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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DARIEL SHAZIER, Defendant and Appellant.	H028674 (Santa Clara County Super. Ct. No. 210813)

Defendant Dariel Shazier was adjudged a sexually violent predator (SVP) and subjected to involuntary civil commitment under the Sexually Violent Predators Act (SVPA or Act). (Welf. & Inst. Code, § 6600 et seq.)

In this appeal from the commitment order, defendant asserts a claim of prosecutorial misconduct.

For reasons explained below, we accept defendant's claim, and reverse the order of commitment.

STATEMENT OF THE FACTS AND CASE

As a result of two cases in 1994, in which defendant pleaded guilty to the sexually violent offenses of sodomy with a minor under the age of 14 (Pen. Code, § 286, subd. (c)); sodomy with a minor under the age of 18 (former Pen. Code, § 286, subd. (i)); and oral copulation where the victim is unable to resist due to an intoxicating substance (Pen. Code, § 288a, subd. (i)), defendant was sentenced to 17 years 8 months in state prison.

In April 2003, the Santa Clara County District Attorney filed a petition to commit defendant as a SVP (Welf. & Inst. Code, § 6600 et seq.). The first jury trial resulted in a mistrial because of a hung jury.

The second jury trial was conducted in March 2005. During the trial, Doctors John Hipka and Craig Updegrove testified for the prosecution regarding their evaluations of defendant's psychological condition. Both doctors diagnosed defendant with paraphilia not otherwise specified and personality disorder with narcissistic and antisocial features. Both doctors believed that based on defendant's past criminal conduct, his diagnosed mental disorders affected his emotional and volitional capacity, making it likely defendant would reoffend in a sexually violent predatory manner if released. Both doctors gave defendant a six on the Static 99 risk assessment tool, which correlates with a 52 percent chance of reoffending within 15 years.

As part of the defense case, Dr. Robert Halon testified regarding his assessment of defendant in October 2004. Dr. Halon testified that he administered several different psychological tests to defendant, and found that defendant did suffer from a mental disorder, but Dr. Halon disagreed with Doctors Hipka and Updegrove's diagnosis of paraphilia.

In addition to Dr. Halon, the defense presented Bret Boyle and Kirk Kramera, two psychiatric technicians that worked in defendant's Atascardero State Hospital housing unit, who testified to their daily observations of defendant. Both men testified that while the SVP unit was a place where inappropriate sexual conduct occurred regularly, defendant never participated in such conduct. Both technicians testified that defendant did not demonstrate any violent or sexually inappropriate behavior while housed in the unit, and did not participate in any grooming behavior of younger patients. The technicians further testified that defendant was "[c]ooperative, polite . . . compliant with the unit rules and routine, staff direction."

Following the second jury trial in March 2005, the jury found true that defendant was a SVP within the meaning of the Act, and the court ordered defendant committed for two years. Defendant filed a timely notice of appeal.

DISCUSSION

On appeal from the civil commitment order, defendant asserts the prosecutor committed misconduct by informing the jury of the consequences of a "true" finding. In addition, defendant asserts the trial court erred by failing to grant defendant's motion for a mistrial due to prosecutorial misconduct.

Factual Background

At defendant's first trial that ended with a hung jury, the court granted a defense request that witnesses be "prohibited from telling the jury what would happen . . . if the petition is found [to be] true." The prosecution did not object to the request.

In the second trial, defendant again requested that witnesses "be prohibited from telling the jurors that [defendant] would not go to prison, but would go to a hospital and receive treatment and no mention should be made of the right to have a trial after two years." The trial court again granted the motion.

During the rebuttal closing argument, the prosecutor stated: "[Y]ou're not supposed to let penalty or punishment factor into your decision. You're not supposed to let the consequences of your decision factor into your decision. [¶] And that's a difficult thing to do. But you should all do it, and let me tell you one reason why. And that is that if you do speculate about the consequences of your decision, you're probably going to guess wrong. *And I'm not trying to insult anybody here, but let me just tell you it's best if you don't speculate about what the consequences will be, and then you can ask afterwards. We can talk about it afterwards. It's no secret.* [¶] . . . [¶] The defense has had some testimony about how difficult a place Atascadero State Hospital is. It's a stressful environment, that sort of thing. And that testimony is intended at least in part to make you think sympathetically towards the [defendant]. [¶] . . . [¶] [*Y*]*ou should not*

make a decision based on what you think it's going to be like for the [*defendant*] *in Atascadero State Hospital*. That's not for you." (Italics added.)

Following this argument, defense counsel objected, approached the bench and asked for a mistrial on the ground that the argument violated the court's in limine order by informing the jury of the consequences of a true finding. The prosecutor responded that he did not intend to inform the jury of the consequences of their decision, that instead, he was trying to refute defendant's argument that Atascadero State Hospital was a difficult place to be. In response, defense counsel stated that her purpose in presenting evidence of the conditions at Atascadero State Hospital was to show that defendant "was cooperative under those circumstances. [¶] . . . [The evidence was not offered] to say to the jury this is what Atascadero is like, don't send him back there."

Prosecutorial Misconduct

Prosecutors are given " ' " 'wide latitude' " ' " in trying their cases. (*People v. Hill* (1998) 17 Cal.4th 800, 819 [wide latitude given in closing argument].) "Prosecutors, however, are held to an elevated standard of conduct." (*Ibid.*) The imposition of this higher standard is justified by their "unique function . . . in representing the interests, and in exercising the sovereign power, of the state." (*Id.* at p. 820.) "The applicable federal and state standards regarding prosecutorial misconduct are well established." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).) Under federal constitutional standards, a prosecutor's " ' "intemperate behavior" ' " constitutes misconduct if it is so " ' " 'egregious' " ' " as to render the trial "fundamentally unfair" under due process principles. (*Ibid.*) Under state law, a prosecutor commits misconduct by engaging in deceptive or reprehensible methods of persuasion. (*Ibid.*) Where a prosecutor has engaged in misconduct, the reviewing court considers the record as a whole to determine if the alleged harm resulted in a miscarriage of justice. (*People v. Duncan* (1991) 53 Cal.3d 955, 976-977.) In considering prejudice "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a

reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*Samayoa, supra,* 15 Cal.4th at p. 841.)

In SVP proceedings, the law is clear that the trier of fact may not consider the consequences of a finding that a person meets the SVPA commitment criteria. (*People v. Rains* (1999) 75 Cal.App.4th 1165, 1169 (*Rains*).) In *Rains*, the defendant objected to the prosecution's evidence about the consequences of a true finding. The Court of Appeal found the trial court erred in overruling the objection, because such evidence was irrelevant to the question of whether the defendant met the criteria of the SVPA. (*Id*. at p. 1170.) The court deemed the error harmless, however, because it concluded that it was not reasonably probable that the defendant would have had a more favorable result absent the error. (*Ibid.*)

In this case, the prosecutor's comments during his rebuttal argument violated not only the court's in limine order prohibiting reference to the consequences of a true finding, but also the proscription against such comments set forth in *Rains*. Indeed, the trial court found that the prosecutor's statements were improper, stating: "I can't think of a reason why the jury needs to hear those [comments]. I don't think they're useful, and I think they're dangerous ground." The court further stated: "Part of the phrases in one of [the prosecutor's] arguments was that you didn't want the jury to—to think what it's going to be like for [defendant] at Atascadero, which seems to suggest that he's going to go to Atascadero."

Our Supreme Court in *Samayoa* stated that a prosecutor commits misconduct by using deceptive and reprehensible means of persuasion. (*Samayoa, supra,* 15 Cal.4th at p. 841.) So too we find the prosecutor's comments here to be deceptive and reprehensible in addition to being in direct contravention of the trial court's orders. We are especially troubled by the fact that the prosecutor made the comments after not one

but two in limine orders[1] that he not make reference to the consequences of a true finding. In spite of the court orders, however, the prosecutor specifically told the jury in his final, rebuttal argument in no uncertain terms "you should not make a decision based on *what you think it's going to be like for [defendant] in Atascadero State Hospital*." (Italics added.) We agree with defendant's trial counsel that such statement made it "crystal clear to this jury. Don't worry about [defendant], he's just going to the hospital. He'll get his treatment."

We are not persuaded by the prosecutor's explanation that his motive for the rebuttal argument was to dispel any sympathy defense counsel may have created in her questions regarding the environment at Atascadero. The prosecutor stated: "[The] stressful environment [at Atascadero has] no relevance whatsoever and I think were only offered to try to create among the jury sympathy for the [defendant]." Notably, he did not object to defense counsel's questions regarding the conditions at Atascadero when they were first presented on relevance ground. Moreover, the issue of defendant's conduct under the conditions at Atascadero was relevant to the question before the jury—namely whether defendant suffered from a mental disorder that created a "well-founded risk that he will commit sexually violent predatory crimes if free in the community." (CALJIC 4.19.) The prosecutor's argument that he was trying to diminish juror sympathy toward defendant is unfounded.

Given the two in limine orders, and the fact that the court sustained defense objections to prosecution questions related to consequences, it is apparent the prosecutor knew exactly what he was saying in his rebuttal, and had a definite purpose in his references to defendant staying at Atascadero State Hospital. We find the prosecutor committed misconduct in his rebuttal argument.

[1] The first in limine order occurred in the first trial that resulted in a hung jury.

Waiver

In this appeal, the Attorney General asserts that even if the prosecutor committed misconduct, the issue has been waived, because defense counsel did not request a curative instruction in the trial court. "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 made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*Samayoa, supra,* 15 Cal.4th at p. 841.) However, an exception to the general rule of waiver exists when an objection and/or request for an admonition would be futile. (*People v. Hill, supra,* 17 Cal.4th at p. 820.)

Although defense counsel did not seek a curative instruction in the trial court, we do not deem the issue of prosecutorial misconduct waived on appeal. Here, defense counsel made every possible effort to object to the prosecutor's improper references to the consequences of a true finding-by successfully securing an in limine order prohibiting the references, by objecting to prosecution questions related to consequences that the trial court sustained, and by objecting to the prosecution's rebuttal arguments as improper and asserting her reasons for requesting a mistrial on the record.

A request for a curative instruction would have been futile in this case given the timing of the prosecution's comments at the end of his rebuttal arguments, leaving the comments fresh in the jurors' minds entering deliberations. Moreover, a curative instruction at the end of the prosecutor's rebuttal would have served to further highlight the issue of consequences—an issue that defendant was clearly trying to avoid.

Prejudice to Defendant

Having determined that the prosecutor committed misconduct in this case, we now turn to the question of whether it is " 'reasonably probable that a result more favorable to the defendant would have occurred' absent the misconduct. [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 753.)

Here, the prosecutor's comments could not have come at a more critical point in the proceedings. They were timed at the end of his rebuttal argument rather than in the middle of the trial, leaving them as the last few words the jury heard from the parties. Moreover, the comments were not brief as the Attorney General suggests. Rather, we note when viewed in the context of the rebuttal argument, the comments encompass a page and a half of trial transcript from the first comment to the last. These were not mere passing references that could be overlooked; rather, they constituted a carefully crafted message to the jury that if they were to find the allegations true, defendant would not be sent to prison, but instead would go to Atascadero State Hospital for treatment. We have no question that given the timing of the delivery, as well as the content of the message, the prosecutor's comments impacted the jury.

In addition, and perhaps more important to our evaluation of prejudice is the fact that this was a close case. We do not accept the Attorney General's assertion that "the evidence overwhelmingly demonstrated that [defendant] was [a] SVP." Indeed, the fact that the first trial ended with a hung jury demonstrates how close the case really was. Moreover, in the second trial, the prosecutor's experts, Doctors Hipka and Updegrove testified that, based on psychological tests they administered, defendant had a 52 percent likelihood of reoffending within 15 years. This conclusion is akin to an opinion that defendant is *slightly more likely than not* to reoffend within 15 years. In addition, defendant presented his own evidence not only that he did not suffer from paraphilia, but also that he did not demonstrate violence or sexually inappropriate behavior at Atascadero, nor did he groom younger patients as potential victims.

The present case can be distinguished from *Rains* in which the court found it harmless error for the jury to be informed of the consequences of its finding. In *Rains*, the defendant presented almost no evidence at all, leaving the prosecution's experts' opinion that Rains had a mental disorder and was likely to reoffend uncontroverted. (*Rains*, *supra*, 75 Cal.App.4th at p. 1170.) In addition, the testimony regarding the

consequences of a true finding was relatively brief, and both the prosecutor and the court advised the jury not to consider what should happen with defendant. (*Id*. at p. 1171.)

While here it is true that the court instructed the jury as it did in *Rains* that it should "reach a just verdict regardless of the consequences," and that it was improper for the jury to consider "what disposition . . . or what treatment [defendant] may receive as a result of their verdict," any similarity to the *Rains* case ends there. (CALJIC 4.19, 17.42.) Unlike *Rains*, defendant here presented significant evidence on his own behalf, certainly enough to raise a doubt as to the prosecutor's experts' opinion that defendant was more likely than not to reoffend. In addition, as discussed above, unlike *Rains*, the prosecutor's comments in this case were not brief or passing references, occupying a page and a half of transcript from the first comment to the last.

In light of the entirety of this case, including the fact that the prosecution evidence was not overwhelming, and that defendant presented strong evidence on his own behalf, we find the prosecutor's comments in violation of the limine order in the trial court and the proscription set forth in *Rains*, to be prejudicial defendant. In addition, we find it " 'reasonably probable that a result more favorable to the defendant would have occurred' absent the prosecutor's misconduct" in this case, and reverse the judgment accordingly. (*People v. Welch, supra,* 20 Cal.4th 701, 753.)

DISPOSITION

The judgment is reversed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

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Trial Court:	Santa Clara Superior Court Superior Court No.: 210813
Trial Judge:	The Honorable Alfonso Hernandez
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