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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

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]

_____
RUSHING, P.J.

WE CONCUR:

_____
PREMO, J.

_____
ELIA, J.

[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.

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

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