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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. FERNANDO LOPEZ LOPEZ, Defendant and Appellant.	B182877 (Los Angeles County Super. Ct. No. BA271983)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ruth Ann Kwan, Judge. Reversed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Michael A. Katz, Deputy Attorneys General, for Plaintiff and Respondent.

Fernando Lopez appeals from the judgment entered following a jury trial in which he was convicted of four counts of committing a lewd act on a 14- or 15-year-old child who was at least 10 years younger than defendant (counts 1–4) and sexual battery by restraint (count 5), in each of which the jury further found that the victim was particularly vulnerable and defendant exploited a position of trust and planned the conduct; child molesting (counts 6 and 8); and sexual battery (count 7). (Pen. Code, §§ 288, subd. (c)(1); 243.4, subd. (a); 647.6, subd. (a); 243.4, subd. (e)(1); all further undesignated section references are to the Penal Code.) Defendant contends that the prosecutor committed prejudicial misconduct in closing argument and that the jury received erroneous instructions. We agree that there was prejudicial misconduct and on this basis reverse without discussing the instructional issue.[1]

BACKGROUND

Defendant, a Catholic priest, was assigned to a Los Angeles parish in 2001. The parishioners were mostly low-income Hispanics. Each parish priest had his own living quarters, including a bedroom, bathroom, and sitting room. Church policy prohibited priests from allowing minors in their private quarters or vacationing with them. The policy also discouraged priests from having minors ride with them in cars. Defendant attended a meeting at which these policies were discussed, and defendant's pastor thought that defendant understood them.

Gerardo V. testified (regarding counts 1 through 4) that he was 13 years old when he first met defendant in confession. Afterward, defendant came to Gerardo's home regularly to visit Gerardo's ill grandmother. Defendant once drove Gerardo to get some food for his grandmother. While the two were in the car, defendant masturbated Gerardo. On another occasion, when Gerardo asked to confess, defendant took Gerardo to

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[1] A contention regarding the statute of limitations was withdrawn in defendant's reply brief.

defendant's quarters, where he masturbated and orally copulated Gerardo. Defendant also placed Gerardo's hand on defendant's penis over defendant's clothing. While there, Gerardo saw a piano in defendant's quarters. On another trip to buy food for Gerardo's grandmother, defendant masturbated Gerardo, and on a later similar trip, defendant masturbated and orally copulated Gerardo. And on an occasion while defendant was driving Gerardo to the hospital to visit his grandmother, defendant placed his hand inside Gerardo's pants and touched his penis.

Luis B. testified (regarding count 5) that when he was 19 or 20, he was in church to speak to a priest when defendant told him to go to the church office. Luis did so and defendant took Luis to defendant's bedroom where defendant removed his own pants and placed Luis's hand on defendant's penis. Defendant then helped Luis remove Luis's pants and touched Luis's penis. Defendant masturbated himself. Then defendant told Luis to go to church and say 10 "Our Fathers" and God would forgive Luis.

Nicholas M. testified (regarding counts 6–8) that he met defendant while visiting Nicholas's brother, who volunteered as a secretary at the parish. When Nicholas was 17, defendant offered to take him out to eat. On the drive, defendant rubbed Nicholas's thigh and touched Nicholas's penis outside of Nicholas's clothing. Defendant attempted to place his hand under Nicholas's waistband, but Nicholas resisted defendant's efforts. While on a church sponsored retreat in Victorville, Nicholas confessed to defendant. Defendant rubbed Nicholas's leg. Finally, after a ceremony at church, defendant took Nicholas to the basement, where he rubbed Nicholas's knee.

Gerardo, Luis, and Nicholas testified that they did not know each other. Photographic evidence established that defendant's quarters contained a piano.

Defendant testified in own behalf and denied committing any of the lewd acts described by the complaining witnesses. Defendant said he first met Luis when Luis testified at the preliminary hearing. Defendant denied taking any minor into his quarters. He admitted having Gerardo in his car during visits to Gerardo's grandmother and her

family but denied any physical contact. He admitted driving Nicholas to a restaurant but denied ever being in the church basement with him. Defendant admitted he may have hugged Nicholas while participating in a church activity and slapped his thigh during the trip to the restaurant but denied any other physical contact.

DISCUSSION

A Catholic priest, like any other defendant, is entitled to a fair trial. Instead, defendant here got a trial in which the prosecutor in argument appealed to the jury's passions, prejudices, and sympathy; alluded to facts outside the record; and expressed her personal belief in defendant's guilt.[2]

The general "federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . 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.] 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.'"' [Citation.] . . . Additionally, 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.]" (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841; *People v. Wilson* (2005) 36 Cal.4th 309, 337.)

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[2] Defendant acknowledges that he failed to object to any of the challenged argument and that such failure generally waives the issue on appeal. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1996) 9 Cal.4th 1196, 1215.) Defendant argues, however, that his trial counsel was ineffective for failing to object and that the challenged arguments prejudiced him. We agree that trial counsel was ineffective for failing to object and that the challenged arguments prejudiced defendant. Accordingly, we address the substance of defendant's contentions.

During the opening portion of final argument, the prosecutor said: "[H]ow do we assess [defendant's] credibility? [I]t is not enough to bolster his credibility that the defendant is a priest in the Catholic Church. And I imagine [defense counsel] will make much of that fact, the fact that he is a priest. And he will want you, as defendant did, . . . to think about the fact that priests do good works and they are motivated by good intentions. But we know that priests are human just like any other person. They commit sins as the defendant said, and *they commit crimes, and they commit horrendous crimes*." (Italics added.)

The prosecutor next argued: "The defendant also revealed in direct examination with me [*sic*] a general philosophy, for lack of a better word, that rules do not apply for him. He made it very clear that he was given a lot of training, that [his pastor] explained to you as well, about how to behave with minors here in Los Angeles. *And we all know why those rules are in place. This is not a surprise to any of us that the Church has these rules*." (Italics added.)

These arguments constitute misconduct. The prosecutor's reference to "horrendous crimes" committed by priests was not an allusion to some abstract or historical figure. Rather, given the almost daily news accounts of the scandal in the Catholic Church over pedophile priests, the jury was certain to think the prosecutor was referring to this scandal and suggesting that defendant played a part in it. Arguing guilt by association constitutes misconduct. (*People v. Castaneda* (1997) 55 Cal.App.4th 1067, 1072; *People v. Galloway* (1979) 100 Cal.App.3d 551, 563–564; see also *People v. Samayoa*, *supra*, 15 Cal.4th at p. 841 [in determining prosecutorial misconduct, "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"].)

As for any notion that defense counsel introduced the pedophile priest scandal into closing argument, defense counsel mentioned it briefly twice in urging that defendant not be considered guilty simply because he was a priest charged with molesting minors.

Defense counsel also argued that the complaining witnesses knew of the scandal and of monetary settlements between the Catholic Church and victims. But that was *after* the prosecutor made the comment noted above, so in no way did defense counsel open the door for the prosecutor to allude to the scandal.

At a later point in the prosecutor's argument, as part of discussing the significance of the complaining witnesses' ability to recall details and anticipating a defense argument that their inability to remember some details undermined their credibility, the prosecutor said: "And put yourself in that situation. . . . I will pick someone at random. Juror number 12. I'm going to take Juror 12 back in the jury deliberation room. I'm going to take a flashlight and beat him up bad. I won't really. And it's going to last about 10 minutes. And then you are going to leave and you are never going to go in that room again. And four years from now I'm going to put you on that witness stand and I'm going to say 'What magazines were on that side table? What color was the rug?' Are you going to remember the flashlight? Are you going to remember me? Are you going to remember maybe what you are wearing and how many stitches you got in your head? Probably. Are you going to remember the color of the carpet? No. Does that mean that you are not going to accurately remember and testify about me beating you up? No."

In comparing Gerardo's and defendant's testimony regarding the molestation that Gerardo testified happened in defendant's living quarters and defendant's claim that Gerardo was never there, the prosecutor referred to photographs of defendant's quarters that show a piano and continued: "Now what does this mean? What do these pictures mean? This means that the defendant is lying when he says that Gerardo was never upstairs. Think about it this way: If I picked one of you out at random. Juror number five. And I said, 'Tell me what's in my bedroom.' You could probably guess some stuff and get it right. You'd say bed. You'd say dresser. You'd say alarm clock. And from those answers no one would know whether you have been in my bedroom or not . . . because I have all those things in my bedroom. Everybody has those things in their

bedroom. [¶] What if you said something really weird? I have this weird clock that's made from the head of a baby doll and then on top of it is this dial that comes up. It's very weird. . . . If you, juror number five, said 'There's this weird clock with a baby head and dial that freaked me' people would know . . . that is something specific and unusual that [lets] us understand that he's actually been in my bedroom. [¶] Well, a piano is a weird thing to have in your room, right? And what did Gerardo describe when [defense counsel] was pushing him about what is in that room? He didn't say bed or chest of drawers. He said piano and there's a piano in that room."

Thus, the prosecutor asked two of the jurors to place themselves in the position of a crime victim who is called to the witness stand and asked detailed questions about the scene of the crime. What the prosecutor was doing was asking the jurors to stand in the shoes of the victim witnesses. This is misconduct. As stated in *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318 [114 S.Ct. 1526, 128 L.Ed.2d 293], "an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of a trial . . . ."

Finally, during rebuttal argument, in responding to defense counsel's argument that he "believe[d]" defendant when defendant said "'I didn't do this,'"[3] the prosecutor stated that defense counsel's thorough questioning of the victims bolstered rather than undercut their credibility by showing the witnesses' consistency, recall of detail, and willingness to correct factual misstatements by counsel. The prosecutor continued: "I don't think [defense counsel] is mean or stupid. But I think his client is guilty."

This argument was also improper. It was not based on the evidence, and immediately following the comment, the prosecutor discussed an issue of law, thereby making the statement stand out as an opinion not necessarily based on the evidence. A prosecutor may not "express a personal opinion or belief in a defendant's guilt, where

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[3] The trial court sustained the prosecutor's arguing-outside-the-evidence objection to this statement by defense counsel.

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. The danger is acute when the prosecutor offers his opinion and does not explicitly state that it is based solely on inferences from the evidence at trial." (*People v. Bain* (1971) 5 Cal.3d 839, 848.)

We conclude that defendant was prejudiced under *People v. Watson* (1956) 46 Cal.2d 818, 836. Three minors testified against defendant, who denied the charges. There were no independent witnesses or any confession or material admissions. Simply counting three against one will not do.

Appellate courts are the last resort against prosecutorial misconduct. We ought to be careful lest the harmless error rule swallow the principle that a defendant is entitled to a fair trial. Because defendant did not receive one, we must reverse.

DISPOSITION

The judgment is reversed. Pursuant to Business and Professions Code section 6086.7, subdivision (b), the clerk of this court is directed to send a certified copy of this opinion to the State Bar.

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MALLANO, Acting P. J.

I concur:

VOGEL, J.

ROTHSCHILD, J., Dissenting.

Although I agree with much of the majority's criticism of the prosecutor's argument, no single inappropriate comment standing alone or all of them viewed together warrant reversal of defendant's conviction. First, although some of the comments were inappropriate, given the rules governing our review of this issue and the entire context of the trial, including voir dire and defense counsel's own argument, they did not amount to misconduct. The trial court instructed the jurors pursuant to CALJIC Nos. 1.00 and 1.02 that the attorneys' statements were not evidence, that they must follow the law as given by the court and ignore contrary statements by the attorneys, and that they must not decide the case based on sympathy or prejudice. "Moreover, we presume that the jury relied on the instructions, not the arguments, in convicting [the] defendant. '[I]t should be noted that the jury . . . could totally disregard *all* the arguments of counsel.' [Citation.] . . . [We also presume] that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 47.) In addition, "'we "do not lightly infer" that the jury drew the most . . . rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 338.) Lopez' attorney, not the prosecutor, repeatedly and directly referred to the priest-sexual abuse cases, both to suggest that the jurors should reject the prosecutor's evidence because the case was brought in response to public pressure, and to undermine the victims' credibility by arguing that they made the claims for pecuniary reasons. In contrast, the prosecutor's challenged comments, even if improper when viewed in isolation, were part of a generally proper argument.

Second, although I agree that we must be careful lest the harmless error rule swallow the principle that the defendant is entitled to a fair trial, I see no danger to that principle in affirming the conviction in this case. The evidence against the defendant was very strong. The three victims did not know each other and the events occurred during different time periods, yet their testimony revealed a strikingly similar pattern of

molestation. Further, nothing impeached the victims' version of the events. Defense counsel's only impeaching argument was that the victims reported the molestation for pecuniary advantage, but nothing in the manner in which these crimes came to the attention of the police suggested improper motives. I therefore disagree that the unimpeached testimony of three unrelated victims testifying to a very similar pattern of molestation is of no greater value than the uncorroborated testimony of one defendant denying the events. Thus, looking at the evidence and the arguments as a whole, I think it unlikely that the jurors were misled by the challenged statements, that the outcome would have been different absent the challenged arguments, or that admonitions would not have cured any impropriety. (*People* v. *Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Gionis* (1995) 9 Cal.4th 1196, 1215.)

ROTHSCHILD, J.