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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

MARQUESE ANTWAN REESE,

Defendant and Appellant.

A131821

(San Mateo County
Super. Ct. No. SC072220A)

Defendant Marquese Antwan Reese appeals a judgment entered upon a jury verdict finding him guilty of unlawfully possessing ammunition, resisting, obstructing, or delaying a peace officer, possessing marijuana in a motor vehicle, and driving with a suspended license. He contends that the prosecutor committed misconduct in closing argument, that his counsel rendered ineffective assistance in failing to object to the misconduct, and that his conviction for possessing marijuana while driving a motor vehicle should be reduced from a misdemeanor to an infraction. We shall direct the trial court to correct a sentencing error, and otherwise affirm the judgment.

I. BACKGROUND

Defendant was charged in count one with felony possession of ammunition while being prohibited from possessing a firearm (Pen. Code,¹ (former) § 12316, subd. (b)(1) (repealed Jan. 1, 2012, now see § 30305)); in count two with misdemeanor resisting, delaying, and obstructing a peace officer in the discharge of her duties (§ 148,

¹ All undesignated statutory references are to the Penal Code.

subd. (a)(1)); in count three with misdemeanor possession of marijuana while driving a motor vehicle (Veh. Code, § 23222, subd. (b)); and in count four with misdemeanor driving while his driving privileges were suspended for failure to appear (Veh. Code, § 14601.1, subd. (a)).² The information also alleged six prior felony convictions and two prior prison terms.

Officer Cristela Solorzano of the Menlo Park Police Department was driving a marked police car just before 10:00 on the evening of March 12, 2010, when she saw a Pontiac with an expired registration tag. She signaled the Pontiac to pull over. The driver pulled over to the right side of the road and stopped the car. Solorzano got out of her car to approach the Pontiac, and saw that the driver was a 25- to 30-year old Black male with shoulder length hair, separated into sections, possibly braids. She did not see anyone else in the car. As she reached the back of the Pontiac, the driver sped away, running a red light.

Solorzano put out a call to dispatch, giving a description of the Pontiac and the driver, who she said was the only occupant. At 10:03 p.m., she was informed that the Pontiac had been found unoccupied at an address in East Palo Alto, a few blocks from the traffic stop. She found the car there, partially in a driveway, blocking the sidewalk, with the tail end of the car in the lane of traffic. Before having the Pontiac towed, Solorzano did an inventory search. She found a cell phone on the driver's side floor panel, and in the center console a California identification card and a debit card belonging to defendant, cash, a bridge toll receipt, a useable amount of marijuana in a clear plastic bag, and 12 unspent rounds of .357 ammunition in a clear plastic sandwich bag. She did not take pictures of the interior of the Pontiac.

The contents of the cell phone were later downloaded. The user of the cell phone had exchanged texts with a contact named "Stace" on the evening of March 12, 2010. "Stace" had sent a message at 9:31 p.m. saying "I'm just going to let the situation go. I

² Defendant stipulated that his driving privileges had been suspended for failure to appear, and that he was aware of the suspension. He also stipulated that he had previously been convicted of a felony.

think I should just be single,” and there was an outgoing response, “[W]hatever. Yeah. I’m strapped.” “I’m strapped” appeared to be a signature line, which Solorzano described as being in “funky writing.” Another incoming message from “Stace” referred to the recipient as Marquese. An outgoing message to “Mae” on the afternoon of the same day said, “I got a rental car. So it don’t matter.” That message also had the signature line, “[Y]eah, I’m strapped.” The phone contained pictures of defendant, with shoulder-length hair in braids.

Stacie Roberson had begun dating defendant in February, 2010. She acknowledged that she had exchanged the “Stace” text messages with defendant. She rented the Pontiac on March 1, 2010, and let defendant use it. The rental continued until March 16, 2010, after the car was reported towed. At around 10:00 or 11:00 on the evening of March 12, 2010, defendant called Roberson and asked her to report the car stolen, but she refused to do so. Defendant later told her he had let a friend drive the car.

Defendant’s fingerprints were not found on either the bullets or the plastic bag, although the palm prints of an unknown person were on the bag. A fingerprint expert testified that it was possible to touch something without leaving prints.

A cell phone in defendant’s possession at the time he was arrested on October 15, 2010, showed defendant with a shaved head in a photograph dated March 26, 2010.³ It also contained pictures of handguns, including one of a revolver. The bullets that were found in the Pontiac were capable of being fired from a revolver.

The jury found defendant guilty on all four counts. After waiving his right to a jury trial on the prior conviction and prison term allegations, defendant admitted the priors. The trial court stayed the prison priors, and sentenced defendant to an aggravated term of three years for count one, and imposed concurrent 120-day terms for counts two, three, and four, with credit for the 120 days he had already served.

³ Roberson testified defendant cut his hair, probably sometime in March.

II. DISCUSSION

A. Prosecutor's Argument

Defendant contends the prosecutor committed prejudicial misconduct by misstating the burden of proof in closing argument, and that his counsel rendered ineffective assistance by failing to object to the argument.

1. Background

Before closing arguments, the trial court gave the jury various instructions. Among those instructions were the admonitions that if the jury believed the attorneys' comments on the law conflicted with the court's instructions, the jury must follow the instructions, and that nothing the attorneys said was evidence. The trial court also instructed the jury that the People had the burden of proof beyond a reasonable doubt, which it defined as "proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt."

In closing argument, the prosecutor described reasonable doubt as follows: "Reasonable doubt. First I'll talk about what it does not equal. It does not equal all possible doubt. Is it possible that hiding on the back floorboard of the Pontiac was the defendant, letting somebody else drive his car, with no knowledge that that person had concealed bullets and marijuana in the center console of his car? The defendant's hiding down there so the officer doesn't see him. Then, when they get pulled over and flee, the defendant decides to throw his cell phone on the driver's side floorboard while running away from the car. Is that possible? Yes. But the question is: Is it reasonable? It has to be a reasonable conclusion supported by the evidence for it to be reasonable doubt. [¶] Reasonable doubt is not imaginary doubt. This is where you get that *it has to be supported by the evidence*. It can't be something imagined. And it's not simply a conflict in the evidence. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction in the truth of [the] charge. *Basically, if you think he did it, looking at the factors, the list I gave you, the evidence in the case, everything you've*

seen, you think he did it, he did it. That's proof beyond a reasonable doubt." (Italics added.)

In rebuttal, the prosecutor argued: "Just like the word reasonable is the operative word in the concept of circumstantial evidence, it's the defining word in the concept of reasonable doubt. ¶ Doubt—the standard of proof in our criminal justice system is proof beyond a reasonable doubt. It would be unheard of to prove a case beyond any possible doubt. There is no other possibility in the world. That's not the standard. ¶ The standard is proof beyond a reasonable doubt. ¶ *And that's proof that leaves you sitting here feeling like, yeah, he did it.*" (Italics added.)

2. *Prosecutorial Misconduct*

Defendant contends prosecutor committed misconduct by misstating the burden of proof as "[If] you think he did it, he did it." He also contends the jury could have misunderstood the prosecutor's argument that reasonable doubt had to be supported by the evidence to mean the prosecutor did not have the burden of proving every element of the charged crimes beyond a reasonable doubt.

A prosecutor commits misconduct by using " 'deceptive or reprehensible methods to persuade either the court or the jury.' [Citation.]" (*People v. Rowland* (1992) 4 Cal.4th 238, 274.) However, "[g]enerally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial. '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.' [Citations.]" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1215; see also *People v. Riel* (2000) 22 Cal.4th 1153, 1212.) Defendant's counsel did not object to the argument he now challenges, and any harm could easily have been cured by an admonition. Under the circumstances, defendant's contentions are not cognizable on appeal.

3. *Ineffective Assistance of Counsel*

Defendant argues, however, that he received ineffective assistance of counsel when his attorney failed to object to the prosecutor's argument. "Establishing a claim of

ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) "A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.]" (*Id.* at p. 541.) "Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions. [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) Moreover, "[i]f a defendant has failed to show that the challenged actions of counsel were prejudicial, a reviewing court may reject the claim on that ground without determining whether counsel's performance was deficient. [Citation.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 784 (*Mayfield*).) Prejudice is established when counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." (*Ibid.*, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 686.) Prejudice must be proved as a demonstrable reality, not simply speculation. (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

Whatever the merits of defendant's claim that the prosecutor's argument was improper and his counsel should have objected, he has not met his burden to show prejudice. As noted in *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268, "[a]rguments of counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.'" [Citation.]' [Citation.] 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the

law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” [Citation.]’ [Citation.]” Here, the trial court instructed the jury properly on the prosecution’s burden to prove each element of an offense beyond a reasonable doubt and on the meaning of proof beyond a reasonable doubt, and also instructed the jury that if the attorneys’ comments on the law conflicted with the court’s instructions, the jury must follow the instructions, and that nothing the attorneys said was evidence. On this record, we cannot conclude the prosecutor’s statements so undermined the process that the trial cannot be relied on to have reached a just result. (*Mayfield, supra*, 14 Cal.4th at p. 784.)

B. Reduction of Marijuana Offense to Infraction

At the time of defendant’s offenses, possession of marijuana while driving a motor vehicle was a misdemeanor. On September 30, 2010, Vehicle Code section 23222, subdivision (b) was amended to make this offense an infraction. (Stats. 2010, ch. 708 (Sen. Bill 1449), § 2.) Under the version of the statute in effect at the time of the offense, a person who possessed no more than an ounce of marijuana while driving was guilty of a misdemeanor punishable by a fine of not more than \$100. Under the amended statute, such a person is guilty of an infraction punishable by the same \$100 fine. (Veh. Code, § 23222, subd. (b).)⁴ Defendant contends this change in the law should be applied retroactively, and his offense should be reduced to an infraction.

⁴ Former Vehicle Code section 23222, subdivision (b), provided: “Except as authorized by law, every person who possesses, while driving a motor vehicle upon a highway or on lands, as described in subdivision (b) of Section 23220, not more than one avoirdupois ounce of marijuana, other than concentrated cannabis . . . is guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100). Notwithstanding any other provision of law, if the person has previously been convicted three or more times of an offense described in this subdivision during the two-year period immediately preceding the date of commission of the violation to be charged, the previous convictions shall also be charged in the accusatory pleading and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, Sections 1000.1 and 1000.2 of the Penal Code are applicable to the person, and the court shall divert and refer the person for education, treatment, or rehabilitation, without a court hearing or determination or the concurrence of the district attorney, to an

It is well established that “ ‘where [an] amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.’ [Citation.] To ascertain whether a statute should be applied retroactively, legislative intent is the ‘paramount’ consideration: ‘Ordinarily, when an amendment lessens the punishment for a crime, one may reasonably infer the Legislature has determined imposition of a lesser punishment on offenders thereafter will sufficiently serve the public interest.’ [Citation.]” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792 (*Nasalga*); see also *In re Estrada* (1965) 63 Cal.2d 740, 747-748 (*Estrada*).) Where, however, the net effect of the amendments to a statute do not mitigate punishment, this rule is inapplicable. (See *In re Griffin* (1965) 63 Cal.2d 757, 759-760 [no retroactivity where sentence for crime decreased but length of time before defendant eligible for parole increased].)

Defendant contends the reduction in the level of his crime from a misdemeanor to an infraction constitutes a mitigation of punishment, and hence falls under the rule of *Estrada*. This rule has been applied where a change in the law reduces the punishment for a crime (see, e.g., *Estrada, supra*, 63 Cal.2d at pp. 742-743 [reduction in term for crime]; *Nasalga, supra*, 12 Cal.4th at p. 787 [under new law, defendant not subject to two-year enhancement]) or decriminalizes behavior entirely (see, e.g., *People v. Babylon* (1985) 39 Cal.3d 719, 721-722, 725 [decriminalization of acts previously treated as over-the-air piracy]; *People v. Trippet* (1997) 56 Cal.App.4th 1532, 1544-1545 [decriminalization of medical marijuana]; *People v. Rossi* (1976) 18 Cal.3d 295, 298

appropriate community program which will accept the person. If the person is so diverted and referred, the person is not subject to the fine specified in this subdivision. In any case in which a person is arrested for a violation of this subdivision and does not demand to be taken before a magistrate, the person shall be released by the arresting officer upon presentation of satisfactory evidence of identity and giving his or her written promise to appear in court, as provided in Section 40500, and shall not be subject to booking.” As amended, this subdivision now provides: “Except as authorized by law, every person who possesses, while driving a motor vehicle upon a highway or on lands, as described in subdivision (b) of Section 23220, not more than one avoirdupois ounce of marijuana, other than concentrated cannabis . . . is guilty of an infraction punishable by a fine of not more than one hundred dollars (\$100).”

[decriminalization of oral copulation].) Here, on the other hand, the *punishment* to which defendant is subject is no less under the amended statute than it was under the earlier version of the statute. Under both versions of the statute, a defendant is subject to a fine of \$100.

In *In re N.D.* (2008) 167 Cal.App.4th 885, 891, the minor had been committed to the Division of Juvenile Facilities (DJF) (formerly the California Youth Authority). After he was committed, the applicable statutes were amended to provide that a ward could be committed to the DJF only if he or she had committed certain enumerated offenses, none of which the minor had committed. (*Id.* at pp. 888, 890.) The court of appeal concluded the statutory amendments should not be applied retroactively, reasoning that the amendments “do not mitigate any punishment, for they do not reduce the amount of time any juvenile offender is confined. Instead, they limit the places in which juveniles committing certain offenses can be confined.” (*Id.* at p. 891.) The court also noted that nothing in the statutes or the legislative history indicated a legislative intent to reduce the severity of punishment for any offense. Therefore, the court held, the rule of *Estrada* did not apply. (*Ibid.*)

Here nothing in the legislative history shows any intent to make retroactive the reclassification of the crime of possession of marijuana while driving. The legislative history suggests instead that the Legislature intended to save the money spent on defendants charged with misdemeanor marijuana possession, who were entitled to a jury trial and appointed counsel. The statement of the bill’s author pointed out that marijuana possession was the only misdemeanor not punishable by jail time, and argued that the costs associated with providing a full jury trial, if demanded, and appointed counsel, should be reserved for defendants who faced more serious consequences than a fine of \$100.⁵ Likewise, in support of the bill, the Judicial Council argued that possession of

⁵ According to a bill analysis in the legislative history, the statement of the bill’s author read: “ ‘The penalty for possession of less than an ounce of marijuana is a fine of \$100, with no jail time. If the penalty is \$100, with no jail time, that is an infraction. That is not a misdemeanor. [¶] ‘Marijuana possession has a unique status under current

marijuana was an infraction in everything but name, and that this mischaracterization came at too great a cost for courts: “Given the comparatively light consequences of the punishment and the courts’ limited resources, the council believes that appointment of counsel and jury trial should be reserved for defendants who are facing loss of life, liberty, or property greater than \$100.” (Sen. Rules Comm., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill 1449 (2010 Reg. Sess.) as amended May 5, 2010, pp. 1-3.) Governor Schwarzenegger indicated he signed the bill because, in light of the small fine at stake, the only difference between classifying marijuana possession as a misdemeanor and as an infraction was that a defendant charged with the misdemeanor was entitled to a jury trial and a defense attorney, and that those resources were properly reserved for those facing greater penalties. (Governor’s signing statement regarding Sen. Bill 1449 (Sept. 30, 2010) (2010 Reg. Sess.).)

This history does not suggest the Legislature concluded the punishment for possession of marijuana while driving was too severe and that the amendment to Vehicle Code section 23222, subdivision (b) should therefore be applied retroactively. Instead, it

law, as it is the only misdemeanor that is not punishable by any jail time. [¶] ‘Serious unintended consequences have surfaced as a result of this mischaracterization. As the number of misdemeanor marijuana possession arrests have surged in recent years, reaching 61,338 in 2008, the burden placed on the courts by these low[-]level offenses are just too much to bear at a time when resources are shrinking and caseloads are growing. Defendant may demand an entire jury trial—including the costs of jury selection, defense, and court time—for a penalty of only \$100. [¶] ‘Given the comparatively light consequences of the punishment and the courts’ limited resources, even the Judicial Council believes that costs associated with appointment of counsel and jury trials should be reserved for defendants who are facing loss of life, liberty, or property, not a fine of \$100. [¶] ‘Keeping this misclassification in the Penal Code lacks common sense especially in light of the fact that minor marijuana offenses can be completely expunged from the criminal record just two years after conviction. [¶] ‘In light of this and the state’s current budget crisis, S[en.] B[ill] 1449 has the potential to save precious few resources by imposing the very same financial penalty, while keeping these low-level offenders out of court. [¶] ‘Though classified as a misdemeanor, conviction of marijuana possession subjects a defendant to no greater punishment than that associated with being found guilty of an infraction. S[en.] B[ill] 1449 will correct this anomalous and wasteful law.’ ” (Bill Analysis on Sen. Bill No. 1449 (2010 Reg. Sess.) as amended April 5, 2010, pp. 2-3.)

indicates the Legislature believed the rights afforded to those accused of possession of less than an ounce of marijuana were too great, and that the reclassification would save the state money by eliminating the need to provide appointed counsel and jury trials for such defendants. As a result, those accused of this crime were arguably in a *worse* position after the amendment than before it.

In these circumstances, we conclude the amendments to section 23222, subdivision (b) do not apply retroactively. Although the crime is now classified as an infraction rather than a misdemeanor, the punishment remains the same after the amendment as it was before, and there is no reason to conclude the Legislature intended the reclassification to operate retroactively. Accordingly, defendant was properly convicted of a misdemeanor marijuana possession.

We note an anomaly in defendant's sentence, however. As we have explained, the earlier version of Vehicle Code section 23222 provided for a fine, but no jail time. The trial court sentenced defendant to 120-day terms for each of the three misdemeanor counts, including the violation of Vehicle Code section 23222, with credit for the 120 days he had already served. As to count three, the marijuana offense, this sentence was unauthorized by the governing statute. We shall direct the trial court to strike this term.

III. DISPOSITION

The trial court is directed to strike the sentence for count three, the violation of Vehicle Code section 23222. The clerk of the court shall then prepare an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

RIVERA, J.

We concur:

REARDON, ACTING P. J.

SEPULVEDA, J.