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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.

ANDRE VINCENT FREEMAN,

Defendant and Appellant.

A140592

(San Mateo County
Super. Ct. No. SC078965)

Defendant Andre Vincent Freeman appeals from his conviction, after a jury trial, of attempted robbery. We affirm.

BACKGROUND

Defendant was charged with one count of attempted second degree robbery (Pen. Code, §§ 212.5, subd. (c), 664).¹

The People’s witnesses at trial were the victim, Luis Hernandez, and two responding officers. Hernandez testified he was sitting in his parked car on Laurel Street in San Carlos around 8:00 p.m. on August 13, 2013. He noticed defendant across the street with two other men; defendant was “trying to get some females’ attention as they were passing by.” Hernandez had never seen any of them before.

Shortly thereafter, defendant approached Hernandez’s open window. Defendant leaned over and asked Hernandez for his wallet. Defendant put his hand inside his

¹ A prior prison term enhancement (Pen. Code, § 667.5, subd. (b)) was also alleged and found true by the trial court in a bifurcated proceeding.

waistband underneath his shirt; Hernandez believed defendant had a gun. Defendant's companions were standing by the passenger side of Hernandez's car. Hernandez froze and did nothing. Defendant asked Hernandez for his wallet two more times; Hernandez still did nothing. Defendant walked to the passenger side of Hernandez's car and told Hernandez several times either "You are a little bitch" or "You are still a little bitch." Defendant and his companions left down a nearby alley; Hernandez could not remember if they walked or ran.

Hernandez flagged down two sheriff's deputies and told them he had just been robbed and the perpetrators had gone down the alley. In the alley, the deputies found defendant with Ryan Percy and Stanley Logan. None had a weapon. Defendant and Percy were noticeably drunk.

A deputy interviewed Hernandez that evening; Hernandez said defendant tried to rob him but he did not say defendant asked for his wallet multiple times. In a second interview the following day, Hernandez said defendant demanded his wallet three times.

Defendant and Percy, defendant's younger brother, testified for the defense. Both witnesses testified they had been drinking for several hours on August 13, 2013. Defendant, Percy, and Logan left Logan's San Carlos house on foot to buy a cigar; Percy also wanted a cigarette but they did not have enough money to buy one. On the way back to Logan's house, the men stopped to look at a motorcycle Percy admired which was parked on the street. Both defendant and Percy were very drunk.

Defendant testified Percy asked defendant to take a picture of him on the motorcycle. Defendant jokingly asked some women walking by if they wanted to do a "photo shoot" with Percy; they said no and asked defendant if he wanted them to call the police. Defendant then saw someone across the street he thought was a former coworker named Roberto. A few years ago, defendant was counting his change while leaving a store and Roberto approached him and said, "Give me your money." Defendant was startled but then laughed. When defendant thought he saw Roberto in San Carlos he said to himself, "Got you." Defendant walked over to the man he thought was Roberto and said, "Give me your wallet, bitch." Hernandez looked at defendant without recognition,

and defendant realized he was not Roberto. Defendant walked away with his hands up in the air saying, “I thought you were somebody else.” Hernandez said, “Get the fuck away from my car, mother fucker,” and defendant responded, “Well, you are still a bitch for letting me run up on your car like that.” Defendant told Percy he thought he knew the person, and the three men walked away.

Percy testified that defendant approached Hernandez and said something to him. Defendant then walked around to the curb, laughing, and the men headed down the alley.

On cross-examination, defendant admitted a felony conviction for reckless evasion of the police. He also admitted misdemeanor convictions for providing false information to the police (two convictions), petty theft (two convictions), and petty theft with a prior.

DISCUSSION

I. *Officer Testimony Regarding Harassment*

During direct examination, the prosecutor asked one of the deputies what had taken him to the area of the attempted robbery on the night in question. Defense counsel objected on hearsay and relevance grounds. The trial court overruled the objection but provided a limiting instruction directing the jury, “the officer’s response to this question is for the limited purpose to explain why he did what he did. It’s not being offered for the truth of the content of the broadcast.” The deputy testified, “The initial dispatch call was that there was a male in the area that was calling [to] women and making inappropriate comments about women’s physique.” Defendant argues the testimony was irrelevant and, because Hernandez’s testimony made clear that defendant was the “male” prompting the dispatch, its admission violated Evidence Code sections 1101 and 352.²

We need not decide if admission of the testimony was error because any error is harmless.³ First, the limiting instruction directed the jury not to consider the testimony

² All undesignated section references are to the Evidence Code.

³ We also need not decide whether the section 1101 and section 352 challenges were forfeited.

for the truth. When a jury is given limiting instructions, “[w]e presume that the jury understood and followed the instructions.” (*People v. Jablonski* (2006) 37 Cal.4th 774, 834.) Second, and most importantly, evidence of defendant’s sexual harassment had already come out through Hernandez’s testimony that defendant was “trying to get some females’ attention as they were passing by” and his behavior was “inappropriate.” Third, while the jury did ask several questions during deliberations, none related to the harassment or this aspect of the deputy’s testimony. Finally, the prosecutor did not rely on this evidence during closing arguments. In his initial closing, the prosecutor mentioned the harassment only in describing Hernandez’s testimony about how he first became aware of defendant, noting Hernandez’s “attention was drawn to the defendant’s group that were on a motorcycle getting loud, harassing passers by.” In rebuttal, the prosecutor mentioned the harassment only in response to an argument by defense counsel that the harassment demonstrated defendant was intoxicated and not acting reasonably: “[Defense counsel]’s picking and choosing with respect to his client’s judgment, depending [on] what works for him. He pointed out his poor judgment to be across the street talking to the girls, it’s poor judgment to go up and do what the defendant did.”⁴ It is not reasonably probable the outcome would have been more favorable to defendant absent any error in admitting the testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

II. *Prior Misdemeanor Convictions*

Prior to trial, the trial court ruled the prosecution could impeach defendant with certain misdemeanors. At trial the prosecutor asked defendant, without defense objection, if he had been convicted of the specified misdemeanor convictions, and defendant answered affirmatively. Defendant does not challenge the trial court’s ruling

⁴ Defense counsel had argued defendant “was so intoxicated . . . that within less than five minutes he can get two different people to phone the cops for two different reasons,” and “[p]eople who are intoxicated . . . do not act reasonably and when you look at what his intent was in this case you have to take that into effect, and we know that was true because they were on the other side of the street, just acting up and causing a problem.”

that he could be impeached with these misdemeanors, but argues the manner of presenting the impeachment evidence was impermissible.

A witness may be impeached with conduct underlying a misdemeanor conviction involving moral turpitude. (*People v. Cadogan* (2009) 173 Cal.App.4th 1502, 1514 (*Cadogan*)). A hearsay exception in the Evidence Code allows this underlying conduct to be proven by a certified official record of conviction. (§ 452.5, subd. (b)(1); *Cadogan, supra*, at p. 1515, fn. 4 [§ 452.5, subd. (b) “ ‘creates a hearsay exception allowing admission of qualifying court records to prove not only the fact of conviction, but also that the offense reflected in the record occurred’ ”].) However, there is no similar hearsay exception for *testimonial* evidence of a misdemeanor conviction offered for impeachment purposes. (*Cadogan, supra*, at p. 1515, fn. 4; cf. § 788 [authorizing impeachment by testimonial or documentary evidence of a felony conviction].)

We need not decide whether the challenge was forfeited because the error is harmless. Defendant does not deny the convictions and offers no reason to presume the prosecutor could not have obtained official records of the convictions. Defendant also does not argue admission of the conviction records, instead of his testimony admitting the convictions, would have rendered a more favorable result probable. Defendant argues instead that, if the prosecutor had questioned him about the underlying conduct instead of just the conviction, he might have been able to explain why he committed the crimes. Such speculation does not satisfy defendant’s burden to demonstrate prejudice. (*People v. Bell* (2010) 181 Cal.App.4th 1071, 1087 [“purely speculative” claims of prejudice are insufficient].)

III. *Percy’s Lay Opinion Testimony*

In in limine motions, the People sought a ruling prohibiting Percy from testifying that defendant was only joking when he asked for Hernandez’s wallet. The trial court provisionally granted the motion: “at this time absent further foundation, Mr. Percy’s belief as to what may have been in [defendant’s] mind is not relevant. The things that are relevant is what is in the defendant’s mind, *either by direct or circumstantial evidence* [¶] So at this point, absent some further foundation which we can address outside the

jury's presence, Ryan Percy is not to testify as to his belief that [defendant] may have been joking." (Italics added.) Defendant argues this ruling was erroneous. We disagree.

"[I]n general, 'a lay witness may not give an opinion about another's state of mind.'" (*People v. Weaver* (2012) 53 Cal.4th 1056, 1086.) However, " 'a witness may testify about objective behavior and describe behavior as being consistent with a state of mind.'" (*Ibid.*) Accordingly, a percipient witness's testimony that a defendant "displayed hatred" is admissible (*ibid.*); similarly, testimony that a defendant "seemed to enjoy" certain conduct is admissible. (*People v. Chatman* (2006) 38 Cal.4th 344, 397.) The trial court's ruling properly prohibited Percy from testifying about *his opinion* of defendant's state of mind, but did not prohibit Percy from providing circumstantial evidence of defendant's state of mind through testimony about defendant's observable conduct.

We also disagree with defendant's contention that the ruling violated his due process rights by prohibiting him from presenting a complete defense. Where " " "there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense," " " due process is not violated. (*People v. Boyette* (2002) 29 Cal.4th 381, 428; accord, *People v. Thornton* (2007) 41 Cal.4th 391, 452–453 ["short of a total preclusion of defendant's ability to present a mitigating case to the trier of fact, no due process violation occurs"].) Such is the case here. Defendant testified that he was only joking when he asked Hernandez for his wallet. Percy testified defendant laughed after he approached and spoke to Hernandez. Defendant was amply permitted to present evidence of his defense that he was joking.

IV. *Instructional Error*

Defendant argues the trial court erred by failing to sua sponte instruct the jury to view with caution Hernandez's testimony about defendant's inculpatory statements; specifically, that defendant asked for his wallet three times.

CALCRIM No. 358 provides, "You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in

part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s]. [¶] [Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]” We agree with defendant that the cautionary instruction was applicable. “[T]he cautionary instruction applies to any extrajudicial oral statement by the defendant that is used by the prosecution to prove the defendant’s guilt—it does not matter whether the statement was made before, during, or after the crime, whether it can be described as a confession or admission, or whether it is a verbal act that constitutes part of the crime or the criminal act itself.” (*People v. Diaz* (2015) 60 Cal.4th 1176, 1187 (*Diaz*).

At the time of defendant’s trial, trial courts had a sua sponte duty to give this cautionary instruction. (*Diaz, supra*, 60 Cal.4th at p. 1190.) Our Supreme Court recently reconsidered and rejected this rule “in light of a change in the law that requires the general instructions on witness credibility to be given sua sponte in every case,” but declined to decide whether the new rule applied retroactively. (*Id.* at pp. 1189, 1195.) We need not decide whether retroactive application is appropriate because any error was harmless.

The jury was instructed with CALCRIM No. 226, which “advise[s] the jury to consider, among other things, how well a witness could ‘see, hear, or otherwise perceive the things about which the witness testified,’ how well the witness was ‘able to remember and describe what happened,’ and whether the witness’s testimony was influenced by ‘bias or prejudice, a personal relationship with someone involved in the case, or a personal interest in how the case is decided.’ ” (*Diaz, supra*, 60 Cal.4th at p. 1191.) “These general instructions, like the cautionary instruction, ‘aid the jury in determining whether [the defendant’s extrajudicial statement] was in fact made.’ ” (*Ibid.*) “ ‘[W]hen the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution.’ ” (*Id.* at p. 1196 [finding failure to give cautionary instruction harmless];

see also *id.* at p. 1191 [“the erroneous omission of the cautionary instruction has frequently been held to be harmless error in light of such general instructions on witness credibility”].) The trial court’s failure to provide the additional cautionary instruction was not prejudicial.

V. *Cumulative Error*

Defendant’s final contention is the cumulative impact of the above errors deprived him of a fair trial. We have either rejected defendant’s claims of error or found that any errors, assumed or not, were not prejudicial. “Viewed as a whole, such errors do not warrant reversal of the judgment.” (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

DISPOSITION

The judgment is affirmed.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.