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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELISA CONCEPCION PADILLA,

Defendant and Appellant.

B233398

(Los Angeles County
Super. Ct. No. KA085971)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Susan K. Shaler, 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, Senior Assistant Attorney General, Blythe J. Leszkay and Tasha G. Timbadia, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Elisa Padilla appeals from the judgment entered following a jury trial in which she was convicted of first degree murder with firearm and gang enhancement findings. Defendant contends the prosecutor committed misconduct in argument. We affirm.

BACKGROUND

Around 10:20 p.m. on March 12, 2008, 53-year-old chiropractor Deborah Lepper was fatally shot as she drove alone on eastbound Interstate 10 in Pomona. Julio Flores, a young member of the Happy Town gang known as Puppet, fired three shots at Lepper's car from the front passenger window of a car driven by defendant, who was an older, influential member of the Happy Town gang. A single bullet entered Lepper's head behind her left ear and exited above and in front of her right ear. The trajectory of the bullet was left to right and back to front.

A freeway driver who was a little behind Lepper's car at the time of the shooting testified he heard a loud noise that he thought could be either a gunshot or a tire blowing out. He saw Lepper's car veer to the left, then to the right. Lepper's car came to a stop on the right shoulder.

In the course of investigating the shooting, the California Highway Patrol (CHP) obtained court orders for wiretaps that led them to Flores, Thomas Delgado, and defendant. On November 14, 2008, defendant went to a police station to meet with CHP investigators, including Investigator Sabino Gonzalez and Sergeant Javier Dominguez, who interviewed her for approximately seven and one-half hours. Portions of the video recording of her interview were played at trial. Defendant admitted that she had been a member of the Happy Town gang for 16 or 17 years and that she had "pull" within the gang. Early in the interview, she steadfastly denied any knowledge of Lepper's shooting and claimed that although she was driving a car on eastbound Interstate 10 on the night of the shooting, she was alone and exited the freeway when traffic began backing up.

After the officers showed defendant photographs of Flores and Delgado, defendant "slumped down" in her seat and admitted that she had picked them up in the

neighborhood and was going to give them a ride to the home of Flores's girlfriend, but claimed she did not know they had shot someone until the next day. Traffic was jammed when she got on the freeway, so they told her to get off. She took them back to where she had picked them up. Defendant insisted that nothing happened while they were in the car with her.

Defendant's demeanor changed again after the officers played some of the intercepted phone calls in which defendant discussed the shooting with another member of her gang. She then told the officers she lent her friend's car to Flores and Delgado with knowledge "that they were gonna go and hit somebody." They returned the car after two hours.

After Sergeant Dominguez revealed more about the wiretaps, defendant admitted that she was driving the car when Flores shot Lepper. Flores had phoned her and asked her to drive him to his girlfriend's house. She knew that Flores and Delgado had done something in another gang's territory and she thought that Westside or Cherryville gang members might be driving around looking for them. When she picked them up, Flores had gloves on. Delgado put gloves on after he was inside the car. There was also a third passenger she referred to as Block, who sat in the backseat with Delgado. Defendant drove through "the backside of Westside" gang territory to get to Interstate 10. Lepper's car pulled up beside defendant's car at a stoplight near the freeway on-ramp. Although the windows on Lepper's car were tinted, defendant told the officers that they were not tinted.

Defendant was concerned because she thought there might be rival gang members in Lepper's car, and either Lopez or Delgado told her to watch out because the car had "heads in it." Defendant made several conflicting statements regarding what her passengers said to her: Delgado said he thought there were Westside gang members in the car; Delgado or Block told her "it didn't look like anybody from a neighborhood" was in the car; and Delgado and Block were talking and joking around in the backseat and not paying attention to who was in the car, which angered defendant because they

weren't "watching [her] back." She told her passengers to look at the car and see if it were "our rivals." She asked her passengers if anyone were "strapped," that is, in possession of a gun, and Block said they were not. Defendant again expressed anger at them, and Flores laughed and said he had a gun. Defendant admitted she told Flores that if he saw "anything" or knew there were Westside gang members in the car, "just shoot at them." She also said, "I told [Flores] if you feel or you think that, you know, it's them, just shoot at them, you know, because either they're gonna light us up and or they're gonna light, or you know we're gonna light them up. And they're either gonna get us or we're gonna get them, you know."

Defendant told the officers that after she and Lepper both got on the freeway, Flores rolled down the front passenger-side window, leaned out, and fired three times at Lepper's car, which was to the right and slightly ahead of defendant's car. There were gaps between the shots, and between the second and third shots Flores retreated into the car and defendant accelerated and moved one lane to the left. Lepper's car also accelerated and moved one lane to the left. Defendant slowed due to traffic, and Flores leaned out and fired the third shot. Lepper's car accelerated and approached the rear of defendant's car. Defendant yelled at Flores to continue shooting at Lepper's car, but he said he was out of ammunition. In the rearview mirror, defendant saw Lepper's car veer off toward the wall on the right side of the freeway and she told her passengers that someone in it had been "hit." Defendant got off the freeway and drove her passengers back to where she had picked them up. When she got home she cleaned the car with Windex to eliminate fingerprints.

Pomona Police Department Detective Greg Freeman testified as the prosecution's gang expert regarding Happy Town and other Pomona gangs, such as Happy Town's rivals, the Westside and Cherryville gangs. He testified that in order to earn respect and remain in good standing with their gang, gang members must put in work, that is, commit "missions" against members of rival gangs or write their own gang's graffiti in the territory claimed by a rival gang. A drive-by shooting was a type of "mission" and

usually involved at least three members of a gang, including one who was more experienced and could ensure that the job was done correctly and offer younger gang members advice and assistance. Freeman testified that the route defendant admitted taking to the freeway passed through territory claimed by the Westside gang, and he opined that a member of the Happy Town gang who was not on a mission, but instead merely running an errand, would take another route to avoid going through the rival gang's area.

In response to a hypothetical question based upon the evidence at trial, Freeman opined that the charged crime was committed for the benefit of, at the direction of, and in association with the Happy Town gang. Freeman explained, "Gangs work off of three things: respect, intimidation, and retaliation or fear. When you got a carload of Happy Town gang members that actually actually [*sic*] go out into a rival's neighborhood, identify a target, ultimately kill the individual. Whether it be the target or not, the point was made it benefits the gang through respect, through rival gang members in the area knowing that Happy Town will put in the work. They will go to your neighborhood and they will shoot one of you. It puts fear into—not only the Westside area but the community as well. ¶ . . . It makes it easier for them to recruit younger gang members. It makes it easier for them to actually commit additional crimes such as selling narcotics, committing more assaults, carrying weapons in their neighborhood because they know the people in the community are afraid to speak up or talk to the police as well as rival gang members. It benefits each of the individual[s'] status in the car as they, again, are known to put in work to get that respect within the gang itself. And, again, it benefits the Happy Town Town [*sic*] gang. It puts fear in the community, and it makes them more—their reputation higher." Even when gang members kill an innocent victim, they earn such respect individually and as a gang.

Defendant rested without presenting any evidence other than additional excerpts of her statement to the CHP investigators.

The jury convicted defendant of first degree murder and returned true findings on allegations that the offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members; and a principal personally and intentionally fired a gun, causing death (Pen. Code, § 12022.53, subs. (d), (e); undesignated statutory references are to the Penal Code). Defendant admitted she served a prior prison term within the scope of section 667.5, subdivision (b). The court sentenced defendant to prison for a total of 51 years to life, consisting of consecutive 25-years-to-life terms for the murder conviction and the firearm enhancement, plus 1 year for the prior prison term enhancement.

DISCUSSION

At the start of the prosecutor's opening argument, he stated, "[T]he events of this case occurred on March 12th of the year 2008; and we heard about how on that particular day the defendant, Ms. Padilla, went to the Happy Town gang neighborhood, her neighborhood, where she's from; and there she picked up two younger Happy Town gang members, Puppet and [Delgado]. Puppet got in the car, gloves already on in the front passenger seat. [Delgado] got in, put his gloves on as they were leaving. [¶] You heard discussions about just going to Puppet's girlfriend's house somewhere else on the 10 east, but you'll hear and you've heard she didn't go up Fairplex. She went directly to where that rival gang was, Westsiders' area right there at 71 and the 10. [¶] You'll hear how that same time, that same area, was a Ms. Deborah Lepper, a chiropractor, a 54-year-old [*sic*] woman, who happened to be driving out of this area . . . in a vehicle with tinted windows. She wasn't a Westside gang member. She wasn't a gang member at all. She was simply leaving the area and, unfortunately, that was what got her killed because she's leaving this area that happened to be Westside territory. In other words, it could have been anyone in that vehicle." The prosecutor replayed a segment of defendant's statement to the police, then stated, "By her direction, that's exactly what she told Puppet at this time at the intersection prior to going on the freeway. No showing of, well, if you

see a gun or if you see anything else. ‘If you think they’re Westsiders, shoot them, kill them.’ And that’s the state of the gangs here in the city of Pomona and that’s exactly why, ladies and gentlemen, this evidence here shows defendant Padilla guilty of the crime of murder.” Thereafter, the prosecutor replayed other portions of defendant’s statement to the police and summarized the evidence demonstrating defendant’s guilt of first degree murder, as an aider and abettor, on the basis of either premeditation and deliberation or shooting from a vehicle. The prosecutor then turned to the gang and gun-use enhancement allegations and explained how the evidence supported true findings.

Defense counsel principally argued a theory of imperfect self-defense based upon seeing an unfamiliar car with tinted windows that seemed to be “mirroring” the movement of defendant’s car. Defense counsel also argued that the prosecutor had presented isolated snippets of defendant’s lengthy statement in order to create a false impression, thrown in red herrings, and had failed to introduce particular evidence, such as photographs of Flores and Delgado and the address of Flores’s girlfriend.

In his closing argument, the prosecutor briefly addressed defense counsel’s criticisms, then turned to the evidence to address defendant’s minimization of her role, defense counsel’s incomplete and inaccurate treatment of defendant’s statements and attempts to distract the jury with irrelevant matters, what the evidence actually showed, and how the evidence supported a first degree murder verdict but did not support imperfect self-defense. During that argument, the prosecutor stated, with respect to premeditation and deliberation, “[T]he occupants [*sic*] of that vehicle were going to be killed. They [*sic*] were perceived to be Westsiders, and it didn’t matter who was in the car as is obvious from the facts of this case.” He later stated, “[T]he purpose of going through all the facts is simply to find out what the truth is. What is the truth in this matter? Because it’s the truth that points to defendant’s conduct as being murder, specifically murder in the first degree. [¶] So how can we deduce what the truth is? [¶] Nothing was ever seen inside of that car. No person, the defendant, or anyone else in the defendant’s car were [*sic*] able to see who was in that car or what was in that car. [¶]

What got Ms. Lepper killed[?] Again, she was driving a car out of Westside territory. She had tinted windows. Anyone could have been in that car. Because nothing could be seen in that car, no perceived threat was ever seen.”

The prosecutor continued by arguing that the bullet trajectory showed that defendant’s car was chasing Lepper’s car. He then stated, “And that is nothing less than murder in the first degree, which to reach first degree, you can say it was planned at the time leaving [*sic*] Happy Town. You can say it was planned at the time they were in that intersection because, remember, a cold, calculated decision to kill, as the instruction reads, can be reached quickly.

“This is the state of the gang violence in Pomona. It doesn’t matter who was driving that car. It was because it was in a certain area at a certain time and the defendant then gave the order to kill who[m]ever’s in that car. If you believe that’s a Westside car, you shoot them, because that’s the state of gangs here in Pomona.

“Now, after hearing this evidence, you all have the unique opportunity to do something about it.

“Ladies and Gentlemen, after your deliberations and after looking at all the evidence and discussing all the testimony, the People are confident you will come to one logical and reasonable conclusion and that is, again, simply to find justice in finding the defendant guilty of first degree murder.”

Defendant contends that the portions of the prosecutor’s argument italicized above constituted misconduct. She argues the prosecutor “improperly played on jurors’ fears about gangs, and made a classically improper ‘send a message’ argument.” She further contends her trial attorney’s failure to object to the challenged remarks and request an admonition constituted ineffective assistance of counsel.

The Attorney General contends defendant forfeited her prosecutorial misconduct claim by failing to object in the trial court. To preserve a claim of prosecutorial misconduct for appeal, the defendant must make a timely objection at trial on the ground asserted on appeal and request an admonition; otherwise, the point is reviewable only if

an admonition would not have cured the harm or objection would have been futile. (*People v. Thomas* (2012) 54 Cal.4th 908, 937; *People v. Bennett* (2009) 45 Cal.4th 577, 595 (*Bennett*)). Defendant’s conclusory assertion that any objection and request for admonition would not have remedied the prosecutor’s purportedly improper argument and would in fact cause further prejudice is insufficient to avoid forfeiture. Neither the challenged remarks themselves nor anything in the record indicates that any alleged harm arising out of the prosecutor’s remarks could not have been readily cured by an appropriate and timely admonition. Accordingly, because defendant did not timely object and request an admonition and has not shown that an admonition would not have cured the harm or objection would have been futile, she forfeited her prosecutorial misconduct claim.

Even if we were to consider defendant’s claim on the merits, we would find no error. “A prosecutor’s conduct violates a defendant’s federal constitutional rights when it comprises a pattern of conduct so egregious that it infects “the trial with unfairness as to make the resulting conviction a denial of due process.” [Citation.]’ [Citation.] . . . Conduct that does not render a trial fundamentally unfair is error under state law only when it involves “the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.” [Citations.]” (*Bennett, supra*, 45 Cal.4th at pp. 594–595.)

If a prosecutorial misconduct claim is based on the prosecutor’s arguments to the jury, we consider whether, considering the challenged statements in the context of the argument as a whole, there is a reasonable likelihood that the jury construed or applied any of the challenged statements in an objectionable fashion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203 (*Cole*)). No misconduct exists if a juror would have taken the statement to state or imply nothing harmful. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) “[W]e “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Dykes* (2009) 46 Cal.4th 731, 772.)

A prosecutor has wide latitude to discuss, argue reasonable inferences from, and comment upon the evidence. (*Cole, supra*, 33 Cal.4th at p. 1203.) “It is, of course, improper to make arguments to the jury that give it the impression that “emotion may reign over reason,” and to present “irrelevant information or inflammatory rhetoric that diverts the jury’s attention from its proper role, or invites an irrational, purely subjective response.” [Citation.]” (*People v. Redd* (2010) 48 Cal.4th 691, 742 (*Redd*).

Viewing the challenged comments in the context of the prosecutor’s arguments as a whole, it is not reasonably likely that the jury construed or applied any of the challenged statements in an objectionable fashion. The prosecutor’s arguments extensively cited the evidence and reasonable inferences from the evidence, along with applicable law, and expressly urged the jury to consider all of the evidence, apply the law, and return a first degree murder verdict and true findings on the enhancement allegations. These were permissible arguments.

The prosecutor’s use of the phrase “the state of the gangs here in the city of Pomona” in his opening argument was expressly tied to the evidence, in particular, an admission by defendant in her police interview that she told her passenger to shoot if he thought Westside gang members were in Lepper’s car. Read in context, it appears the prosecutor meant that this was how gangs in Pomona behaved toward perceived rivals according to the evidence, namely, defendant’s admissions and the gang expert’s testimony. The prosecutor’s use of similar phrases in the challenged portion of his argument also appeared to refer to the evidence as to how gangs behaved, as indicated by both the immediately preceding remarks about how the bullet trajectory showed that defendant’s car was chasing Lepper’s car and the sentences between the two uses of the phrase: “This is the state of the gang violence in Pomona. It doesn’t matter who was driving that car. It was because it was in a certain area at a certain time and the defendant then gave the order to kill whoever’s in that car. If you believe that’s a Westside car, you shoot them, because that’s the state of gangs here in Pomona.” This argument was based

upon evidence and pertained to both defendant's mental state and the elements of the gang enhancement allegation. It was not improper.

The other challenged remark was also expressly tied to the evidence and the prosecutor's theory that the evidence demonstrated defendant's guilt of first degree murder: "Now, *after hearing this evidence*, you all have the unique opportunity to do something about it. [¶] Ladies and Gentlemen, after your deliberations and *after looking at all the evidence and discussing all the testimony*, the People are confident you will come to one logical and reasonable conclusion and that is, again, simply to find justice in finding the defendant guilty of first degree murder." (Italics added.) Read in context, the prosecutor was urging the jury to consider all of the evidence, apply the law given to it by the court, perform its role, and convict defendant of first degree murder, all of which are permissible arguments. (*Redd, supra*, 48 Cal.4th at p. 743; *People v. Cornwell* (2005) 37 Cal.4th 50, 92–93, overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*); *People v. Adanandus* (2007) 157 Cal.App.4th 496, 513; *People v. Escarcega* (1969) 273 Cal.App.2d 853, 862.) The prosecutor was not attempting to divert the jury's attention from its proper role or inviting the jury to respond irrationally and subjectively, but instead focusing the jury on its function and asking it to convict defendant *because of* the evidence and the law.

Defendant relies upon numerous federal decisions, none of which supports her misconduct claim. In some of the decisions defendant cites, the federal appellate courts found no impropriety in the prosecutor's argument. (*United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1442; *United States v. Leon-Reyes* (9th Cir. 1999) 177 F.3d 816, 823.) The remaining federal cases upon which defendant relies are readily distinguished based upon the nature of the argument therein. For example, in *United States v. Johnson* (8th Cir. 1992) 968 F.2d 768, 769, the prosecutor stated, "[The defense attorney] says your decision to uphold the law is very important to his client. Your decision to uphold the law is very important to society. You're the people that stand as a bulwark against the continuation of what Mr. Johnson is doing on the street, putting this

poison on the street.” The prosecutor in the present case did not argue that the jury should convict defendant to prevent the continuation of gang violence by defendant or anyone else. He instead focused the jury on its proper role and asked it to convict defendant because the evidence established her guilt under the law provided to the jury by the court.

Accordingly, the prosecutor’s argument was not misconduct and defense counsel was not ineffective for failing to object it.

“Even if we were to assume for the sake of argument that defendant’s claim was preserved and that the prosecutor’s reference to societal concerns about crime was improper, we would conclude that this isolated, brief remark, when viewed in the context of the entire argument, which focused on defendant’s own culpability for these particular offenses, could not have inflamed the jury’s passions to the point where the outcome of the trial was affected or the trial became fundamentally unfair.” (*People v. Rundle* (2008) 43 Cal.4th 76, 162, disapproved on another ground in *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) We further note that the trial court instructed the jury that statements made by counsel were not evidence; that it must “decide what happened, based only on the evidence that has been presented to you in this trial”; that it must not “let bias, sympathy, prejudice, or public opinion influence” its decision; that it must follow the law given to it by the court, even if it disagreed with that law; the presumption of innocence; and the prosecution’s burden of proof beyond a reasonable doubt; and that it could consider the evidence of gang activity only with respect to witness credibility, the gang enhancement allegation, motive, and unreasonable self-defense. (CALCRIM Nos. 104, 200, 220, 1403.) We presume the jury followed the trial court’s instructions, which would have cured any possible prejudice from the brief, isolated remarks of the prosecutor challenged on appeal. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.