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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MAZEN ADBALLAH ALIAHMAD,

Defendant and Appellant.

2d Crim. No. B280011
(Super. Ct. No. 2009023655)
(Ventura County)

Mazen Adballah Aliahmad appeals from the judgment entered after his conviction by a jury of four counts of committing a lewd act upon a child under the age of 14 years. (Pen. Code, § 288, subd. (a).) As to three counts, the jury found that appellant had substantial sexual conduct with the victim. (*Id.*, § 1203.066, subd. (a)(8).) Appellant was sentenced to prison for 12 years. He was ordered to pay the victim restitution of $100,000.

Appellant was originally tried in 2012. A mistrial was declared because the jury was deadlocked on all counts. Appellant was retried in November 2016. The victim was not

present at the retrial. The trial court found that she was unavailable and admitted her prior trial testimony. Appellant contends that the court erred because the People had failed to exercise due diligence to procure her attendance at the retrial. Appellant also contends that the court erroneously (1) admitted the testimony of the People's expert witness, (2) failed to give a jury instruction sua sponte, and (3) overruled his objection to the prosecutor's cross-examination of character witnesses. Finally, appellant maintains that the trial court erroneously restricted the scope of his closing argument and that the prosecutor committed misconduct during her closing argument. We affirm.

Facts Underlying Appellant's Offenses

In view of the issues raised on appeal, we need not provide a detailed description of the facts. The victim, P.H., was born in 1995. When P.H. was 13 years old, appellant sexually touched her on "[m]ultiple occasions." P.H. eventually reported the touching to her mother, who contacted the police.

The police recorded a pretext telephone call made by P.H. to appellant. The following is an excerpt from the telephone conversation:

"[P.H.]: [Y]ou put your finger inside me.

"[Appellant]: Did it bother you?

"[P.H.]: Well it was in my vagina.

"[Appellant]: But did it bother you?

"[P.H.]: I don't, I don't know.

"[Appellant]: You en--, as much as I did.

"[P.H.]: What?

"[Appellant]: I said you enjoyed it as much as I did.

"[P.H.]: Okay. But . . . do you have condoms, uh, when we're in Havasu?

"[Appellant]: Yeah.

"[P.H.]: You -- so then are we gonna have sex?

"[Appellant]: No. What do you want?

"[P.H.]: Well what do you want to do?

"[Appellant]: We'll talk about it when you and I see each other."

Admission of P.H.'s Prior Testimony from Original Trial

Appellant argues, "The admission of P.H.'s prior testimony violated the Confrontation Clause of the Sixth Amendment because she was not 'unavailable' due to the prosecution's failure to undertake 'good faith' efforts to prevent her absence and secure her attendance at the retrial." (Bold omitted.) The People sought to admit P.H.'s prior testimony pursuant to Evidence Code section 1291, subdivision (a), which provides that such testimony "is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness . . . ."[1] The declarant is unavailable as a witness if she is "[a]bsent from the hearing and the proponent of . . . her statement has exercised reasonable diligence but has been unable to procure . . . her attendance by the court's process." (§ 240, subd. (a)(5).) "[W]hen the requirements of section 1291 are met, the admission of former testimony in evidence does not violate a defendant's constitutional right of confrontation. [Citation.]" (*People v. Herrera* (2010) 49 Cal.4th 613, 621.)

"'The term "reasonable diligence" or "due diligence" under Evidence Code section 240, subdivision (a)(5) "'connotes persevering application, untiring efforts in good earnest, efforts of a substantial character. [Citations.]"'" [Citations.]

[1] Unless otherwise stated, all statutory references are to the Evidence Code.

'Considerations relevant to this inquiry include the timeliness of the search, the importance of the proffered testimony, and whether leads of the witness's possible location were competently explored.' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 68.)

The trial court determined that the People had exercised due diligence in trying to produce P.H. for trial. "We review the trial court's resolution of disputed factual issues under the deferential substantial evidence standard [citation], and independently review whether the facts demonstrate prosecutorial good faith and due diligence [citation]." (*People v. Herrera*, *supra*, 49 Cal.4th at p. 623.) The trial court's finding of due diligence is "presumed correct," and appellant "must affirmatively demonstrate prejudicial error." (*People v. Garza* (2005) 35 Cal.4th 866, 881.)

Sealed Clerk's Transcript

Material facts relating to the due diligence issue are contained in a clerk's transcript that the superior court ordered to be sealed. The apparent reason for the order is that the transcript discloses P.H.'s full name, email address, and telephone number.

We granted the request of appellant's counsel for a copy of the sealed transcript on condition that he not disclose its contents to his client. Counsel filed a publically-available opening brief referring to and quoting from the sealed transcript.

The Attorney General filed an unopposed motion to unseal the clerk's transcript. He noted, "Appellant cites extensively to the sealed transcript in his opening brief." We denied the request but provided him with a copy of the sealed transcript. The Attorney General subsequently filed a publically-available respondent's brief citing extensively to the sealed transcript.

Pursuant to Rule 8.46(f)(2)(A) and (B) of the California Rules of Court, the parties should have filed a public redacted version and a confidential unredacted version of the briefs. Appellant's counsel should have sent the redacted version to his client.

We have no reservations in referring to facts in the sealed transcript that the parties have already disclosed in their briefs. These facts do not reveal P.H.'s identity, contact information, or other confidential information. They are necessary to adequately consider the due diligence issue. In *Sager v. County of Yuba* (2007) 156 Cal.App.4th 1049, 1051, the record was sealed, but the court concluded it "must discuss *some* facts in order to provide an opinion 'in writing with reasons stated' as required by the California Constitution. (Cal. Const., art. VI, § 14.)"

Facts Concerning People's Due Diligence

The material facts concerning the People's due diligence are as follows: The retrial was continued numerous times. In March 2013 when P.H. was still a minor, her mother (mother) telephoned the prosecutor's office to confirm that P.H. had been served with an "on call" subpoena for a retrial date of April 5, 2013.[2] In March 2014, when P.H. was 18 years old, she notified the prosecutor's office that she was designating mother as her "point of contact." In September 2014 P.H. telephoned the prosecutor's office and said that she had been subpoenaed on-call for a retrial date of September 17, 2014. In May 2015 mother informed the prosecutor's office that she had received P.H.'s on-call subpoena for a retrial date of September 2, 2015. Mother "stated that P.H. is out of the country until July." For

[2] "If service is to be made on a minor, service shall be made on the minor's parent . . . ." (Pen. Code, § 1328, subd. (b)(1).)

subsequent continuances of the retrial, the prosecutor's office notified mother that P.H.'s status as a subpoenaed witness was being "trailed . . . on call."

In September 2015 the trial court granted appellant's request to continue the retrial to October 27, 2015. At appellant's request, in October 2015 the retrial was continued to April 20, 2016. Again at appellant's request, in April 2016 the retrial was continued to May 17, 2016. In May 2016 the trial court granted the parties' joint request to continue the retrial to August 9, 2016.

In July 2016 District Attorney Investigator Catherine Mano spoke to P.H. about the retrial. The following day, P.H. emailed Mano that she was in Paris and would be unable to return to the United States until October 2016. In August 2016 the trial court granted the parties' joint request to continue the retrial to October 12, 2016. The court's minute order states that the retrial must begin no later than November 14, 2016.

On October 4, 2016, Mano telephoned P.H. and left a voicemail message. She also texted P.H. Mother telephoned Mano and said she "was currently in Paris, France with P.H." Mother assured Mano that "P.H. would call and speak to [Mano] the following week about making travel arrangements to return to the United States for the pending [re]trial."

On October 10, 2016, Mano texted P.H. and asked her to call about the retrial. P.H. responded that she would call Mano the following day. But the following day P.H. did not contact Mano, even though Mano texted her twice that she wanted to "discuss travel plans for the upcoming [re]trial." Mother telephoned Mano and said she "would do everything she could to get P.H. to court for [re]trial. [Mano] explained to [mother] the

dates [she] planned to have P.H. return to the United States for [re]trial."

On October 12, 2016, the trial court granted the People's request to continue the retrial to November 9, 2016. On October 13 and 14, 2016, Mano tried to telephone P.H. and emailed her "about transportation plans to fly her to the United States for [re]trial." Mano "did not hear back from P.H." On October 25, 2016, Mano again emailed P.H., but she did not respond to the email.

On November 4, 2016, Mano had a telephone conversation with mother, who said that P.H. was in Milan, Italy and "could not return to the United States until after January 1, 2017, . . . due to work obligations. P.H. would like the case to be continued until that time."

The People moved to continue the retrial. Appellant filed written opposition. The trial court denied the motion. The retrial began on November 14, 2016.

The People Carried Their Burden of Showing Due Diligence

Appellant asserts: "[T]he prosecution did not demonstrate good faith because it did not use reasonable means to prevent P.H. from becoming absent. [¶] Despite plenty of opportunity, the prosecution never subpoenaed P.H. for the retrial or attempted any other court process." But as the above factual summary shows, the prosecution served on-call subpoenas for the retrial dates of April 5, 2013, and September 17, 2014. It made a good faith attempt to serve an on-call subpoena for the retrial date of September 2, 2015, but mother said that P.H. was out of the country.

"Also, the prosecution is not required, absent knowledge of a 'substantial risk that this important witness would flee,' to

'take adequate preventative measures' to stop the witness from [becoming absent]. [Citation.]" *People v. Wilson* (2005) 36 Cal.4th 309, 342.) Appellant has not cited evidence in the record showing that, before P.H. left the country, the prosecution had knowledge of a substantial risk that she would refuse to return for the retrial. On September 15, 2014, P.H. emailed the prosecutor, "Do you have any information on the angle that [appellant's] defense is using? I'm not sure how mentally/emotionally healthy it would be for me to dig everything up again." But on December 19, 2014, the prosecutor emailed P.H., "I spoke with your mom a couple weeks ago and she informed me that it was your wish to proceed with the [re]trial and you are ready and willing to testify again." As late as July 22, 2016, P.H. sent an email to Mano indicating that she was willing to return for the retrial: "I leave back to Berlin tomorrow, and because of the nature of my work--I'm a designer for a fashion label--I will not be able to return to the states until after SS17 Paris fashion week which is end of September."

Even if the prosecution had knowledge of a substantial risk that P.H. would refuse to return for the retrial, appellant does not set forth any reasonable measures that the prosecution could have taken to prevent her from traveling to Europe. Appellant claims that the prosecution was "required" to "recommend" that P.H. be taken into custody before she left California. But our Supreme Court has concluded that "confinement of a sexual assault victim to ensure her presence at [her] assailant's trial would . . . not be a reasonable means of securing the witness's presence." (*People v. Cogswell* (2010) 48 Cal.4th 467, 479.) The Supreme Court explained: "Although any crime victim may be traumatized by the experience, sexual assault victims are

particularly likely to be traumatized because of the nature of the offense. . . . It comes as no surprise, therefore, that often a victim of sexual assault is hesitant to report the crime. Even fewer such crimes would be reported if sexual assault victims could be jailed for refusing to testify against the assailant." (*Id*. at p. 478.) "'Trial courts "do not have to take extreme actions before making a finding of unavailability."' [Citation.]" (*Id*. at p. 479.) Sexual assault victims' entitlement to special treatment is shown by Code of Civil Procedure section 1219, subdivision (b), which provides, "[A] court shall not imprison or otherwise confine or place in custody the victim of a sexual assault . . . for contempt if the contempt consists of refusing to testify concerning that sexual assault . . . ."

Appellant faults the prosecution for not making an attempt to compel P.H.'s presence through "Mutual Legal Assistance Treaties" that "[t]he United States has entered into . . . with all members of the European Union." Appellant does not explain how the prosecution could have compelled her presence through these treaties. Moreover, the point is forfeited because in the trial court appellant acknowledged that, because P.H. was living in a foreign country, the prosecution could not compel her presence:

"The Court: . . . [P]ractically speaking, a subpoena from the superior court of Ventura County can't compel her to come from Germany.

"[Defense Counsel]: That's correct.

"The Court: If she doesn't want to come.

"[Defense Counsel]: That's correct. One could exercise a privilege with one's feet. [¶] [¶] And that's the state of the law.

"The Court: . . . [Y]ou can't force her to come from

outside . . . of the country.

"[Defense Counsel]: No."

"It is well established that a party may not change his theory of the case for the first time on appeal. [Citations.]" (*People v.* Borland (1996) 50 Cal.App.4th 124, 129.)

Accordingly, "[a]fter independent review, we agree with the trial court that the prosecution satisfied its burden of showing due diligence." (*People v. Valencia* (2008) 43 Cal.4th 268, 292.)

Admission of Testimony of People's Expert Witness

Dr. Jody Ward, a psychologist, testified for the People as an expert on Child Sexual Abuse Accommodation Syndrome (CSAAS). "'CSAAS cases involve expert testimony regarding the responses of a child [to molestation]. Expert testimony . . . is not admissible to prove the sex crime charged actually occurred. However, CSAAS testimony "is admissible to rehabilitate [the molestation victim's] credibility when the defendant suggests that the child's conduct after the incident—e.g., a delay in reporting—is inconsistent with his or her testimony claiming molestation. [Citations.]"' [Citations.]" (*People v. Perez* (2010) 182 Cal.App.4th 231, 245, first brackets added, second brackets in original.) '"'Such expert testimony is needed to disabuse jurors of commonly held misconceptions about child sexual abuse, and to explain the emotional antecedents of abused children's seemingly self-impeaching behavior.'" [Citation.]" (*People v. Brown* (2004) 33 Cal.4th 892, 906.)

Appellant argues that "the trial court erred in overruling the defense objections" to portions of Dr. Ward's testimony that exceeded the permissible scope of CSAAS testimony. Appellant's citations to the record disclose two objections. The first was to the prosecutor's question, "Now, based on your work evaluating

sex offenders, would you say that it is common for child molesters to maintain normal adult sexual relationships at the same time they molest children?" Defense counsel interjected, "Objection. Beyond the scope and foundation as to CSAAS." The trial court overruled the objection. Dr. Ward responded, "Yes, it is." The prosecutor's question was clearly beyond the permissible scope of CSAAS testimony. It had nothing to do with how children respond to molestation. But the trial court's error is not enough to warrant a reversal. Appellant must show that the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; § 353, subd. (b).) "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citations.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) The "defendant . . . has the burden to show a miscarriage of justice. [Citation.]" (*People v. Ervine* (2009) 47 Cal.4th 745, 771.)

Appellant has not carried his burden. He fails to explain how Dr. Ward's "Yes" answer resulted in a miscarriage of justice. "[O]ur duty to examine the entire cause arises when and only when the appellant has fulfilled his duty to tender a proper prejudice argument. Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice. [Citations.]" (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106; see also *People v. Singh* (2015) 234 Cal.App.4th 1319, 1330 ["it is not enough for an appellant to identify an error in the proceedings in

the trial court without *affirmatively* establishing 'how the error caused a miscarriage of justice'"].)

Appellant's second objection was to the prosecutor's question, "And you mentioned, also, that child molest typically happens in secret, and that it's unusual if it happens when other people are around. Is that an absolute that in your experience there are never people around, or it occurs in situations where the perpetrator is confident that his behavior will go undetected?" Defense counsel interjected: "Objection. Discovery." The trial court overruled the objection. Because the objection was made on the specific ground of "discovery," appellant may not argue on appeal that it should have been sustained on the ground that the prosecutor's question exceeded the permissible scope of CSAAS testimony. (§ 353, subd. (a); *People v. Harrison* (2005) 35 Cal.4th 208, 239.)

Appellant asserts that the prosecutor committed misconduct because he "exploited" the inadmissible CSAAS testimony "by making highly improper arguments during summations." But appellant cites no instance where the prosecutor "exploited" Dr. Ward's testimony that it is common for child molesters to have normal adult sexual relationships.

Alleged Failure to Instruct Sua Sponte Pursuant to CALCRIM No. 1193

Appellant maintains that the trial court erroneously failed to instruct sua sponte on CSAAS testimony pursuant to CALCRIM No. 1193. The instruction would have provided as follows: "You have heard testimony from Dr. Ward regarding child sexual abuse accommodation syndrome. Dr. Ward's testimony about child sexual abuse accommodation syndrome is not evidence that the defendant committed any of the crimes

charged against him. You may consider this evidence only in deciding whether or not P.H.'s conduct was not inconsistent with the conduct of someone who has been molested, and in evaluating the believability of her testimony."

The Bench Notes to CALCRIM No. 1193 state: "Several courts of review have concluded there is no sua sponte duty to give this instruction when an expert testifies on child sexual abuse accommodation syndrome. (*People v. Mateo* (2016) 243 Cal.App.4th 1063, 1073-1074 . . . ; *People v. Sanchez* (1989) 208 Cal.App.3d 721, 736 . . . and *People v. Stark* (1989) 213 Cal.App.3d 107, 116 . . . . But see *People v. Housley* (1992) 6 Cal.App.4th 947, 958–959 . . . , which did find a sua sponte duty to give this instruction." We elect to follow the decisions finding no duty to give the instruction sua sponte. (See *People v. Mateo*, *supra*, 243 Cal.App.4th at pp. 1073-1074 [court explains why it disagrees with *Housley*].)

Appellant claims that defense counsel "was ineffective for failing to request the instruction." "To demonstrate ineffective assistance of counsel, a defendant must show that counsel's action was, objectively considered, both deficient under prevailing professional norms and prejudicial. [Citation.] To establish prejudice, a defendant must show a reasonable probability that, but for counsel's failings, the result of the proceeding would have been more favorable to the defendant. [Citation.]" (*People v. Seaton* (2001) 26 Cal.4th 598, 666.)

Appellant's claim of ineffective counsel is forfeited because it is not supported by meaningful legal analysis. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408.) In any event, "[b]ecause the record sheds no light on why counsel did not request CALCRIM No. 1193, we cannot reach the merits of the claim of ineffective

assistance of counsel. . . . As a tactical matter, competent counsel could rationally conclude that it would be counterproductive to request an instruction highlighting expert testimony supporting the victim's credibility." (*People v. Mateo*, *supra*, 243 Cal.App.4th at p. 1076.)

Overruling of Objection to Prosecutor's Cross-Examination of Character Witnesses

Appellant called several witnesses to testify that his character is inconsistent with that of a child molester. During cross-examination of the witnesses, the prosecutor played or read excerpts from the pretext telephone call that P.H. had made to appellant. The prosecutor then asked whether the telephone call had changed the witness's opinion of appellant's character. Appellant asserts, "The trial court erred in overruling the defense objection [to the cross-examination] . . . about whether the pretext call changed their opinions of [appellant]." Appellant argues: "This type of cross-examination constituted error because it essentially allowed the prosecutor to ask the witnesses to evaluate the evidence presented to the jury and then render an opinion on guilt. . . . The prosecutor's questions were 'tantamount' to asking the witnesses whether the pretext call demonstrated to them that [appellant] was guilty." "A witness may not express an opinion on a defendant's guilt. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 77.)

Appellant's claim of improper cross-examination has not been preserved for appellate review. He objected only during cross-examination of the first character witness, Juliette Benshaw. When the prosecutor said, "I would ask the Court for permission to play that pretext call," defense counsel interjected:

"Objection. [Section] 352.[3] Improper cross. Improper opinion." The trial court overruled the objection. After the pretext call was played, the prosecutor asked Benshaw, "Assuming . . . that P.H. is 13 years old when she made this phone call, does that change your opinion as to whether [appellant] has the characteristics of a child molester?" Appellant objected, "Incomplete hypothetical." The trial court overruled the objection. Benshaw answered, "Yes, it would change my opinion." Because appellant failed to object on the ground that the question sought to elicit an improper opinion on his guilt, the issue is forfeited. (§ 353, subd. (a); *People v. Harrison*, *supra*, 35 Cal.4th at p. 239; see also *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 76 ["by failing to make a contemporaneous objection," defendant forfeited contention "that in response to the prosecutor's cross-examination, [a codefendant] gave inadmissible opinion testimony on the central question of [defendant's] guilt"].)

Had appellant preserved the issue for appellate review, we would conclude that the prosecutor did not ask the character witnesses to render an opinion on appellant's guilt. The prosecutor sought to impeach their testimony that appellant did not have the character trait of a child molester. This was proper cross-examination. "When, as here, a witness is called to express an opinion as to the good character of the defendant, the prosecution must have the opportunity to let the jury test the

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[3] Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

validity of the opinion or the weight to be given to it by asking whether the holder of the opinion has knowledge of events or acts which have indisputably occurred." (*People v. Hempstead* (1983) 148 Cal.App.3d 949, 954.) "[T]he price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him. [Citations.]" (*People v. Eli* (1967) 66 Cal.2d 63, 78.)

Alleged Misconduct by Prosecutor during Closing Argument

Appellant contends, "Even if the cross-examination of the character witnesses did not constitute error, the prosecutor committed error when she argued the evidence in summations." The contention is forfeited because appellant's record citations do not show that he objected to the argument about the character witnesses and requested that the jury be admonished to disregard it. ""'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.]'" [Citations.] If an objection has not been made, "'the point is reviewable only if an admonition would not have cured the harm caused by the [prosecutor's] misconduct." [Citations.]' [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1000-1001.) Appellant has failed to show that a timely admonition would not have cured any harm.

Appellant takes issue with the following excerpt from the prosecutor's closing rebuttal argument: "[T]he defense attorney spoke to you for over two hours yesterday and this morning, . . . never once addressing the [pretext] phone call, and today spending approximately ten minutes on [the phone call] in the

nearly three-hour closing argument. [¶] And why is that, ladies and gentlemen? It is because that call is devastating . . . to the defendant. . . . [¶] And that's why in all of those words that you just heard, you heard ten minutes' worth on that phone call. Instead what you heard is blame the victim, shame the victim. It is a tale as old as time, and it's something that I hear all the time. [¶] [¶] [¶] But it makes it no less sickening every time I hear it. If a child ever had any doubts about bringing allegations of sexual abuse, [appellant's] closing argument tells you you might as well just keep your mouth shut. [¶] [¶] [¶] Because your character is going to be filleted. It is going to be destroyed." Appellant twice objected to the prosecutor's comments, but the trial court overruled the objections.

Appellant maintains that in the above argument "[t]he prosecutor injected her personal views and experiences outside the facts of this case, which is improper." "[T]he argument also improperly denigrated [appellant's] counsel" and "the inflammatory and personal language was an improper appeal to the jurors' passions."

"[A] prosecutor [may not] express a personal opinion or belief in a defendant's guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor's command, other than evidence adduced at trial." (*People v. Bain* (1971) 5 Cal.3d 839, 848.) The prosecutor here did not express a personal belief in appellant's guilt. She merely responded to accusations made against P.H. during appellant's closing argument. For example, defense counsel said P.H. was a liar who had "tattle[d] on [appellant] to the police so that he can get arrested for dog beating, being a habitual drunk, smoking cigarettes. God only know what's in this witness's mind."

Defense counsel continued: "We've seen evidence in this case that P.H. thinks that she's better than all of us. . . . P.H. is trying to play us like a fiddle." P.H. is "a thief" and "a morally bankrupt individual." "She's flying her flag, and she's telling you that she can steal scooters because she's better than you, better than me, better than [appellant]." She has a "motive for lying" so she can bring a civil lawsuit against appellant. "So it's one of two things, . . . either she's clearly psychopathic with no conscience, with no empathy, with no caring for anyone except herself or she's a liar."

Defense counsel went so far as to accuse the prosecution of unethical conduct: "[W]hat happened is the prosecution took the complaining witness [P.H.], gave her [the transcript of] Detective Nicholson's interview [of her], and told her to get on the stand and repeat it. That is what happened in this case." "The D.A. gave her the script." "Folks, she was scripted and she reviewed it with the prosecution." "You know now, well, the witness was scripted, yeah. As surely as my pen is blue, that witness sat down with . . . Mr. Dunlevy [the prosecutor in the original trial but not the retrial] and went over her script."

"In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 978, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) In view of defense counsel's disparaging comments about the victim and the prosecution, the prosecutor's rebuttal argument was a fair response to those comments. (See *People v. Medina* (1995) 11 Cal.4th 694, 759 [prosecutor's criticism of "defense counsel for

suggesting to the jury that the law enforcement witnesses may be lying" was "fair comment"].)

Trial Court's Restriction of Scope of Appellant's Closing Argument

The prosecutor objected to defense counsel's closing argument that P.H. had a financial motive to lie so she could "bring a civil lawsuit" against appellant. The ground for the objection was that the argument "[a]ssumes facts not in evidence." The trial court sustained the objection, but it did not strike the argument or admonish the jury to disregard it. Defense counsel then told the jury, "It [the lawsuit] has not yet been filed, but it's possible." The prosecutor did not object, but the court stated: "There's no evidence of that. Sustained." Appellant argues that the court erroneously restricted counsel's argument because "it was not an unreasonable inference . . . to argue that P.H. could obtain a significant financial award in the courts."

"Trial courts have broad discretion to control the duration and scope of closing arguments. [Citation.] [¶] We review a trial court's decision to limit defense counsel closing argument for abuse of discretion. [Citation.]" (*People v. Simon* (2016) 1 Cal.5th 98, 147.) The trial court here did not abuse its discretion. "It is axiomatic that counsel may not state or assume facts in argument that are not in evidence." (*People v. Stankewitz* (1990) 51 Cal.3d 72, 102.) Appellant has not cited any evidence in the record suggesting that, when 16-year-old P.H. testified at the original trial in June 2012, she was influenced by a financial motive.

In rebuttal closing argument, the prosecutor stated: "For the defense to even suggest to you that P.H. may possibly file

some future lawsuit is so inappropriate." "[T]he idea that she went through this to get money is pure speculation not supported by one piece of evidence, and it is improper for you to even consider that." Appellant claims that the prosecutor's argument was misleading because she "sought and obtained $100,000 in noneconomic damages on behalf of P.H. at the time of [appellant's] sentencing." But the prosecutor's actions at the time of sentencing in January 2017 have no bearing on the credibility of P.H.'s trial testimony in June 2012.

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Charles W. Campbell, Judge

Superior Court County of Ventura

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