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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT EVARISTO CAMPOS,

Defendant and Appellant.

B233703

(Los Angeles County
Super. Ct. No. BA373180)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

John J. Uribe, 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 E. Mercer and Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Robert Evaristo Campos appeals from a jury verdict finding him guilty of elder abuse likely to produce great bodily injury or death. (Pen. Code § 368, subd (b)(1).)¹ Appellant contends: (1) the trial court abused its discretion by allowing inflammatory and cumulative photographs to be admitted into evidence; (2) statements made in the prosecution's closing argument constituted misconduct; (3) the trial court erred by relying on improper factors to sentence appellant to the middle term for the base count; and (4) because his attorney failed to properly articulate objections to the prosecutorial misconduct and improper sentencing, appellant was denied effective assistance of counsel. We conclude the photographs were relevant, not unduly prejudicial, and were properly admitted; the prosecutor's statements to the jury constituted valid argument and the trial court gave the necessary instructions regarding counsels' comments; the trial court did not rely on improper factors to aggravate appellant's sentence since he received the middle term; and the ineffective assistance of counsel argument is moot since all claims on appeal have been dealt with on their merits.

We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On July 2, 2010, 56-year-old appellant was involved in an altercation with 79-year-old victim Enrique Milanez. Although the victim initiated the confrontation, appellant soon gained control of a wooden stick Milanez was holding and began to beat him with it. While the victim lay on the ground, appellant repeatedly kicked him and continued to beat him until a passerby intervened. Law enforcement officers responded to the scene and took appellant into custody. The victim had injuries to his legs, elbows and face, and was covered in blood. He was taken to a hospital emergency room, where his injuries were photographed and treated. Appellant was taken to a police station where he was informally interviewed by an officer. Appellant claimed he was the victim and was acting in self-defense. After appellant complained of injuries, the officer conducted a physical examination of appellant, but observed no visible injuries.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

At trial, appellant was found guilty of elder abuse likely to produce great bodily injury (§ 368, subd. (b)(1)); the jury found true allegations that appellant used a deadly or dangerous weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury on a person 70 years of age or older (§§ 368, subd. (b)(2), 12022.7, subd. (c)). The trial court sentenced appellant to the middle term of three years on the elder abuse count, with consecutive enhancement terms of five years for great bodily injury and one year for the use of a deadly weapon. This appeal followed.

DISCUSSION

I

Appellant contends the trial court abused its discretion by admitting three photographs. He argues they were unnecessarily cumulative and unduly prejudicial, and thus, should have been excluded under Evidence Code section 352.

A trial court's exercise of discretion under Evidence Code section 352 will not be disturbed unless it is shown that it resulted in a manifest miscarriage of justice. (*People v. Jones* (1998) 17 Cal.4th 279, 304.) More specifically, the trial court has broad discretion when determining the admissibility of photographs challenged as unduly inflammatory, and we uphold the admission of such evidence unless its prejudicial effect *clearly* outweighs its probative value. (*People v. Taylor* (2010) 48 Cal.4th 574, 649.)

The prosecution introduced six photographs of the victim (People's exhibits 1-6). Appellant claims exhibits 2-4 should have been excluded under Evidence Code section 352 as the evidence otherwise presented (the additional photographs, the testimony of the attending emergency room doctor and the arresting officer) was sufficient to detail the victim's injuries. He argues these three additional photographs were cumulative and served to "inflame the passions of the jurors," in violation of his due process rights.

The three photographs not challenged (People's exhibits 1, 5, & 6) depict various areas of the victim's body, including a frontal closeup of the face, the lower legs, and the elbow and torso area. The three challenged pictures show injuries to each side of the victim's face and a closeup of the bruising on his neck and the underside of his chin. Reviewing the six photographs together, it is apparent that each serves to depict a specific

and distinct area of the victim's body which was injured as a result of appellant's actions. The charges being tried included infliction of great bodily injury; thus, detailing the injuries sustained was necessary to prove an element of the crime, and the photographs served that end. They were especially probative given the self-defense claim that defendant had only punched the victim five times in the face. The photos rebutted that claim and there is no basis to find them cumulative or unduly prejudicial. We find no abuse of discretion.

II

Appellant argues that the trial court abused its discretion in overruling his objection to statements made by the prosecutor during closing arguments, which amounted to prosecutorial misconduct.

A prosecutor's conduct violates the federal Constitution 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.) Under state law, prosecutors commit misconduct when they attempt to persuade the jury using methods that are deceptive or reprehensible. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1070-1071.) When a claim of prosecutorial misconduct involves comments made by the prosecutor in the jury's presence, the relevant question is whether there is a reasonable probability that the challenged statements were used by the jury in an improper manner. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.) A defendant's conviction will be reversed only if it is reasonably probable that absent such misconduct a more favorable outcome would have resulted. (*Wallace, supra*, at pp. 1070-1071.) Here we deal with the following comments by the prosecutor during closing argument: "The defendant has nothing close to any type of injury like [the victim's] on his shirtless body. Nothing even close. The reason there's no photographs of the defendant's back is because there were no injuries on his back." Appellant argues these statements amounted to testimony by the prosecutor and imply knowledge of undisclosed information. We disagree.

Prosecutors have "wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Here, the prosecutor

commented on the lack of photographs showing defendant's injuries. She also cited an officer's testimony that no injuries were visible on appellant after a physical examination. There is nothing improper about a prosecutor discussing a defendant's failure to provide logical, material evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 338.) In her closing argument, defense counsel suggested that appellant's claim that he suffered injuries to his back was not properly documented. The prosecutor was entitled to offer her conclusion from the same evidence, even if more explicitly. Whether the inferences drawn by counsel were reasonable was for the jury to decide. (*People v. Dennis, supra*, 17 Cal.4th at p. 522.)

We see nothing reprehensible or deceptive about these comments, and we find no evidence that their utterance infected the trial with unfairness. Mitigating any improper impact on the jury, the trial court gave explicit instructions both before closing arguments commenced, and immediately after ruling on appellant's objection to the statements. The judge instructed the jury that counsels' comments were to be considered only as argument, and not as evidence in the case. On review, we "presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) We presume the jury heeded the court's instructions.

III

Appellant contends the sentence imposed was improper because the trial court relied on elements of the crime charged and facts used for sentencing enhancements to aggravate the base term.

When determining the period of imprisonment to be imposed between three possible determinate terms "the choice of the appropriate term shall rest within the sound discretion of the court." (§ 1170, subd. (b).) In the exercise of that discretion, the court may consider aggravating and mitigating circumstances. (*Ibid.*; Cal. Rules of Court, rule 4.420(b).) "Only a single aggravating factor is necessary to make it lawful for the trial court to impose an aggravated prison term." (*People v. Jones* (2009) 178 Cal.App.4th 853, 863, fn. 7.) There are numerous limitations placed on the imposition of the upper

term. For example, elements of the crime and facts used to support enhancements cannot also be used to impose an aggravated sentence. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d); see *People v. Scott* (1994) 9 Cal.4th 331, 350.)

Appellant argues the court considered elements of the crime and facts used to impose enhancements in aggravating his base sentence. But the court did not impose the aggravated term; it imposed the middle term, neither aggravated nor mitigated. The factors complained of by appellant were not used to aggravate the term, and no prejudice was suffered.

IV

Appellant argues that the judgment should be reversed for ineffective assistance of counsel because of the failure of counsel to articulate sufficient objections to the alleged prosecutorial misconduct and the factors considered by the court at sentencing.

Since we decide those issues on their merits and reject each of his challenges, we need not address the ineffective assistance of counsel argument.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.