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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.

ARGELIO LOZANO,

Defendant and Appellant.

A130107

(Contra Costa County
Super. Ct. No. 05-100712-9)

Argelio Lozano appeals following a jury trial. He was convicted of receiving stolen property, evading an officer, hit and run, and obstructing a peace officer in the performance of duties. He argues that his conviction should be reversed because the trial court improperly restricted his voir dire of prospective jurors, the jury was given misleading and confusing instructions on circumstantial evidence, and the court gave an unwarranted instruction on expert testimony. We conclude that the trial court did not improperly restrict the scope of voir dire, and that Lozano's challenges to the instructions were forfeited due to his failure to raise them in the trial court. Moreover, we conclude there was no instructional error. Thus, we affirm.

BACKGROUND

A San Pablo police officer on patrol ran the license plate number of a white Acura Integra through his computer system to determine whether it was stolen. While doing so, he followed the car into a parking lot. Lozano was the driver. When the officer learned that the Acura was reported as a stolen car, he confronted Lozano who tried to drive away

and then fled on foot. He was apprehended with the assistance of a police dog after a brief chase through the neighborhood.

Lozano testified at trial. He denied knowing that the car was stolen and said that he purchased it that very day for \$600 in cash. The seller wrote out a bill of sale. Lozano said that he saw the officer behind him when he was driving, and made a right turn into the parking lot to see if the officer would follow him. When the officer did so and tried to approach him, Lozano ran because he was in the country illegally and did not want to be deported. Lozano's girlfriend was with him and she ran too. He was apprehended when he was attacked by a police dog after he lay down on the ground in response to an officer's order. In addition to the bill of sale, Lozano claimed he had a wallet and \$300 at the time of his arrest. The bill of sale, wallet and money were never found. But the car was operated with a key, and there was no damage to the ignition or wiring.

Lozano was charged in an information with vehicle theft under California Vehicle Code section 10851, subdivision (a), receiving stolen property under Penal Code section 496d, misdemeanor evading an officer under Vehicle Code section 2800.1, misdemeanor hit and run under Vehicle Code section 20002, subdivision (a), and misdemeanor obstructing a peace officer in the performance of duties under Penal Code section, subdivision 148, subdivision (a). The felony counts were enhanced due to allegations that Lozano had served two prior terms in state prison. The jury convicted Lozano of possession of stolen property and the three misdemeanors, and he was acquitted of vehicle theft. The trial court determined beyond a reasonable doubt that Lozano had served two prior terms in state prison. He was given the midterm of two years in prison for receiving stolen property, and assessed two consecutive one-year enhancements for each of his prior terms in prison for a total prison sentence of four years. Lozano was given a concurrent 300-day jail sentence for the misdemeanors. He was awarded 300 days of presentence credits and timely appealed.

DISCUSSION

A. Voir Dire

When the facts indicate that racial or ethnic prejudice may affect the jurors' view of the evidence, it is essential for the court to make an inquiry of possible racial bias during jury voir dire. (*People v. Holt* (1997) 15 Cal.4th 619, 660.) But the contours of such an inquiry is committed to the sound discretion of the trial court and entitled to substantial deference. (*People v. Wilborn* (1999) 70 Cal.App.4th 339, 343.) We will not reverse a judgment for the manner in which an inquiry about racial bias is made unless we "can say that the resulting trial was fundamentally unfair." (*People v. Holt, supra*, at p. 661.) Here, we can say no such thing.

During voir dire, Lozano's counsel attempted to ask potential jurors about whether their views of the case would be affected by knowledge that Lozano is illegally in the United States. The prosecution objected. After a brief sidebar conference, defense counsel resumed questioning but changed the tenor of questions concerning illegal presence in the United States from a focus on Lozano to "a witness involved in the case or someone involved in the case." In this court, Lozano claims that the court erred because he was prohibited from questioning the jury about "possible juror bias toward him personally as a Mexican illegal with a federal conviction for illegal entry." But the record does not support Lozano's characterization of the trial court's ruling.

The trial court permitted counsel to question potential jurors generally about immigration and whether they would be biased against immigrants, but did not want any questions tied specifically to Lozano. The court was concerned that questions about Lozano's immigration status would introduce the jury to yet unproven facts and raised the possibility that they would prejudge issues in the case. So, while counsel did not ask jurors about their views toward Lozano due to his conviction for illegal entry, she did ask jurors whether they could fairly consider the testimony of an illegal immigrant. In fact, two jurors were excused after they expressed concern over whether they could fairly evaluate testimony from a witness who was illegally in the United States.

Moreover, the court's ruling did not prevent Lozano's lawyer from asking jurors about whether their ability to be fair would be affected if a witness or other person associated with the trial had been previously convicted of an immigration offense. But no such questions were asked. The trial court's de-linking of voir dire questioning from the identities of specific parties or witnesses comports with the general guidelines contained in the Judicial Administration Standards. California Standards of Judicial Administration, Standard 4.30 (b)(20), provides that when appropriate racial bias may be probed in the following manner: "It may appear that one or more of the parties, attorneys, or witnesses come from a particular national, racial, or religious group (or may have a lifestyle different from your own). Would this in any way affect your judgment or the weight and credibility you would give to their testimony?" "Trial court judges should closely follow the language and formulae for voir dire recommended by the Judicial Council in the Standards to ensure that all appropriate areas of inquiry are covered in an appropriate manner." (*People v. Holt, supra*, 15 Cal.4th at p. 661.) That appears to be what the trial court was attempting to do here.

This is not a case, like those relied upon by Lozano, where the court declined to permit any inquiry into racial or ethnic bias or bias due to a prior criminal conviction. (See *Rosales-Lopez v. United States* (1981) 451 U.S. 182; *Ristaino v. Ross* (1976) 424 U.S. 589; *People v. Wilborn, supra*, 70 Cal.App.4th 339; *People v. Chapman* (1993) 15 Cal.App.4th 136.) Those cases are inapposite. The court did not prohibit voir dire of potential jurors to see if they would be biased against illegal immigrants or a person convicted of an immigration offense. There was no error.

B. Instructions on Circumstantial Evidence

Lozano makes two arguments challenging the instructions to the jury. He argues it was error and confusing for the trial court to instruct on the use of circumstantial evidence with both CALCRIM Nos. 224 and 225. He also contends these instructions were improper because they did not specifically guide the jury in evaluating his intent to receive stolen property. According to Lozano the instructions on circumstantial evidence were deficient because the instructions on the elements of receiving stolen property did

not require the jury to conclude that the circumstantial evidence of his intent must be irreconcilable with his claim of innocence.

The People contend, correctly, that Lozano forfeited this contention by failing to object to the use of both CALCRIM Nos. 224 and 225. “Generally, ‘ “[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.” ’ ” (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*); *People v. Tuggles* (2009) 179 Cal.App.4th 339, 364.) Lozano is not arguing that either CALCRIM Nos. 224 or 225 is an incorrect statement of the law, but rather claims that together they were misleading in the circumstances. To preserve this claim for appeal, Lozano was required to request clarifying language at trial. (*Ibid.*; see also *People v. Spurlock* (2003) 114 Cal.App.4th 1122, 1130.) He did not. Nevertheless, we will consider his claim.

We consider a claim of instructional error under the de novo standard of review. But “ ‘ “[i]n determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.” ’ ” (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We interpret instructions to support rather than defeat the judgment when they are reasonably susceptible of such an interpretation. (*Ibid.*)

As the Attorney General points out, CALCRIM No. 224 and CALCRIM No. 225 are each accurate statements of the law, and Lozano makes no claim that they are not. (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1186-1187 [upholding CALCRIM No. 224]; *People v. Golde* (2008) 163 Cal.App.4th 101, 118 [upholding CALCRIM No. 225].) Moreover, although the bench notes to the jury instructions advise that CALCRIM No. 225 is to be used when a defendant’s intent or mental state is the only issue that rests upon circumstantial evidence and that CALCRIM No. 224 is to be used when multiple elements of an offense may rest upon it, no court has yet held that giving the two instructions together is reversible error. (Cf. *People v. Salas* (1976) 58

Cal.App.3d 460, 473 [where both precursor instructions to CALCRIM Nos. 224 and 225, CALJIC Nos. 2.01 and 2.02, were given]; *People v. McKinzie* (2012) 54 Cal.4th 1302, 1355 [again, both precursor instructions CALJIC Nos. 2.01 and 2.02 were given].) We will not be the first. Each of the instructions properly advised the jury on the consideration of circumstantial evidence. The fact that they were repetitive or redundant does not in and of itself create error.

Nor did the instructions as a whole permit the jury to conclude that it could find Lozano guilty of receiving stolen property without properly evaluating the circumstantial evidence of his state of mind. When the jury was instructed on its consideration of circumstantial evidence of Lozano's intent, the court specifically told jurors that "[t]he instruction for each crime explains the intent or mental state required." The jury was also told that "before you may rely on circumstantial evidence to conclude that the defendant had the required intent or mental state, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant had the required intent or mental state. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions supports a finding that the defendant did have the required intent or mental state and another reasonable conclusion supports a finding that the defendant did not, you must conclude that the required intent or mental state was not proved by the circumstantial evidence." Later instructions told jurors that receiving a stolen vehicle required a specific intent, and the elements of the crime required the jury to conclude that Lozano "knew that the property had been stolen."

Against this backdrop, Lozano's claim that the jury was not instructed that circumstantial evidence of his mental state must be irreconcilable with his innocence falls short. The instruction that circumstantial evidence of intent was sufficient if "the only reasonable conclusion" could be that Lozano had the required criminal intent, and that evidence that could reasonably support either guilt or innocence, must support innocence, effectively ensured that the jury would not convict on insufficient circumstantial evidence. It is not error to permit the jury to reject unreasonable interpretations of the

evidence, and no reasonable juror would have understood the court's instructions to permit Lozano's conviction on circumstantial evidence that could be reasonably squared with his innocence. (See *People v. Hines* (1997) 15 Cal.4th 997, 1050–1051.)

Lozano's reliance on *People v. Salas*, *supra*, 58 Cal.App.3d 460 in support of this argument is misplaced. In *Salas*, the court concluded that instructions on circumstantial evidence of intent were inadequate because they informed the jury only how to evaluate the defendant's intent to commit robbery, but said nothing of the intent required for robbery with the specific intent to inflict great bodily injury on the victim. It is worth noting that the satisfactory instruction on the circumstantial evidence of intent to commit robbery was CALJIC No. 2.02, the predecessor instruction to CALCRIM No. 225, that Lozano challenges in this appeal.

Considering the instructions as a whole and affording proper deference to the jury's abilities to reasonably understand and correlate all the instructions given, there was no error in the instructions pertaining to circumstantial evidence of specific intent.

C. Instructions Pertaining to Expert Testimony

Lozano's final claim of error is that the trial court instructed on expert testimony despite the fact that the prosecution never offered any witness as an expert. According to Lozano, without citation to authority, "before a witness's opinion can be deemed an expert opinion, the party procuring the testimony must offer the witness as an expert." We disagree. It is incumbent on a party opposing expert evidence to object to it, and in the absence of an objection there is no requirement that the proponent qualify a witness. (*People v. Rodriguez* (1969) 274 Cal.App.2d 770, 776.) Moreover, it is the trial court's duty to instruct on the effect of expert testimony admitted in a criminal trial. (Pen. Code, § 1127b.)

Several police officers testified during trial, in part, on subjects based upon their training and experience. Without objection, they offered opinion testimony on the inherent risks in traffic stops, and the likelihood that trained canines would discover personal items discarded by a defendant in the vicinity of a crime scene. The efficacy of search dogs is a proper subject of expert testimony. (*People v. Willis* (2004) 115

Cal.App.4th 379, 386.) The court was correct to instruct on the jury’s proper consideration of expert testimony.

Lozano argues that “[d]efense counsel quite reasonably did not object when the police officers offered their lay opinions for the very reason that the subsequent instruction was objectionable.” We will not indulge this strange tactical choice. There were a variety of legitimate means available to Lozano’s counsel to oppose the introduction of this evidence. (See *People v. Williams* (1992) 3 Cal.App.4th 1330 [discussing motions in limine and procedures under Evidence Code section 402 to test police officer expert testimony].) Silence was not one of them. “The doctrine of invited error is designed to prevent an accused from gaining a reversal on appeal because of an error made by the trial court at his behest. If defense counsel intentionally caused the trial court to err, the appellant cannot be heard to complain on appeal.” (*People v. Wickersham* (1982) 32 Cal.3d 307, 330.)

Because we have concluded none of Lozano’s arguments on appeal have merit, we reject his argument that his conviction must be reversed because his trial was affected by cumulative error.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

McGuinness, P. J.

Jenkins, J.