

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANGEL MARIO OLIVERO,

Defendant and Appellant.

B237995

(Los Angeles County
Super. Ct. No. BA383929)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed as modified.

Suzann E. Papagoda, 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, Paul M. Roadarmel, Jr. and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Angel Mario Olivero appeals from the judgment entered following his conviction by a jury for aggravated assault contending prosecutorial misconduct during closing argument requires a reversal. We affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

1. Summary of the Evidence Presented at Trial

Olivero, a parolee, had been Consuelo Lemos's boyfriend since 2003. In April 2011 parole agents searched Lemos's home, which Olivero had listed as his residence. Olivero had not been there for at least two weeks, and Lemos did not like the disruption.

On April 28, 2011 Lemos confronted Olivero in the parking lot of a fast food restaurant and told him to notify his parole agent of his current address because she did not want her home searched. Using profanity, Olivero demanded that Lemos leave. He pulled out a knife, pointed it at Lemos and lunged toward her, causing Lemos to step back. Olivero then warned Lemos he would harm her if she did not leave him alone.

Lemos telephoned police twice from the restaurant parking lot to report the assault. Officers responding to Lemos's first telephone call were unable to find either Lemos or Olivero. Lemos flagged down the officers as they were responding to her second telephone call and directed them to an alley where Olivero was standing. When searching Olivero, the officers found a homemade knife with a six-inch long blade in his pants pocket.

Lemos, who seemed very frightened, was interviewed by the police. She described the assault and told the officers she and Olivero had been estranged for two months.

After Olivero was taken into custody, he telephoned Lemos approximately five times, including the night before she testified at trial. The calls violated a protective order Lemos had previously obtained prohibiting Olivero from contacting her. At trial Lemos testified she loved Olivero and denied telling the police he had a knife or shank, had threatened her in any way or that they were estranged.

Olivero neither testified nor presented other evidence in his defense.

2. Closing Argument

During her initial closing argument the prosecutor challenged Lemos's testimony recanting her report to the police that Olivero had assaulted her with a knife, contending it was inconsistent with her calls to the police emergency operator and insisting it was simply not believable: Lemos was "a woman who's trying to protect the man she loves, and what she told you from the stand is not true." "Do not be dissuaded or distracted by a woman who will protect her abuser at all costs."

Defense counsel countered that Olivero and Lemos may have had a heated argument and he may have even threatened her, but, as Lemos testified, he did not have a knife or shank in his possession and did not assault her with a weapon. He insisted the jurors should not believe the police officers' testimony simply because they were the police.

In her final argument the prosecutor noted the only defense proffered was that the aggravated assault had never occurred, the police were lying about what Lemos had told them the night of Olivero's arrest, and they had planted the knife on Olivero. She explained Lemos's testimony was necessary to advance that theory: "Now [Olivero's] faced with criminal charges, what's he doing? Calling her, sweet talking her. He needs her to get up there and say she never told the police that. . . . That's why Angel Olivero is violating his protective order over and over and over and over again, calling Consuelo Lemos and talking to her, even though he's not supposed to, even though everybody knows he's not supposed to. And that's why Consuelo Lemos gets up here and minimizes his behavior in every single possible way she can." No objection was made to this portion of the prosecutor's argument.

Following the noon recess and after reviewing other evidence, the prosecutor concluded her final argument by saying, "[S]he loves him. She'd rather have an argument with him than not be with him. She wants to be—she wants him in her life. He's been gone for two weeks, just walked out and didn't come home for two weeks, so she goes over there looking for him. It doesn't matter what he does to her. She loves

him. And what has he been doing since April 28th of this year [the date of the incident and Olivero's arrest]? Calling her, manipulating her, because he needs this defense."

Defense counsel finally objected, noting there had been no evidence about the substance of Olivero's telephone calls with Lemos between the time of his arrest and trial: "For them to say that he's calling her to manipulate her to . . . change her story, there's been no evidence of that. There were no questions about that. So, therefore, that's improper."

The court, after observing that "these are closing arguments," overruled the objection, finding the prosecutor's comments reasonably based on the evidence that Olivero had repeatedly called Lemos in violation of the protective order. Following the ruling, the prosecutor repeated the charge that Olivero had called Lemos to manipulate her in violation of an outstanding protective order and stated, "the fact that she's forgiven him for pulling a knife on her and lunging at her, isn't at issue. That's for you to decide. . . . The defendant is a dangerous man, and he is a bully. Do not believe this defense."

3. The Jury's Verdict and Sentencing

The jury convicted Olivero on one count of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ and one count of carrying a dirk or dagger (§ 12020, subd. (a)(4)).² In a bifurcated proceeding the trial court found Olivero had suffered one prior serious or violent felony conviction for robbery within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and section 667, subdivision (a), and had served five separate prison terms for felonies (§ 667.5, subd. (b)).

Olivero was sentenced to an aggregate state prison term of 11 years, consisting of six years (the three-year middle term doubled under the Three Strikes law) for assault with a deadly weapon plus five years for the prior serious felony conviction under section

¹ Statutory references are to the Penal Code.

² Effective January 1, 2012, section 12020, subdivision (a)(4), was renumbered as section 21310.

667, subdivision (a).³ The trial court stayed sentencing for possession of a dirk or dagger pursuant to section 654.

DISCUSSION

Olivero contends the prosecutor engaged in egregious misconduct by arguing without evidentiary support that Olivero had repeatedly telephoned Lemos prior to trial to persuade her to deny an aggravated assault had occurred and by waiting until her rebuttal argument to make these improper comments, depriving defense counsel of the opportunity to respond. Citing this court's opinion in *People v. Robinson* (1995) 31 Cal.App.4th 494, 505, Olivero suggests the prosecutor abused the closing argument structure by presenting a relatively brief opening argument designed to preclude effective defense reply and then giving a lengthy rebuttal argument.

Olivero has forfeited these arguments by failing to make timely objections in the trial court. (*People v. Lopez* (2008) 42 Cal.4th 960, 966; see *People v. Gamache* (2010) 48 Cal.4th 347, 371.) As discussed, well before defense counsel's objection near the conclusion of the rebuttal argument, the prosecutor had argued Olivero was able to influence Lemos's trial testimony by repeatedly telephoning her, in violation of the protective order, following his arrest. "The purpose of the rule requiring the making of timely objections is remedial in nature, and seeks to give the court the opportunity to admonish the jury, instruct counsel and forestall the accumulation of prejudice by repeating improprieties, thus avoiding the necessity of a retrial." (*People v. Brown* (2003) 31 Cal.4th 518, 553.) Olivero also failed to object, to request a jury admonition or

³ At the sentencing hearing the court imposed a five-year enhancement for Olivero's prior serious felony conviction pursuant to section 667, subdivision (a), and struck the prior prison term enhancement allegations. However, both the minute order entered after the hearing and the abstract of judgment incorrectly state the court imposed five one-year prior prison term enhancements under section 667.5, subdivision (b). We order the correction of these clerical errors. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of court's oral pronouncement controls over clerk's minute order]; *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [appellate court may correct clerical errors on its own motion or upon application of the parties]; see also *People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1.)

to ask for additional argument time because the prosecutor's comments were not responsive to defense counsel's argument, unfairly surprised the defense on rebuttal and was part of an overall abuse of the closing argument structure. He has forfeited these claims as well.

Even if we were not inclined to find forfeiture, Olivero's challenges to the prosecutor's closing arguments lack merit.⁴ Although it is misconduct to suggest the existence of facts outside the record or otherwise to argue facts beyond the evidence before the jury (see *People v. Valdez* (2004) 32 Cal.4th 73, 133; *People v. Benson* (1990) 52 Cal.3d 754, 794), testimony regarding the nature and history of Lemos's relationship with Olivero reasonably supported the inference he had influenced her trial testimony through his repeated telephone calls prior to trial. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1203 ["prosecutors 'have wide latitude to discuss and draw inferences'"; whether inferences are reasonable is for the jury to decide].) Accordingly, the prosecutor's argument to that effect amounted to fair comment on the evidence. (See *People v. Hawkins* (1995) 10 Cal.4th 920, 956-957 [victim shot in head from close range and absence of struggle described as "execution-style" murder], disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

Nor is this case similar to *People v. Robinson, supra*, 31 Cal.App.4th 494, in which the prosecutor gave a perfunctory opening argument and then a rebuttal argument, immune from defense reply, that was 10 times longer. (*Id.* at p. 505.) We held the prosecutor's tactics to be misconduct, seemingly aimed at gaining an improper advantage over the defendant. (*Ibid.*) Here, the prosecutor's opening argument, although somewhat

⁴ "The applicable federal and state standards regarding prosecutorial misconduct are well established. "A prosecutor's . . . intemperate behavior violates the federal Constitution only 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."'" [Citations.] 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. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

shorter than her rebuttal, was substantial, and included a discussion of the fabricated portions of Lemos's testimony and her motivation to lie at trial to protect Olivero. The prosecutor's rebuttal argument, in which she explored in greater detail Lemos's reasons for giving false testimony, was a direct response to defense counsel's argument that Lemos had testified credibly, unlike the officers, who purportedly had a reason to lie. (See *People v. McDaniel* (1976) 16 Cal.3d 156, 177 [rebuttal argument must permit the prosecutor to fairly respond to argument by defense counsel]; see also *People v. Panah* (2005) 35 Cal.4th 395, 464.) Although the prosecutor argued aggressively and at length in her rebuttal, she did not abuse the closing argument structure to gain an improper advantage over Olivero.

DISPOSITION

The judgment is modified to reflect imposition of a five-year sentence enhancement for Olivero's prior serious felony conviction pursuant to section 667, subdivision (a), and to delete reference to five one-year prior prison term enhancements pursuant to section 667.5, subdivision (b). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.