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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.

BRIAN WILSON,

Defendant and Appellant.

A142655

(Contra Costa County
Super. Ct. No. 51409150)

Brian Wilson was convicted of one count of evading a peace officer by reckless driving and one count of evading a peace officer by driving opposite the direction of lawfully moving traffic. He asserts the prosecutor committed prejudicial misconduct in closing argument and that the court erred when it imposed an attorneys' fees fine without evidence of his ability to pay. Neither contention has merit.

Both parties correctly acknowledge that the minute order of sentencing does not conform to the court's oral pronouncement, so we order the trial court to have its clerk modify the minute order. As so modified we affirm the judgment.

BACKGROUND

The pursuit that led to Wilson's conviction started around 1:45 the morning of March 29, 2014, when California Highway Patrol Officers David Herrera and Grant Tucker clocked Wilson driving a tan Honda Accord on Highway 80 at 104 miles per hour. During an ensuing high-speed chase through city streets, Wilson repeatedly drove through stop signs and crossed into the direction of oncoming traffic while traveling at over twice the speed limit.

Wilson eventually turned into a church parking lot and stopped. The officers pulled up next to the Honda and tried to box it in. The officers got out of the patrol car with guns drawn and ordered Wilson out of the car. Officer Herrera ordered him to put his hands up. Wilson “had this blank stare on his face, kind of just looking straightforward at us. It’s about three to five seconds. [¶] . . . [¶] Almost looked as if he was looking through us. It was a weird blank stare.” Both officers were certain Wilson was the man they saw in the Honda.

Suddenly Wilson backed up the Honda and tried to flee by driving “figure eights” around the lot, looking for an exit. Officer Herrera tried to block the exit with the patrol car, but Wilson maneuvered around it and sped away. The officers briefly resumed their pursuit before cancelling it as ordered by their sergeant. They then decided to drive to the address listed by the DMV for the Honda’s registered owner. As they approached the house on 1372 Rolling Hill Way in Martinez, they saw the Honda drive past them in the opposite direction. Officer Herrera activated the patrol car’s overhead lights and turned around to follow, but lost sight of the car after it turned a corner.

Officer Tucker later identified Wilson as the driver from a driver’s license photograph of the Honda’s registered owner. Officer Herrera testified that the Honda had not been reported stolen.

The defense called one witness, retired Contra Costa County Sheriff’s Department employee Gregory Moore. Moore lived next door to 1372 Rolling Hill Way. He knew Wilson had lived there at some point, but thought that he had moved out by December 2013. Moore had seen Wilson only three or four times before December 2013 and did not know his last name before defense counsel contacted him. After December 2013 the landlord took over the property and had construction work done on it, so Moore believed the home was vacant. Moore had no idea where Wilson was on March 29, 2014, and did not recall ever seeing a tan Honda at the house.

The jury found Wilson guilty of both charges. The court suspended imposition of sentence, imposed various fines, and placed Wilson on court probation for three years

with the condition, among others, that he serve 350 days in county jail with 50 days of actual and conduct credit. Wilson timely appealed.

DISCUSSION

I. Prosecutorial Misconduct

A. The Prosecutor's Argument

In discussing defense witness Moore's testimony, the prosecutor said: "Now, the defense did choose to call a witness. Let's talk about that witness for a moment. [¶] He didn't even know the defendant's name prior to talking to the defense attorney. So, really, how well does he know anything about the defendant? He wasn't even in California on March 29th, 2014. He was in Arizona. . . . He had no idea where the defendant was on March 29th, 2014. [¶] So, where was the homeowner? If you wanted to prove something, that he didn't live there, why not call the homeowner?" The court overruled a defense objection that the prosecutor's comment misstated the burden of proof and suggested the defense had an obligation to provide an alibi witness.

Continuing to address Moore's testimony, the prosecutor said, "So if you weren't there and it's not you, where's the movie ticket? Oh, I was at the movies. Where's the restaurant receipt? [¶] . . . [¶] [T]he truth leaves a trail. So, where is—you call a neighbor who doesn't even know the defendant's name to say, I don't really know. He didn't even know he owned a car. He [had] never even seen the tan car. So what does he add? He wasn't even in California on March 29th. Okay." After describing the chase and identification, the prosecutor reiterated: "So—and [we] can only consider the evidence that we have. And there is no evidence that he was anywhere else except in that car, on that pursuit that he took the officers on, in that church parking lot on March 29th, 2014."

In her rebuttal argument, the prosecutor commented that defendant's counsel "is a good attorney. Do you really think if he had reported his car stolen that that evidence wouldn't be here. Do you really think that? If he had, in fact, reported his car stolen that she wouldn't present you with that evidence. Why? Because it was never reported stolen that night. Hasn't been reported stolen since." The prosecutor revisited this theme when she discussed Mr. Moore's defense testimony: "Maybe there's some renovations going

on in the house. That doesn't mean that nobody doesn't live there. So it makes perfect sense. You don't know where he was. That's the bottom line. You don't know where he was on the 29th. [¶] Again, why did we need—what are you here to tell us exactly? Why is your testimony significant? You don't know him. You don't know where he was. Maybe you should have had a friend come in and be, like, yeah, he was at my house asleep.”

B. Analysis

Wilson contends the prosecutor committed misconduct because the quoted comments suggested the jury “hold the defense accountable for failing to provide alibi evidence” and find him guilty because he provided no evidence reasonably pointing to innocence. He further asserts the prosecutor explained the issues “in a manner that confused the rules for considering circumstantial evidence with proof beyond a reasonable doubt[,]” thereby undermining the presumption of innocence. We disagree.

Prosecutorial misconduct is reversible error “when it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) A prosecutor’s behavior that does not render the trial fundamentally unfair is misconduct “only if it involves the use of deceptive or reprehensible methods to attempt to persuade” the trier of fact. (*Ibid.*) A prosecutor is given “wide latitude during argument” (*People v. Wharton* (1991) 53 Cal.3d 522, 567), and on review the challenged statements must be viewed not as isolated words or phrases, but in the context of the argument as a whole. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) We review the defendant’s prosecutorial misconduct claim to determine whether there is a reasonable likelihood the jury would have understood the challenged comments in an improper or erroneous manner. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403.) “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. Frye* (1998) 18 Cal.4th 894, 970.)

While the prosecution may not directly or indirectly refer to the defendant’s decision not to testify on his own behalf (*Griffin v. California* (1965) 380 U.S. 609, 613),

the same prohibition does not extend to comments on a defendant's failure to introduce material evidence or call logical witnesses. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339–1340; *People v. Vargas* (1973) 9 Cal.3d 470, 475.) “A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.” (*People v. Bradford, supra*, at p. 1340.) Thus, in *People v. Ratliff* (1986) 41 Cal.3d 675, 691, it was not misconduct when the prosecutor stated: “ ‘Now is there any evidence on the other side? Any evidence at all? None has been presented to you. Absolutely zero has been presented to you by [the defendant] and his attorney.’ ” Similar allegations of prosecutorial misconduct have been rejected as to arguments that “ ‘Ladies and gentlemen, you have now heard the entirety of the case. . . . Obviously, if there has been some or is some defense to this case, you'd either have heard it by now or for some reason nobody's talking about it’ ” (*People v. Johnson* (1989) 47 Cal.3d 1194, 1236) and “ ‘put yourself in the position of being a defendant and you can bet your boots that if you had anything to offer by way of evidence, by way of alibi, that you would offer it’ ” (*People v. Morris* (1988) 46 Cal.3d 1, 35–36; see also *People v. Gonzales* (2012) 54 Cal.4th 1234, 1275 [“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].)

The prosecutor's comments here did not transgress these boundaries. She did not comment on Wilson's decision not to testify. Nor did she suggest Wilson had the burden of presenting evidence that he was not the person driving his Honda that night. Her argument, rather, was simply that he had failed to offer any material evidence to support that theory. The court properly overruled the defense objection.

Defendant also contends the prosecutor's argument improperly confused the rules for considering circumstantial evidence with proof beyond a reasonable doubt. The argument appears to focus on the following comment on the defense theory that Wilson's car had been stolen.

“Now, there is an instruction that talks about circumstantial evidence. And it says that if there’s a reasonable alternative supported by circumstantial evidence that points to innocence in the case, that then you would have to leave—you’d have to make a decision based on innocence. But that—let me back up. [¶] So, if there’s circumstantial evidence presented that points to another reasonable alternative to innocence, then you’d have to go with that and you’d have to find the defendant not guilty. But that’s only if actual evidence. We don’t have any other evidence. You can’t just suppose, Well, maybe he wasn’t there. You can’t make up your own scenario, your own story. That can only be based on the evidence presented in the case, and we simply don’t have any other evidence.” After briefly discussing the officers’ identification and the weakness of Moore’s testimony for the defense, the prosecutor continued : “So, there is no other reasonable alternative that points to innocence. There just isn’t one that’s supported by the evidence. You’re not allowed to make one up.”

Wilson’s argument that the prosecutor confused the rules of circumstantial evidence with the burden of proof beyond a reasonable doubt was not raised by an appropriate objection in the trial court and, therefore, was not preserved for appeal. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) In any event, whatever confusion the argument might have created¹ was cured by the repeated instructions from the court and defense counsel on the presumption of innocence and the prosecution’s burden of proving each element of the crime beyond a reasonable doubt. The jury was also correctly instructed on the rules governing circumstantial evidence. In light of the proper instructions and ample evidence, including the officers’ unequivocal identification testimony and the evidence that defendant’s Honda turned up at his listed address shortly after the incident, the error, if any, was harmless under any standard.

II. Attorney’s Fees

The court ordered Wilson to pay \$500 in attorney’s fees. Wilson contends this was improper because there was neither a finding of his ability to pay as required under

¹To be clear, we express no views on whether the comment was likely to have caused any confusion.

Penal Code section 987.8 nor substantial evidence to support such a finding. This contention, too, fails.

At sentencing defense counsel asked that attorneys' fees and fines be waived, which the court declined to do, but did not object to their imposition. Wilson argues he nonetheless preserved his challenge for appeal, but the Supreme Court recently rejected that view. *People v. Aguilar* (2015) 60 Cal.4th 862, 866–867 squarely holds that challenges to the imposition of booking and attorney's fees are forfeited unless made at sentencing.

Wilson's point that his challenge is premised in part on insufficiency of the evidence to support the award does not avoid forfeiture. In *People v. Trujillo* (2015) 60 Cal.4th 850, 858–859, a companion case to *People v. Aguilar*, the Court confirmed that the general rule allowing challenges to the sufficiency of evidence to be made for the first time on appeal does not extend to the imposition of probation costs. It explained: "As recognized in *McCullough*, ' . . . the requirement that a defendant contemporaneously object in order to challenge the sentencing order on appeal advanced the goals of proper development of the record and judicial economy. Given that imposition of a fee is of much less moment than imposition of sentence, and that the goals advanced by judicial forfeiture [were equally relevant in the fee context,] we [saw] no reason [in *McCullough*] to conclude that the rule permitting challenges made to the sufficiency of the evidence to support a judgment for the first time on appeal "should apply to a finding of" ability to pay a booking fee under Government Code section 29550.2.' " (*Trujillo, supra*, 60 Cal. 4th at p. 857.) Reasoning that "the existence, per se, of procedural safeguards in the sentencing process, such as the right to counsel and to present evidence and argument, did not prevent us from holding the forfeiture rule should apply with respect to the trial court's discretionary sentencing choices," the Court held the same conclusion applied equally to the imposition of the probation fees. (*Id.* at p. 858.)

Wilson's failure to object to the fee award at sentencing precludes review of the award on appeal. Wilson alternatively asserts his attorney's failure to object was ineffective assistance of counsel, but, as the People observe, that assertion requires a

showing that his attorney had no reasonable basis for the challenged action or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 436–437; *People v. Pope* (1979) 23 Cal.3d 412, 426.) Here, defense counsel could have concluded there was simply no factual basis for a claim that Wilson was unable to pay the \$500 award.

III. Modification of Sentencing Order

At the sentencing hearing, the court orally suspended imposition of sentence and placed Wilson on three years’ court probation. However, the minute order states the court imposed a three year sentence as well as probation. “Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.” (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.) Accordingly, we order the minute order modified to conform to the court’s oral pronouncement.

DISPOSITION

The matter is remanded with directions to the trial court to modify the minute order to reflect that it suspended imposition of sentence. As so modified, the judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.