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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. DEVIN L. TYSON, Defendant and Appellant.	B211180 (Los Angeles County Super. Ct. No. VA101353)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed.

Law Offices of Hassan & Associates and Marvin J. Hassan for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Roberta L. Davis and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant Devin L. Tyson guilty of assaulting Hanna K. with the intent to commit a felony (Pen. Code, § 220, subd. (a))[1] and of assaulting her with a deadly weapon, specially finding he inflicted great bodily injury upon her (§ 12022.7, subd. (a)) as to both offenses.[2] The trial court sentenced defendant to a seven year prison term consisting of a four year middle term for the first count, plus three years for the great bodily injury enhancement. A six year consecutive term for the second count was imposed and stayed pursuant to section 654.

In his timely appeal, defendant contends (1) the prosecutor committed numerous acts of misconduct during closing argument and in the examination of witnesses; (2) there was insufficient evidence to support his convictions; and (3) the trial court committed "judicial error" by denying a juror request to view police reports, denying defense motions to unseal juror records and for a new trial, and failing to control prosecutorial misconduct. We affirm.

STATEMENT OF FACTS[3]

Hanna was the property manager of an apartment building on Woodruff Avenue in Bellflower where she lived with her husband, Laimas. On May 30, 2007, defendant telephoned Hanna to make an appointment to see an apartment the following morning.

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[1] All further statutory references are to the Penal Code, unless specified otherwise. The jury was instructed that it must find a specific intent to commit rape, sodomy, or oral copulation.

[2] The trial court granted defendant's section 1118.1 motion for acquittal on the third count of kidnapping.

[3] We disregard defendant's statement of facts because his Opening Brief failed to provide any citations to the appellate record in violation of the Rules of Court, rule 8.204(a)(1)(C). "Statements of facts not supported by references to the record may be disregarded as a violation of" the Rules of Court. (*Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451; see also *In re. S.C.* (2006) 138 Cal.App.4th 396, 402.)

He represented that his name was Jason. On the morning of May 31, defendant telephoned and requested to be admitted to the apartment complex. Hanna walked to the front gate, unlocked it, and escorted him around the ground floor of the apartment building, showing him the parking lot and other points of interest. They walked to her office, where Hanna gave defendant a rental application and list of the items he needed to provide in order to rent an apartment. They made an appointment for the next day for defendant to return the necessary paperwork and deposit. Defendant left the office and Hanna completed some work and went to her apartment for lunch with her husband.

As soon as they began to eat, defendant telephoned and requested a second application. Hanna had the front gate opened and defendant met her at the office. They entered and Hanna gave defendant the application. Defendant began to ask her for the same rental information she had provided in their first meeting. As she stood in front of the desk and began highlighting portions of the information form, defendant approached her and suddenly pushed her into the bathroom and against the interior wall. Defendant shut the bathroom door and pulled a large cologne bottle from his pocket. Hanna screamed, but defendant cursed at her and repeatedly ordered her to "[s]hut up." Defendant ripped open her shirt and said, "Let me feel your tits." He grabbed Hanna's breasts, scratching them.

Defendant forced her to bend over the toilet and told her, "Do it, bitch." She believed defendant was preparing to sexually penetrate her from behind. As she begged him to stop, he tried to pull up her skirt. Defendant turned Hanna around so that she faced him and ordered her to "suck on his penis." He pulled his pants down, grabbed her hair, and pushed her toward his penis. She noticed a condom package had been placed on the bathroom counter. Hanna tried to stab defendant with her highlighter and pushed him into the shower door. Defendant punched her and hit her face with the cologne bottle. At no time did defendant demand money. Believing that defendant was going to kill her, Hanna passed out. When she regained consciousness, she found herself alone on the bathroom floor.

Laimas knew Hanna had gone to the office to give an application to defendant, the same prospective tenant who had been there earlier. He heard his wife's screams and ran to the office. Hanna was bleeding, terribly upset, and her clothes disheveled. He ran out of the office and toward the street, after the attacker. When he got to the street, he heard a car door slam, and saw defendant behind the wheel of a black Ford Focus. Laimas tried to open the car door, but it was locked. Defendant sped away. Laimas remembered some of the letters on the license plate.

An ambulance took Hanna to the hospital emergency room, where she was treated for the injuries defendant had inflicted—lacerations on the inside and outside of her lips, blunt force trauma to her face, hand, and knees, along with scratches on her breast. As a result of defendant's beating, Hanna continues to suffer lower back pain, requiring physical therapy. Two of her fingers remained numb at the time of trial and her ability to move them was significantly impaired. She continues to suffer from debilitating headaches and psychological problems. She is no longer able to have marital relations.

Detective Rudy Ramos located defendant's Ford Focus parked in front of the Long Beach residence of defendant's father. The car's license plate had the same three letters Laimas had recalled. Defendant's fingerprints were found on the office's bathroom door and the cologne bottle defendant used to strike Hanna.

Defense

Jessica Culberson, defendant's best friend, was looking for apartments with defendant in May and June of 2007. Defendant testified that during his first meeting in the office with Hanna, he noticed that someone handed her a white envelope, which he assumed held a check or money. Hanna put the envelope in her desk, and defendant decided he was going to steal it. After Hanna escorted him out of the apartment complex, he waited in his car for approximately four minutes. As part of his plan, he telephoned her and asked for a second application. They met at the front gate and Hanna took him into the office. He noticed Hanna had a set of keys. While Hanna was speaking to

someone on the telephone, defendant tried to open the desk drawer, but found it locked. When he tried to take the keys from Hanna's hand, she "got startled," screamed, and tried to defend herself with a highlighter. He called her a "bitch" and told her to "shut up." Defendant tried to punch her with his closed fist, but missed when she ducked. Hanna retreated to the bathroom and he followed to take her keys. He forced his way inside.

Defendant pulled a cologne bottle out of his sweatshirt pocket and threatened to hit her with it. He swung the bottle at Hanna, but never struck her. He did not utter any words "of sexual import" to her. He dropped the cologne bottle and Hanna pushed him into the shower. When defendant got back on his feet, he became "aggressive," pulling her hair and punching her five to ten times in the face and head—but never pulling her toward his genitals or reached underneath her skirt. There was no sexual contact. Defendant saw Hanna's keys on the bathroom floor, grabbed them, ran out of the office, and got into his Focus. He turned himself into the authorities a few days after learning the sheriff's department had been to his father's house looking for him. Defendant denied having a condom.

DISCUSSION

Forfeiture of Appellate Claims

The California Rules of Court require parties to an appeal to "support each point by argument and, if possible, by citation of authority" and to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears."[4] (Cal. Rules of Court, rule 8.204(a)(1)(B) & (C).) Defendant's opening brief does not contain a single citation to the appellate record. "When an appellant's brief makes no reference to the pages of the record where a point can be found, an appellate

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[4] This rule applies to civil and criminal appeals. (Cal. Rules of Court, rule 8.360(a).)

court need not search through the record in an effort to discover the point purportedly made. [Citations.] We can simply deem the contention to lack foundation and, thus, to be forfeited." (*In re S.C.* (2006) 138 Cal.App.4th 396, 406-407; *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239, fn. 16 ["*any* reference in the brief must be supported by a citation, regardless of where in the brief that reference appears"]; *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 796 [reviewing court may disregard evidentiary contentions unsupported by proper page citations to the record].)

Here, it appears that instead of preparing a proper opening brief, appellate counsel merely repackaged his unsuccessful new trial motion (without making any substantive changes) as a brief to this court. For instance, rather than providing the requisite citations to the clerk's and reporter's transcripts, the opening brief cites to a separate document entitled, "Appellant's Appendix," which he filed and served along with his opening brief. That 150-page document consists of the same 48 exhibits attached to his new trial motion, along with copies of the new trial motion itself, his unsuccessful motion to unseal jurors' records, the minute order in which the trial court denied the new trial motion, defendant's notice of appeal, and a jury question concerning consideration of the police report. To the extent defendant purports to provide any record citations on appeal, he merely refers us to the exhibit number and the page reference to the particular document in his appendix. However, none of those page references corresponds to the clerk's transcript or reporter's transcript on appeal since the pagination on the documents comprising the appellate record is different.

Defendant never sought permission to file his appendix, and the Attorney General objects to its being considered on appeal. We agree and order appellant's appendix stricken. The California Rules of Court do not authorize the filing of such a document as part of a criminal appeal. Rather, they provide an entirely different scheme for ensuring a

complete and accurate record is made available to the parties and the court.[5] (See Cal. Rules of Court, rules 8.320-8.346.) The record on this appeal consisting of the clerk's and reporter's transcripts is adequate for the review of defendant's appeal—and defendant does not argue the contrary. Every document in the unauthorized appendix is contained in the clerk's or the reporter's transcripts—albeit having been repaginated and renumbered in conformance with appellate procedure. Appellant's appendix is thus unauthorized and superfluous. Its only conceivable purpose is to give defendant's counsel a means of avoiding his responsibility of complying with the California Rules of Court. That is, appellate counsel chose not to make the effort to locate and identify the relevant portions of the record on appeal in support of his client's contentions. Consideration of appellant's appendix would improperly require the Attorney General and this court to cross-reference and search for each one of defendant's citations in the proper record—a time-consuming and wasteful exercise inconsistent with longstanding appellate rules and practice.

"'It is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations.' [Citations.] If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856.) "If and when we are required to perform tasks which are properly those of appellant['s] counsel, we necessarily relegate farther into the background appeals waiting their turn to be decided. It is unfair to litigants thus affected that we do this." (*Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 151; see also *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486 ["It is not the duty of a reviewing court to search the record for evidence on a point raised by a party whose brief makes no reference to the specific pages where the evidence can be found"].)

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[5] California Rules of Court, rule 8.124 concerns the manner in which parties to civil appeals may provide the record on appeal through appendices and does not apply to this criminal appeal.

In sum, defendant's failure to support his statement of facts and any of his arguments by proper reference to the record forfeits all of his contentions on appeal. (See e.g., *Miller v. Superior Court* (2002) 101 Cal.App.4th 728, 743; *People v. Woods* (1968) 260 Cal.App.2d 728, 731.)

Prosecutorial Misconduct Claims

Defendant asserts the prosecutor committed numerous acts of misconduct during closing argument and in the examination of witnesses. As we explain, independent of our forfeiture finding detailed *ante*, defendant failed to preserve his prosecutorial misconduct claims for appellate review.

It is well established that a prosecutor's improper remarks can so infect a trial with unfairness as to render a conviction a denial of due process. (*People v. Farnam* (2002) 28 Cal.4th 107, 167, citing, *Darden v. Wainwright* (1986) 477 U.S. 168, 181, *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642, and *People v. Hill* (1998) 17 Cal.4th 800, 819.) On the other hand, for purposes of state law, a prosecutor's intemperate conduct that does not render a criminal trial fundamentally unfair amounts to prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Ibid.*) However, "[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety. [Citation.]" (*People v. Thornton* (2007) 41 Cal.4th 391, 454.)

Defendant made no objection and requested no admonition as to any of the statements he belatedly attempts to brand as misconduct. From our independent review of the record, it is clear that "a timely objection and request for admonition would have

cured any resulting harm" in every instance.[6] (*People v. Thornton, supra,* 41 Cal.4th at p. 454.) Moreover, we perceive no misconduct. "Most of defendant's contentions relate to closing argument. At that stage, prosecutors have wide latitude to discuss and draw inferences from the evidence presented at trial. ""'Whether the inferences the prosecutor draws are reasonable is for the jury to decide.'"" [Citation.]" (*Ibid.*)

For example, we find no federal or state violation arising out of the misconduct allegation defendant deems the most egregious. Defendant asserts the prosecutor improperly disparaged defendant's constitutional right to confront adverse witnesses by stating during voir dire that defendant's parents had retained private counsel for their son, and then arguing to the jury that his "family gives him everything he needs." As the Attorney General points out, however, defendant provides no record citation for the supposed statement during voir dire. Once again, rule 8.204(a)(1)(C) of the California Rules of Court requires that any statement in a brief concerning matters in the appellate record must be supported by "citation to the volume and page number of the record where the matter appears." We will disregard references to such matters when they lack proper citation to the appellate record. (See *Yeboah v. Progeny Ventures, Inc.* (2005) 128 Cal.App.4th 443, 451; *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.) Nor will we consider contentions grounded on statements unsupported by record references. (*Weller v. Chavarria* (1965) 233 Cal.App.2d 234, 246.)

Moreover, defendant could not provide a proper record citation for the supposed voir dire statement, as voir dire proceedings were not included in the reporter's transcript and defendant made no request to augment the record to include them. This error points to one even more fundamental—the factual predicate to defendant's claim is not part of the record on appeal. "When practicing appellate law, there are at least three immutable

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[6] Our Supreme Court has also recognized a limited exception to the waiver rule in the case of futility: "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Defendant does not contend the futility exception applies. We perceive no basis for making such a contention.

rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.) In any event, even if defendant had preserved his contention for review, we perceive only the most strained and tenuous connection between the supposedly improper statements and a Confrontation Clause violation. There is no reasonable likelihood the jury would have understood those statements in the way defendant argues.

None of the other instances of alleged prosecutorial misconduct amounts to a violation of due process or state law. In each instance, defendant overlooks the rule that "[p]rosecutors may attack the defense case and argument. 'Doing so is proper and is, indeed, the essence of advocacy.' [Citation.]" (*People v. Thornton, supra,* 41 Cal.4th at p. 455; see *People v. Earp* (1999) 20 Cal.4th 826, 862-863 [prosecutor's argument that defendant was lying "was based on inferences that could reasonably be drawn from the evidence and therefore was proper"].) Defendant fails to show that any of the challenged statements went outside the bounds of fair comment under the relevant standards. We refuse to consider defendant's argument that the prosecutor engaged in improper questioning, or "bullying" of witnesses, because the contention is perfunctorily raised, without any legal support. (See, e.g., *People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37 ["As this contention is perfunctorily asserted without any analysis or argument in support, we reject it as not properly raised"]; *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 ["We need not consider an argument for which no authority is furnished"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["When an appellant . . . asserts [a point] but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

Finally, we reject defendant's assertion that the supposed instances of misconduct, when considered together, combined to establish a pattern of misconduct that warrants reversal. That argument "fail[s] for want of a sufficient factual predicate"—defendant cannot support his claims as to any single instance of misconduct. (*People v. Thornton, supra,* 41 Cal.4th at p. 460.)

Sufficiency of Evidence

Defendant's claim that there was constitutionally insufficient evidence to support his convictions merits scant attention, as it is premised on the application of an incorrect standard of review. Defendant improperly urges us to reweigh the evidence regarding witness credibility pursuant to the standard for granting a new trial or modifying a verdict under section 1181, subdivision (6). The standard of review on appeal is entirely different. "'In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]" (*People v. Mejia* (2007) 155 Cal.App.4th 86, 93, citing, *People v. Young* (2005) 34 Cal.4th 1149, 1181; see *In re S.C., supra,* 138 Cal.App.4th 396 ["Appellant's counsel fails to grasp the fundamental rule that an appellate court does not reassess the credibility of witnesses or reweigh the evidence"].)

As our summary of the facts makes clear, there was nothing physically impossible or inherently improbable about the prosecution case. The jury had a reasonable, solid, and credible basis for finding Hanna a more credible witness than defendant. Defendant's claim fails.

Judicial Error

Defendant contends the trial court committed "judicial error" by denying a juror request to view police reports, denying the defense motions to unseal juror records and for a new trial, and failing to control prosecutorial misconduct. Defendant presents no authority in support of his contentions of trial court error. Instead, he invites us to review his unsuccessful trial court motions. We decline the invitation. "To demonstrate error, appellant must present meaningful legal analysis supported by citations to authority and

citations to facts in the record that support the claim of error. [Citations.] When a point is asserted without argument and authority for the proposition, 'it is deemed to be without foundation and requires no discussion by the reviewing court.'" (*In re S.C., supra,* 138 Cal.App.4th at p. 408, citing *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647; see also *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1117.) "This is no legal analysis at all. It is simply a conclusion, unsupported by any explanation . . . . Hence, appellant has forfeited the claim of error." (*In re S.C., supra,* at p. 410.)

The third aspect of his contention—the failure to control supposed prosecutorial misconduct—fails for the reasons we gave in rejecting defendant's prosecutorial misconduct claims. Indeed, defendant does not make *any* argument in support of this contention, apparently assuming his prior misconduct argument would suffice. Accordingly, his judicial error assertion is forfeited.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.