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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFTON ASHLEY CASS,

Defendant and Appellant.

B240002

(Los Angeles County Super. Ct.
No. GA083054)

APPEAL from a judgment of the Superior Court of Los Angeles County, Janice C. Croft, Judge. Affirmed.

David Y. Stanley, under appointment by the Court of Appeal, for Plaintiff and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Clifton Ashley Cass was charged in count 1 with the murder of Victor Cass¹ (Pen. Code, § 187, subd. (a))² and in count 2 with possession of a firearm by a felon (§ 12021, subd. (a)(1)). It was alleged defendant used a firearm in the commission of the murder (§ 12022.53, subds. (b)-(d)), and he had suffered five prior convictions under the three strikes law (§§ 667, subds. (a)-(d), 1170.12, subds. (b)-(i)).

The jury found defendant guilty on both counts and also found true the firearm use allegations. Defendant admitted the prior conviction allegations were true in a bifurcated proceeding.

Defendant was sentenced to state prison for 100 years to life; 25 years to life for first degree murder—tripled to 75 years to life due to the “strike” prior convictions—plus 25 years to life for firearm use pursuant to section 12022.53, subdivision (d). A concurrent sentence of 25 years to life was imposed on count 2.

Defendant argues the trial court erred by instructing the jury pursuant to CALJIC No. 2.21.2, and the error was not harmless.

We affirm the judgment.

FACTS

Prosecution Evidence

At approximately 8:30 p.m. on February 27, 2011, defendant left his home on Park Rose Avenue with his brother Victor. Victor came to the house with the understanding that the brothers were going to Pasadena to meet a drug dealer at the Rose Bowl to buy cocaine. Defendant had previously told his friend, Dwayne Sims, that he was going to kill Victor.

¹ Various members of the Cass family are involved in this case. We refer to them by first name for purposes of clarity.

² All statutory references are to the Penal Code unless otherwise stated.

Within an hour of when defendant and Victor left, defendant returned alone from Pasadena, and Sims heard defendant tell his brother Greg Cass and Lydia S., a woman with whom defendant had a rocky romantic relationship for approximately eight years, that he had killed Victor. Defendant stated he had shot Victor in the head and tried to wring his neck in a parking lot in Pasadena, and Victor had fallen “like a sack of potatoes.”

Police discovered Victor’s body with three gunshot wounds to the head and sharp force injuries to the neck. The cause of death was determined to be homicide by multiple gunshot wounds. The toxicology report was positive for cocaine.

During the day following the incident, defendant gave Sims a .38-caliber handgun wrapped in black plastic. Sims told police that defendant had asked him to discard the weapon, although he testified differently at trial. Acting on information from Sims, officers later recovered a .38-caliber Colt revolver from a location between one and two blocks from defendant’s house. A criminalist matched the gun to the bullets removed from Victor’s head. Gunshot residue was discovered on the steering wheel and gear shift lever of a white Nissan Maxima registered to defendant. Additionally, officers located a sickle, on which police found DNA matching both defendant and Victor.

Defendant had regularly complained about Victor’s disrespect towards their mother, citing instances where Victor would eat her food and bring women to the house. Prior to the incident, defendant had informed Sims that he was going to kill Victor, but Sims did not believe him due to the fact that defendant often made similar threats. Sims assumed the trip to Pasadena was for drugs, since both defendant and Victor were involved with drugs.

Sims heard defendant tell both Greg and Lydia that he had killed Victor, despite the fact that defendant told Sims he had dropped Victor off at a girl’s house. Sims did not believe defendant had carried out his threats. Contrary to what Sims said during his interview with police, Sims testified at trial that defendant had not asked him to get rid of the gun.

About a week after Victor's death, defendant told Lydia S. that he had shot Victor and slit his throat. Like Sims, Lydia did not believe it; she knew defendant had been upset with Victor for years for eating their mother's food and taking girls to the house but did not believe he carried out his threats to kill Victor. She never heard defendant tell anyone else he had shot Victor, and at the time of the trial, she still had difficulty believing that he had.

Defendant also told his mother Mildred that he shot Victor and slit his throat. However, like Sims, his mother did not believe defendant's statements and did not contact police.

Police interviewed Greg while he was in custody for an unrelated matter and offered leniency if he provided pertinent information regarding Victor's death. Greg said that everyone in the neighborhood disliked the way Victor treated their mother, and that defendant had been talking about killing Victor all week. Defendant left the house with Victor in his own car, then returned alone inside of an hour. Defendant told him he had killed Victor by luring him to Pasadena under the guise they were going to acquire cocaine and then shooting him at the Rose Bowl. Defendant said he shot Victor, who fell like a sack of potatoes. Defendant asked Greg to dispose of the gun, but it ended up in Sims's possession because he wanted to sell it. At trial, Greg claimed to be unable to recall most of the substance of his interview with police.

Defense Evidence

Contrary to the account given by the prosecution's witnesses, defendant returned alone from Pasadena two and a half to three hours after departing with Victor.

Defendant denied killing Victor and telling Greg, Lydia S., or Sims that he had done so. He maintained that he and Victor had gone to Pasadena to buy cocaine, and that they went to a friend's residence because the people that were supposed to sell them the cocaine were not at the Rose Bowl as planned. According to defendant, Victor entered the house and subsequently exited under the influence of cocaine, at which point

defendant gave him \$40 and parted company. Defendant also told Victor he would leave the keys to the car with Sims, and Victor could call Sims for a ride. Defendant did leave the keys with Sims upon returning home.

DISCUSSION

Whether the Trial Court Erred in Giving CALJIC No. 2.21.2

“The independent or de novo standard of review is applicable in assessing whether instructions correctly state the law” (*People v. Posey* (2004) 32 Cal.4th 193, 218.)” (*People v. Westbrooks* (2007) 151 Cal.App.4th 1500, 1506.)

CALJIC No. 2.21.2 provides: “A witness, who is willfully false in one material part of his or her testimony, is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.”

Defendant argues that, on the facts of this case, giving this instruction impermissibly lowered the burden of proof and hindered his ability to create a reasonable doubt as to his guilt. “The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.” (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) The logic of the argument proceeds as follows: a criminal defendant theoretically always has a motive to lie, so the defendant is consistently the one witness to whom the jury is likely to apply the instruction. The jury identifies one material point about which the defendant has lied and proceeds to reject the whole of the defendant’s testimony at the direction of the jury instruction. In doing so, the jury declines to weigh testimony that it otherwise would have considered in the absence of the jury instruction, testimony that could raise a reasonable doubt if considered. This deflection of valuable defense testimony

significantly hinders the ability of the defendant to make his case and therefore contravenes the Due Process Clause of the Fourteenth Amendment.

Even more directly, defendant argues, CALJIC No. 2.21.2 redirects the jury's focus from an evaluation of the prosecution evidence to an evaluation of defendant's veracity. If defendant denies the crime, but the jury determines that defendant lied about something material and rejects the denial of the crime, then defendant must be guilty.

The California Supreme Court has addressed this issue in the past. “We have rejected substantially identical attacks upon CALJIC No. 2.21.2 on many occasions, and decline to reconsider our conclusion. (*People v. Crew* (2003) 31 Cal.4th 822, 848; *People v. Maury* (2003) 30 Cal.4th 342, 428-429; *People v. Beardslee* (1991) 53 Cal.3d 68, 94-95.) “The qualification attacked by defendant as shifting the burden of proof . . . is merely a statement of the obvious—that the jury should refrain from rejecting the whole of a witness's testimony if it believes that the probability of truth favors any part of it. [¶] ‘Thus [the instruction] does nothing more than explain to a jury one of the tests they may use in resolving a credibility dispute.’ . . . When [the instruction] is considered in context with CALJIC Nos. 1.01 (consider instructions as a whole) and 2.90 (burden of proof), “the jury was adequately told to apply CALJIC No. 2.21.2 ‘only as part of the process of determining whether the prosecution had met its fundamental burden of proving [defendant's] guilt beyond a reasonable doubt.’” (*People v. Maury, supra*, . . . at pp. 428–429.)” (*People v. Martinez* (2009) 47 Cal.4th 399, 448; *People v. Beardslee, supra*, at p. 94 [“The instruction has been approved by this court, as well as by intermediate appellate courts, as a correct statement of the law.”].)

We are, of course, required to follow all decisions of the state's high court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 457.)

We further note that Judicial Council of California Criminal Jury Instructions (2006-2007) CALCRIM No. 226, which contains language expressing the same concept as that found in CALJIC No. 2.21.2, has also been upheld. (*People v. Vang* (2009) 171 Cal.App.4th 1120, 1128-1131.) CALCRIM No. 226 provides in pertinent part that “[i]f you decide that a witness deliberately lied about something significant in this case, you

should consider not believing anything that witness says. Or, if you think the witness lied about some things, but told the truth about others, you may simply accept the part that you think is true and ignore the rest.” “The last paragraph of CALCRIM No. 226 serves the same purpose as former CALJIC No. 2.21.2. Like the CALJIC instruction, it tells the jurors that if they find a witness lied about a material part of his testimony, they may, but need not, choose to disbelieve all of his testimony. Furthermore, if they find that though he willfully lied on one point he told the truth on others, his lie on the former point does not bar them from believing the rest. Thus, like CALJIC No. 2.21.2, the last paragraph of CALCRIM No. 226 aims specifically, and only, to address deliberate lying on the stand.” (*People v. Vang, supra*, at p. 1130.)

Harmless Error Analysis

In evaluating whether or not an instructional error is prejudicial, we apply the state law test of harmless error. An instructional error must result in a miscarriage of justice in order to merit a reversal; such a miscarriage of justice occurs when, after an examination of the entire cause, it is “reasonably probable” that a result more favorable to defendant would have been reached in the absence of the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

Even assuming CALJIC No. 2.21.2 was given in error, defendant has not sustained his burden of demonstrating that a more favorable result would have been reached had the instruction not been given. There was an array of damning forensic evidence—DNA from the sickle, an affirmative match of the bullets, gunshot residue from defendant’s car—to substantiate defendant’s conviction. In addition, there was consistent witness testimony from multiple sources that corroborated the story told by the physical evidence. The weight of the physical evidence coupled with the testimony provided overwhelming proof of defendant’s guilt. Error, if any, was completely harmless under the *Watson* standard of review.

DISPOSITION

The judgment is affirmed.

KRIEGLER, J.

We concur:

MOSK, Acting P. J.

O'NEILL, J.*

* Judge of the Ventura County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.