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PEDRO MARTINEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN BERNARDINO

THE PEOPLE OF THE STATE OF CALIFORNIA,

v.

Plaintiff,

PEDRO MARTINEZ,

Defendant.

Case: FVI19000218

DEFENDANT PEDRO MARTINEZ'S POINT AND AUTHORITIES RE LIMITATIONS ON PROSECUTION CLOSING ARGUMENT

There are two cases that address arguments that the defense is concerned may be raised by the People during closing arguments – *People v. Castaneda-Prado* (2023) 94 Cal.App.5th 1260 ("*Castaneda-Prado*") and *People v. Rodriguez* (2020), 9 Cal. 5th 474. Each is discussed below. And there are multiple authorities addressing the jury's consideration of the photos at issue during deliberations which are also submitted below.

I. A Prosecutor May Not Assert Or Imply Facts That She Knows Excluded Evidence Would Refute

At the end of August in this year *Castanedo-Prado* came down firmly establishing limits on what prosecutors may argue during closing argument. It is expressly forbidden for a prosecutor to assert an argument that the prosecutor knows would be refuted by excluded evidence. The *Castanedo-Prado* court stated as follows:

> Even when a ruling excluding evidence is correct—the underlying evidentiary ruling here was not—it is improper for an advocate to take unfair advantage of the ruling in closing argument, which is what this prosecutor did. "It is well settled that it is misconduct for a prosecutor to base argument on facts not in evidence." (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.) And "[i]t is improper for counsel to assert or imply facts not in evidence that counsel knows excluded evidence could refute." (*Jackson v. Park* (2021) 66 Cal.App.5th 1196, 1214. *id.* at pp. 1205–1206, 1214, 1217 [affirming grant of new trial in civil case based on defense counsel's misconduct in closing argument, including his assertion that evidence of defendant's intoxication did not exist when counsel knew it existed and the evidence had been excluded at the defense's behest]; accord, *Hoffman v. Brandt* (1966) 65 Cal.2d 549, 555[defense counsel's argument in civil case falsely implying defendant lacked insurance was misconduct requiring reversal of judgment].)
>
> No matter how fervently the prosecutor here believed in Castaneda-Prado's guilt and in the egregiousness of Castaneda-Prado's behavior toward Does 1 and 2, he had no business suggesting to the jury that the absence of a motive to lie was significant to the issue of veracity, when in fact he knew that there was such evidence, having vigorously and successfully fought to keep the jury from hearing it. To put it mildly, the argument was

> disingenuous. Prosecutors should never assert or imply that there is no evidence on a certain point when they know such evidence exists but was excluded by the court. Such arguments may, in an appropriate case, result in the granting of a new trial motion or an appellate reversal on grounds of prosecutorial misconduct. Castaneda-Prado timely objected to the prosecutor's closing argument on this point, but on appeal he chose not to raise the issue of misconduct; instead, he has framed the prosecutor's closing remarks about the absence of any proven motive to lie as a prejudice argument. While we have no occasion to rule upon any issue of prosecutorial misconduct, we conclude that Castaneda-Prado's prejudice argument is well-taken, in no small part because of the prosecutor's closing argument. (See *D.Z. v. Los Angeles Unified School Dist.* (2019) 35 Cal.App.5th 210, 232 [in a case where the underlying ruling excluding evidence on a certain point is erroneous, a closing argument that highlights the lack of evidence on that point may support a conclusion that the evidentiary error was prejudicial].)

(*Castaneda-Prado*, 94 Cal.App.5th at 1294.)

This means that, in this case, the Prosecutor may **not** assert the arguments listed below, among others, and the Court's allowance of the assertion of such arguments constitute substantial error.

- No evidence was presented that Ms. Serna had a criminal history (the Court excluded her criminal history);
- No evidence was presented that Ms. Serna beat Ismael (the defense was precluded from presenting DCFS evidence that she did or mentioning her subsequent criminal action);
- No evidence was presented that Ms. Serna accused others of similar conduct to that of which Mr. Martinez stands accused (the Court excluded this evidence);
- That Ms. Serna had no strange obsession with, or knowledge of, matters related to child molestation (the Court excluded this evidence);
- Ismael began acting out sexually after commencing school at Maple Elementary (the Court excluded evidence of Essence Smith witnessing such conduct long before Ismael attended Maple elementary)

- The Law Enforcement Agents have no motive to lie or fabricate evidence (first, such an argument is barred under *People v. Rodriguez* (2020), 9 Cal. 5th 474, discussed below. Second, the Court precluded evidence of Law Enforcement's meeting at the District Attorney's Office on or about January 30, 2019 to discuss the matter).

II. The Prosecutor May Not Argue That Law Enforcement Witnesses Have No Motive To Lie Or Fabricate Or Enhance Evidence

In *People v. Rodriguez* (2020), 9 Cal. 5th 474, the Prosecutor asserted that law enforcement agents would not lie on the stand as such would put their careers on the line and possibly subject themselves to perjury. (*Id*. at 478-479.) The Court held this to be impermissibly vouching, as it "convey[ed[the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." (*Id.* at 481 (*citing United States v. Young* (1985), 470 U.S. 1, 18).)

III. The Prosecutor May Not Argue That Viewing The Cartoon Pornography Images Or Bestiality Images Is Evidence That Mr. Martinez Committed The Charged Acts

a. <u>No evidence has been offered by the people establishing the relevance of the photos</u>

The People have still presented *no expert testimony* or *any other evidence at all* linking the viewing of the cartoon pornography images or bestiality images to child molestation. And the prosecutor did not call an expert to make this link on rebuttal, despite being quite aware, vis-à-vis several motions to exclude or strike and a pending request for a jury instruction on the issue, to suggest a link. No such link has been offered into evidence, let alone accepted into evidence.

b. By addressing the photos without providing evidence of their relevance, the Court is allowing the Prosecution to circumvent the rules of evidence and bypass Mr. Martinez's right to cross-examination.

The Court in *People v. Rodriguez* (2020) 9 Cal. 5th 474, also stated as follows:

> Referring to facts not in evidence is "clearly" misconduct "because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.] 'Statements of supposed facts not in evidence … are a highly prejudicial form of misconduct, and a frequent basis for reversal.'

(*Id.*, at 480 (*citing People v. Hill* (1998).)

c. It does not matter that the People have made the photographs a centerpiece of their case. The Court is obligated to ensure that the allegations against Mr. Martinez have proper evidentiary support and are subject to cross-examination

The People have made the images a centerpiece of their case against Mr. Martinez. But that is not the Court's concern. It is this Court's responsibility to ensure that Mr. Martinez is charged based solely on evidence presented to the jury, and to protect Mr. Martinez from facing allegations that are provided without proper evidentiary support. It is this Court's responsibility to ensure that evidence is not presented that bypasses Mr. Martinez's constitutional right of cross-examination.

What evidence of the relevance of these images has been presented to the Court? What evidence of the relevance of these images has been presented to the defense so that it could be cross-examined? The answer is "none."

d. The Jury Only Decides Propensity In Rare Specific Circumstances, None Of Which Apply To These Photographs

This Court has stated that "[t]he jury decides propensity." Aside from two circumstances discussed below, this position is wrong and dangerously so.

A jury *may* decide propensity when presented with an appropriate jury instruction that it does so – such as CALCRIM 1191A (allowing for evidence of uncharged conduct to be relied on to determine if a defendant was "disposed or inclined to commit" the offense). Or a jury can determine propensity if expert witness testimony is presented suggesting a link between the evidence and the conduct. In *People v. Earle* (2009), 172 Cal. App. 4th 372, 398, the Court first stated that "Does the commission of indecent exposure rationally support an inference that the perpetrator has a propensity or predisposition to commit rape? Not without some kind of expert testimony, it does not". **And the *Earle* Court then provided this footnote explaining the *only* way that a jury is allowed to consider evidence for propensity.** The *Earle* Court stated, at 172 Cal. App. 4th at 398, Fn. 15, as follows (emphasis added):

> Evidence Code section 1108 would not authorize the admission of expert opinion concerning the presence or absence of a particular disposition in a particular defendant. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495; *see id. at* p. 496, citing Pen. Code, § 29 [expert may not testify on "the ultimate question of whether the defendant had or did not have a particular mental state at the time he committed the offense"].) This does not mean that in a sex crimes prosecution, the state may not be required to lay a proper foundation for an inference of propensity to commit the charged offense. For instance, testimony like Dr. Abbott's, addressing the incidence of rapes by criminal exhibitionists and vice versa, and the factors bearing on the likelihood of an exhibitionist's committing rape, would offend neither of the prohibitions just noted, but would provide the jury with an evidentiary foundation on which to predicate an inference, as well as an estimate of the likelihood, that defendant's commission of indecent exposure actually reflected a propensity to commit rape. *It was not defendant's burden to make this showing. It is for the proponent of evidence to establish the foundational facts for its admission, including its relevance to a material issue.* (See Evid. Code, § 403, subd. (a).)[1]

[1] The defense understands that this Court decided that *Earle* is inapplicable because the propensity evidence in *Earle* was criminal conduct, and the propensity evidence offered here is lawful conduct. This distinction is not relevant to when and how propensity evidence may be (a) offered to the jury and (b) subject to cross-examination.

The *Earle* Court went on to describe a situation *exactly* like that presented here, stating:

> [A] propensity to commit one kind of sex act cannot be supposed, without further evidentiary foundation, to demonstrate a propensity to commit a different act. The psychological manuals are full of paraphilias, from clothing fetishes to self-mutilation, some of which are criminal, some of which are not. No layperson can do more than guess at the extent, if any, to which a person predisposed to one kind of deviant sexual conduct may be predisposed to another kind of deviant sexual conduct, criminal or otherwise. Is one who commits an act of necrophilia (Health & Saf. Code, § 7052) more likely than a randomly selected person to commit an act of rape? Child molestation? Indecent exposure? Is a pedophile more likely than a rapist or a member of the public to commit necrophilia? Without some evidence on the subject, a jury cannot answer these questions.

(*Earle*, *supra,* 172 Cal. App. 4th at 399.)

At its core, the People are arguing that Mr. Martinez's viewing of these lawful images indicates a propensity to commit these acts. This is character evidence expressly prohibited by Cal. Evid. Code § 1101(a) (" Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

In sum, no evidence has been presented by the Prosecution to the jury that these photos have any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. They are not relevant. They are highly prejudicial. They are propensity-evidence without expert witness testimony support. They are propensity evidence submitted without a lawful ground – such as an applicable jury instruction. They have not been presented as evidence and subjected to cross-examination.

DATED: December 4, 2023

LAW OFFICES OF IAN WALLACH, P.C.

By: 

IAN M. WALLACH
Attorney for Defendant,
PEDRO MARTINEZ

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 5777 West Century Blvd., Suite 750, Los Angeles, CA 90045

On November 19, 2023, I served the following document(s) described as: **DEFENDANT PEDRO MARTINEZ'S** in this action by placing true copies thereof enclosed in sealed envelopes and/or packages addressed as follows:

Deputy District Attorney Deena Pribble
DPribble@sbcda.org

☐ **BY MAIL:** I deposited such envelope in the mail at 8383 Wilshire Blvd. Suite 210, Beverly Hills, CA 90211. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one (1) day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE:** I served said document(s) to be transmitted by facsimile pursuant to California Rules of Court. The telephone number of the sending facsimile machine was (310) 893-3191. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the above addressee(s).

☒ **BY ELECTRONIC MAIL:** On the above-mentioned date, from Los Angeles, California, I caused each such document to be transmitted electronically to the party(ies) at the e-mail address(es) indicated above. To the best of my knowledge, the transmission was reported as complete, and no error was reported that the electronic transmission was not completed.

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on December 4, 2023 at Los Angeles, California.

IAN WALLACH