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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE WELDON WINDOM, JR.,

Defendant and Appellant.

A141621

(Contra Costa County  
Super. Ct. No. 05-131573-8)

Defendant Bruce Weldon Windom, Jr., appeals his convictions for (1) evading a police officer and (2) evading a police officer and driving against traffic. The charges arose out of a high-speed car chase through the streets of Richmond. At trial, defendant claimed he acted under duress. During closing arguments, the prosecutor contended this testimony should not be believed because it amounted to an “eleventh-hour, made-up defense[.]” Defendant now argues these and similar comments amounted to prosecutorial misconduct. We affirm.

**I. BACKGROUND**

In July 2013, defendant was charged by information with (1) evading a peace officer with willful or wanton disregard for the safety of persons or property (Veh. Code, § 2800.2, subd. (a)), and (2) driving a vehicle on a highway in the opposite direction of lawful traffic while evading a peace officer (*id.*, § 2800.4).

At trial, Police Officer Steven Harris testified he noticed defendant’s car, with its high beams illuminated, driving towards him. Harris flashed his own high beams, but the car did not respond. He then shined his spotlight into the car and saw four occupants;

defendant was the driver. Harris made a U-turn and pulled behind the car, but defendant sped away.

A chase ensued, and defendant's car ran multiple stop signs and red lights, traveled at 40 to 50 miles per hour (mph) in a 25 mph zone, and drove into the oncoming traffic lane. The car then entered a freeway and accelerated to 100 mph. At one point, defendant lost control of the car and it spun around. Soon thereafter, the car exited the freeway and came to a stop. One passenger fled the scene and was not apprehended. Defendant, who was the driver, and two other passengers were detained. In total, the chase lasted about 10 minutes and about nine miles. The police found 12 grams of marijuana and some prescription medication on one of the passengers.

Defendant testified that, on the evening in question, he and a friend, Abel Zarasua, drove Stephanie Navarro, a high school acquaintance, to a hotel in Richmond. Navarro then exited the car and asked defendant to give a ride to two men who defendant had not seen or met before. The two men got in the back seat, Zarasua sat in the front passenger seat, and defendant drove.

After Harris's police car pulled behind defendant's, one of the passengers in the back seat "freaked out." According to defendant, the passenger said he had a "warrant out" and then told defendant: "Mother fucker, you better just drive or else I'll shoot you where you sit." Defendant did not see a gun, but claimed he was too scared to look and that he had a "sense" it was there. Defendant testified that, as the chase went on, the passenger continued to threaten him and also threatened Zarasua.

There was conflicting testimony about what defendant said to Officer Harris after he was apprehended.<sup>1</sup> According to Harris, defendant said he panicked after one of the passengers told him "he had something and that [defendant] should go." Harris testified defendant never indicated his life was in danger, never mentioned he had seen or heard a gun, and did not appear afraid. Harris also stated that, immediately after the arrest,

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<sup>1</sup> It is unclear from the record whether defendant was read his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436) prior to talking with Officer Harris. In any event, defendant does not raise a *Miranda* issue on appeal.

defendant was “calm,” “forthright,” “apologetic,” and “contrite, like he knew that he had done something wrong and wanted to explain why he had done it.” Defendant claimed he told Harris he had been threatened, but conceded he had not said anything about a passenger with a gun.

The prosecutor attacked defendant’s duress defense during closing arguments, stating: “This is a chase for him to get away because he doesn’t want to get in trouble. Period. That’s what he tells police after the fact. And it wasn’t until today, today, that all of a sudden he’s being threatened, there’s a gun in the car. Really think about that.” Defense counsel objected to this as improper argument. The objection was overruled. The prosecutor returned to the point later in his argument: “How reasonable is the testimony when you consider all of the other evidence in this case? Again look at his pattern, his conduct. It’s not reasonable. Nobody sees a gun. Nobody talks about threats until 35 minutes ago today. That’s the first time we hear about threats.” Defense counsel again objected, and his objection was again overruled.

After the prosecutor finished his initial closing statement, defense counsel renewed his objection. Counsel explained it was acceptable for the prosecutor to point out inconsistencies in defendant’s testimony, but it was untrue the duress defense was not disclosed until trial. Counsel averred he discussed the defense with the prosecutor’s office during pretrial proceedings. Counsel also asserted the comments violated attorney-client privilege by placing at issue the communications between counsel and defendant. The court was asked to instruct the jury the duress defense was raised with the prosecution prior to trial. The court declined to change its ruling or give an instruction because counsel’s account of his conversations with the prosecutor’s office “ha[d] no evidentiary value.” The prosecutor returned to the same arguments in his rebuttal: “I don’t have to prove the case beyond all possible doubt. I especially don’t have to prove my case beyond doubts that are based on untruths that are last-minute eleventh-hour attempts at a defense.”

As to count one, the jury found defendant not guilty of evading a peace officer with willful and wanton disregard, but guilty of the lesser included offense of evading a

peace officer. The jury also found defendant guilty of evading a peace officer and driving in the direction opposite of traffic. Defendant was placed on formal probation for two years on the condition he serve 180 days in the county jail.

## **II. DISCUSSION**

At issue in this case is whether the prosecutor engaged in misconduct and whether that misconduct warrants reversal of defendant's convictions. "When a prosecutor's intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the federal Constitution is violated. Prosecutorial misconduct that falls short of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." (*People v. Panah* (2005) 35 Cal.4th 395, 462.) "As a prerequisite for advancing a claim of prosecutorial misconduct, the defendant is required to have objected to the alleged misconduct and requested an admonition 'unless an objection would have been futile or an admonition ineffective.'" (*People v. Jablonski* (2006) 37 Cal.4th 774, 835.)

Here, defendant contends the prosecutor engaged in misconduct in closing arguments by claiming defendant raised duress for the first time at trial. Defendant advances two distinct theories of misconduct. First, he argues the prosecutor's comments violated the rule that it is misconduct to argue a defense should not be believed because defense counsel failed to disclose privileged information prior to trial. Second, he asserts the comments were contrary to evidence the prosecutor successfully excluded, specifically evidence that defense counsel had discussed the duress defense with the prosecutor's office prior to trial. We conclude that, when viewed in context, the prosecutor's comments do not amount to misconduct. To the extent there was misconduct, we find no prejudice.

### **A. Defendant's Pretrial Silence**

As to his first argument, defendant contends the instant action is analogous to *People v. Lindsey* (1988) 205 Cal.App.3d 112. In that case, the prosecutor engaged in reversible misconduct during closing argument when he condemned defense counsel for

failing to inform the authorities of Lindsey's alibi defense—his mother testified the defendant was sick on the day of the crime—prior to trial. (*Id.* at p. 115.) Specifically, the prosecutor argued it was unreasonable to believe an officer of the court would allow her innocent client to remain in jail for months and not disclose the defense to anyone. (*Id.* at p. 116.) The court held Lindsey had a constitutional right to remain silent and not discuss his alibi with the prosecutor or police, as well as a right to withhold any advance notice of his alibi defense, and “[t]hese rights would be stripped of much of their meaning and effect if the prosecutor were permitted to use their exercise against the defendant at trial.” (*Id.* at p. 117.) The court also found the prosecutor improperly disparaged defense counsel by implying the state would have dropped all charges if it learned of Lindsey's alibi prior to trial, or alternatively, that defense counsel did not disclose the alibi because she did not believe it. (*Ibid.*)

Defendant argues that, as in *People v. Lindsey*, the prosecutor in this case improperly commented on his statutory and constitutional right not to disclose his defense prior to trial. Defendant testified he attempted to evade the police on the night in question because he was forced to do so at gunpoint. The prosecutor argued this testimony was not credible because defendant raised duress as a defense for the first time at trial. But when viewed in context, the prosecutor was not attempting to penalize defendant for exercising his constitutional right to remain silent. Instead, he was pointing out inconsistencies in defendant's account. If defendant was held at gunpoint, it is reasonable to assume he would have appeared scared and reported the incident when he talked with the police. However, according to Officer Harris, defendant was calm and apologetic, and he did not mention anything about being threatened.

Defendant contends the prosecutor's closing improperly implied defendant or his counsel should have disclosed his duress defense to the prosecution prior to trial but failed to do so. The prosecutor's statements are conceivably susceptible to such an interpretation since the prosecutor repeatedly argued defendant did not claim he was threatened with a gun “until today.” But lacking from the prosecutor's closing is any description of what happened between the time defendant was questioned by Officer

Harris and trial. Unlike in *People v. Lindsey*, the prosecutor did not condemn defendant or defense counsel for failing to speak with the prosecutor's office. Rather, the prosecutor focused on the inconsistency between defendant's testimony at trial and his statements to police. While the prosecutor was careless and stepped very close to the line by representing defendant waited "until today" to talk about the alleged duress, we cannot conclude he tried to persuade the jury to draw an improper inference. Nor can we conclude a reasonable juror would infer from the prosecutor's comments that defendant should be penalized for failing to talk to the prosecutor's office after his arrest.

Even if the prosecutor did step over the line, there was no prejudice. "A defendant's conviction will not be reversed for prosecutorial misconduct . . . unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Where misconduct rises to the level of a constitutional error, we must determine whether that error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Such prejudice is demonstrated where the evidence against a defendant is "less than overwhelming" and the prosecutor's comments touch a "live nerve" in the defendant's defense. (*People v. Galloway* (1979) 100 Cal.App.3d 551, 560.) Here, the evidence against defendant was compelling. He did not dispute he fled from the police or drove with reckless disregard on the night in question. He argued he was forced to do so at gunpoint by a passenger, which as the prosecutor argued, was inconsistent with his statement to Officer Harris.

### ***B. Arguing Claims Contrary to the Evidence***

Next, defendant argues the prosecution engaged in misconduct by advancing a theory he knew was contrary to the evidence. In objecting to the prosecutor's closing, defense counsel stated he had disclosed information about the threats and duress to the prosecutor's office in pretrial negotiations and asked the court to convey this information to the jury. The prosecutor did not deny the assertion, but contended that counsel's statement was not evidence. The court agreed and declined to instruct the jury. Defendant argues that because he was precluded from presenting evidence concerning

pretrial discussions, the prosecutor was barred from arguing defendant raised his duress defense for the first time at trial. According to defendant, the prosecutor instead returned to the point, arguing defendant's testimony concerning threats to his person were a "last-minute eleventh-hour attempt[] at a defense," and an "eleventh-hour, made-up defense[]."

We find no misconduct. As discussed above, the prosecutor did not argue defendant should be penalized for failing to disclose his defense to the prosecution prior to trial. Rather, he contended defendant's testimony concerning threats could not be believed because it was inconsistent with his behavior at the time of his arrest. The prosecutor's characterization of defendant's account as an "eleventh-hour defense" was not contrary to the evidence. As the prosecutor argued at trial, if defendant had been held at gunpoint, it is reasonable to assume he would have disclosed that information to the police at the scene of the crime. That it did not occur to defendant to disclose he had been held hostage while talking with police at the scene raises serious credibility issues.

Moreover, the instant action is distinguishable from defendant's authority. In *People v. Varona* (1983) 143 Cal.App.3d 566, 568–569, the prosecutor successfully moved to exclude evidence a rape victim was on probation for prostitution, and then argued to the jury there was no proof the victim was a prostitute. The court held the prosecutor's argument "went beyond the bounds of any acceptable conduct," and reversed. (*Id.* at p. 570.) In the case at the bar, the prosecutor did not prevent defendant from introducing evidence concerning pretrial discussions, he merely argued defense counsel's statements were not evidence. More importantly, the prosecutor did not assert defendant declined to disclose his defense to the prosecutor's office.

### **III. DISPOSITION**

The judgment is affirmed.

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Margulies, Acting P. J.

We concur:

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Dondero, J.

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Banke, J.

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*People v. Windom*