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S208398

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
DARIEL SHAZIER,
Defendant and Appellant.

Case No. _____

Sixth Appellate District, Case No. H035423
Santa Clara County Superior Court, Case No. 210813
The Honorable Alfonso Fernandez, Judge

PETITION FOR REVIEW

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Respondent respectfully petitions for review of the decision of the Court of Appeal for the Sixth Appellate District. The decision, attached as Exhibit A, was filed on December 27, 2012. It is published at 212 Cal.App.4th 520. Neither party sought rehearing. This petition is timely. (Cal. Rules of Court, rule 8.500(e).)

ISSUES PRESENTED

1. May the prosecutor examine witnesses in a civil commitment trial under the Sexually Violent Predators Act about the defendant's plans for release, including where he would live, the surrounding environs, and whether he would be under any form of supervision?

2. Did the Court of Appeal err in finding misconduct as to questions and argument to which there was no objection, failing to consider the remarks in the entire context of trial, and in relying on unpreserved claims and proper prosecutorial conduct to find prejudice?

STATEMENT OF THE CASE AND FACTS

A. Evidence at the Trial

On March 18, 2010, a jury found that defendant was a sexually violent predator (SVP), and the court committed him to the Department of Mental Health (DMH) for an indeterminate term. (3 CT 685-686.)[1]

At trial, the prosecution presented evidence of defendant's long history of sexual assaults against teenage boys, and evidence that defendant suffered the requisite convictions for commitment as an SVP.

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[1] This was defendant's third trial. The first trial resulted in a hung jury. A second trial resulted in an SVP commitment that was reversed on appeal for prosecutorial misconduct. (Slip Opn. at p. 2, fn. 1; *People v. Shazier* (May 8, 2006, H028674), review dism. in light of *People v. Lopez* (2008) 42 Cal.4th 960, (May 14, 2008, S144419).

In September 1987, defendant approached several teenage boys at a youth center, offered to give them karate lessons, and befriended them. (5 RT 305.) Soon after, defendant attempted to sexually assault one boy. (5 RT 305.) Defendant was arrested, but the charges were dismissed. (5 RT 305.)

In July 1988, defendant met a 17-year-old boy, befriended him, discussed karate, provided him alcohol, and drove him to an isolated place. Defendant then fondled the boy's penis. (5 RT 306-307.) Defendant was arrested, but the charges were dismissed. (5 RT 307.)

In October 1988, defendant approached and befriended Lee, a 16-year-old boy. (5 RT 308.) When defendant was alone with Lee, he forcibly sodomized him. (5 RT 308.) When arrested for the assault, defendant was giving a 15-year-old boy a massage. (5 RT 314.) Defendant was convicted of molesting Lee and sentenced to prison. (5 RT 314.)

In 1990, defendant was released on parole. (5 RT 314.) Within four months, he approached several teenage boys and offered them karate lessons. (5 RT 315.) Defendant's parole was revoked for contact with teenage boys. (5 RT 315.)

In November 1991, defendant was rereleased on parole. (5 RT 318.) Five weeks later, defendant met a 15-year-old boy, offered him karate lessons, grabbed the boy's groin area during a lesson, and called it a secret karate stretch. (5 RT 318-319.) The boy reported the incident to the police, and defendant's parole was revoked. (5 RT 321.)

In December 1992, defendant was paroled a third time. (5 RT 321.) Soon after, he befriended several teenage boys and offered to give them karate lessons. (5 RT 321-322.) He developed a "cult-like following" among the boys. (5 RT 322.) During this time, defendant kissed several boys, and grabbed their genitals. (5 RT 322, 328.)

In March 1994, defendant met and offered a ride to William, a 14-year-old boy. (5 RT 325-326.) Defendant took William to his home, pushed him against the wall, and forcibly sodomized him. (5 RT 326.)

Three weeks later, defendant approached 17-year-old Douglas, saying that he was a talent scout and the boy could make big money. (5 RT 324.) Eventually, defendant took Douglas to his home, gave him alcohol, and forcibly sodomized him twice. (5 RT 324-325.)

Dr. Craig Updegrove and Dr. Carolyn Murphy evaluated defendant as meeting the criteria for an SVP commitment. Based on the evaluations, the district attorney filed a petition to commit defendant as an SVP.

Dr. Updegrove testified that he diagnosed defendant with paraphilia not otherwise specified (NOS) with a sexual attraction to pubescent boys, sometimes called hebephilia. (5 RT 297.) Dr. Updegrove also diagnosed defendant with personality disorder NOS with antisocial and narcissistic traits. (5 RT 299.)

Dr. Murphy diagnosed defendant with paraphilia NOS, specifically nonconsenting persons or minors. (7 RT 521.) Dr Murphy also diagnosed defendant with personality disorder NOS with antisocial and narcissistic traits. (7 RT 549.) She did not diagnose hebephilia, which is not listed as a disorder in the Diagnostic and Statistical Manual (DSM), but she recognized literature that recognizes hebephilia as its own disorder. (7 RT 523.)

Both doctors believed that defendant's mental disorders impaired his volitional and emotional control and that defendant was likely to engage in sexually predatory violent criminal acts as a result of his diagnosed mental disorders. (5 RT 342, 347, 350; 7 RT 516, 564, 580.) Drs. Updegrove and Murphy evaluated defendant's risk of reoffense using a revised actuarial tool, the Static 99-R. (6 RT 394; 7 RT 567.) Both doctors gave defendant a score of 5 on the Static 99-R, and found him to be comparable with other

high-risk subject sample groups that had recidivism rates ranging from 10 to 23 percent over five years, and 12 to 32 percent over 10 years. (6 RT 394-397; 7 RT 574.) Dr. Updegrove also evaluated defendant as scoring 6 on an updated actuarial tool, the Static 2002, which placed him in the medium-high risk group. (6 RT 402, 406.)

Both doctors recognized that defendant had been actively participating in the sex offender treatment program at the state hospital, but had only completed two of the five phases. (6 RT 419-425; 7 RT 582.) Both doctors found that defendant's participation was a positive factor affecting his likelihood of reoffense, but believed that he needed more treatment in a secure facility before it would be safe to release him. (6 425-431; 7 RT 583.) Dr. Updegrove pointed out defendant had a history of quickly reoffending even when released with parole conditions. (6 RT 430.)

Defendant testified that he used to be attracted to teenage boys, but that, like an alcoholic, he had learned in therapy to manage his behaviors so that he would not molest anyone again. (8 RT 703-706, 777.) Defendant testified that if he were released, he would live with his mother in the Washington D.C. area. (8 RT 778.) Defendant denied having a mental disorder, but planned to voluntarily continue outpatient sex offender therapy if released. (8 RT 788, 805-808; 9 RT 1089-1090, 1095.)

Dr. Theodore Donaldson evaluated defendant for the defense. (9 RT 915.) Dr. Donaldson found no evidence defendant suffered from paraphilia. (9 RT 920.) Dr. Donaldson opined that diagnosing paraphilia is difficult because the criteria are not well defined. (9 RT 924.) Dr. Donaldson found no evidence that defendant was aroused by the nonconsent of his victims, that he had a sexual preference for pubescent boys, or that he was disturbed by any such sexual preference. (9 RT 928, 940.) Dr. Donaldson also did not find defendant had seriously difficulty

controlling his behavior, because there was no evidence defendant had ever wanted to, or tried, to control his behavior. (9 RT 944.) Also, there was no evidence that defendant was "tormented" by the commission of his offenses. (9 RT 946.) As Dr. Donaldson explained, "I think that's what we'll eventually come up with for a legitimate diagnosis of pedophilia, that they have to be bothered by the behavior. If they're just doing it because they want to, that's just criminal behavior." (9 RT 945.) Dr. Donaldson also criticized the use of the Static 99 and Static 99-R for purposes of predicting the likelihood of reoffense. (9 RT 957-968.) Dr. Donaldson viewed the Static 99 as the best tool available, but estimated defendant's risk of reoffense was five to six percent over five years. (9 RT 968, 1101.)

Ex-SVP's David Litmon, Joseph Johnson, and Fred Grant testified that they had lived with defendant at the state hospital, and that he was always respectful and positive. Defendant stood up for other patients, helped solve conflicts, and was a representative in the governing of the living units. (8 RT 819-825, 833-837, 842-849.)

Michael Ross, a psychiatric technician, had worked at Atascadero State Hospital (ASH). He testified that defendant was ward representative and was not involved in any inappropriate conduct while housed at ASH. (8 RT 858-859, 868-869.)

Angelo Arrendondo and Phillip Morales, hospital police officers at Coalinga State Hospital, testified that defendant was well-behaved. (8 RT 881-882, 87-888.) Defendant acted as a liaison between the patients and the officers, and defendant would often help with difficult patients. (8 RT 882, 888-890.)

Defendant's sister, Crystal Bozeman, testified that she lives in Waldorf, Maryland. (10 RT 1105.) She testified defendant would live with their mother in the same area if he was released. (10 RT 1125.) Bozeman, along with their mother, would be part of his support system to ensure that

he succeeded in the community. (10 RT 1125-1126.) Bozeman had been helping defendant find a therapist in the area, and she was willing to help defendant financially if he needed it. (10 RT 1124-1125.)

B. Court of Appeal Decision

Defendant appealed the commitment. On December 27, 2012, the Court of Appeal for the Sixth Appellate District, in an opinion by Presiding Justice Rushing, held that the prosecutor had committed 10 instances of prosecutorial misconduct in trial. (Slip Opn. at pp. 7-18.) The Court of Appeal found the incidents constituted a "pervasive pattern of inappropriate questions, comments, and argument." (*Id.* at p. 18.) The Court of Appeal concluded that the "aggregate prejudicial effect of the prosecutor's misconduct therefore requires reversal." (*Id.* at p. 20.)

REASON FOR GRANTING THE PETITION

Review is necessary to secure uniformity of decision with the opinions of this Court addressing SVP cases and prosecutorial misconduct, and to settle important questions of law in those fields. The Court of Appeal's opinion is a profoundly disruptive precedent for the prosecution of SVP cases statewide. Among its misconceptions, the court held inadmissible the defendant's proposed community and the lack of parole restrictions if released, notwithstanding the prosecution's burden in an SVP proceeding to prove, beyond a reasonable doubt, that the defendant is likely to reoffend if released into the community. Obviously, the defendant's living circumstances upon release inform both his likelihood of reoffense, and his amenability to voluntary treatment—factors that this Court has found are necessary to prove a civil commitment that comports with constitutional standards.

Equally worthy of review is the Court of Appeal's disregard of this Court's settled precedents regarding waiver and prosecutorial misconduct.

Among the 10 purported instances of prosecutorial misconduct, the appellate court disregarded the absence of an objection in at least half. In addition, it distorted the substantive standard for misconduct claims by ignoring material facts in order to infer the most damaging inference from the prosecutor's comments, in conflict with holdings of the United States Supreme Court and this Court.[2]

I. THE COURT OF APPEAL'S HOLDING THAT QUESTIONING AND ARGUMENT ON DEFENDANT'S RELEASE PLANS WAS PREJUDICIAL MISCONDUCT REQUIRES REVIEW

Defendant testified that if released, he would live with his mother outside the District of Columbia. (8 RT 778.) Referring to the area surrounding his mother's home reflected in a map, defense counsel asked how defendant would handle his proximity to shopping malls and parks nearby. (9 RT 1076.) Defendant answered:

> Well, there isn't really a reason for me to go to a park, so I wouldn't go to a park, especially when I know that they are frequented by minors. I wouldn't put myself in a high-risk situation like that given my background.
>
> So as far as a mall is concerned, I feel safe. I feel confident in my own ability to go to a mall. However, though, what I've learned, and what I believe from group, this is what I would do. I wouldn't go by myself. I would have a support team member with me or somebody, a person like me so there'll always be checks and balances.

(9 RT 1077.)

With reference to the map of his mother's home, the prosecutor asked defendant if there were two elementary schools very close to where he would be living. (9 RT 1099.) Defendant said, "I don't believe so." (9 RT

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[2] For similar reasons, contemporaneous with the filing of this petition for review we are filing a letter seeking depublication of the opinion. (See Cal. Rules of Court, rule 8.1125.)

1099.) The prosecutor then showed him two elementary schools on the map, and confirmed there was also a nearby park, shopping mall, and a fast-food outlet of a hamburger chain. (9 RT 1099-1100.)

During closing argument, the prosecutor discussed defendant's criminal history, then argued:

> These are the facts that—that Mr. Shazier is a convicted child molester over and over and over. Remember, when [defense counsel] gets up and starts to argue to you, remember that notwithstanding what Mr. Shazier has done for people at Coalinga State Hospital, please remember that ever since he has been an adult, whenever he has been out of a secure facility he has always gone back to commit crimes after he said that he was sorry, after he said that he wouldn't do it again. After he said I never want to see a cell again, ever. What did he do, the opposite of what he said. You cannot and should not ignore that.
>
> [¶] . . . [¶]
>
> And so there is really no stopping Mr. Shazier, not even when he was on parole. And now of course, you know, he is not on parole. So when Mr. Shazier tells you that he is going to go live in Maryland with his mother, the only thing you have to go—the only thing that you have to believe that is what Mr. Shazier said. That is just, there is no other guarantee wherever he is going to live outside of where he currently lives is not a secured facility.

(10 RT 1228-1230.)

The Court of Appeal held the "prosecutor's reference to the proximity of schools to defendant's mother's house, as well as the fact that if released defendant would be living with his mother and would not be under the supervision of parole were improper references to the consequences of the

jury's verdict." (Slip Opn. at p. 11.) To support its conclusion, the Court of Appeal cited only decisions in criminal cases.[3]

In an SVP case, the prosecutor must prove that the respondent is likely to reoffend "unless confined in a secure facility." (CALCRIM No. 3454; *People v. Grassini* (2003) 113 Cal.App.4th 765, 777-778.) That defendant was unamenable to voluntary treatment and needed to be in a secure facility was an element the prosecution had to prove. Likewise, in conducting their evaluations, the experts were required to assess whether or not defendant was amenable to voluntary treatment, or whether confinement is necessary for the safety of the community. (*People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888, 927-929.) Because confinement in a secure facility is an element that must be proved by the prosecution, the jury had to consider whether the circumstances surrounding release affects defendant's amenability to voluntary treatment, or otherwise affects his risk of reoffense. The appellate court's finding of prosecutorial misconduct from eliciting and arguing plainly relevant evidence on those points is inexplicable.

Indeed, defendant's plans for release were the crux of his case. The location and surroundings of his mother's residence, his plan to enroll in treatment in his mother's community, and the existence of a support system were integral to defendant's prevention plan against relapse. (See 9 RT 1077-1081.) It was defense counsel who presented defendant with the map and questioned him on his strategies for avoiding high-risk areas like parks and shopping malls. It was both logical and wholly permissible to cross-examine defendant on his plan for avoiding those areas, and to question

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[3] There was no objection to the questioning or argument by the prosecutor. The Court of Appeal's failure to consider the lack of objection is addressed in Argument II, *post*.

him about his actual knowledge of the surroundings in which he would be living. By holding such an examination and argument improper, the Court of Appeal impermissibly burdens the prosecution's ability to prove its case and hobbles the factfinder in SVP trials from considering relevant evidence on the central issues allocated to it for decision. Review should be granted.

II. REVIEW IS REQUIRED TO ENSURE CONFORMITY BY THE COURT OF APPEAL TO THIS COURT'S CONTEMPORANEOUS OBJECTION RULE AND TO ITS REQUIREMENT TO ANALYZE THE REASONABLE LIKELIHOOD THAT THE JURY CONSTRUED OR APPLIED THE COMPLAINED-OF REMARKS OF THE PROSECUTOR IN AN OBJECTIONABLE FASHION

As to eight of the purported instances of misconduct the Court of Appeal ignored facts in the record and misapplied this Court's misconduct and/or waiver jurisprudence. That led directly to its further erroneous conclusion that there was a "pervasive pattern" of misconduct and that the misconduct was prejudicial. (Slip Opn. at p. 18.)

"To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) The Court of Appeal said "defense counsel objected to all of the prosecutor's improper questions, statements and arguments. We observe that not one of counsel's well-taken objections was sustained by the court." (Slip Opn. at pp. 18-19.) This is contradicted by the record. Defense counsel did not object to the prosecutor's questioning of defendant's release plans or the mention of parole during closing argument. (See IIA, IIB, *post*). Moreover, as discussed below, three additional alleged instances of misconduct were not objected to on any grounds. (See IIE, IIF, IIG, *post.*) The Court of Appeal incorrectly found the prosecutor's unobjected-to conduct was improper, and in relying on that conduct to assess prejudice.

Substantively, in assessing a claim of prosecutorial misconduct, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1072, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823.) Moreover, "the standard in accordance with which his conduct is evaluated is objective." (*People v. Berryman*, *supra*, 6 Cal.4th at p. 1072.)

Here, the Court of Appeal incorrectly asserted the foregoing principle is only relevant to assessing prejudice once misconduct has been established. (Slip Opn. at p. 6 ["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. . . .'"].)

The Court of Appeal conflated harmless error analysis with the defendant's burden required to establish misconduct. As a consequence, the Court of Appeal erroneously assumed the most damaging meaning from ambiguous comments during the prosecutor's cross-examination and closing argument when it decided misconduct had occurred. In addition, the Court of Appeal ignored facts in the record which gave context to the prosecutor's alleged improper questioning and arguments. By ignoring the facts and inferring the most damaging meaning, the Court of Appeal's conclusions contravened settled rules of this Court and the United States Supreme Court with respect to the various allegations of misconduct. (See *Donnelly v. De Christoforo* (1974) 416 U.S. 637, 647 ["a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from a plethora of less damaging interpretations"]; *People v. Howard* (1992) 1 Cal.4th 1132, 1192 ["we do not lightly infer

that the prosecutor intended his remarks to have their most damaging meaning or that the jury drew that meaning rather than the less damaging one"].)

As detailed *post*, the Court of Appeal failed to apply this Court's precedents, leading to its erroneous conclusion that the misconduct was so "pervasive," as to require reversal. (Slip Opn. at p. 18.)

A. Questioning About Defendant's Release Plans

Defense counsel did not object to the prosecutor's questions regarding the location and surroundings of defendant's mother's home. (9 RT 1099-1100.) The Court of Appeal erroneously found no waiver of the misconduct claim. (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.) As shown in Argument I, the Court of Appeal erroneously found the prosecutor's questions regarding appellant's release plans were improper references to the consequences of the jury's verdict. The appellate challenge to this line of questioning was forfeited. Neither the examination nor the argument on these points was misconduct.

B. Discussion of Parole

Defendant did not object to the prosecutor's reference in closing argument to parole restrictions. (10 RT 1228-1230.) The issue was forfeited. (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.)

The Court of Appeal also overlooked the fact that defendant's motion to exclude the parole evidence had been denied by the trial court in limine. (2 CT 359; 4 RT 175.) On appeal, defendant did not seek review of that ruling nor did he challenge the admission of the evidence. As discussed, the fact that defendant would not be on parole if released was properly admitted as relevant to defendant's risk of reoffense if released.

The Court of Appeal cited no authority that makes the prosecutor's discussion of properly-admitted evidence misconduct. Even had the

appellate court found the evidence improperly admitted, there would not be a basis for a finding of misconduct. "Regardless of whether an appellate court may later conclude that a piece of evidence was erroneously admitted, argument directed to the evidence does not become misconduct by hindsight. Such references may be considered in determining the prejudicial effect of the error in admitting evidence, but are not misconduct." (*People v. Visciotti* (1992) 2 Cal.4th 1, 82.) The Court of Appeal's reliance on the prosecutor's discussion of parole to establish a pervasive pattern of misconduct was erroneous.

C. Questioning of Dr. Donaldson

During cross examination of Dr. Donaldson, the following colloquy occurred:

> Q. [The prosecutor]: Do you remember an individual who was going through the process of determination whether or not he was an SVP by the name of Ronald Ward?
>
> [Defense Counsel]: Objection. Relevance.
>
> THE COURT: Overruled.
>
> THE WITNESS: I recognize the name. I don't remember anything about the case.
>
> Q . [The prosecutor]: All right. If I told you that Mr. Ward was an individual who was charged with a variety of sexual assaults, the first being forcible rape where he picked up a hitchhiker and raped her—
>
> [Defense Counsel]: Your Honor, I'm going to object to this. If he's going to get into diagnosis, he needs all the information before him that Dr. Donaldson and the other evaluators relied on. I don't think he can get into this without knowing anything more about those cases than just an inflammatory recital.
>
> THE COURT: Stop for a moment. I think that he's trying to refresh his recollection, if I understand this correctly.
>
> At this point the objection is overruled.

Q. [The Prosecutor]: Dr. Donaldson, Mr. Ward was charged with forcible rape for picking up a hitchhiker and raped her. He served a sentence for that. He got back out and then tried to rape an 11-year-old girl who was watching her house for her mother while the mother was out. He went to prison for that. He got back out of prison and committed five counts of child molestation because he met a woman and married her and within two weeks he began molesting her two children.

Do you have any recollection of the case of Ronald Ward?

A. No.

[Defense counsel]: Your Honor, I'm going to object. Inflammatory. We don't know anything about this case. We don't have any records, any psychological records.

THE COURT: The objection is overruled.

THE WITNESS: What year was that?

[The prosecutor]: That was in the late 1990s.

A. Okay.

Q. I believe it was Riverside County. Does that refresh your recollection at all?

A. Yes, Riverside County. Okay. That was before Crane. Okay. Go ahead.

Q. And you determined that Mr. Ward, based on those facts, was not a sexually violent predator, correct?

[Defense Counsel]: Objection. We don't know what he determined that based on. He doesn't have sufficient information to refresh his recollection.

THE COURT: He hasn't stated that. The objection is overruled.

Q. You were testifying in court on the Ward case, correct?

A. Yes.

Q. And because you were testifying in court, you had determined that he was not a sexually violent predator, correct?

A. I determined he didn't meet one of the criteria, but I don't know which one it was, whether it was a mental disorder or predisposition.

[Defense Counsel]: Again, I'm going to object and move to strike all this testimony. This is a continuing objection, just for the record.

THE COURT: The objection's overruled at this point.

Q. You determined Mr. Ward was not a sexually violent predator, as you offered, because he failed to meet at least one or more of the three criteria, correct?

A. Correct.

Q. I just have a few more examples that I want to discuss with you.

[Defense counsel]: Your Honor, I'm going to object.

May we approach?

THE COURT: Is it different than what we talked about initially?

[Defense Counsel]: We.

THE COURT: Just yes or no.

[Defense Counsel]: More information that I'd like to convey to the Court.

(9 RT 987-990.)

After the lunch break, the prosecutor asked similar questions, over defense counsel's relevance objections, regarding four other cases in which Dr. Donaldson testified. Even after the prosecutor related some of the facts of the cases to refresh Dr. Donaldson's recollection, Dr. Donaldson testified that he did not recall the other four cases. (9 RT 991-994.)

During redirect examination of Dr. Updegrove, the prosecutor asked:

If I describe to you an individual who is charged with a variety of sexual assaults, charged with forcibly raping a hitchhiker that he picked up, sent to prison, and got out, and then assaulted an

> 11-year-old girl with intent to rape the 11-year-old girl while she was minding the house for her mother, and then he got prison for that and then got out.
>
> And then after getting out he married a woman. And within two weeks of meeting the woman began molesting her two children and was ultimately convicted of five counts of child molestation.
>
> Given this hypothetical, would it be unreasonable to find the absence of a mental disorder under those bare-bone facts as describe to you?

(10 RT 1184-1185.) Defense counsel objected to the question as an improper hypothetical and was overruled. (10 RT 1185.) Dr. Updegrove answered:

> I believe so. You would certainly be—it would be unreasonable not to consider the possibility of the mental disorder.

(10 RT 1185.)

The Court of Appeal cited *People v. Buffington* (2007) 152 Cal.App.4th 446, and said "the prosecutor's recitation of facts in other SVP cases was not designed to elicit relevant evidence in this case. . . . As a result, there was nothing to be gained from the prosecutor's questions other than to put egregious and incendiary facts of SVP cases to inflame the passion and prejudice of the jury." (Slip Opn. at p. 14.)

The prosecutor's questioning of Dr. Donaldson was not misconduct. *Buffington* found improper questioning of a defense witness in an SVP case about the details of three other SVP cases on which he had worked:

> Eliciting Dr. Donaldson's opinion about those three cases only had a tendency in reason to suggest bias if the jury had some other basis for concluding that the given facts reasonably should have led to a different opinion. If the state had put on an expert witness who offered an opinion that under the bare bones facts described, regardless of anything else, it would not be reasonable to find the absence of a mental disorder, then it might have been permissible to elicit testimony that Dr. Donaldson reached the opposite conclusion under those facts. That would

> go, not so much to show bias, but to undercut the value of Dr. Donaldson's opinion in this case. In other words, if the jury credited the testimony of the People's expert witness, then it could reasonably discredit Dr. Donaldson's contrary conclusion in the earlier cases, and by extension in this case. (If his opinion was not reliable three times before, why should the jury believe it is now?)

(152 Cal.App.4th at p. 455.)

The prosecutor here presented the exact evidence that was missing in *Buffington*. He asked Dr. Updegrove whether it would be unreasonable, on the barebone facts of Mr. Ward's case, to find no mental disorder.[4] Dr. Donaldson had testified that he could not diagnose a mental disorder without evidence of some internal conflict about the behavior, i.e., repetitive criminal behavior is not enough to establish a mental disorder. Dr. Updegrove's testimony that it was unreasonable not to even consider the possibility of a mental disorder on the bare bones facts of Ward's case demonstrated the unreasonableness of Dr. Donaldson's testimony.

The Court of Appeal ignored the relevancy of the questions of Dr. Donaldson that the prosecutor established through the additional questions posed to the prosecution's expert. (Slip Opn. at pp. 12-14.) The relevancy of that inquiry undermines entirely the conclusion by the Court of Appeal that the prosecutor's goal in interrogating Dr. Donaldson was "'for the purpose of getting before the jury the facts inferred therein . . . .'" (Slip Opn. at p. 14.)

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[4] Presumably, the prosecutor only asked Dr. Updegrove about Mr. Ward's case because Dr. Donaldson only testified that he recalled Mr. Ward's case. (9 RT 989.) Even after hearing some details of the other cases involving Badura, Flick, Rawls, and Hubbart (all of which were asked about after the lunch break), Dr. Donaldson did not remember anything about those cases.

Assuming the Court of Appeal could find the testimony by Dr. Donaldson irrelevant and improperly admitted over the defendant's objection, the questions to the witness were not prosecutorial misconduct. As discussed above, even where evidence is erroneously admitted, the prosecutor's reliance on that evidence does not become misconduct "by hindsight." (*People v. Visciotti, supra*, 2 Cal.4th at p. 82.) *Buffington* held that the challenged questions and answers were irrelevant, not that the prosecutor committed misconduct. (152 Cal.App.4th at pp. 454-456.) *Visciotti* demonstrates the Court of Appeal erroneously conflated the admissibility issue with prosecutorial misconduct.

D. Questioning of Michael Ross

The prosecutor cross-examined Michael Ross as follows:

Q. Do you know how long Mr. Shazier has been at Coalinga?

A. Yes, sir.

Q. How long?

A. I would say approximately three years, two months.

Q. Longer than that. Isn't it a lot longer than that?

A. When they disappear, I have no emotional attachment. He left. I don't know what day he left. I didn't care what day he left.

Q. How long did you know him at Atascadero?

A. At least six. I would say six years.

Q. Six years at Atascadero, and then you believe he's been at Coalinga three years. Is that what you're saying?

A. I would think he's been there three years, at least three years.

Q. So you believe he's been in the state hospital system since 2001 at least?

A. That's what I believe.

Q. Now, what are his prior sexual offenses?

A. I cannot recollect. I believe they were offenses against—I would just say child pedophilia or something. I work with too many of these guys to remember those things.

Q. You're just here to help Mr. Shazier, though, correct?

A. No. I'm just here to tell the truth. I mean, if it helps, it helps him. I don't know. I'm not emotionally attached to the man, so whatever happens to him happens.

Q. Mr. Ross, you don't know what you're talking about, do you?

[Defense Counsel]: Objection. Vague question. Over-broad. Argumentative.

The Court: Overruled.

Q. [The prosecutor]: You don't know what you're talking about, do you?

A. I do know what I'm talking about. Now if you want to make it into exact dates, times, months, well then you can make me look stupid. But I know I had treated him as a patient, and I know I observed him for a lengthy time. And I know that I don't have any emotional attachment to him, and I know he was a good patient. Now that's all I'm here to explain.

(8 RT 870-871.)

After further questioning, the following colloquy took place:

Q. [The prosecutor]: Mr. Ross, do you know that Mr. Shazier was actually in Mule Creek State Prison in March of 2003?

A. I don't have recollection of that. I might have known it at some time, but I don't have a recollection of that today.

Q. When I asked you, "You don't know what you're talking about, Mr. Ross," it's that one thing you don't know about is when Mr. Shazier was in prison, when he was at ASH, and when he was at Coalinga, correct?

A. Correct.

(8 RT 873.)

Later during cross examination, the prosecutor asked:

Q. And you personally don't have a fear that Mr. Shazier would reoffend?

A. I personally don't.

Q. And would you let him take care of your 13- or 14-year-old-son?

A. Oh, now we're going a little further. First of all, I have a 15-year-old son, and I don't trust anybody. I don't understand how these kids get in the hands of other people. My 15 year old is barely out of her sight and my sight, and we meet everybody that they—they don't just get to run around. I don't trust—

Q. Mr. Ross, I don't know whether you have any children at all or what their ages are. I picked a 13-year-old son as a hypothetical to ask you a question about your feelings about Mr. Shazier.

A. I wouldn't—I don't trust anybody, so I wouldn't trust—I mean, I wouldn't say, Hey go. Why would a 13 year old be with him? So that's not something I wouldn't allow to happen. My son's allowed to hang around with children his age, not grown adults, male or female.

Q. So parents who have teenage children who end up being victimized by child molesters, they really have themselves to blame by leaving their children out of their care at some period of time?

[Defense Counsel]: Objection. Beyond the scope. 352. Irrelevant.

The Court: Overruled.

The witness: I believe parents should supervise their children and keep maximum amount of supervision. I don't think children should hang around with adults unless they're on a football team, a basketball team, some type of activity.

(8 RT 877-879.)

The Court of Appeal held the "prosecutor's questions" to Mr. Ross were not designed to "glean actual evidence," but were "rhetorical attempts to degrade and disparage the witness." (Slip Opn. at p. 15.)

To the contrary, it is clear, viewed in context, that the question about whether Ross knew what he was talking about referred to the fact that Ross could not have known defendant as long as he claimed. That was a garden-variety inquiry into witness bias, lack of knowledge of matters about which the witness testified, and contradiction of fact, all proper subjects of cross-examination. Lest there be any doubt, the prosecutor later clarified, asking Ross specifically if knew what he was talking about vis-à-vis the dates and location of defendant's custody. Ross admitted that he did not know the relevant dates. The Court of Appeal did not mention this follow-up question in its opinion.

Likewise, there was nothing improper in asking, in response to Ross's testimony that he personally did not fear that defendant would reoffend, whether Ross would leave a teenage boy in the care of defendant. Whether Ross blamed the parents of child molestation victims was plainly relevant to bias. Ross responded by explaining that, as a parent, he would not let his child hang out with an adult. The prosecutor's question reasonably went to Ross's minimization of defendant's crimes, and to his credibility. The prosecutor's questions of Michael Ross were not misconduct, let alone part of a pattern of prejudicial misconduct.

E. References to the Defense Expert

During closing argument, the prosecutor stated:

> You heard from a defense expert. He has got a streak that would make Cal Ripkin jealous. Cal Ripken the baseball player and the Iron Man that played in something like 4,000 straight games. Dr. Donaldson's streak of 289, 289 straight times of testifying exclusively for the defense.

> Now, he would like to tell you that is not his fault, because he offered to teach the State of California all his wisdom. His brilliance has yet to be fully appreciated by this society. It is appreciated by defense attorneys who pay him and he comes in, and 289 straight times testified for the defense.

(10 RT 1233-1234.)

The prosecutor later indicated that Dr. Donaldson was "completely biased and not helpful." (10 RT 1239.) In describing the criteria for finding a mental diagnosis of paraphilia, the prosecutor stated:

> This is what a paraphilia is, over a period of at least six months, someone has recurrent intense sexually arousing fantasies, urges, or behaviors involving the suffering or humiliation of children being the under the age of 18 or nonconsenting persons, meaning people that he has raped. Not surprisingly Mr. Shazier did not take the stand and say, why am I aroused by teen-age boys. That's how I am able to get an erection. That is how I am able to molest them, because I fantasize about teen-age boys the way that other people fantasize about appropriate people. That's what he does with his victims. And that is what leads to the behavior.
>
> And then for the diagnosis, the person has acted on these urges, and it causes marked distress or interpersonal difficulty. This is more of a laughable assertion of Dr. Donaldson. Dr. Donaldson tried to tell you, well, he did tell you he wants you to believe that because Mr. Shazier didn't really ever change, therefore he doesn't really have a mental disorder. . . . He doesn't suffer any distress or interpersonal difficulty. Really? Going back to prison, he said that he hated prison. It makes sense. You heard—you heard about how child molesters are regarded in prison, but he kept going back. That's distress or interpersonal difficulty.

(10 RT 1239-1240.)

During rebuttal argument, the prosecutor described Dr. Donaldson as "truly not independent," and "incredible." (10 RT 1284.)

The Court of Appeal said that, standing alone, this argument would not be prejudicial, implicitly treating the prosecutor's statements as

misconduct. (Slip Opn. at p. 17.) Again, the Court of Appeal ignored the lack of an objection to this alleged misconduct. (*People v. Brown, supra,* 31 Cal.4th at p. 553.) It also ignored the principle that "[h]arsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.)

The Court of Appeal ignored the fact that the comments by the prosecutor were supported by the evidence. It demonstrated that Dr. Donaldson had testified 289 times for the defense. (9 RT 996.) The doctor had offered his services to the Department of Mental Health because he felt he was ahead of his time on the relevant science involved in SVP evaluations. (9 RT 985.) He opined he could not diagnose a mental disorder without some evidence of internal distress. (9 RT 940-946.)

Based on the evidence, the prosecutor was entitled to characterize Dr. Donaldson's testimony as laughable and incredible, and to suggest that he was biased because he only testified and was paid by the defense. The Court of Appeal erroneously relied on the prosecutor's argument to bolster the prejudicial "pattern" of misconduct it incorrectly perceived.

F. References to "Grooming" by Defendant

After discussing defendant's criminal history and his failure to comply with parole conditions, the prosecutor stated:

> You have been groomed. Now, you have been groomed through the testimony of Mr. Shazier trying to say everything that he could say, trying to play on emotions, trying to show that everything is different now. The grooming behavior, the manipulation, it still continues. You heard what Mr. Shazier was saying in 1988. You heard what he said in 1994. You heard what he said six years ago in court. You heard what he said two months ago to his own expert about his plans two months ago, and now you heard what he said in court.

> This is a person who is manipulative. That was how he accomplished many of his crimes, one of his risks is quote, unquote being slick. . . .

(10 RT 1230-1231.)

The Court of Appeal held that the "prosecutor's argument that defendant was 'grooming' the jury, thus placing them in the same position as the defendant's victims was clearly improper." (Slip Opn. at p. 16.) The Court of Appeal again ignored the absence of an objection. (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.)

Moreover, the Court of Appeal failed to assess whether there was a reasonable likelihood that the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) When read in context, it is reasonable to infer that the prosecutor's was using evidence that defendant had groomed and manipulated his victims to argue that defendant continued to be manipulative and was not truly amenable to voluntary treatment. Viewed objectively and in context of the evidence, there is no reasonably likelihood the jury interpreted the prosecutor as asking the jurors to put themselves in the shoes of the victims in deciding the allegations of the petition. To the contrary, the prosecutor simply pointed out evidence that defendant continued to manipulate, i.e., groom, people into believing what he wanted them to believe.

The court reasoned that the "prosecutor was improperly appealing to the passions of the jury by implying they were also defendant's victims." (Slip Opn. at p. 16.) The Court of Appeal was not free to reject the objectively reasonable interpretation of the complained-of comments in favor of its most damaging meaning. Had the Court of Appeal properly applied the holdings of *Donnelly v. De Christoforo* (1974) 416 U.S. 637, 647 and *People v. Howard* (1992) 1 Cal.4th 1132, 1192, it would have

necessarily found that the prosecutor's comments, in context, did not constitute misconduct.

G. References to Defendant's Witnesses

In closing argument, the prosecutor pointed out that defendant had not presented testimony by any of his treating doctors that he was amenable to voluntary treatment in the community. The prosecutor continued:

> . . . The defense does not have to prove anything, and yet you may consider what they tried to show. So what did they do. They brought in two serial rapists and a child molester to say that Mr. Shazier has good character.

(10 RT 1232.)

The Court of Appeal quoted this portion of the argument under a separate heading of its opinion. Apart from quoting the passage, however, the court provided no analysis as to why the statements constituted a "clear instance[] of misconduct." (Slip Opn. at p. 17.)

Again, the Court of Appeal ignored the waiver rule; there was no objection to the challenged statements. (*People v. Brown*, *supra*, 31 Cal.4th at p. 553.)

Moreover, the argument was based squarely on the evidence. Defendant's three character witnesses had suffered multiple prior convictions for sex offenses and were properly characterized. Johnson had been convicted of two rapes and one attempted rape. (8 RT 836-837.) Grant had been convicted of 45 counts of child molestation. (8 RT 849, 851.) Litmon had been convicted of two rapes, three counts of forced oral copulation, and one count of child molestation. (8 RT 825, 827.) The witnesses admitted the prior crimes and the evidence of moral turpitude was plainly admissible to impeach their testimony.

The Court of Appeal, again, failed to explain the impropriety of arguing this properly admitted evidence. Indeed, it failed to refer to the

record, or to perform an actual legal analysis. There was no misconduct in this instance. As discussed above, even had the evidence been improperly admitted, it would not constitute misconduct for the prosecutor to rely on the evidence in closing argument. (*People v. Visciotti*, *supra*, 2 Cal.4th at p. 82.)

H. References to Defense Counsel

During rebuttal argument, the prosecutor stated that defense counsel "left something off one of his charts. Frankly it was deceptive." (10 RT 1278.) Defense counsel objected, and the court overruled the objection. The prosecutor continued:

> [Defense counsel] showed you an instruction, "a person is likely to engage in sexually violent predatory criminal behavior if there is a serious and well-founded risk that the person will engage in such conduct if released in the community." That is what he showed you and that is accurate. Part of that very same paragraph and the most important jury instruction you are going to get from the judge, is 3454, that is the number, and part of this same paragraph it says, "The likelihood that the person will engage in such conduct does not have to be greater than 50 percent." Why didn't he put that up there? Because [defense counsel] objected in my closing argument when I talked about five percent chance, let alone a 29 percent chance, but the instruction, the law says it doesn't need to be greater than 50 percent.

(10 RT 1278.) Defense counsel objected again, and moved to strike. The court overruled the objection. (10 RT 1279.)

The Court of Appeal found that "the prosecutor's denigration of defense counsel's veracity was misconduct." (Slip Opn. at p. 18.) It again improperly inferred the most damaging meaning from the challenged statement in order to find misconduct. The prosecutor characterized as deceptive an argumentative omission by defense counsel of the critical defining portion of an element committed to the jury's decision. In context, the prosecutor merely was reminding the jury of its duty to apply the whole

of the instructions, rather than any isolated part thereof. The Court of Appeal improperly failed to consider the statements in context, and failed to infer the less damaging meaning from the challenged statements. (*People v. Howard*, *supra*, 1 Cal.4th at p. 1192.)

Review is warranted because the Court of Appeal misapplied this Court's waiver and misconduct precedents, improperly assumed the inference most damaging to the defendant from the challenged remarks by the prosecutor, and ignored facts in the record that plainly supported the prosecutor's questions and arguments.

Absent its faulty analysis on the misconduct issues, the Court of Appeal would have been unable to reach its erroneous conclusion, that "the prosecutor's improper conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. [Citations.]" (Slip Opn. at p. 20, internal quotation marks omitted.) As such, both the misconduct and prejudice holdings by the Court of Appeal require review.

CONCLUSION

Accordingly, respondent respectfully requests that the petition for review be granted.

Dated: January 31, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 7,905 words.

Dated: January 31, 2013

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ATTACHMENT

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIEL SHAZIER,

Defendant and Appellant.

H035423
(Santa Clara County Super. Ct. No. 210813)

Defendant Dariel Shazier appeals an involuntary civil commitment order adjudging him a sexually violent predator (SVP) under the Sexually Violent Predators Act (SVPA or Act). (Welf. & Inst. Code, § 6600 et seq.) An SVP must have "a *diagnosed mental disorder* that makes [him] a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior." (Welf. & Inst. Code, § 6600, subd. (a)(1), emphasis added.)

All of the experts who testified in this trial agreed that defendant's diagnosis of hebephilia, an attraction to pubescent young men, is not included in the DSM-IV, and "doesn't exist" as a mental disorder diagnosis. Moreover, all agreed that defendant did not demonstrate arousal by the use of force or violence in his sexual acts.

From the outset, securing a civil commitment of defendant as an SVP, following his 1994 conviction, has been difficult for the prosecutor. Indeed, defendant's first trial resulted in a hung jury. We reversed the judgment in defendant's second trial, finding the

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prosecutor committed prejudicial misconduct during the trial. (*People v. Shazier* (2006) 139 Cal.App.4th 294.)[1]

During the third trial in this case, the prosecutor told the jury in his closing argument that their finding for defendant would subject them to ignominy within their community, and that it was likely that defendant, who he described as a "prolific child molester," had other victims who had not reported his crimes However, there was no evidence presented at trial that defendant had committed additional uncharged crimes against unknown victims.

Defense counsel objected to the prosecutor's improper arguments and statements throughout trial; however, the court overruled all of these objections. We find the prosecutor committed misconduct in this case that prejudiced the defendant. The judgment must be reversed.

STATEMENT OF THE FACTS AND CASE

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 motions in limine, the trial judge admonished counsel that there be no mention of the fact that defendant would be sent to a state hospital if the allegations that he was a SVP were found true. During closing argument, the prosecutor directly violated the court's in limine order, and told the jurors they should not make their decision in the case based on their consideration of life would be like for defendant in "Atascadero State Hospital."

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[1] The California Supreme Court granted a petition for review in *People v. Shazier, supra*, 139 Cal.App.4th 294 pending a decision in *People v. Lopez* (2008) 42 Cal.4th 960, another prosecutorial misconduct case. Following the court ruling in *People v. Lopez, supra*, the court dismissed the petition for review in *People v. Shazier, supra.*

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. We reversed his commitment finding that the prosecutor's comments to the jury regarding Atascadero State Hospital violated not only the court's in limine ruling, but also the proscription against comments regarding the outcome of the SVP trial set forth in *People v. Rains* (1999) 75 Cal.App.4th 1165, 1169.

The case currently before this court is an appeal from defendant's third trial on the petition to commit him as an SVP. During the trial, the prosecutor presented two experts, Doctors Updegrove and Murphy, who testified to defendant's mental condition. Dr. Updegrove testified that he believed defendant met the criteria as an SVP. Dr. Updegrove also testified that defendant suffered from paraphilia[2] n.o.s. nonconsent, specifically hebephilia, which he explained was a sexual attraction to teenage boys who have attained puberty. He further stated hebephilia is life-long and cannot be cured. He also stated that defendant was not a pedophile. Dr. Updegrove conceded that defendant is not aroused by force or violence, and that the only reason his prior crimes were considered nonconsensual was because the victims were minors who could not legally consent.[3] He further stated that hebephilia is a very controversial diagnosis, and has not been widely used until the advent of civil commitment cases. Dr. Updegrove testified that based on the tests he administered, defendant had a moderate to moderate-high risk to re-offend.

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[2] Paraphilia is defined as a sexual focus or attraction that deviates from the norm.

[3] The criminal case giving rise to this SVP proceeding occurred in 1994, when defendant pleaded guilty to 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.

Dr. Murphy testified that she also believed defendant qualified as an SVP. She further stated that he suffered from hebephilia, but acknowledged that hebephilia "doesn't . . . exist" as a diagnosis of mental illness listed in the DSM IV.

Defendant presented the opinion of Dr. Donaldson, who testified that defendant does not qualify as an SVP, because he does not have a diagnosable mental disorder that predisposes him to sexual violence. Dr. Donaldson confirmed Doctors. Murphy and Updegrove's testimony that paraphilia n.o.s. nonconsent, specifically hebephilia, does not exist as a diagnosis of a mental disorder in the DSM IV, and that it was created in the advent of SVP cases.

Dr. Donaldson stated that a diagnosis of a mental disorder is not dependent on what is considered socially acceptable or moral. He confirmed that homosexuality was removed from the DSM because is it no longer considered a mental disorder, and was only included in the DSM because of social views of morality at the time. Dr. Donaldson further stated with regard to hebephilia, many adult men are attracted to teenage young women, and while most do not act on this attraction, the fact that some men do does not necessarily mean they suffer from a mental disorder.

Dr. Donaldson testified that defendant has a relatively low risk of re-offending, because he does not have a diagnosable mental disorder that causes him to be dangerous.

Defendant also presented the testimony of people who resided with defendant while in treatment, as well as employees of the state hospitals where defendant was housed. All of the witnesses similarly testified that defendant followed all the rules, served as a leader to other residents, participated willingly in voluntary treatment, and while presented with numerous opportunities to have sexual contact with vulnerable teenage boys housed with him, defendant did not display inappropriate sexual behavior.

Finally, defendant presented evidence he would have financial and emotional support from his family if released.

After a 15-day trial, the jury found the allegation that defendant was an SVP true. The court committed defendant to an indeterminate term.

DISCUSSION

On appeal from the civil commitment order, defendant asserts the prosecutor committed multiple acts of misconduct during the trial that were pervasive and prejudicial, resulting in an unfair trial.

Prosecutorial Misconduct

Defendant's assertion of prosecutorial misconduct in this case is based on a series of incidents in which the prosecutor asked improper questions of the witnesses that elicited inflammatory answers, or made improper arguments to the jury.

In considering the effect of the prosecutor's conduct, we are mindful that "[p]rosecutors . . . are held to an elevated standard of conduct. 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." (Bus. & Prof. Code, § 6068, subds. (b) and (f).) A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." [Citation.]'" (*People v. Hill* (1998) 17 Cal.4th 800, 819-820 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)

Prosecutorial misconduct —often occurring during argument—may take a variety of forms. It may include (without limitation) mischaracterizing or misstating the evidence (*Hill, supra*, 17 Cal.4th at p. 823); referring to facts not in evidence (*id.* at pp. 827-828); misstating the law, particularly where done in an effort to relieve the People of

responsibility for proving all elements of a crime beyond a reasonable doubt (*id.* at pp. 829-830); attacking the integrity of, or casting aspersions on defense counsel (*id.* at p. 832); intimidating witnesses (*id.* at p. 835); referring to a prior conviction of the defendant that was not before the jury (*People v. Sanchez* (1950) 35 Cal.2d 522, 529); predicting that the defendant, if not found guilty, will commit future crimes (*People v. Lambert* (1975) 52 Cal.App.3d 905, 910); stating a personal opinion, such as an opinion that the defendant is guilty (*People v. Kirkes* (1952) 39 Cal.2d 719, 724); or appealing to passions or prejudice, such as asking the jury to view the crime through the victim's eyes (*People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, revered on other grounds in *Stansbary v. California* (1994) 511 U.S. 318).

Prosecutors are given " ' " 'wide latitude' " ' " in trying their cases. (*Hill, supra,* 17 Cal.4th 800, 819 [wide latitude given in closing argument].) "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.)

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.)

Asking Jury What Their Friends And Family Would Think if They Returned a Verdict of "Not True"

During closing argument, as it was nearing the end, the prosecutor said, "So soon, the oath, the promise that you made to the judge every time you . . . leave the courtroom, you are told don't talk about this with anyone unless you are deliberating. The time is going to come very soon, however you will be lifted from that obligation. You can talk to your family. You can talk to your friends. You can talk to who you choose. You may choose not to talk, but you are going to have to explain if you choose what you have been doing for the last two and a half weeks . . . your friends might say, was it a criminal case? No, it was a civil case. It dealt with commitment of someone to a state hospital. Oh really. Wow. What kind of case was it? Well, it involved a case of someone who was accused of being a sexually violent predator. So, take this out, imagine if you found the petition to be not true in this case. [Can] you explain this to people that you work with, or friends, or neighbors. What did you do? Well we found the petition to be not true. Oh, wow. That is interesting. Did the person—"

The defense attorney objected at that point as an improper consideration for the jury. The court overruled the objection because it got the "sense" that the argument was proper.

The prosecutor's use of the phrase, "Oh, wow," as a response to the jury's finding the petition not true was clearly suspect. The use of the word, "wow" in this context implied disapproval, shock akin to the phrase, "How could you do that, how could you find the petition not true?" Such a word was bound to cause the jury to fear disapproval and contempt from their friends should they were to find for defendant.

The defense objection to the prosecutor's arguments was proper, and should have been sustained. The court should have admonished the jury that the prosecutor's statements were in direct violation of the instruction that the jury is "not [to] discuss or consider the consequences of your verdict." (See CALJIC No. 17.42)

The prosecutor went on to say, "What I am getting at ladies and gentlemen, is that you have something very important to do here, and you need to feel very comfortable with it. The burden is on the People. It is beyond a reasonable doubt, and to feel comfortable with it is how you explain it to yourself, perhaps how you explain it to others. What they say, did you find the petition to be not true, you would do that, did the person, the person had never acted out sexually in the past [*sic*]. Oh, no, no, no. No, far from it. In fact, the person has repeated, repeatedly acted out, had multiple convictions, went to prison. [¶] Well, I guess, you found the petition not be true because you heard from a psychologist that was really top notch, really credible and believable. Well, actually we heard from this guy named Donaldson. He just, well, he was truly not independent. He was just—there is word [*sic*] for Dr. Donaldson, the word it incredible. So I am not sure how that would play out. [¶] And then perhaps people would say, well, the person that was allegedly a sexually violent predator they hadn't molested anyone for a long time, right, I mean , they knew they were a changed person, assuming that people can change the way they are wired, their sexual preferences, the evidence is that they cannot. So you might be asked haven't molested anyone for a long time [*sic*]. That's right. It has been 16 years. Oh, that is really good. But there haven't been any teenagers around for the 16 years."

Defense counsel again objected to the Prosecutor's argument stating that telling members of the jury to consider what their friends would think if they found the petition not to be true was improper, because it was not an appropriate consideration in this case. The court stated: "On the surface that's what it sounds like. Again my sense that it's

more than that. As it progressed I am more confident than I was earlier. [¶] The objection is overruled." Again, the court should have sustained defense counsel's objection. The prosecutor's arguments were clearly improper.

We see no difference between the prosecutor's proposal here that a juror or jurors conduct a conversation with an imaginary friend explaining that by their verdict they loosed a dangerous predator on the public than saying directly to the jury, "your friends and neighbors will condemn you if you release him." Both are flagrant misconduct. Public opinion is not a proper consideration for a jury. This reasoning has been condemned as faulty since the time of ancient Greece. *Argumentum ad populum* is fallacious. A jury cannot be made to consider an appeal to the masses, with the notion that "a proposition is true because many or most believe it."

Here, the jury was specifically instructed against this form of reasoning. Specifically, the instruction states, "[y]ou must not be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, *public opinion* or *public feelings* . . . [and that you will] reach a just verdict *regardless of the consequences.* (See CALCRIM No. 3454, emphasis added.)

In asking the jury to consider the reactions of their friends and family, fearing reproval should they find for the defendant, the prosecutor committed blatant misconduct.

Implying That Defendant Had Committed Other Crimes

The prosecutor told the jury during closing: "throughout the trial you have heard that [defendant] may just be the unluckiest child molester in the world, because every single boy he molested he got caught for. Isn't that amazing? Isn't that amazing? Of course, I am being sarcastic. That is know I am [*sic*]. This is a prolific child molester. All the experts testified that sex crimes go unreported."

Defense counsel objected and argued that there is no evidence defendant has committed additional crimes against other victims, and that it is improper to argue from

lack of evidence. The court overruled the objection. The objection should have been sustained, and the Prosecutor should have been admonished not to refer to facts that were not in evidence before the jury.

The prosecutor's reference to defendant as the "unluckiest child molester in the world," because he had been caught every time he molested a child was improper. The prosecutor's statement, "[t]his is a prolific child molester. All the experts testified that sex crimes go unreported," clearly was made to imply defendant had committed additional crimes of molestation that were unreported. Our Supreme Court stated in *Hill*, "[a]lthough prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. [Citations.] A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." [Citation.] (*Hill, supra*, 17 Cal.4th at p. 823.)

Here, the prosecutor's statements regarding defendant being a "prolific child molester," and that most child molestations go unreported, coupled with defendant's "luck" was a deliberate misstatement of the evidence intended to mislead the jury to believe defendant committed other crimes. There was nothing in the evidence to suggest this conclusion. In reference to the prosecutor referring to facts not in evidence in her closing argument, our Supreme Court in *Hill* stated: " '[s]tatements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' " (*Hill, supra*, 17 Cal.4th at p. 828.)

Schools in Defendant's Neighborhood if Released

Defendant argues the prosecutor improperly referred to the proximity of schools and parks in the neighborhood surrounding his mother's home where defendant would live if released. Defendant asserts this was improper, because it suggested that the jury consider the consequences of its verdict.

Specifically, during his examination of defendant, the prosecutor showed defendant a map of the area surrounding his mother's home. He had defendant point out two schools, a park, a shopping center and a McDonald's restaurant in close proximity to his mother's home.

Defendant Would Not be on Parole

Defendant asserts the prosecutor improperly informed the jury defendant would not be on parole if released, thus allowing the jury to consider the consequences of their verdict. Specifically, the prosecutor stated: "[a]nd so there is really no stopping [defendant], not even when he was on parole. And now of course, you know, he is not on parole. So when [defendant] tells you that he is going to live in Maryland with his mother, the only thing you have to go—the only thing that you have to believe that is what [defendant] said." The prosecutor went on to say, "When you deal with a case like this and the facts are so ugly, and they are so distinct from the things that you deal with in your normal daily lives, you may think, you just may want to understandably put it out of your minds as though this sort of thing doesn't happen, and just give this man who can be quite eloquent at times an unjust benefit of the doubt, and just think it is going to be somebody else's problem now. We will let his sister, we will let his mother deal with this. I submit to you that would be an abdication of your responsibilities here, because your service here presents an opportunity."

The prosecutor's reference to the proximity of schools to defendant's mother's house, as well as the fact that if released defendant would be living with his mother and would not be under the supervision of parole were improper references to the consequences of the jury's verdict. The United States Supreme Court has explained, "The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is

guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. Information regarding the consequences of a verdict is therefore irrelevant to the jury's task. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion. [Citations.]" (*Shannon v. United States* (1994) 512 U.S. 573, 579.)

A defendant's potential punishment or lack thereof is not a proper matter for juror consideration. (See *People v. Holt* (1984) 37 Cal.3d 436, 458, superseded by statute on other grounds in *People v. Muldrow* (1988) 202 Cal.App.3d 636.) There is no question the prosecutor's comments regarding the schools and lack of parole were designed to make the jury consider the consequences of its decision in this case. Such considerations are wholly improper, and cast doubt on the jury's ability to properly consider the evidence in this case.

Questioning of Defense Expert on Other SVP Trials

Defendant asserts the prosecutor improperly questioned the defense expert, Dr. Donaldson about five previous SVP cases in which he had determined the defendants did not have a diagnosed mental disorder. Dr. Donaldson did not have any of the files on these cases with him at trial. As a result, the prosecutor recited the facts of the cases before the jury. Defendant argues these facts were inflammatory, irrelevant to this case, and were only brought up to incite the passions and prejudice of the jury.

The prosecutor chose five particularly egregious SVP cases about which to question Dr. Donaldson. Because Dr. Donaldson did not have his files on these cases with him to properly refresh his recollection, some of which occurred in the 1990's, the prosecutor recited specific, incendiary facts about the cases in front of the jury. For example, the prosecutor asked Dr. Donaldson about the case of Ronald Ward, in which Mr. Ward "pick[ed] up a hitchhiker and raped her. . . . He got back out and then tried to

rape an 11-year old girl who was watching her house for her mother while the mother was out. . . . He got back out of prison and committed five counts of child molestation because he met a woman and married her and within two weeks he began molesting her children."

In addition, the prosecutor asked Dr. Donaldson if he remembered the case of Mr. Badura, who "was accused of molesting every child in his apartment complex, including his own three-and-a-half year old son," or Mr. Flick, who "was an older gentleman who used one child to hold down another child in order to molest her." The prosecutor went on to ask defendant about Marcus Rawls who committed "forcible rape where several weapons were used, including a baseball bat that he shoved up the victim's rectum, that he used guns, [and] he pistol-whipped a victim . . . ." Finally, the prosecutor asked Dr. Donaldson about the Hubbart case, stating: "[h]e admitted to more than 50 burglaries with the intent to commit rape where he would rape a lone female after gagging and binding her . . . . He was deemed an MDSO, a mentally disordered sex offender, after being caught as a serial rapist in [Los Angeles] He did seven years in Atascadero State Hospital as an MDSO, and then was released from the hospital."

The present case is similar to *People v Buffington* (2007) 152 Cal.App.4th 446 (*Buffington*), in which the prosecutor questioned the same Dr. Donaldson about three other cases for which he testified for the defendant. Like this case, the three prior cases also had egregious facts that were presented to the jury through the prosecutor's examination of Dr. Donaldson. While the court ultimately did not find prejudice sufficient to reverse the judgment, the court held the questioning was improper, because information about the prior cases was not relevant to show Dr. Donaldson's bias or prejudice. The court stated: "To be relevant, evidence must have a tendency in reason to prove or disprove a fact in dispute. Here, the fact in dispute could be deemed the reliability of the psychologist's opinion. That Dr. Donaldson, in three previous cases

involving men who committed multiple sex offenses, found no mental disorder did not have a tendency in reason to prove his opinion in this case and was unreliable unless the jury had some basis in reason to reject the reliability of the psychologist's opinion in those cases. In this case, there was no basis in reason for that inference." (*Buffington, supra*, 152 Cal.App.4th at pp. 455-456.)

Here, like *Buffington*, the prosecutor's recitation of facts of other SVP cases was not designed to elicit relevant evidence in this case. Indeed, it appears the prosecutor intentionally chose these cases not to impeach the witness, but to present facts to the jury much worse than those alleged here. Dr. Donaldson did not have his files to properly refresh his recollection about his diagnosis of the individuals to whom the prosecutor referred. As a result, there was nothing relevant to be gained from the prosecutor's questions other than to put egregious and incendiary facts of SVP cases to inflame the passion and prejudice of the jury. "The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.' [Citations.]" (*People v. Wagner* (1975) 13 Cal.3d 612, 619-620.)

Argumentative questioning of Defense Witness-Ross

During trial, defendant offered the testimony of Michael Ross, a psychiatric technician from Astascadero who knew defendant for six years. The prosecutor asked Mr. Ross, "You're here to help [defendant], though, correct?" To which Mr. Ross responded, "No. I'm just here to tell the truth. I mean, if it helps, it helps him. I don't know. I'm not emotionally attached to the man, so whatever happens to him happens." The prosecutor then said, "Mr. Ross, you don't know what you're talking about, do you?" The defense attorney immediately objected on numerous grounds, including the fact that the question was argumentative. The court overruled the objection. The court should

have sustained the objection. The prosecutor then repeated, "You don't know what you're talking about, do you?"

The prosecutor also asked Mr. Ross whether he would allow defendant to take care of his 13 or 14-year-old son, to which he responded, "I wouldn't—I don't trust anybody, so wouldn't trust—I mean, I wouldn't say, Hey, go. Why would a 13-year-old be with him? So that's not something I wouldn't allow to happen [*sic*]. My son's allowed to hang around with children his age, not grown adults, male or female." The prosecutor responded, "So parents who have teenage children who end up by being victimized by child molesters, they really have themselves to blame by leaving their children out of their care at some period of time?" The prosecutor's response was not at all what Mr. Ross actually said. Defense counsel objected on numerous grounds that the court overruled. The court should have sustained this objection.

Here, the prosecutor's questioning of Mr. Ross referenced above was clearly argumentative, and was not intended to glean relevant information. "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable. . . . An argumentative question that essentially talks past the witness, and makes an argument to the jury, is improper because it does not seek to elicit relevant, competent testimony, or often any testimony at all." (*People v. Chatman* (2006) 38 Cal.4th 344, 384.)

The prosecutor's questions as to whether Mr. Ross did not "know what he was talking about," were not proper questions designed to elicit actual evidence. Nor was his question to Mr. Ross of whether parents of teenagers who are victims of molestation have themselves to blame designed to glean actual evidence. Rather, these questions were "speech[es] to the jury masquerading as . . . question[s]" (*People v. Chatman, supra,* 38 Cal.4th at p. 384), and were rhetorical attempts to degrade and disparage the witness.

Rather than seeking facts, in posing these questions, the prosecutor was arguing to the jury that Mr. Ross was only testifying to help defendant, and had no knowledge of defendant's conduct at Atascadero. In addition, the questions were designed to argue that the defense was "blaming the victim," in child molestation cases.

Telling Jury They Had Been "Groomed" by Defendant

In closing argument, the prosecutor told the jury that they "have been groomed" by defendant's testimony at trial. The prosecutor went on to say, "[t]he grooming behavior, the manipulation, it still continues."

During trial, Dr. Murphy defined grooming as a "slow, steady manipulation to get a person in a compromising position or violate boundaries without awareness." The irony here is that the prosecutor's conduct toward the jury throughout the trial closely fit Dr. Murphy's definition of grooming. Defendant argues this comment was intended to inflame the jury making them each feel like victims in the case, who were being "groomed" by defendant so he could achieve his desired result. We cannot say this to be untrue.

The prosecutor's argument that defendant was "grooming" the jury, thus placing them in the same position as the defendant's victims was clearly improper. A prosecutor may not appeal to the passions or prejudice of the jury by asking it to view the crime through the victim's eyes. (*People v. Stansbury, supra,* 4 Cal.4th 1017, 1057). Here, by arguing that defendant had "groomed" them during the trial, and that he had similarly "groomed" his victims by a "slow, steady manipulation to get [them] in a compromising position or violate boundaries without awareness," the prosecutor was improperly appealing to the passions of the jury by implying they were also defendant's victims.

Reference to Defense Witnesses as "Serial Rapists and Child molesters."

During closing, the prosecutor stated, "[t]he defense does not have to prove anything, and yet you may consider what they tried to show. So what did they do? They

brought in two serial rapists and a child molester to say that [defendant] has good character. It was surreal. It was surreal, but telling."

Questionable Conduct by Prosecutor

In addition to the clear instances of misconduct discussed above, there were also statements made by the prosecutor that were close to the line, and standing, alone would not necessarily be prejudicial to defendant. However, when considered together, along with the other acts of misconduct committed by the prosecutor in this case, the cumulative prejudice rendered the trial fundamentally unfair. (See, e.g., *People v. Hill, supra*, 17 Cal.4th at p. 845.)

Impugning of Defense Expert-Dr. Donaldson

Defendant asserts the prosecutor committed misconduct by impugning the character of its expert witness, Dr. Donaldson. During closing argument, the prosecutor stated: "[y]ou heard from a defense expert. He has got a streak that would make Cal Ripken jealous. Cal Ripken the baseball player and the Iron Man that played in something like 4,000 straight games. Dr. Donaldson's streak of 289, 289 straight times testifying exclusively for the defense. [¶] Now he would like to tell you that is not his fault, because he offered to teach the State of California all his wisdom. His brilliance has yet to be fully appreciated by this society. It is appreciated by defense attorneys who pay him and he comes in, and 289 straight times testified for the defense." In addition to this summary, the prosecutor also referred to Dr. Donaldson as "completely biased and not helpful," and a person who offered a "laughable assertion."

Impugning Character of Defense Attorney

Defendant asserts the prosecutor committed misconduct by impugning the character of the defense attorney by arguing in closing that counsel had been deceptive during the trial. Specifically, the prosecutor argued that defense counsel "left something off . . . [the] charts. Frankly it was deceptive." Defense counsel objected to this

statement, and moved to strike, but the objection was overruled. The objection should have been sustained and the motion granted. The prosecutor went on to explain to the jury that only part of CALCRIM No. 3454 was included on the chart of instructions. He noted that defense counsel objected to the language in the instruction that reads "[t]he likelihood that the person will engage in such conduct does not have to be greater than 50 percent," and also objected to the prosecutor's statement about a "five percent chance, let alone a 29 percent chance." The prosecutor asked the jury, "Why didn't [defense counsel] put that [referring to the 50 percent language] up there?"

"If there is a reasonable likelihood that the jury would understand the prosecutor's statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) Here, the prosecutor described defense counsel as "deceptive" to the jury for leaving information off a particular instruction. The prosecutor's denigration of defense counsel's veracity was misconduct, and was not a proper method to argue the defense evidence lacked credibility.

Prejudice to Defendant

This is not a case in which the prosecutor engaged in a few minor incidents of improper conduct. Rather, the prosecutor engaged in a pervasive pattern of inappropriate questions, comments and argument, throughout the entire trial, each one building on the next, to such a degree as to undermine the fairness of the proceedings. The misconduct culminated in the prosecutor flagrantly violating the law in closing argument, telling the jury to consider the reaction of their friends and family to their verdict, implying they would be subject to ridicule and condemnation if they found in favor of defendant. The cumulative effect of all of the prosecutor's misconduct requires reversal. (See *People v. Riggs* (2008) 44 Cal.4th 248, 298.)

It must be noted that during trial, defense counsel objected to all of the

prosecutor's improper questions, statements and arguments. We observe that not one of counsel's well-taken objections was sustained by the court. The court erred in overruling these objections. We do not mean to be understood as saying the case must be reversed because of technical objections to the evidence. Here, the rulings of the trial court on defense objections to misconduct made the trial unfair. Former Chief Justice George's statement in his concurrence in *Hill*, can equally be applied to the present case. "[T]he prosecutorial misconduct (together with the *related* erroneous rulings by the trial court) committed in this case in itself requires reversal of the judgment." (*Hill, supra*, 17 Cal.4th at p. 853 (conc. opn. of George, C.J.).)

In addition, we find it is reasonably probable that defendant would have obtained a more favorable result absent the repeated incidents of improper conduct. (See *People v. Welch* (1999) 20 Cal.4th 701, 753.) Importantly, the evidence presented in this case was not overwhelming that defendant qualified as an SVP. The fact that the first trial ended with a hung jury demonstrates how close the case really was. Here, the prosecutor's expert, Dr. Updegrove testified that based on psychological tests he administered, defendant had a moderate to moderate-high risk to re-offend. However, Dr. Updegrove also stated he probably already had his mind made up when he recently interviewed defendant. In addition, Dr. Murphy testified that defendant's diagnosis of hebephilia, which is a psychopathy related to preying on victims aged 14-17, does not exist as a diagnosis of a mental disorder in the DSM-IV.

In this third trial, defendant presented a vigorous defense that included an expert opinion that defendant does not qualify as an SVP, because he does not have a diagnosable mental disorder that would predispose him to sexual violence. He also presented evidence that he had spent the last 15 years while incarcerated seeking every voluntary treatment available. In addition, while incarcerated, defendant had many opportunities to re-offend, as there were vulnerable teenage boys housed with him, but

had not. Hospital employees testified that defendant followed the rules, was a leader and was a friend to many other residents.

In reviewing the record and considering the extent of the prosecutor's improper questions and arguments, we conclude that the prosecutor's improper conduct " ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' " (*People v. Riggs, supra,* 44 Cal.4th at p. 298.) Moreover, the aggregate prejudicial effect of the prosecutor's misconduct therefore requires reversal.

DISPOSITION

The judgment is reversed.[4]

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[4] In light of the fact we are reversing the judgment based on prosecutorial misconduct, we are not considering defendant's additional claims of error in this case.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

People v. Shazier
H035423

Trial Court:	Santa Clara County Superior Court No.: 210813
Trial Judge:	The Honorable Alfonso Fernandez and The Honorable Edward Frederick Lee
Attorney for Defendant and Appellant Dariel Shazier:	Jill A. Fordyce under appointment by the Court of Appeal for Appellant
Attorneys for Plaintiff and Respondent The People:	Kamala D. Harris Attorney General Dane R. Gillette, Chief Assistant Attorney General Gerald A. Engler, Senior Assistant Attorney General Seth K. Schalit, Supervising Deputy Attorney General Bridget Billeter, Deputy Attorney General

People v. Shazier
H035423

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Dariel Shazier***
No.: **H035423**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On February 1, 2013, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 1, 2013, at San Francisco, California.

Tan Nguyen
Declarant

Signature

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