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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.

CLIFFORD VECERA,

Defendant and Appellant.

A134123

(Contra Costa County
Super. Ct. No. 050810572)

Defendant Clifford Vecera was convicted following a jury trial of second degree robbery and assault with a firearm after he shot a pizza deliveryman and took money from him. He argues for the first time on appeal that an accomplice's testimony violated his due process rights, because she was improperly compelled to testify to a specific version of events. We disagree and affirm.

I.

FACTUAL AND PROCEDURAL
BACKGROUND

On the evening of February 11, 2008, defendant directed 18-year-old Marisa Mohamed to place an order for several pizzas from a payphone at a convenience store in Concord and told her to have the pizzas delivered to a hotel across the street. After Mohamed placed the order, defendant informed her that he planned to rob the person who delivered the pizzas. Mohamed and another friend of defendant's (Mohamed's pimp) stayed in a car while defendant crossed the street. Mohamed and her companion had an

open cellular phone line with defendant placed on speakerphone, so that it was possible to hear some of what defendant was doing.

When the pizza deliveryman arrived at the hotel, he parked his car near the room where he had been told to deliver pizzas. He tried to deliver pizzas to the room but was interrupted by defendant, who came up from behind him. Defendant pointed a gun at the deliveryman and demanded the pizza and all the victim's money. The victim handed over around \$23 in one dollar bills, along with the pizzas. Defendant walked away, and the victim followed him, demanding the return of the pizzas and his money. Defendant then pulled a gun out of his pocket and shot the victim.¹

At this time, Mohamed heard "[a] loud pop," and the cellular phone line that had been open with defendant went dead. About three minutes later, defendant called and told Mohamed to meet him at a nearby fast food restaurant. After Mohamed arrived at the restaurant, she saw defendant come out of the restroom and noticed that he was no longer wearing the jacket he wore earlier. Defendant stated that he had taken \$20 from the pizza deliveryman, but that the deliveryman started chasing him to try to get his money back, so defendant shot him.

Police arrested Mohamed four months after the robbery, and she gave a statement to police describing her and defendant's involvement in the crime.

Defendant was charged by amended information with second degree robbery (Pen. Code, §§ 211, 212.5²—count 1), with an allegation that he personally discharged a firearm causing great bodily injury (§ 12022.53, subds. (b)-(d)); and assault with a firearm (§ 245, subd. (a)(2)—count 2), with an allegation that he personally used a firearm (former 12022.5, subd. (a)(1)). The district attorney also alleged, with respect to both counts, that defendant personally inflicted great bodily injury (former § 12022.7,

¹ The victim was hospitalized for more than three months for his injuries. He was unconscious from the evening he was shot (February 11) through March 20 and underwent multiple surgeries, including one to remove his damaged spleen.

² All statutory references are to the Penal Code.

subd. (a)). Finally, it was further alleged that defendant had suffered a prior strike and a prior serious felony conviction, and that defendant was ineligible for probation.

Mohamed also was charged with second degree robbery and assault with a firearm. As discussed in more detail below, she agreed after the preliminary hearing to testify at trial under a grant of immunity against defendant in order “[t]o have a clean slate and just start over.”

Defendant testified on his own behalf and denied shooting the victim. He admitted being with Mohamed and her pimp on the night in question, but he claimed that it was the pimp who committed the robbery.

A jury convicted defendant as charged and found the enhancement allegations to be true. Following a bifurcated bench trial, the trial court found the prior conviction allegations to be true. The court sentenced defendant to a total of 31 years to life, and this timely appeal followed. By order dated May 4, 2012, this court denied defendant’s request to augment the record with a reporter’s transcript of opening statements.

II. DISCUSSION

Defendant argues in his opening brief that his conviction violates the due process clause of the Fourteenth Amendment to the United States Constitution, because accomplice Mohamed was impermissibly under compulsion to testify in a particular fashion in violation of the rule of *People v. Medina* (1974) 41 Cal.App.3d 438, 455-456 (*Medina*).³ “A prosecutor may grant immunity from prosecution to a witness on

³ After defendant’s appellate counsel filed an opening brief, defendant submitted a handwritten “Notice of Objection,” asking this court to consider additional arguments regarding (1) the admission of evidence of a pretrial photographic lineup and (2) a sentencing issue. Once appellate counsel is appointed, “the attorney has the exclusive right to appear and control court proceedings as long as fundamental rights are not denied; neither the party himself nor another attorney can be recognized in the conduct or disposition of the case. [Citations.]” (*In re Walker* (1976) 56 Cal.App.3d 225, 228; see also *People v. Clark* (1992) 3 Cal.4th 41, 173 [general rule that defendant represented by attorney will not be personally recognized by court applies to filing of pro se documents on appeal].) As counsel’s diligent representation has not deprived defendant of his fundamental rights, we decline to address the arguments set forth in defendant’s letter.

condition that he or she testify truthfully to the facts involved. [Citation.] But if the immunity agreement places the witness under a strong compulsion to testify in a particular fashion, the testimony is tainted by the witness's self-interest, and thus inadmissible. (*Medina*[, *supra*, at p. 455].) Such a 'strong compulsion' may be created by a condition ' "that the witness not materially or substantially change her testimony from her tape-recorded statement already given to . . . law enforcement officers." ' (*Medina, supra*, 41 Cal.App.3d at p. 450.)" (*People v. Boyer* (2006) 38 Cal.4th 412, 455.) "[T]he use of such tainted testimony is a denial of the fundamental right to a fair trial in violation of federal constitutional principles." (*Medina, supra*, at p. 456.) "On the other hand, although there is a certain degree of compulsion inherent in any plea agreement or grant of immunity, it is clear that an agreement requiring only that the witness testify fully and truthfully is valid. [Citations.]" (*People v. Allen* (1986) 42 Cal.3d 1222, 1252.)

Mohamed entered into a written agreement with the district attorney's office titled "AGREEMENT TO PROVIDE TRUTHFUL TESTIMONY." The agreement, which was admitted into evidence at trial, provided in part that "[my] only obligation under this agreement is to testify truthfully and completely in [defendant's] case, regardless of who asks questions of me. I shall not resort to silence, nor feign any lapse of memory, in an attempt to avoid answering any questions." The agreement further provided that if the judge presiding over the trial considered Mohamed's testimony to be truthful and complete, she would be permitted to plead no contest to misdemeanor accessory to robbery (§ 32), with credit for time served. On the other hand, if the judge determined that Mohamed had not testified truthfully or completely, the People would continue to prosecute her for second degree robbery.

Defendant acknowledges that the written agreement between Mohamed and the district attorney's office "passed constitutional muster." He claims, however, that Mohamed's trial testimony established that she was in fact required to testify in a particular fashion. This argument is based on Mohamed's answer to a single question on direct examination, which drew no objection:

“[Prosecutor]: You spoke with your attorney about your decision to cooperate in the prosecution of your friend Clifford Vecera?”

“A. Yes.

“Q. And you’re aware that you’re still being prosecuted for the robbery and your involvement; is that correct?”

“A. Yes.

“Q. The only thing that is being promised to you is that your statements in court can’t be used against you?”

“A. Correct.

“Q. Now, Ms. Mohamed, are you—you read through that contractual agreement that I entered into with you and your attorney?”

“A. Yes.

“Q. You read it?”

“A. Yes.

“Q. And it includes a portion that says a judge is going to determine whether or not you testified truthfully; is that correct?”

“A. Yes.

“Q. And if it is, in fact, found that you testified truthfully, *consistent with exactly what you told the police*, your charge of robbery would be reduced to accessory to robbery as a misdemeanor?”

“A. *Yes.*

“Q. And what’s the condition if you testify untruthfully, Ms. Mohamed?”

“A. That I’ll get charged with robbery.

“Q. Exactly where you are now, only you’ll be sitting in that seat [presumably, defendant’s seat] again?”

“A. Correct.

“Q. Have any other promises been made to you whatsoever?”

“A. No.” (Italics added.)

Defendant claims that the italicized portions of the foregoing exchange reveal that Mohamed understood her agreement to testify truthfully to mean that she was supposed to testify “exactly” consistently with her statement to police, regardless of its truth. He compares this to the agreement found constitutionally impermissible in *Medina, supra*, 41 Cal.App.3d at page 450, where witnesses testified under agreements that they “ ‘not materially or substantially change’ ” their testimonies from previous police interviews. By failing to object below that Mohamed’s testimony should be excluded because her immunity agreement compelled her to testify to a certain version of events, defendant forfeited this claim. (*People v. Boyer, supra*, 38 Cal.4th at p. 457.) We nonetheless will consider the objection because defendant also contends that his attorney was ineffective for failing to object at trial (*People v. Reyes* (2008) 165 Cal.App.4th 426, 433-434); however, we reject the argument on the merits because insufficient evidence supports defendant’s claim. (*People v. Maury* (2003) 30 Cal.4th 342, 417.)

It is no doubt true that the prosecutor expected Mohamed to testify consistently with her previous statement to police, which she did.⁴ “It is a rare case indeed in which the prosecutor does not discuss the witness’s testimony with him beforehand and is assured that it is the truth. However, unless the bargain is *expressly contingent* on the witness sticking to a particular version,” constitutional principles are not violated. (*People v. Garrison* (1989) 47 Cal.3d 746, 771, italics added.) To conclude that there was such an express condition here, we would have to assume that Mohamed’s written agreement to testify truthfully and completely did not “constitute the sole and complete agreement between the People” and Mohamed, as the agreement specifically provided, but that the true interpretation of the agreement to testify “truthfully” was revealed in a one-word answer to the prosecutor’s ambiguous and leading question. “This claim is hypothetical and unverifiable.” (*People v. Reyes, supra*, 165 Cal.App.4th at p. 434 [no

⁴ The prosecutor played for the jury an audio recording of Mohamed’s interview with police, and the recording was admitted into evidence. The recording is not included in the record on appeal; however, the record does contain transcripts of the recording that were shown to the jury but not admitted into evidence.

Medina error where witness understood that he would breach agreement if it was found that his third interview to police was untruthful].) Practically, it is almost certain that the prosecutor phrased the question the way he did because he believed Mohamed's interview was truthful, in which case there was no improper compulsion. (*Reyes* at p. 434.)⁵

To be sure, it would have been preferable to have the prosecutor clarify that he expected Mohamed to testify consistently with her police interview because she had been truthful when she previously spoke to police. In *People v. Fields* (1983) 35 Cal.3d 329, for example, a witness who had entered into a plea bargain under which she agreed to testify for the prosecution admitted on cross-examination that if she told a story that differed from a previous statement to an investigator, this would be a violation of her agreement. (*Id.* at pp. 359-360.) On redirect examination, the witness confirmed that her previous statement had been truthful, and that she had never been instructed to testify as to a particular “ ‘ ‘story.’ ’ ” (*Id.* at p. 360.) Likewise in *People v. Boyer, supra*, 38 Cal.4th 412, a witness testifying pursuant to an immunity agreement admitted on cross-examination that he would be prosecuted if his testimony was inconsistent with what he previously told the district attorney. (*Id.* at p. 455.) The witness then clarified on redirect that he understood that he was to testify truthfully, and that he was never directed how to testify. (*Ibid.*) Had defendant objected below on *Medina* grounds to the prosecutor's unclear question, the trial court could have permitted the prosecutor to clarify the nature of the plea agreement.

Assuming the question is clear, defendant is correct that here, by contrast, the prosecutor did not seek specific confirmation that Mohamed was to testify consistently with “exactly” what she told the police because her previous statement was, in fact, truthful. We agree with respondent, however, that the absence of such clarification does

⁵ After defense counsel was questioned at oral argument about the similarity of *Reyes, supra*, 165 Cal.App.4th 426 to this case, he requested leave to file a supplemental letter brief. In the letter he subsequently filed, he reiterated his claim that, unlike the agreement in *Reyes*, the plea bargain in this case was “expressly contingent” on Mohamed testifying in a particular manner. Again, we disagree with this characterization of the agreement.

not compel reversal here.⁶ When we review Mohamed’s response to a single question in context, the record does not demonstrate that the witness was required to testify consistently with her previous statement, regardless of its truth. (*People v. Garrison, supra*, 47 Cal.3d at p. 770.) The written agreement that Mohamed signed stated that she was to testify “truthfully and completely,” with no specific reference to her prior statement. She confirmed on the stand that she had read the agreement, supporting an inference that she understood it. We also emphasize that the facts surrounding the immunity agreement and their relevance to Mohamed’s credibility—a highly relevant issue at trial—were fully presented to the jury, both through cross-examination of Mohamed and by counsel in their closing arguments. (*People v. Allen, supra*, 42 Cal.3d at p. 1255, fn. 10.)

Because we conclude that Mohamed’s agreement to testify was not improperly coercive, we need not consider defendant’s argument that he was prejudiced thereby. Because the agreement was not improper, it likewise follows that counsel was not ineffective for failing to object to Mohamed’s testimony on that ground or to move for a mistrial, as defendant claims. (*People v. Maury, supra*, 30 Cal.4th at p. 418.)

⁶ The Attorney General argues not only that there is insufficient factual support for defendant’s argument, but also that there is inadequate legal support. Respondent criticizes the analysis set forth in *People v. Medina, supra*, 41 Cal.App.3d 438, and claims that the Supreme Court decisions which rely on *Medina* do so only in dicta. Respondent also cites out-of-state cases that reject a strict interpretation of *Medina*. (E.g., *People v. Bannister* (Ill.Ct.App. 2009) 923 N.E.2d 244, 250-254; *People v. Jones* (Mich.Ct.App. 1999) 600 N.W.2d 652, 656-658.) In light of our high court’s repeated reliance on *Medina* (e.g., *People v. Boyer, supra*, 38 Cal.4th at p. 455; *People v. Sully* (1991) 53 Cal.3d 1195, 1215-1217), we decline respondent’s invitation to revisit its holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

III.
DISPOSITION

The judgment is affirmed.

Baskin, J.*

We concur:

Ruvolo, P.J.

Reardon, J.

* Judge of the Contra Costa Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.