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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO MADRIZ,

Defendant and Appellant.

B232617

(Los Angeles County
Super. Ct. No. NA080016)

APPEAL from a judgment of the Superior Court for Los Angeles County, Gary J. Ferrari, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Sergio Madriz was charged with murder (Pen. Code, § 187) and firearm allegations (§ 12022.53, subs. (b), (c), (d)). He was convicted by jury, and the special allegations were found true. Defendant was sentenced to 50 years to life in prison. On appeal, defendant contends the prosecutor committed misconduct during closing argument by arguing facts outside the evidence. He also seeks an additional day of custody credit. Defendant's custody credits have already been corrected by the trial court. Also, defendant forfeited the prosecutorial misconduct claim, and in any event, no prejudicial misconduct occurred. We therefore affirm.

FACTS

During the early morning hours of March 16, 2008, Cesar Maya was at the Brite Spot Restaurant in Long Beach with his friends, Victor Fuentes and Fernando Flores. The friends sat at a banquet table with Cinda Perez and Sally Garcia Ventura. Pablo Ortiz also joined their group. Maya had seen him around before, but only knew him as "Chile." Before coming to the Brite Spot, Maya and Fuentes had been to a bar, where Maya had three beers. Fuentes was drunk.

Defendant sat at an adjacent table, accompanied by two women and two or three men. Maya made a rose out of some paper and gave it to one of the women at defendant's table. Defendant confronted Maya and asked him and his friends, "Why are you looking at my wife? I'm going to f--- you up. Let's go outside." Fuentes told defendant he was not looking at his wife and apologized, promising not to look at defendant's table. A short time later, Fuentes walked up to defendant's table and apologized again. Defendant did not accept Fuentes's apology; instead, he started hitting Fuentes. The other men at defendant's table joined in hitting Fuentes. Fuentes's friends from his table interceded and led Fuentes into the restaurant's kitchen.

Josie Bautista was sitting at a nearby booth and saw the fight. She saw some men arguing; one of them was yelling at Fuentes, who was an acquaintance of Bautista's. The man who was yelling at Fuentes took a black gun out of his front pocket. Bautista yelled, "He has a gun," in Spanish. Restaurant patrons started panicking and trying to flee the restaurant. The gun looked small and black, like the .22 Bautista's father owned.

Alejandro “Tiny” Reynoso went to the Brite Spot after ending his shift at Los Potros, where he worked as a security guard. He was not drinking that night. He sat at one of the booths with a couple of friends, eating dinner. He had been to the restaurant before and knew the regulars, such as Pablo Ortiz, Cinda Perez, Victor Fuentes, and one of the women sitting with defendant, a stripper with the stage name “Sin” or “Sinful.” He also noticed a “curly haired girl” with defendant. Reynoso heard tables being pushed around and saw that some people were arguing. He and a couple of other men went over to try and diffuse the situation, telling them to calm down. It was obvious that Fuentes was drunk. Reynoso told him to “shut up and go to the bathroom.” Fuentes was still argumentative, but some of his friends escorted him to the back of the restaurant.

Ortiz was also trying to stop the fight, telling people to calm down. Reynoso heard defendant tell Ortiz to get out of his face. Reynoso grabbed Ortiz and pushed him back to his own table. Things appeared to calm down and Reynoso returned to his table, although his friends decided to leave because of the fight. Reynoso saw defendant and the men with him leave the restaurant. A minute or so later, someone ran inside, yelling that someone had been shot.

Maya was leaving the restaurant and saw defendant and Ortiz outside. Ortiz’s hands were up, and he was telling defendant to “calm down.” Defendant and Ortiz were standing near a gray or silver car in the parking lot. Maya did not see a weapon. Defendant took off his shirt, walked closer to Ortiz, and shot him. Maya ran back into the restaurant when he heard the shot, shouting, “Hey, they just shot that guy.” He heard two or three more shots. Maya grabbed a bottle of chili from inside the restaurant and threw it at a car that was speeding away past the parking lot.

Cinda Perez saw the fight inside the restaurant. Her beer was knocked over in the scuffle, so she walked outside to make a phone call. While on her phone, she heard an argument in the restaurant’s parking lot. Someone said in Spanish, “Don’t play with me.” Another voice said “I’m not.” She recognized defendant and Ortiz as the men who were arguing. They were standing next to a silver car. Defendant kept accusing Ortiz of “playing with” him. Perez heard a gunshot and saw Ortiz fall to his knees, with his back

to defendant. Defendant grabbed the back of Ortiz's shirt, and put the gun to the back of Ortiz's head. Defendant said, "I told you not to play with me," and shot Ortiz twice in the back of the head. Defendant then said, "I told you not to play with me," and shot Ortiz again. He pushed Ortiz to the ground. Defendant used a small gun, "like a .22." Defendant ran across the parking lot, coming within arm's reach of Perez, and got into a car outside the restaurant's parking lot. The car made a U-turn, stopped at a driveway near the restaurant, and someone inside the car started shooting.

Reynoso walked outside the restaurant and saw Ortiz on the ground, with a lot of blood. The women who had been sitting with defendant (the stripper and the girl with curly hair) asked Reynoso for a ride. He ignored them and went inside the restaurant to call 911.

Long Beach Police Officer Jeremy Chavez went to the Brite Spot in response to a 3:47 a.m. call reporting a shooting. When he arrived, police units and paramedics were already there attending to Ortiz, who was lying face down next to a silver car. There were 30 to 50 civilians gathered in the parking lot.

Maya identified defendant in a photographic lineup, but noted that defendant's "hair may be longer" than what was depicted in the photograph. He also identified him in court as the shooter. Maya was nervous about testifying in court, including when he testified at the preliminary hearing.

Reynoso also identified defendant from a photographic lineup, and in court as the man who fought with Fuentes. He did not want to come to court and was concerned about his safety.

Perez identified defendant from a photographic lineup as the shooter. She was reluctant to talk to police, because she "wanted to forget that I seen anything. I just wanted to go home." She also identified defendant at the preliminary hearing and trial as the shooter. Perez admitted that she was nervous about testifying and was visibly shaking during her testimony.

According to the medical examiner, Ortiz was shot four times. He was shot in the face, from the front. He was also shot three times in the back of the neck. Each of the

four shots would have been fatal. He had abrasions on his face, consistent with falling onto his face after being shot, or having his face pushed into a rough surface from a kneeling position. Ortiz had no alcohol or drugs in his system. The bullets recovered in the autopsy were .22 caliber.

Psychology Ph.D. Mitchell Eisen testified for the defense about his research and studies on memory and identification. He explained that people tend to fill gaps in their memory by inferring and reconstructing details. Also, alcohol impairs memory. Eisen testified about the impact of stress and trauma on memory, opining that memories concerning traumatic events, like shootings, are less accurate. On cross-examination, the prosecutor asked whether someone could feel scared to testify in a murder case. Dr. Eisen responded “sure.” The prosecutor asked whether fear of retaliation is something a witness considers when faced with making an identification. The expert said there was no general rule for the impact of this fear on the accuracy of identifications.

During his closing argument, the prosecutor made the following statements:

“[T]he things that [Eisen] says, keep in mind, are based on college students. They are studies with college students. Why is that important? It’s important because I think college students, and he acknowledges they are not in actual fear in these experiments, they are in an artificial setting, they are perfectly willing to cooperate. That’s going to be very different from witnesses to an execution homicide. The principles that might apply to how long [it is] going to take somebody to pick somebody out [of] a six pack. How eager is somebody going to be to say, ‘That’s the person’? How eager are they going to be to admit that they are certain about it even when they are[?]”

“College student, ‘Yeah, I’m certain.’ If they are certain they’ll say so.

“Somebody witnesses a homicide and is now for [*sic*] first time ever in the presence of a person that they saw shoot somebody in the back of the neck. They are scared to death.

“And Cesar Maya told you, ‘You know what, when I testified at the preliminary hearing, I was nervous.’ He was nervous even testifying here. They are looking to be nervous talking to the police thinking about the implications, what’s going to happen if they own up to what they know.

“Why is that important? Because an identification by a witness that is made despite their fear is more credible. Think about that for a moment. Why is that? Well, it’s because there is a bias there not to identify because you are scared. Right. Think about how bias works[.] Bias is something you can take into account when you are talking about witnesses. Right. So take an example of, say, there is a traffic trial over, I think it’s a lawsuit over a traffic accident and I want to call somebody to say the light was red. All right. I call my wife. And she says, ‘Yeah, the light was red.’

“Well, if you believe her, you might think, okay, that’s worth something. But you’ve got to keep in mind it’s my wife, [and] she’s got a bias towards me.

“Now, I call a guy that you learn has been my sworn enemy for my entire life and he gets up and he says, ‘I really don’t like that guy but I got to tell the truth the light was red.’

“I mean, he’s got a bias actually against saying something for me but he says it anyway, it makes it more credible. Right?

“Well, if you’re in fear, what you want to do and what so many do in cases of violent crime is to not get involved, when you think about this. This is a shooting that happens at the Brite Spot Restaurant with a lot of people out there, a lot of people saw that car drive by when a couple more shots came out, a lot of people saw that fight inside.

“Who are you hearing from? You’re hearing from a few people because nobody is coming forward. Right? I mean, because people are scared in a case like this. It’s natural.”

Defense counsel interjected: “Objection, Your Honor.” The trial court overruled the objection.

The prosecutor then continued:

“It’s natural and the people who come forward are scared. You could see it, you could see it in the attitude of Cinda Perez very clearly. I mean, if you didn’t see her shaking up there, you weren’t watching. There are times when she was just trembling in fear right in front of your eyes [¶]

“These people have an incentive to say, ‘Yeah, you know what, I’m not really sure. I’m not sure that’s the guy.’ They come in and they tell you, ‘That is him.’ That means something.”

DISCUSSION

1. Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during his closing argument when he said: “Well, if you’re in fear, what you want to do and what so many do in cases of violent crime is to not get involved, when you think about this. This is a shooting that happens at the Brite Spot Restaurant with a lot of people out there, a lot of people saw that car drive by when a couple more shots came out, a lot of people saw that fight inside. [¶] . . . You’re hearing from a few people because nobody is coming forward. . . . I mean, because people are scared in a case like this.” Defendant reasons the statement constitutes misconduct because there was no evidence that others witnessed the crime, and no evidence “that people were failing to testify because of fear.” We conclude that defendant forfeited any claim of error because he did not make a specific objection, and that in any event, the comments were well within the permissible scope of closing argument and could not have prejudiced defendant.

“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.) . . . [W]hen the claim focuses upon comments made by the prosecutor 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. Samayoa* (1997) 15 Cal.4th 795, 841, citation omitted.)

As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant made an

objection and requested that the jury be admonished to disregard the impropriety. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072, overruled on other grounds as stated in *People v. Hill* (1998) 17 Cal.4th 800, 822-823.) Here, defense counsel objected once during the prosecutor's closing argument, simply stating, "Objection, Your Honor." This objection was insufficient to preserve defendant's claim for review because counsel did not articulate the grounds of the objection, or seek an admonition. Accordingly, the claim of prosecutorial misconduct has been forfeited for purposes of review. (*People v. Miller* (1990) 50 Cal.3d 954, 1001.)

Even if we ignore defendant's failure to preserve the claim for review, we reject the claim on the merits. Referring to facts not in evidence is " 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness— offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, "although worthless as a matter of law, can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations.]" (*People v. Hill, supra*, 17 Cal.4th at p. 828.) However, the prosecutor is given wide latitude to broadly argue the law and facts of a case and to draw inferences from the evidence. (*People v. Lucas* (1995) 12 Cal.4th 415, 473.) The prosecutor may comment on the actual state of the evidence, and may "urge whatever conclusions he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283; see also *People v. Medina* (1995) 11 Cal.4th 694, 755.)

The challenged comments read in context addressed the expert testimony about the impact of fear and bias on the reliability of witness identifications. The prosecutor was making the point that the prosecution witnesses should be believed because they had no bias and nothing to gain by testifying for the prosecution, and were obviously scared and reluctant to testify. The prosecutor was also responding to the defense expert's testimony about studies regarding the effect of fear on perception, arguing that the jury should not rely on his opinions because they rested on studies using college students in artificial, experimental settings with no element of genuine fear. To the extent the jury may have inferred that other witnesses refused to come forward out of fear, there was

substantial evidence that many more people were present in the restaurant and in the parking lot after the shooting. Only a fraction of the people present during the crime testified, and they were visibly shaken and admitted to being nervous and fearful for their safety. Accordingly, the comments were based on permissible inference.

Moreover, under either federal or state standards (*People v. Roybal* (1998) 19 Cal.4th 481, 520; *People v. Bolton* (1979) 23 Cal.3d 208, 214), the prosecutor's statements, even if improper (a finding we do not make), could not have prejudiced defendant. The jury was instructed that statements by attorneys are not evidence, and that the jury "must decide all questions of fact in this case from the evidence received in this trial and not from any other source." The jury is presumed to have followed these instructions. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

Contrary to defendant's claim on appeal, the prosecutor's slight remarks did not fill any "evidentiary gap for the prosecution by explaining why other witnesses did not come forward[.]" or imply that defendant "was a person to be feared." There were no evidentiary gaps; multiple witnesses unequivocally identified defendant as the shooter. The remarks merely posited that an execution-style shooting is terrifying to witness. It was for the jury to decide whether defendant was the shooter. Because the evidence of defendant's guilt was substantial, it is not reasonably probable he would have obtained a result more favorable in the absence of the prosecutor's remarks. (*People v. Arias* (1996) 13 Cal.4th 92, 161.)

2. Custody Credit

Defendant's opening brief also seeks one day additional custody credit. However, the trial court corrected the custody credits during the pendency of this appeal, and defendant's reply brief concedes that this issue is now moot.

DISPOSITION

The judgment is affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.