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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.

LEO RAY OLGUIN,

Defendant and Appellant.

A138446

(Alameda County
Super. Ct. No. H50110)

Leo Ray Olguin appeals from a judgment convicting him of, among other crimes, three counts of second degree murder and sentencing him to an aggregate term of 110 years and four months to life in state prison. He contends the prosecutor committed prejudicial misconduct in closing argument and that his attorney was ineffective in failing to object to the trial court's failure to state on the record its reasons for its discretionary sentencing choices. Defendant also contends the court erred in failing to stay, under Penal Code section 654, the sentence imposed on certain counts. We conclude that any impropriety in the prosecutor's closing argument was not prejudicial but that for the reasons we shall explain the matter must be remanded for resentencing.

Factual and Procedural History

Defendant was charged by an amended information with 12 counts arising out of events occurring on two different days. Counts 1 through 3 alleged crimes occurring on December 11, 2009. Count 1 charged reckless evasion of a police officer (Veh. Code, § 2800.2, subd. (a)); count 2 charged evasion of a police officer by driving against traffic on a highway (Veh. Code, § 2800.4); and count 3 charged misdemeanor hit-and-run (Veh. Code, § 20002, subd. (a)). Counts 4 through 12 related to events on December 23,

2009. Counts 4, 5, and 6 charged the crime of murder (Pen. Code, § 187); count 7 charged evasion of a police officer causing injury (Veh. Code, § 2800.3, subd. (a)); count 8 charged reckless evasion (Veh. Code, § 2800.2, subd. (a)); count 9 charged driving under the influence causing injury (Veh. Code, § 23153, subd. (a)); count 10 and 11 charged robbery (Pen. Code, § 211); and count 12 charged attempted robbery (Pen. Code, §§ 211, 664). A prior conviction for carjacking (Pen. Code, § 215, subd. (a)) was also alleged.

The following evidence was presented at trial: ¹

December 11, 2009 (Counts 1-3)

At 9:49 a.m. on December 11, 2009, Deputy James Messina, a uniformed Alameda County sheriff's deputy, was in his marked patrol car when he saw a white Nissan Altima run a stop sign at 15 miles per hour. The driver looked directly at Messina, who activated his lights and, momentarily, his siren before giving chase. The Altima increased its speed, in Messina's estimation, to 60 miles per hour. At that point, Messina ceased the chase because he considered conditions on the wet two-lane road were too dangerous to continue. Messina observed the Altima run another stop sign before rounding a corner. Shortly after losing sight of the Altima, Messina saw an "explosion of car parts flying through the air." At the intersection, Messina found a rear bumper and tail light pieces on the road and possible damage to a telephone pole. Fifteen minutes later, the Altima was located in a carport of a nearby apartment complex. Messina searched the Altima and recovered a jacket containing identification that was traced to defendant, whom Messina identified in court as the person he saw driving the Altima.

December 23, 2009 (Counts 4 through 12)

At 12:14 a.m. on December 23, 2009, Alameda Sheriff's Deputy Shawn Osborne was in a marked patrol car when he observed a green Mazda sedan roll through a stop

¹ Because the jury acquitted defendant of the robbery charges we will not recite testimony relevant only to those charges.

sign at approximately two to three miles per hour. When the driver began to accelerate, Osborne followed, noticing his own speed rising to 40 miles per hour in a 25 miles per hour speed zone. An ensuing chase was recorded on the deputy's patrol car video camera. That video tape was shown to the jury.

Osborne testified that over the course of the chase, the Mazda sped through two stop signs and at least one red light before entering the large intersection of A Street and Foothill Boulevard. The Mazda entered the intersection against a red light and proceeded to drive under a truck, largely severing the roof from the car, before crashing the car into the column of a building across the street.

At the scene, Osborne found defendant in the driver's seat. The registered owner of the car, Brittany Farina, was in the front passenger seat. The three passengers in the back seat, who subsequently died, were Dominic Hall, Andrew Falcon and Vanessa Hurtado. Defendant was saying something like, "I'm sorry, I'm sorry. Help my brother." He turned to Hall in the back seat and shook him, saying, "help my brother, help my brother," and he continually asked if his brother was dead. Defendant was arrested at the scene.

Using the video from Osborne's patrol car as a reference, the police did a time-distance analysis of the Mazda's approximate average speed from A Street and Mission Boulevard to the crash site at A Street and Foothill—a distance of about two blocks. According to their analysis, the Mazda averaged a speed of 78 to 80 miles per hour over these two blocks.

A forensic toxicologist analyzed a blood sample that was taken from defendant around 1:30 a.m. The sample showed a blood-alcohol percentage of .07, which according to the toxicologist would have been at .09 about an hour before the blood draw. The blood test also indicated ingestion of cocaine, methamphetamine and marijuana, which combined with the alcohol would have caused confusion of the normal thinking processes.

The jury found defendant guilty on counts 1 through 9 and set the murder convictions at second degree. Defendant was acquitted of the robberies charged in counts

10 through 12. At a bifurcated trial, the court found the prior conviction allegation to be true.

Defendant was sentenced to a total term of 110 years, four months, to life in state prison. He timely filed a notice of appeal.

Discussion

1. Prosecutorial Misconduct

A prosecutor commits misconduct when he or she makes “ ‘arguments to the jury that give it the impression that “emotion may reign over reason,” ’ ” or presents “ ‘ “irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.” ’ ” (*People v. Redd* (2010) 48 Cal.4th 691, 742.) “ ‘When a claim of misconduct is based on the prosecutor’s comments before the jury, “ ‘the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.’ ” ’ ” (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1239.)

In *People v. Morales* (1992) 5 Cal.App.4th 917, 928, the court observed that it is “misconduct for a prosecutor to suggest that jurors disregard instructions and consider public opinion in determining the guilt phase of a criminal trial.” In that case, “[d]uring closing argument the prosecutor asked the jury to consider the reactions of those closest to them in reaching a verdict. In discussing defendant's stated intent, he argued: ‘If you have any doubt about how powerful a piece of information that is, remember tonight, or tomorrow, whenever you finish deciding this case, eventually you are going to be able to discuss this case with your spouses or your significant others and imagine when you tell them you had a case where the defendant admitted his intent to kill, he told one of his intended victims, I am going to go and get the faggot boyfriend and then I am coming back for you—if you are thinking about letting him escape with responsibility for that, think about what your spouse or significant others are going to say. [¶] They are going to say, he admitted and you let him go? [¶] That guy, who admitted intent to kill and did everything necessary to carry out that plan till the cops got there, who was five feet from

his victim, is back out on the street. [¶] What were you thinking of? [¶] That's what the reaction is going to be.' ” (*Ibid.*)

Defendant contends that, as in *People v. Morales, supra*, 5 Cal.App.4th 917 the prosecutor's closing argument in this case improperly urged the jury to consider public opinion in deciding defendant's guilt. Here, to explain the concept of implied malice to the jury, the prosecutor argued: “The way to put it in context is this: You're going to be done with this case, I don't know when, but you'll be done at some point and you'll be able to go and talk to your friends about it finally, and think of this, they'll ask you what it's about. You're going to say it was a case, murders, hopefully you'll say wildly interesting, I don't know, and they'll say what was the issue that you guys had to deal with in this case, what did you talk about? Well, we had to decide whether it was implied malice murder and you'll be able to explain that to them because it's a concept most people don't know when they come in the courtroom. They'll ask you what's the issue there, what did you guys have to decide? We had to decide basically what he did was dangerous to human life, whether he consciously, whether he deliberately consciously disregarded that danger and whether the natural and probable consequences of that were dangerous to human life. So whether basically he knew about the dangerous to human life and whether he disregarded it. So you talk about the facts and you say, they say what were the facts of that case, what were you called upon to determine? [¶] Well, the defendant was in a chase. Where was the chase at? Was it down a road? No, through a residential neighborhood. Okay, that seems kind of dangerous. They'll say give me some more facts. Well, it was at night, just a quarter after midnight. Okay. What else? Well, he blew through two stop signs going about 40 miles an hour. Okay. That's sounding pretty dangerous. What happened next? Well, he got on A Street and Foothill. That's a busy street. Yeah. What did he do next? He went through a stop sign around 40, 50 miles an hour. Your friend will be naturally wondering, this is seemingly dangerous. What happened next? He continued on A Street and he was going around 60 miles an hour. What happened after that? Well, there was some people in the road but he didn't hit them. Okay. What happened next? Well, he continued going on A Street and he was going

around 60 miles an hour and he passed that Luckey's, you know, the Luckey's you know people are out at? Yeah, that sound pretty dangerous. What happened next? Well, he got to Mission and A Street. Did he stop? No. When he got through he blew straight through that stop sign, stoplight I should say, going around 45, 50 miles an hour. Your friend will be surprised or shocked at the circumstances if they're reasonable people. What happened next? Well, there's cars on the left and right of them. He went past them. What did he do next? Well, he went at 78 or 80 mile an hour. Was there a green light? No. He went into a red light at 78 or 80 miles an hour. Your friend will ask, was it at least a dead intersection? No, it was Foothill and A Street. That's a big intersection. [¶] Then the question will come, what did you decide? What did you decide? Well we decided it wasn't dangerous to human life and we decided that he couldn't have known it was dangerous to human life and he wasn't disregarding that danger. If that sounds at all strange to you, if that sounds weird, it's because it is. It doesn't fit the facts of this case. This is not gross negligence at all. So for a moment you hesitate and think in your mind, that's a strange thing to have to justify."

Defense counsel objected to this argument and requested that the "remarks be stricken." The court sustained the objection but denied the request to strike the remarks. Counsel did not request that the jury be admonished. As a general rule, "[t]o preserve a claim of prosecutorial misconduct for appeal, a defendant must object and seek an admonition if an objection and admonition would have cured the harm." (*People v. Kennedy* (2005) 36 Cal.4th 595, 618, overruled on different ground in *People v. Williams* (2010) 49 Cal.4th 405, 459.) Contrary to the Attorney General's argument, counsel's failure to request an admonition did not forfeit the claim of misconduct here. Although defense counsel failed to request an admonition, he did substantially comply with the obligation to do so by requesting the court to strike the offending argument. (*People v. Bonin* (1988) 46 Cal.3d 659, 678, overruled on other grounds as recognized in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Accordingly, we will consider defendant's argument on the merits.

Defendant contends the above argument was improper because it suggested the jury consider public opinion in determining defendant's guilt. He argues that "the prosecutor hypothesizes a juror, who had acquitted appellant of murder, having to justify that verdict to a disinterested friend, who would be appalled. In order to forestall this eventuality, the jurors had to find appellant guilty of murder." The trial court apparently agreed that the argument was improper and sustained the objection. The Attorney General disputes that the argument was improper, arguing that "there was no suggestion in the prosecutor's initial remarks that the jurors should *disregard instructions* and instead consider some external public opinion. Rather, even before the objection, the prosecutor stressed that the hypothetical friends with whom the juror was discussing the case were '*reasonable people*.' [Citation.] Accordingly, the prosecutor was not requesting the jurors to disregard instructions, but rather was properly urging the jury to be reasonable." The prosecutor's argument was perilously close to the line between proper and improper closing argument and may well have crossed that line. (See *People v. Shazier* (2014) __ Cal.4th __, __-__ [2014 Cal. Lexis 5747, *67-73]. However, any impropriety was not prejudicial under either the state or federal standard. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1071 [" 'conviction will not be reversed for prosecutorial misconduct' that violates state law . . . 'unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct' "]; *People v. Williams* (2013) 58 Cal.4th 197, 274 [no "relief for prosecutorial misconduct under federal law" unless the defendant shows " 'the challenged conduct was not harmless beyond a reasonable doubt' "].)²

² " 'A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' ' (*People v. Clark* (2011) 52 Cal.4th 856, 960.)

The evidence that defendant's conduct constituted implied malice rather than gross negligence was overwhelming. Contrary to defendant's argument, Officer Osborne's testimony does not support an inference that defendant's conduct immediately preceding the accident did not pose a threat to public safety. Osborne testified that police policy requires the termination of a chase " 'when any person is gravely in danger because of the pursuit' " and that he did not terminate his pursuit of defendant. He clarified, however, that as defendant "was approaching that intersection [at Foothill Boulevard and A Street], that at that point the circumstances were such that they gravely endangered others." The prosecutor similarly conceded in closing argument that the initial stages of the pursuit did not rise to the level of implied-malice murder. He argued that as defendant's speed increased from rolling through a stop sign to driving 40 miles per hour in a residential area and to entering a busy intersection at 80 miles per hour, defendant's conduct became increasingly more egregious. By the time defendant entered the intersection at Foothill Boulevard and A Street, the prosecutor argued, defendant must have appreciated the magnitude of the danger he was creating. The prosecutor's argument was supported not only by the officer's description of defendant's driving or the conditions on the road that night, but also by the video recording showing the pursuit from beginning to end. The jury could see the number of other cars and pedestrians on the street as defendant increased his speed and ran multiple stop signs and red lights before entering the busy intersection against the light at 80 miles per hour. The jury could hardly conclude that defendant was unaware of the danger to human life posed by his conduct.

Moreover, any potential misunderstanding by the jury caused by the prosecutor's argument was cured by the prosecutor's subsequent comments and the court's instructions. Immediately following defendant's objection, the prosecutor stated "If you find that's a strange thing to have to reconcile with your own sense of what is right and what is wrong, what is reasonable and what the law and the facts and the evidence in this case are, that's because it is. *I'm not trying to appeal to anything but the facts and the law in this case.* I'm trying to tell you that those three people died and they deserve the truth and there needs to be some justice here." (Italics added.) The court then instructed the

jury, “You must decide what the facts are. It is up to all of you and you alone to decide what happened based only on the evidence that has been presented to you in this trial. Do not let bias, sympathy, prejudice or *public opinion* influence your decision. [¶] . . .

[¶] You must follow the law as I explain it to you even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” (Italics added.) Given the prosecutor’s comment and the accepted presumption that jurors generally understand and follow the court’s instructions (*People v. Myles* (2012) 53 Cal.4th 1181, 1212), there is no basis in the record to conclude that objectionable argument had any effect on the outcome of this case. (*People v. Shazier, supra*, ___ Cal.4th at pp. ___-___ [2014 Cal. Lexis at pp. *84-87 [comparable misconduct not prejudicial because of court’s instructions and strength of evidence].)

2. Sentencing Issues

Defendant’s sentence was calculated as follows: The court imposed consecutive terms of 15 years to life for each of the three second degree murder convictions. Each of these terms was doubled under the Three Strikes Law, Penal Code section 667, subdivisions (b) through (i). The court treated count 7 (evasion of a police officer causing injury on December 23) as the principal term and imposed the upper sentence of seven years on that count, a consecutive one third the midterm sentence of eight months on count 1 (reckless evasion of a police officer on December 11) and concurrent terms of one year four months on counts 2, 8 and 9. Each of these terms was also doubled under the Three Strikes Law. The court dismissed count 3 under Penal Code section 1385.

As defendant asserts, the court was required to make two discretionary decisions in selecting his sentence, each of which required a statement of reasons for the record. “First, designating count 7, reckless evasion, as the principal term, the court chose the upper term of seven years. (Veh. Code, § 2800.3(a).) Although the doubling of this term to 14 years was mandatory under the three-strike law (Pen. Code, § 1170.12(c)(1)), the choice of the term to be doubled was discretionary, and required a statement of reasons. (Pen. Code, § 1170(c).) None was given. Secondly, and more importantly, the murder counts, — four, five, and six, — also doubled to thirty-years-to-life, were imposed

consecutively. Because these murders occurred on the same occasion and arose from the identical set of operative facts, concurrent sentences were not statutorily barred (Pen. Code, § 1170.12(a)(6)), and the sentencing court's choice of consecutive imposition of the term for these counts required a statement of reasons. (Cal. Rules of Court, rule 4.406(b)(5).) None was given."

The Attorney General does not dispute that these discretionary decisions were incorporated in defendant's sentence. (See, e.g., *People v. Coelho* (2001) 89 Cal.App.4th 861, 864-865 ["Under the 'Three Strikes' law, the court must impose a consecutive sentence for each current offense 'not committed on the same occasion, and not arising from the same set of operative facts. . . .' [Citations.] Conversely, if the current offenses were committed on the same occasion and arose from the same set of operative facts, the court has discretion to impose consecutive or concurrent sentences." (Fn. omitted).]) The Attorney General argues that defendant forfeited claims of sentencing error by failing to raise them at the time of sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 353 ["claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices" cannot be raised for the first time on appeal]; *People v. Zuniga* (1996) 46 Cal.App.4th 81, 83-84 [claim of error based on failure to state reasons for sentencing choices is waived unless objection stated before trial court].)

Defendant acknowledges that no objection appears on the record with regard to any of the court's discretionary sentencing choices and that counsel's failure to object forfeits a direct challenge to the sentence. He argues, however, that "the sentencing court here seemed to be under the impression that it had no discretionary sentencing choices" so that "a timely intervention by defense counsel, objecting to the failure and presenting argument for the more mitigated disposition, would have been beneficial to appellant, and this failure constituted ineffective assistance of counsel."

As defendant notes, there is some ambiguity in the record regarding the court's understanding of the scope of its discretion. Prior to imposing defendant's sentence the court made the following remarks: "Record should reflect the court has read and considered the probation report. Record should reflect that the court read the attachments

to the probation report which I did receive this morning. And prior to the sentencing hearing, I did receive a number of letters from relatives of the victims, as well as the defendant's family. And I did receive a sentencing letter from the prosecutor. Record should reflect I discussed the matter briefly in chambers with both counsel as to what I believe is the legal and appropriate sentencing scheme in this matter." Later, the court repeated that he "went over [his] sentencing scheme in chambers with [counsel]." The court's use of the word "appropriate" in its prefatory remarks suggests that it may have understood that it had some sentencing discretion. However, both the prosecution and the probation department repeatedly advised the court incorrectly that consecutive 15-year-to-life terms were mandatory on each of the murder convictions. Nowhere in the record is that error addressed or corrected. Moreover, the court's subsequent statement, "I'm not being a harsh judge, I am not being a tough judge, but I have to impose a tough sentence and because I am required to by law," does suggest that the court was under the misimpression that consecutive terms were mandatory.

On this record we cannot determine with any confidence whether the incorrect information provided by the prosecution adversely impacted defendant's sentence and thus, cannot conclude that the failure to object was harmless. Moreover, the Attorney General agrees that another sentencing error, albeit of lesser significance, requires correction.³ Accordingly, we shall remand the matter for resentencing.

³ Defendant and the Attorney General agree that the court erred in imposing concurrent terms on counts 2, 8, and 9 after determining that Penal Code section 654 applied to those counts. (*People v. Jones* (2012) 54 Cal.4th 350, 353 [When section 654 applies, the prohibition of multiple punishment forbids not only consecutive, but also concurrent impositions of sentence.].) Accordingly, on remand, the court shall stay the sentences imposed on these counts.

Disposition

Defendant's conviction is affirmed, but the matter is remanded for resentencing.

Pollak, J.

We concur:

McGuinness, P. J.

Siggins, J.