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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DIANE CHERYL WARRICK,

Defendant and Appellant.

A131787

**(Contra Costa County
Super. Ct. No. 51013895)**

Diane Cheryl Warrick appeals from her conviction of second degree murder. (Pen. Code, §§ 187, 189.)¹ She contends the lawyer who defended her at trial rendered ineffective assistance of counsel by making offensive and insensitive remarks during closing argument. In her closing, defense counsel quoted from William Shakespeare’s play, *The Merchant of Venice*, and she repeatedly referred to the character Shylock as “the Jew.” Warrick argues that her counsel’s language must have offended the jury and undermined counsel’s credibility as an advocate.

We conclude Warrick has failed to establish she was prejudiced by defense counsel’s comments. Accordingly, we reject her claim of ineffective assistance of counsel and affirm her conviction.

¹ All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

Because Warrick's only claim of error on appeal is that her trial counsel rendered ineffective assistance in making her closing argument, the details of the crime are not relevant for our purposes. We therefore set them forth in abbreviated fashion.

Warrick was charged with the June 23, 2010 murder of Mary Jane Theresa Scanlon. Scanlon, who at the time of her death was 70 years old and confined to a wheelchair, had hired Warrick in late 2009 to serve as her caregiver. Warrick moved into Scanlon's residence three months after being hired.

On June 23, 2010, Scanlon's friend and next-door neighbor made her daily visit to Scanlon's home. The neighbor later discovered Scanlon's dead body lying on the floor. An autopsy revealed that the cause of death was multiple stab wounds. Warrick testified at trial and admitted she had stabbed Scanlon to death.

At Warrick's trial, near the end of her closing argument, Warrick's trial counsel² made the following statements to the jury:

"I want to digress for a second. I love Shakespeare. I don't know about any of you, but I love Shakespeare. And probably one of my all time heroines is Portia in [*The Merchant of Venice*]. And Portia has a well-known speech about mercy.

"If you recall the story of [*The Merchant of Venice*], there was a merchant of Venice—well, there was a Jew, who was a money lender. And there was a merchant who entered into a contract with this money lender and then defaulted on the contract. And back then the terms of the contract were if the merchant defaulted, then the Jew could get a pound of flesh.

"Portia is giving this speech to the Jew about mercy and justice.

"The quality of mercy is not strain'd. It droppeth as the gentle rain from heaven upon the place beneath: it is twice bless'd; it blesseth him that gives and him that takes."

"And then I'm going to skip a little bit.

² Warrick is represented by different counsel on appeal.

“Where mercy seasons justice. Therefore, Jew, though justice be thy plea, consider this, that in the course of justice we all must see salvation: we all do pray for mercy; and that same prayer, doth teach us all to render the deeds of mercy. I spoke thus much to mitigate the justice of thy plea; which if thou follow, this strict court of Venice must needs give sentence against the merchant there.”

“Then it goes on, because the terms of that contract said that the Jew could get a pound of flesh. It didn’t say how he was going to get the pound of flesh. So Portia says, Well, you can take a pound of flesh but not one bit more. And guess what? Your contract doesn’t say that you can draw any blood. So, you can take your pound of flesh, Mr. Jew, but you can’t draw any blood to get the pound of flesh. And she goes on in that vein.

“Ultimately the Jew says, You know what? I’ll just take the money. I don’t want my pound of flesh.

“And the moral of the story here is exactly that, ladies and gentlemen. The prosecution wants that pound of flesh and then some. He wants the first-degree murder. But you, as jurors, have to decide what’s right in this case based on the evidence. And what’s right in this case, based on the evidence, is that Ms. Warrick should be found guilty of voluntary manslaughter.”

Outside of the presence of the jury, the trial court expressed concern about defense counsel’s argument. The trial judge explained that counsel’s repeated references to the character of Shylock, the money lender in Shakespeare’s play, as “the Jew” had made the court uncomfortable. Although the court noted it did not mean to suggest that defense counsel’s remarks were intended to be anti-Semitic, it informed counsel, “I think I have an obligation to, under the ethical rules of my court, to not let it pass without some kind of comment.” The court stated, “I just feel like it can’t happen in my courtroom that there be some suggestion that the judge is okay with anyone making what could be considered [an] anti-Semitic reference.”

Before the prosecutor’s rebuttal argument, the trial court admonished the jury as follows:

“One of the hazards of quoting 16th century literature is that we sometimes can use language that the writer, in this case Shakespeare, may have used that is perhaps offensive to 21st century sensibilities. And I know [defense counsel] was not intending in any way to offend anyone by describing one of the characters in [*The Merchant of Venice*] – I’m a Shakespeare fan myself; know the play well. I just wanted to make sure that everyone understood that [defense counsel] did not intend, and I certainly did not intend to countenance any derogatory statement based on religion in my courtroom. I don’t think that was the intention. I hope that was not the effect. [¶] But I just want to make sure that the jurors are not distracted by language used in the argument from the merits of the argument that [defense counsel] was making because Shakespeare may have been less than sensitive.”

On March 14, 2011, the jury convicted Warrick of second degree murder. Warrick was sentenced to an indeterminate term of 31 years to life. She filed a timely appeal on April 8, 2011.

DISCUSSION

Warrick’s sole claim on appeal is that “[b]y making comments during her closing statement that were sufficiently offensive and insensitive to require an admonition from the court, counsel failed to provide appellant with the effective assistance of counsel[.]” We disagree.

I. *Standard of Review*

On appeal, it is Warrick’s burden to demonstrate, by a preponderance of the evidence, that she is entitled to relief on the grounds of ineffective assistance of counsel. (E.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) To do so, she must show that: (1) her counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms and (2) she was prejudiced by the deficient performance. (*People v. Lucas* (1995) 12 Cal.4th 415, 436.) It is difficult to carry this burden on direct appeal from a conviction (*id.* at p. 437), because the trial record often does not indicate why trial counsel acted or failed to act in the manner she did. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268.) And we may not reverse a conviction on the

grounds of ineffective assistance of counsel unless the record affirmatively discloses that counsel had no rational tactical purpose for the act or omission in question. (*People v. Jones* (2003) 29 Cal.4th 1229, 1254.) Where the record sheds no light on the issue, we must affirm unless there could be no conceivable reason for counsel’s act or omission. (*Ibid.*) Furthermore, our review of trial counsel’s performance is deferential (*People v. Ledesma, supra*, 43 Cal.3d at p. 216), and there is a strong presumption that counsel’s actions fell within the wide range of reasonable professional assistance. (*People v. Lucas, supra*, 12 Cal.4th at p. 437.)

We need not determine whether counsel’s performance was deficient if Warrick is unable to show prejudice. (See, e.g., *People v. Seaton* (2001) 26 Cal.4th 598, 666.) To establish that she was prejudiced by her counsel’s allegedly deficient performance, Warrick must show “a reasonable probability that, but for counsel’s failings, the result of the proceeding would have been more favorable to [her].” (*Ibid.*) In other words, we ask “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” [Citation.]” (*In re Cudjo* (1999) 20 Cal.4th 673, 687.)

II. *Warrick Has Failed to Demonstrate She Was Prejudiced by Counsel’s Allegedly Deficient Performance.*

Warrick’s opening brief does not articulate precisely how she may have been prejudiced by her trial counsel’s argument.³ She agrees the trial court was correct to admonish the jury her counsel “had stepped over the line” in closing argument. But Warrick contends her trial counsel “engaged in offensive speech that almost certainly upset jurors *and* she [trial counsel] was then the subject of what must have been perceived as a scolding by the trial judge.” We cannot agree.

³ In their brief, the People argue that Warrick has failed to demonstrate she was prejudiced by her trial counsel’s remarks. Warrick did not file a reply brief, and thus she has not responded to the People’s argument. Her failure to do so permits us to infer she has conceded the point. (See *People v. Hightower* (1996) 41 Cal.App.4th 1108, 1112, fn. 3 [appellant’s failure to reassert claim in reply brief led court to “assume that he, as are we, was persuaded by the Attorney General’s argument in response that the trial court did not abuse its discretion”].)

Warrick has pointed to nothing in the record demonstrating she was prejudiced. There is nothing in the transcript of the trial suggesting the jurors were offended or angered by counsel's statements. Indeed, during the discussion between court and counsel that followed defense counsel's closing argument, the prosecutor noted that he "didn't see any looks from the jurors that expressed frustration," and he "didn't see any visible signs of offense." Moreover, the trial judge admonished the jury that defense counsel did not intend—and the trial court would not countenance—any derogatory comments based on religion. We must presume the jury heeded this admonition. (Cf. *People v. Tully* (2012) 54 Cal.4th 952, 1020 [jury presumed to have followed instruction to disregard portion of prosecutor's closing argument].)

Warrick argues that the length of the jury deliberations is significant here, although she does not explain why. While she does not say so explicitly, we can only presume she means that the length of the deliberations demonstrates the jury was having a difficult time deciding whether she acted in the "heat of passion" and was debating whether it should convict her of murder under section 187 or of the lesser included offense voluntary manslaughter under section 192. As the People point out, however, Warrick "ignores the equally likely possibility that the jury wavered between conviction of first and second degree murder, and was swayed to acquit her of the former offense by trial counsel's argument for mercy." Thus, we cannot conclude from the length of the jury's deliberations alone that Warrick was somehow prejudiced by her trial counsel's argument.

We also see no basis for Warrick's claim that her counsel's credibility was damaged by the trial judge's so-called "scolding." The trial judge was careful to raise the issue of counsel's remarks *outside* of the jury's presence. The court then sought counsel's views on how best to deal with the issue, and both defense counsel and the prosecutor addressed the matter on the record. In the end, the trial court carefully admonished the jury, explaining that defense counsel did not intend to make any derogatory statement based on religion and asking the jurors not to be distracted from the merits of the defense argument merely "because Shakespeare may have been less than

sensitive.” Far from scolding defense counsel, the trial court went out of its way to assure the jury that, by quoting Shakespeare, counsel had not intended to make any kind of offensive statement. The court’s admonition made clear that any insensitivity in counsel’s remarks was attributable to the Bard rather than defense counsel.

We conclude Warrick has failed to show her trial counsel’s remarks prejudiced her. Consequently, her claim of ineffective assistance of counsel fails.⁴

DISPOSITION

The judgment is affirmed.

Jones, P.J.

We concur:

Simons, J.

Needham, J.

⁴ While we hold Warrick has not met her burden of showing she was prejudiced by her counsel’s remarks in closing argument, this is not to say we consider counsel’s repeated references to Shylock’s religion appropriate. We certainly do not object to counsel quoting Shakespeare. A lawyer’s use of literary allusions may well enliven a closing argument. But as the trial judge so aptly observed, “It was the repeated characterization of the character as the Jew as opposed to the money lender that . . . made it potentially troublesome.”