand is "clearly 'a person who testified under oath,' [and] . . . a 'witness' and the jury [is] free to 'consider anything in reason that tended to prove or disprove the truthfulness of his testimony, including the existence or nonexistence of a bias, interest or other motive. . . .' (See Evid. Code, § 780, subd. (f) and CALJIC No. 2.20.)" (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1223.) In such circumstances, it is "appropriate for the prosecutor to argue that the jury could consider whether defendant had a motive to lie . . . arising from his interest in the outcome, i.e., to avoid conviction." (*Ibid.*; see also *People v. Dykes* (2009) 46 Cal.4th 731, 769, 774 [prosecutor may challenge defendant's credibility and point out discrepancies between trial testimony and prior statement].) The prosecutor did not commit misconduct.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.