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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK GRANT,

Defendant and Appellant.

A130089

(Alameda County
Super. Ct. No. C163224)

Defendant Patrick Grant appeals his convictions for second degree robbery and possession of a firearm by a felon. Defendant contends: (1) the trial court abused its discretion by failing to question the jurors about whether they could set aside the fact that one of the robbery victims was an off-duty police officer in assessing his credibility; (2) the prosecutor committed prejudicial misconduct by repeatedly emphasizing that the victim was a police officer and inappropriately vouching for his credibility; and (3) counsel rendered ineffective assistance by failing to object to the references to the victim’s status as a police officer, eliciting testimony that defendant was on parole, and acknowledging that “maybe” defendant committed the robberies. We shall affirm.

Factual and Procedural History

There was testimony at trial of the following facts. On July 18, 2009, Hung Nguyen, an off-duty Oakland police officer, and his cousin Khai Tang were robbed at gunpoint when they were fishing at a pond in the City of Oakland. Nguyen and Tang both testified that they were approached by a Black male who appeared to be in his late teens or early twenties, wearing a white t-shirt, long jean shorts, and purple and white

shoes. The man first approached Nguyen and Tang, examined their fishing gear, and walked away. A few minutes later, he returned, pointed a black semi-automatic gun at Nguyen and Tang and demanded their wallets. The man took Nguyen's money clip and Tang's wallet before running off. Nguyen immediately called the Oakland Police Department to report the robberies and chased the robber, observing him to flee in a green Suburban.

Garrison Rios was driving on the same street and saw a car that was either a green Suburban or Explorer pull out in front of him. Rios saw the driver for a "real brief" period and later identified defendant as the driver.

Officer Rainbird, who was on patrol that day, observed a green Suburban traveling away from the pond at high speed. Rainbird followed and eventually saw a man jump out of the Suburban and begin to run. The man was a Black male wearing a black shirt and long jean shorts, between the ages of 18 and 25, carrying a black semi-automatic firearm. Rainbird chased the man, but lost sight of him when he climbed over a fence. The police later obtained a DVD taken from a video camera behind the house where the man had allegedly jumped the fence. The DVD showed the man running through several backyards.

Nguyen and Tang identified the abandoned green Suburban as the vehicle in which the robber had fled. Inside the vehicle, police found two pay stubs, one bearing defendant's name. Photographs of the interior showed two white t-shirts and a pair of purple and white shoes.

Nguyen, Tang, and Rios each independently identified defendant as the robber from photographic lineups and again identified defendant at trial. When defendant was arrested several days after the robberies he initially gave a false name. He eventually admitted his real name and that he lived about three or four blocks from where the abandoned green Suburban had been recovered.

Defendant was charged by information with two counts of robbery (Pen. Code, § 211)¹ with personal use of a firearm (§ 12022.5, subd. (a), 12022.53, subd. (b), 12022.53, subd. (g)), and being a felon in possession of a firearm (§ 12021, subd. (a)(1)). The information also alleged a prior strike conviction. (§§ 667, subd. (c), 1170.12, subd. (a).)

During voir dire, the prosecutor disclosed to the jury that one of the victims was an off-duty police officer. Defense counsel asked a few but not all of the potential jurors whether they could set aside that fact when assessing the officer's credibility.

Throughout trial, the prosecutor stressed that Nguyen was an off-duty police officer. In addressing the jury, the prosecutor also spoke without objection of the important role of police officers in protecting city residents and the dangers faced by police officers while in the line of duty.²

¹ All statutory references are to the Penal Code unless otherwise noted.

² During her opening statement, the prosecutor told jurors that Nguyen was an off-duty police officer at the time of the crime, and went on: "Police officers generally are here to protect us. They're here to serve the community in which they work. Generally, they uphold the law and they go out and risk their lives every day. [¶] Officer Hung Nguyen is no exception. He's been a police officer with the Oakland Police Department for the past eight years. Every time he puts on his uniform, he does his job, does what he swore to do when he . . . took the oath of office. He goes out, protects the citizens of Oakland, investigates crime, serves the community in which he works. And he's proud. He's a hard worker just like the rest of us. [¶] And when he gets a day off, he enjoys it, just like the rest of us. Where he doesn't have to go risk his life[.] [W]here he doesn't have to go worrying about chasing after criminals[, or] [i]nvestigating crime[s]. Where he can just enjoy a day off like we do. [¶] . . . [¶] But July 18th, 2009, turned out to be the most stressful and one of the most traumatic days of his life. Why? Because the defendant . . . robbed him and his cousin Khai Tang at gunpoint. You see, on July 18th 2009, Officer Nguyen . . . was a citizen, [l]ike you and I."

During rebuttal, the prosecutor stated: "[Defense Counsel] seems to think that the Oakland Police Department spent too much time, spent all their efforts and resources because one of their own was robbed. Well, no. I mean, the Oakland Police Department has a lot on their plate. A lot of crime. And as citizens, we hope that we can go to bed, sleep safely in our beds, walk around our own neighbors and not have to worry about being a victim of a crime. So we would hope that if there is a person driving erratically in neighborhood residential streets, running through stop signs, not caring who is out on

At one point during trial, defense counsel elicited from a witness that defendant was a parolee. And in closing, defense counsel argued that “maybe” defendant committed the crime, but the evidence created a reasonable doubt.

The jury found defendant guilty of all counts. Defendant subsequently admitted the prior strike offense. Defendant was sentenced to 30 years and four months in prison and filed a timely notice of appeal.

Discussion

I. The trial court adequately conducted voir dire.

Defendant contends the trial court erred by failing to question all jurors about whether they could set aside the fact that Nguyen was an off-duty police officer in assessing Nguyen’s credibility. During voir dire, the potential jurors were informed that one of the alleged victims was an off-duty police officer. Aware of this, defense counsel questioned only some of the potential jurors about whether they could set aside that fact in assessing the off-duty police officer’s credibility. The trial court asked potential jurors no questions on the subject, and was not requested to do so.

“The Constitution . . . does not dictate a catechism for *voir dire*, but only that the defendant be afforded an impartial jury. Even so, part of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors.’ . . . [Citations.] ‘[T]he trial court retains great latitude in deciding what questions should be asked on *voir dire*,’ and ‘ “content questions,” ’ even ones that might be helpful, are not constitutionally required. (*People v. Cleveland* (2004) 32 Cal.4th 704, 737.) “Unless the

the street, what cars it may hit, leading police on a chase, and then jumping out of a still moving car, not caring, not knowing who or what it’s going to hit, and then running [o]n a residential street with a gun in his hand. I would hope that the police department took it seriously. We all would. It’s their job.”

The prosecutor later continued: “Hung Nguyen, yes, is a trained police officer of eight years. But on July 18, 2009, he was not in cop mode. He was in citizen mode. It’s different when you’re in your uniform, when you have your gun, when you have your badge, when you’re ready to go out [and] [r]isk your life to protect the city in which you work. But he wasn’t. It was his day off. And they were both shocked and there was a gun pointed at their face[s] by the defendant.”

voir dire by a court is so inadequate that the reviewing court can say that the resulting trial was fundamentally unfair, the manner in which voir dire is conducted is not a basis for reversal.” (*People v. Holt* (1997) 15 Cal.4th 619, 661.) A trial court abuses its discretion if the questioning is not reasonably sufficient to test the jury for bias or partiality. (*People v. Cleveland, supra*, 32 Cal.4th at p. 737.)

The trial judge permitted the attorneys to conduct substantially all of the voir dire examination of prospective jurors. The court was neither requested to ask any questions concerning the prospective jurors’ ability to fairly evaluate the credibility of a police officer nor did the court limit defense counsel’s questioning on this subject. Defendant cites no authority suggesting that the trial court was obliged to ask any such questions *sua sponte*. The court certainly was aware that the jury ultimately would be instructed concerning the factors to be considered in evaluating a witness’s credibility, as in fact it properly was. There is no basis to fault the manner in which the voir dire examination was conducted, nor any reason to believe that because each juror was not asked to confirm his or her ability to even-handedly evaluate the testimony of a police officer, the jury selected was less than fair and impartial.

II. *The prosecutor did not commit prejudicial misconduct.*

Defendant contends that the prosecutor committed prejudicial misconduct by repeatedly emphasizing that Nguyen was an off-duty police officer, and by eliciting sympathy for the officer and vouching for his credibility by extolling the virtues of police officers. (See fn. 2, *ante*.)

“To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct.” (*People v. Price* (1991) 1 Cal.4th 324, 447.) Here, defense counsel never objected to the prosecutor’s references to Nguyen’s occupation. Having failed to raise a timely and specific objection below, defendant has forfeited this claim for purposes of appeal.

Moreover, even if a proper objection had been made, most of the prosecutor's references to Nguyen being a police officer were appropriate. Nguyen's status as an off-duty police officer was relevant to explain many parts of his testimony. The fact that he is an officer was necessary to explain why he had a gun in his vehicle, why he was able to describe the robber's gun in detail, why he chased the robber instead of waiting for police to arrive, why he called the non-emergency number of the Oakland Police Department instead of 911, why he used many police terms during his call to the police dispatcher,³ why he knew many of the Oakland police officers involved in the case, and why he was familiar with the various police districts. The prosecutor engaged in no misconduct in bringing out that Nguyen was a police officer.

However, portions of the prosecutor's argument went well beyond what was relevant about Nguyen's status as a police officer to what can only be regarded as an emotional plea for sympathy for the officer. There was no occasion for the prosecutor to argue, for example, that "[p]olice officers generally are here to protect us. They're here to serve the community in which they work. Generally, uphold the law and they go out and risk their lives every day. [¶] Officer Hung Nguyen is no exception. He's been a police officer with the Oakland Police Department for the past eight years. Every time he puts on his uniform he does his job, does what he swore to do when he put on or took the oath of office. He goes out, protects the citizens of Oakland, investigates crime, serves the community in which he works." None of this had anything to do with the facts of the crime on trial or with Nguyen's testimony concerning those events.

Appeals to the jury's passions are generally inappropriate during the guilt determination phase of a trial. (*People v. Smith* (2003) 30 Cal.4th 581, 634.) A prosecutor is permitted "to make fair comment on the evidence, including reasonable inferences or deductions to be drawn from it" (*People v. Collins* (2010) 49 Cal.4th 175,

³In an audio recording played for the jurors, Nguyen directed the police to look for the suspect in certain areas and used phrases such as "code three response," "we just got 211," and "Mac" — terms and phrases familiar to members of the Oakland Police Department but not necessarily the general public.

213), but “[a] prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record” (*People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1584).

Although some of the prosecutor’s statements were inappropriate, defendant made no objection to any of those statements and thus may not raise the objection for the first time on appeal. Moreover, placing those statements in the context of the complete trial, it is clear that no prejudice resulted. The asserted misconduct was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence against defendant was overwhelming. Nguyen’s identification of defendant was unequivocal. Nguyen’s cousin, who simultaneously witnessed the robberies, similarly described the incident and independently identified defendant as the robber. Rios, in addition to Nguyen and Tang, testified that defendant fled the scene in a green Suburban. Officer Rainbird testified that he followed the green Suburban until it was abandoned a few blocks from defendant’s house and found to contain a pay stub bearing defendant’s name and address, along with white t-shirts and purple shoes similar to the ones worn by the robber. And when defendant was arrested a few days later, he initially provided a false name to the officers. Based on the overwhelming evidence, the alleged misconduct undoubtedly was harmless.

III. *Defense Counsel rendered effective assistance.*

Lastly, defendant contends that his counsel rendered ineffective assistance by: (1) failing to object to the evidence concerning Nguyen’s status as a police officer and to request a limiting instruction; (2) eliciting Sergeant Armstrong’s testimony that defendant was on parole; and (3) arguing that “maybe” defendant committed the robberies.

“ ‘A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) “Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.” ’ ” (*In re Harris* (1993) 5 Cal.4th 813, 832.) The defendant has the burden of demonstrating ineffective assistance of counsel. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) “[A] defendant must first show counsel’s

performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ (*In re Harris, supra*, at p. 832, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Secondly, a defendant must establish “prejudice flowing from counsel’s performance or lack thereof.” (*In re Harris, supra*, at p. 833, citing *Strickland v. Washington, supra*, at pp. 691-692.) A defendant is prejudiced when there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*In re Harris, supra*, at p. 833.)

1. *Failure to object to evidence concerning Nguyen as a police officer*

Defendant argues that defense counsel’s failure to object to evidence concerning Nguyen’s status as a police officer constituted ineffective assistance of counsel. As indicated above, the testimony that Nguyen was a police officer—as distinguished from some of the prosecutor’s argument—was properly received. The jury needed to know that Nguyen was an off-duty police officer in order to contextualize his actions immediately following the robbery and his testimony at trial. “[A] mere failure to object to evidence or argument seldom establishes counsel’s incompetence” (*People v. Ghent* (1987) 43 Cal.3d 739, 772), and defense counsel is not obligated to make futile objections (see *People v. Carter* (2003) 30 Cal.4th 1166, 1210 [rejecting defendant’s ineffective-assistance-of-counsel claim where it found that an objection would have been futile under the circumstances]). Nguyen’s occupation was admissible evidence and an objection would have been pointless. Defense counsel correctly abstained from objecting.

The situation is somewhat different insofar as counsel failed to object to the prosecutor’s emotional appeals concerning the nobility of police officers. We need not decide whether the failure to object fell below the standard of what a reasonable attorney would have done or was a sound tactical choice to avoid appearing an obstructionist when the argument, though inappropriate, was harmless. As we have concluded above, in view of the overwhelming weight of the evidence, the prosecutor’s statements could

have given rise to no prejudice. Had defense counsel objected and the court instructed the jury to disregard the prosecutor's remarks, there is no reasonable possibility that the outcome of trial would have been any different.

2. *Eliciting a witness's testimony that defendant was on parole*

Defendant argues that defense counsel rendered ineffective assistance by eliciting testimony that defendant was on parole. During direct examination, a police officer testified that it was common for suspects to give false names and run from police in order to avoid arrest. On cross-examination by defense counsel, the police officer acknowledged that parolees—such as defendant—often elude police in order to avoid further trouble. As defense counsel made clear in his closing argument, defendant's parole status was brought out in an attempt to counter the consciousness of guilt inference arising from the prosecution's evidence that defendant gave a false name when apprehended. Defense counsel argued: "I don't see how hiding his identify helps him on the robbery because in a robbery they're looking for a face and his face is what it is. [¶] However, if you're on parole, you have a name. And if you say my name is Patrick Grant and they look in the computer, well, this clown is on parole, just lock him up right now. Would that give him a motive to give a fake name? For you [to] decide. It is a circumstance."

This was a reasonable tactical decision which we are in no position to conclude was deficient performance. (See *People v. Burnett* (2003) 110 Cal.App.4th 868, 884 ["the reviewing court may not second-guess trial counsel if the record indicates that he or she made a reasonable tactical decision"].)

3. *Arguing that "maybe" defendant committed the robberies*

Defendant argues that defense counsel rendered ineffective assistance by arguing that "maybe" defendant committed the robberies. During closing argument, defense counsel stated: "Simple question. Was Patrick Grant the robber? Obviously he could have been. It's a maybe. I've been saying that from day one. He may have been the guy who committed this crime. I don't know. I've been going over this for a long time and I

can't figure it out. So now you get that assignment. [¶] . . . [I]f you have any doubt about it, return a verdict of not guilty.”

Defense counsel was attempting to persuade the jury that there was a reasonable doubt about defendant's guilt. The “maybe” statement appears to have been an attempt to preserve counsel's credibility in light of the weight of the prosecution's evidence, while suggesting that there nonetheless was a reasonable doubt that defendant was the person who committed the robberies. This argument was supported by highlighting evidence that the attorney claimed created a reasonable doubt. Defense counsel pointed out that while chasing the robber Nguyen lost sight of him, it made little sense that defendant would have driven through residential streets to escape if he had been the robber because he had the opportunity to go directly onto the freeway from a freeway on-ramp near the crime scene and also that the Black male depicted on the video running through backyards was wearing a black t-shirt, and not a white t-shirt as the victims described the robber wearing. Defense counsel argued that defendant could have been mistakenly chosen from the photographic lineups simply because he resembled the robber and not because he committed the robberies. In context, counsel did not admit defendant's guilt but made a competent effort to create doubt in the face of a strong prosecution case. We cannot say that his efforts fell below the standard of care required of a defense attorney.

Disposition

The judgment is affirmed.

Pollak, J.

We concur:

McGuinness, P. J.

Jenkins, J.