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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. OLLIE BOYD, Defendant and Appellant.	A142471 (Alameda County Super. Ct. No. 173507)

Defendant Ollie Boyd urges that his conviction for assault with a deadly weapon must be reversed because the prosecutor committed misconduct by stating in his rebuttal closing argument that the defense attorney "has exactly the same power of subpoena," which amounted to shifting the burden to defendant to prove his innocence. We reject this claim and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Merrell Dedmon had been married to defendant since 1995. He was drinking, belligerent and argumentative on the morning of February 19, 2014, and Dedmon wanted him out of the apartment they shared on Shattuck Avenue in Oakland and out of her life. When she tried to call 911, defendant "snatched the phone out of my hand and said he would beat my motherfucking brains out." He eventually left without taking any of his belongings, and drove off in his "very big" 1982 van.

Dedmon then called her 27-year-old grandson, Warner Bowers, and asked him to get the apartment keys from defendant and make an arrangement for defendant to collect

his belongings. At around 11:00 a.m., Dedmon's daughter, Tamala Tisdale, and Bowers came by Dedmon's apartment with the keys.

Around 1:00 in the afternoon, defendant went back to the apartment and banged on the window, demanding to be let in so that he could "get his shit." Dedmon was afraid to let him in, so she refused, and defendant left a few minutes later. Defendant did not say anything about his medication.

Shortly after 5:00 p.m., Tisdale and Bowers returned to Dedmon's apartment. Tisdale told Dedmon that defendant was outside. Dedmon saw defendant's van parked across the street, and defendant standing outside the van. Bowers was in the passenger seat of the van. Dedmon gave Tisdale defendant's medications, and told her to give them to him.

A few minutes later, Dedmon (who was inside the apartment) saw Tisdale and Bowers inside the metal gate between the sidewalk and the apartment complex. Soon thereafter, Tisdale called out to Dedmon: "Mother. Mother. Come quick. This fool is going to hit these cars, these parked cars."

Dedmon ran out of the apartment to the end of the porch and saw defendant's van in the middle of the street blocking traffic and faced in towards her apartment building. During the minute when defendant was in the van stopped in the middle of the street, he leaned out of the driver's side, looked at Tisdale and said, "I'm going to kill you, bitch." When defendant caught Dedmon's eye, he said, "I'm going to kill all of you motherfuckers." Defendant then closed the door to the van, and "floored the engine." Dedmon screamed to her daughter and grandson to run. Defendant drove the van through the fence and gate, and a piece of the fence broke off and struck Tisdale as she and Bowers were trying to move out of the path of the van.

As Dedmon was helping her daughter get back into the apartment, she saw defendant back his van away and head in the direction of Oakland. Once inside the apartment, Dedmon attended to her daughter and called 911. Paramedics took Tisdale to the hospital.

Tisdale testified that the first time she saw defendant on February 19 was when she and Bowers went to retrieve defendant's house keys, at her mother's request. Tisdale and Bowers found defendant in his van on 53rd Street, parked in the middle of the street. Defendant was talking to someone on the sidewalk, and laughed when he saw Tisdale and Bowers. Tisdale saw Bowers reach into the van; Bowers returned to the car with defendant's keys, which they later took to Dedmon's apartment. According to Tisdale, Bowers looked angry during the encounter with defendant.

Tisdale and Bowers were back at Dedmon's apartment shortly after 5:00 p.m. that day. Defendant was seated in his van, parked across the street from the apartment. Tisdale went into Dedmon's apartment while Bowers got into the van with defendant. A few minutes later Tisdale went outside to smoke a cigarette, and saw Bowers in the van, seated in the row of seats behind defendant. Tisdale went back into the apartment, got defendant's medications, and took them over to the van to give them to him. Defendant, who was seated in the van at the time, threw the medications down inside the van. Based on his bloodshot eyes, his demeanor and knowing him for 19 years, Tisdale could tell defendant had been drinking. Tisdale went back into her mother's apartment. When she went outside a few minutes later, defendant was seated in the van and Bowers was standing in the street. Tisdale saw defendant with a wrench in his hand, and he "lunged at [Bowers] and fell out the van."[1] Tisdale went over to the van, and saw defendant get up off the ground and get back into the van. Bowers and defendant "exchanged words." Tisdale told her son to get back across the street away from the van, which they both did. Tisdale yelled at defendant, "Why don't you leave and get the hell out of here?"

Tisdale and Bowers went inside the apartment gate. Tisdale saw that defendant had started the van, and thought he was going to leave. But instead of making a u-turn, he stopped the van in the middle of the street and stayed there for a few minutes, blocking all traffic. Dedmon was outside the apartment at the time to check on Tisdale and

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[1] Michael Valle, an Oakland police officer, testified in the defense case that Tisdale told him that defendant threatened her and Bowers with a rock, and did not mention a wrench.

Bowers. Dedmon heard defendant yell out the open window of his van, "I'm going to kill you motherfuckers." The van started coming towards Tisdale, and she turned to run. She felt the iron gate and the wood post that it was attached to strike her on the left side of her back and shoulder, and this caused her to be thrown to the ground. The van was stopped inside the apartment gate at a brick stairway. Tisdale yelled for someone to call the police, and saw the van back up and speed off. The paramedics arrived and took her to the hospital. Tisdale had lacerations on her left shoulder and back, and a lump and bruising on her left arm.[2]

On February 22, 2014, Tisdale saw defendant in his van and called the police. The front of defendant's van was damaged; the front grill was "bent up, kind of smashed in, the windshield was busted badly, and there [were] wood fragments in the grill." The police arrested defendant that day.

John Harrison testified that he was driving down Shattuck Avenue towards Oakland on February 19, 2014, between 5:30 and 6:00 p.m. when he saw a van blocking the street. Harrison was sitting in his car unable to move for about a minute. He took a photo of the van, intending to send it to a friend. The van was parked in the middle of the street, and cars were unable to pass in either direction. Harrison then saw the van move: "It happened really fast. The car just took off like very quickly and just left a big hole in the fence there on the other side of the street." Harrison drove off immediately thereafter, while the van was still in the fence. He did not hear defendant say anything before the crash (Harrison's car window was up), nor did he see anyone near the fence before or after the impact; Harrison said it is possible that his view was blocked by the fence. A few minutes after the crash, Harrison went back to the scene and gave his contact information to two women there. Harrison believed that defendant looked like the person who was driving the van that day.

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[2] The prosecution offered in evidence without objection six photographs which Tisdale testified depicted her appearance on the day of the incident after she arrived at Highland Hospital, except that a picture of her left shoulder did not show the contusion on her back.

Defendant testified in his own defense. Defendant bought a van in September 2013 in anticipation of separating from Dedmon. He spent about 14 hours a day in his van sitting in front of the apartment house or over on 54th Street with friends, and slept in it on occasion. Tisdale is defendant's stepdaughter. He has known her for 23 years, but they were never close.

On the day in question, defendant woke up early and took a neighbor to the grocery store at about 6:00 a.m. Defendant purchased a 24-ounce can of beer on the way home, which he drank when he returned to the apartment he lived in with Dedmon. He and Dedmon quarreled; she screamed at him and accused him of taking $10 from her. He left the apartment without taking anything with him because he planned to return later, and drove over to 54th Street to visit a friend. He and the friend went to the store and bought a half pint of brandy and drank it.

Defendant was sitting on the front porch drinking brandy with his friend sometime before 9:00 a.m. when Warner Bowers called and asked him where he was. About half an hour later, while defendant was sitting in the front seat of his van, Tisdale pulled up in her car. Bowers got out of Tisdale's car, walked over to defendant, and took the keys out of the ignition. Bowers took all of the keys on the key chain except the keys for the ignition and van door. Bowers didn't say anything when he took the keys; defendant was laughing at the situation. He knew that if he talked to Dedmon, "everything would work out."

Defendant stayed on 54th Street for a while; about 11:00 a.m. he bought a half pint of vodka and sat on his friend's porch and drank it. He headed back home shortly before 1:00 p.m. to get his leukemia medication, which he is supposed to take every 12 hours. He knocked on the door of his apartment. No one answered, and he didn't see Dedmon, so he went out front and sat in his van, which he had parked across the street, until about 5:00 p.m. At one point in the early afternoon he walked down the street to buy medical marijuana, but then got back into the van.

Defendant saw Tisdale and Bowers arrive at the apartment about 5:20 p.m. Bowers came over to defendant's van about 15-20 minutes later. Bowers and defendant

had a friendly conversation for about 10 minutes. At no time did defendant threaten Bowers with a weapon. Tisdale went up to the van "with an attitude" and threw a box of medication into the van without saying anything. Then Tisdale and Bowers walked across the street and went inside the apartment gate.

Defendant sat in the van for about seven minutes and decided to go back to 54th Street. He pulled out into the street to make a u-turn, but the van "died out in the middle of the street" and it took a few minutes at most to get it started again. He tried to turn the van into a driveway, but he stepped on the gas too fast and it ran into the gate. The bumper and windshield of the van were damaged. Defendant did not see anyone behind the gate; he thought Bowers and Tisdale were already inside the apartment. He did not yell or make threats before the van crashed into to gate. The crash was an accident.

Defendant backed away and left the scene of the accident because he was afraid he would go to jail for drinking and smoking marijuana in his van. He returned to 54th Street, where he remained until he was arrested.

The jury found defendant guilty as charged of one felony count of assault with a deadly weapon, to wit, a car, upon Tisdale, in violation of Penal Code section 245, subdivision (a)(1). Defendant was sentenced to state prison for the low term of two years, with credit for time served of 250 days.

DISCUSSION

I.

Asserted Prosecutorial Misconduct

Defendant contends his conviction must be reversed because of a comment by the prosecution in rebuttal closing argument that "shift[ed] the burden onto the defense to prove appellant's innocence." We describe the alleged misconduct in context.

In the defense closing argument, counsel asked some rhetorical questions:

"Now, here is some questions, because [the prosecutor] bears the burden of proof. Here is some questions that aren't answered, and again you have to ask them. Whenever you have a question, you have to ask why didn't the prosecution show us? It's not the defense. We don't bear the burden. [¶] Where is Warner Bowers? Where are the

medical records? And where are the 9-1-1 calls? [¶] Now in terms of the medical records, Ms. Tisdale says she was hurt. She said she had has [sic] lacerations and this contusion. [¶] Well, where are the medical records that show that? We have a photo that shows some redness to her shoulder, but medical records would be something that would independently corroborate what she said. Why haven't we seen those medical records? [¶] And where is the 9-1-1 call? Ms. Tisdale said she called 9-1-1."

The prosecution objected that the argument was improper, but the objection was overruled. Defense counsel continued, "This is verification. Maybe she made a statement different than what she tells the police in the 9-1-1 call. We don't know. Where is that 9-1-1 call? [¶] Again, don't shift the burden when there are unanswered questions. The burden stays on the prosecution. It is a giant block on this table, not on my table."

In rebuttal closing argument, the prosecutor referred to defense counsel's closing argument that we have just described, stating: "Now, three points that Ms. Cediel made: The 9-1-1 tape, Mr. [Bowers] and the medical records. [¶] You will get an instruction that refers to all available evidence, and it lets you know that neither side has the duty to present all available evidence; that we, in using our good judgment, are going to decide not to waste your time with evidence that's already been covered, that it's sufficiently established. [¶] And, as Ms. Cediel says, if there was something else out there that would prove something up, I would—I would certainly show that to you. [¶] *That goes exactly the other way, as well. She has exactly the same power of subpoena. She can get the medical records if they contradict*." (Emphasis added.)

At this point, defense counsel objected "shifting the burden." The trial court sustained the objection. Defense counsel did not request an admonition. The court stated that the prosecutor could "rephrase," and so he continued:

"Your job is not to speculate about stuff that you haven't heard. It is a common defense attorney tactic to point to evidence that you haven't heard and say that would have really told us what happened. [¶] In fact, the medical records, she can say, 'Where is the doctor?' If the doctor was here, then she would say, 'How can you be sure this

came from what Ms. Tisdale says it came from? That these injuries were actually caused by the flying debris?' [¶] If I brought in an accident reconstructionist on an accident, I'm sure Ms. Cediel, being the talented lawyer she is, would come up with something else that I needed to really seal it. [¶] Your job as jurors is to make your decision on the evidence that you have got, not on the evidence that you don't have. . . . [¶] . . . [¶] The 9-1-1 tape, if that was helpful for the defense, be assured you would have heard it. [¶] Mr. [Bowers], if he was helpful for the defense, be assured you would have heard from him. [¶] The medical records, if those were helpful for the defense, be assured you would have heard—you would have seen them. [¶] On the other hand, if they are helpful for me, I have decided that the evidence that you have heard is enough, and now it's your decision about whether or not I'm right."

Standard

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"A prosecutor is given wide latitude during closing argument. The argument may be vigorous as long as it is a fair comment on the evidence, which can include reasonable inferences or deductions to be drawn therefrom." (*People v. Harrison* (2005) 35 Cal.4th 208, 244.) "Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt on all elements [citation].' " (*People v. Centeno* (2014) 60 Cal.4th 659, 666.) Our Supreme Court has

recognized that, "As for the prosecutor's reference to witnesses not called, it is neither unusual nor improper to comment on the failure to call logical witnesses." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.)[3]

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements.' " (*People v. Centeno, supra*, 60 Cal.4th at p. 667.)

Finally, to prevail on a claim of prosecutorial error, defendant must show 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. Tully* (2012) 54 Cal.4th 952, 1010.)

Preserving Claim for Appeal

As a general rule, a claim of prosecutorial misconduct is preserved for appeal "only if the defendant objects in the trial court *and* requests an admonition, or if an admonition would not have cured the prejudice caused by the prosecutor's misconduct." (*People v. Lopez* (2013) 56 Cal.4th 1028, 1072, abrogated on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) " 'The primary purpose of the requirement that a defendant object at trial to argument constituting prosecutorial misconduct is to give the

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[3] In *People v. Gonzalez, supra,* the prosecutor asked rhetorically in closing rebuttal argument, "Why not call [the witness's child advocate] . . . ? Why not call him? Why doesn't the defense—they put on witnesses. [Objection lodged and overruled.] Why don't they call the process servers? Why don't they call [a witness's] psychologist? Why don't they call whatever? Why don't they do something about that? Because they're all going to deny it." The trial court in *Gonzalez* sustained an objection at this point, but only to admonish the jury that they could not consider the prosecutor's speculation about what absent witnesses might have said. (54 Cal.4th at p. 1274.)

trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.)

Defendant concedes that he failed to seek a curative admonition, but argues that an admonition should not be prerequisite to bringing this claim on appeal because it is "dependent on a legal fiction," and an instruction could not have cured the error here.

This argument is not persuasive. It is largely based on defendant's citation to a footnote in *Bruton v. United States* (1968) 391 U.S. 123, 132, fn. 8 (*Bruton*) about limiting instructions. At issue in *Bruton* was whether the conviction of a defendant at a joint trial should be set aside where one codefendant's confession inculpated the other codefendant. In the circumstances described in *Bruton*, the Supreme Court concluded that even clear limiting instructions to the jury to disregard inadmissible hearsay evidence concerning the defendant were not "an adequate substitute for petitioner's constitutional right of cross-examination." (*Id*. at 137.) The *Bruton* footnote cited by defendant (*id*. at p. 132, fn. 8) in support of its "legal fiction" argument amplified the statement in the text that Judge Learned Hand was a "particularly severe critic of the proposition that juries could be counted on to disregard inadmissible hearsay." (*Id*. at p. 132.) The matter before us, by contrast, concerns whether a trial judge could instruct the jury with an admonition and curative statement of the law in a closing argument; it does not implicate the question whether a judge could ever successfully admonish a jury to block out or limit its use of "powerfully incriminating" evidence as in *Bruton*. (*Id*. at p. 135.)

Nor has defendant shown how an admonition would not have cured any harm caused by the alleged misconduct by the prosecutor in this case. Defendant contends that the prosecutor's argument "invited the jury to adopt the intellectually comfortable position of requiring the identified wrongdoer to prove that he did not commit the charged crime," and as such no admonition could ever cure the error. We disagree. The trial court could easily have corrected an incorrect or misleading statement of the law by telling the jury to disregard the argument, and by reminding the jurors right there and then that the prosecution has the burden of proof, that nothing the attorneys say is evidence, and that the judge's statement of the law, not the attorneys, must be followed.

(See *People v. Centeno, supra,* 60 Cal.4th at p. 674 ["prosecutor's misstatements of law are generally curable by an admonition from the court"]; *People v. Najera* (2006) 138 Cal.App.4th 212, 224.)[4] Because the alleged error was to one point only and not pervasive throughout the prosecutor's argument, it was susceptible to being cured. What is more, there is nothing to suggest that the trial court would not have given an admonition if one had been requested. In fact, the trial court readily sustained defense counsel's objection to the statement.

Defendant also contends that the error could not be cured by an admonition as evidenced by the fact that the jury deliberated for four days and asked multiple questions. This is an ipse dixit, and the record does not suggest a link between the two. We conclude an admonition could have been curative, defendant's attorney failed to ask for it, and the claim is therefore forfeited.

Merits of Claim

Even if the claim was not forfeited, it fails on the merits because the comments were not improper. The prosecution was responding to defense counsel's argument that the prosecution had failed to present key evidence: Warner Bowers' testimony, the 911 call after Tisdale was allegedly hit by defendant, and Tisdale's medical records. When it was his turn for rebuttal, the prosecutor's response to this argument was that he wasn't required to present this evidence, and the court would give an instruction that neither side was required to present all available evidence. This was an accurate statement of the law, and is exactly what the trial court stated a few minutes later when it instructed the jury with CALCRIM No. 300.[5] The prosecutor argued that the district attorney's office used its judgment in deciding what evidence to present to the jury, and did not want to waste the jury's time with evidence that had already been covered. The essence of the

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[4] As we will discuss below, the judge instructed the jury on these points as soon as the brief rebuttal argument concluded.

[5] The jury was instructed, "Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant."

argument was that the prosecution believed it had presented legally sufficient evidence for a conviction, and now it was up to the jury to decide. The point of the prosecution's rebuttal argument was not to shift the burden of proof; it was to rebut the point that it had an obligation to present additional evidence before the jury could find the defendant guilty, and to argue that *if* the defense believed there was evidence that would undermine the prosecution's case as presented, there was nothing to stop defendant from subpoenaing evidence, but the jury should not speculate as to the substance of evidence it had not heard. This was not error.

Prejudice Analysis

Even if it was error, it was harmless under any standard because the jury could not have used these comments in an improper fashion. As we have noted, prosecutorial error requires a showing that, in the context of the whole argument and the instructions, it is reasonably likely the jury would understand or apply the prosecutor's statements in an improper or erroneous manner. (*Centeno*, *supra*, 60 Cal.4th at p. 667.) There was no question that the jury understood who bore the burden of proof. In closing argument, the defense counsel stated repeatedly that it was the prosecution's burden and the burden did not shift. Defense counsel described the burden of proof as a "giant block" on the prosecution table, not defendant's. The prosecution in rebuttal stated that the reasonable doubt standard is "definitely the highest burden of proof there is." Immediately after closing arguments (and within minutes of the objected to comment that is the subject of this appeal), the judge instructed the jury that defendant was presumed innocent, that it was the prosecution's burden to prove his guilt beyond a reasonable doubt, that nothing the attorneys say is evidence, including anything in their opening or closing statements, and that if the jury believed an attorney's comments on the law conflicted with the trial court's instruction, the jury must follow the court's instruction. The trial court's instructions were proper, and we presume that the jury followed the court's instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436.)

Nothing in the record bears out defendant's suggestion, without more, that prejudice has been shown because the jury deliberated for four days, and asked "multiple

questions." The Attorney General describes these questions as showing that the jury was "focused on the elements of the crime and the credibility of the witnesses," a characterization that the defendant does not dispute or address in its reply brief. In fact, the court commented at sentencing that it believed the jury "stayed out as long as it did also because it was really taking into consideration and I believe gave a very conscientious effort towards understanding the totality of what was really going on."

II.

Ineffective Assistance of Counsel

Defendant asserts that if an admonition was necessary to preserve this issue on appeal, he was denied his right to effective assistance of counsel. We reject this claim because, for the reasons described above, we find no prejudicial error.

DISPOSITION

The judgment is affirmed.

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Miller, J.

We concur:

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Richman, Acting P.J.

_____
Stewart, J.

A142471, *People v. Boyd*