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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

CRISTOPHER MICHAEL TOWNER,

Defendant and Appellant.

C065172

(Super. Ct. No. 09F7595)

A jury convicted defendant Christopher Michael Towner of carrying a concealed dirk or dagger (Former Pen. Code, § 12020, subd. (a)(4); count one), driving under the influence of alcohol (Veh. Code, § 23152, subd. (a); count two), and driving while having 0.08 percent or greater blood-alcohol (Veh. Code, § 23152, subd. (b); count three). He admitted a prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and a prior driving with blood-alcohol conviction (Veh. Code, § 23540). The trial court struck the prior serious felony conviction for sentencing purposes. (Pen. Code, § 1385.) Defendant

was sentenced to state prison for two years on count one and to county jail for 10 days on count three. Sentence on count two was stayed pursuant to Penal Code section 654.

On appeal, defendant contends (1) denial of his new trial motion was an abuse of discretion, and (2) the judgment should be reversed due to witness intimidation by the prosecutor. We affirm the judgment.

FACTS AND PROCEEDINGS

On September 12, 2009, at 2:40 a.m., Redding Police Officer Jacob Provencio performed a traffic stop of defendant who was riding his motorcycle in downtown Redding 20 miles per hour over the speed limit.

Defendant told Officer Provencio that he had consumed four glasses of beer at a local bar between 10:00 p.m. and 1:00 a.m. Two preliminary alcohol screening tests performed in the field registered a 0.106 blood-alcohol level. Two evidential breath tests done at the Redding Police Department registered 0.10.

Officer Provencio arrested defendant for driving under the influence. A search incident to arrest revealed a knife concealed in a compartment of his backpack.

After waiving his constitutional rights, defendant told Officer Provencio that the knife “was for personal protection in case any drunk idiots tried to jump him.” Defendant did not tell Provencio that he had possessed the knife for a barbecue.

Defendant testified that he had the knife, a spatula, plastic utensils, a two-tine hotdog fork, sandals and a sweatshirt in his backpack. After the barbecue, he forgot to take the utensils out of the backpack. Defendant told Officer Provencio that the knife was for personal protection because he “had forgotten why it was in the backpack” and “was trying to give him what [he] believed was the most reasonable excuse.” The knife was enclosed in the sheath when it was purchased.

A licensed nurse, Linda N., who took care of defendant’s handicapped child, testified that defendant carried his belongings in a backpack. She saw him with a

“regular meat-cutting knife” and a spatula at a barbecue prior to his arrest, but she did not know whether he carried those items in his backpack.

In rebuttal, Officer Provencio testified that he searched the backpack and did not notice any kitchen utensils in it. He would have noted an item such as a two-tine hotdog fork, since it can be used as a weapon.

DISCUSSION

I

New Trial Motion

Defendant contends the trial court abused its discretion when it denied his new trial motion that was based on an allegation of witness intimidation.

Defense counsel made the following offer of proof regarding his witness, Linda N.: “she has observed [defendant] driving a motorcycle, using a backpack to carry his belongings, and that she was present at a barbecue a few days before he was arrested where he had the backpack, had the motorcycle, and had the utensils he was using for the barbecue.”

The prosecutor said he was concerned about “how long [Linda N.] has known the defendant,” and that, “if she has [known him], I’d like to know that before I begin my cross-examination.” The prosecutor added, “there’s a possibility, of course, that if she is aware of the defendant’s record and the possibility of defendant facing enhanced penalties--as the Court knows, I’ve been down this road before with people--I’d prefer to know about that ahead of time before asking it, and probably defendant should know about it.”

The trial court asked defense counsel to “find out during the break how long they’ve been acquainted, the nature of the relationship, express that orally to the People, and if we need to discuss it anymore, let me know.”

Following the break, defense counsel objected that the prosecutor had insinuated himself into defense counsel's discussion with Linda N. in the hallway outside the courtroom. This exchange ensued:

“THE COURT: Okay. Why did that happen?”

“[THE PROSECUTOR]: Your Honor, I went out to go see the witness, Miss-- apologize for mispronouncing the name. My question to her was very specific, and that was, how long have you known the defendant? [¶] . . . [¶] My question then consisted of: How long have you known the defendant? Is it a business relationship? She then pointed out she was the nurse for his child. I asked what was wrong with his child and she then correctly pointed out she wasn't comfortable with that and I told her I was fine with that. I told her I didn't need to know, that all I needed to know was, was it a business relationship, and that was it. [¶] . . . [¶]”

“THE COURT: Why didn't it just go the way that I suggested; that is, that you secure the information and pass along--

“[DEFENSE COUNSEL]: I started asking her questions and [the prosecutor] came out, stepped in front of me and started asking her questions.

“[THE PROSECUTOR]: That's true, Your Honor. My concern--quite frankly, my concern is that a question was going to be asked in a way or in a manner that would have tipped off an answer for her to give once I had the--once I knew that it was a business relationship, I didn't worry about the rest.

“THE COURT: Okay. Well, first of all, I think, arguably, you're doing it differently than I suggested and directed that it be done was--would fetter counsel's ability. She has a right to talk to her witness in private”

Later, Linda N. testified on direct examination as follows:

“Q [BY DEFENSE COUNSEL]: Good afternoon, Miss [N.]. How do you know [defendant]?”

“A I'm a licensed nurse and I take care of his handicapped child.

“Q Okay. And do you remember September of 2009?

“[THE PROSECUTOR]: Objection. Vague as to date.

“THE COURT: Sustained.

“Q [BY DEFENSE COUNSEL]: Do you remember the week preceding September 12th of 2009?

“A Well, it is a while ago, but I do remember an outing, and I was working and taking care of his daughter.

“Q Okay. Is that the approximate time that you went to a barbecue out at Whiskeytown?

“A It was a Sunday, because I only do Sundays.

“[THE PROSECUTOR]: Objection. Nonresponsive.

“THE COURT: Next question.

“Q [BY DEFENSE COUNSEL]: Do you remember that date?

“A Yes, I do.

“Q Okay. And what is it that you did on that day?

“A I worked my shift, 12:00 to 8:00, and I did my duties.

“Q Okay. And did you go anyplace on that day?

“A Yes.

“Q Where?

“A Whiskeytown Lake.

“Q Okay. Why?

“A To have a--a barbecue with the family.

“Q Okay. And do you remember what [defendant] was driving?

“A A bike, a motorcycle.

“Q A motorcycle. Okay. And do you remember how he carried belongings when he was on the motorcycle?

“A In a backpack.

“Q Okay. And do you remember--could you describe that backpack?

“A I believe it’s blue and black.

“Q Did you observe [defendant] with any cooking utensils that day?

“A A spatula.

“Q Okay. Anything else?

“A He had a knife to cut the meat.

“Q Okay. And do you know how he brought those items to the barbecue that day?

“A His backpack?

“Q Do you know?

“A Uhm, well, some things were put in my vehicle, yeah.

“Q Okay. Do you remember exactly which items were--

“THE COURT: Well, that’s not responsive. I’m going to strike the answer.

“Q [BY DEFENSE COUNSEL]: Okay. Let me ask, do you remember which items went into your vehicle and which items went into his backpack?

“A I’m not--

“[THE PROSECUTOR]: Objection. Relevance, Your Honor.

“THE WITNESS: --totally sure.

“THE COURT: Sustained. Clarify your question, counsel.

“Q [BY DEFENSE COUNSEL]: Do you remember which cooking utensils were in your vehicle?

“A I’m assuming all of them.

“Q Okay. Do you remember if [defendant] carried any in his backpack?

“A What’s in his backpack is none of my concern.

“[THE PROSECUTOR]: Objection. Nonresponsive.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: I’ll leave the answer.

“[DEFENSE COUNSEL]: Thank you. No further questions.”

After defendant was convicted, he made an oral motion for a new trial based on a letter Linda N. wrote that alleged she felt the prosecutor had badgered her prior to her testifying, causing her to be “scared” and “intimidated.” The letter stated in relevant part: “This is regarding [defendant]. On the day I appeared in court, before I came in[, t]he prosecuting attorney cornered me in the hallway. He began asking me questions. I felt he was badgering me. I felt very scared, and intimidated. I did not know this person, and I was taken by surprise. I did not know how I should respond. I felt this was unprofessional, and I do not know what was appropriate for the situation. [¶] When I was brought up to testify this previous situation had me panicked, and unable to think clearly. When I was being asked questions I got confused. The attorney kept [rephrasing] the questions. I got very intimidated it was like time started to slow down. I felt very much on the verge of a panic attack. I don’t remember most of what I said. Just remember wanting to get out of the situation, away from the prosecuting attorney. I know I said the wrong thing at the time, and I am very sorry. I did not lie intentionally. I just said what came out at the time it sounded like the right thing to say, at the time. I am sorry I got so confused. After thinking about this afterwards, I did realize what had happened, and I would like to try, and fix my error. I was present at the BBQ, and I do remember [defendant], having the knife at the BBQ. I also remember him having the knife in his backpack, as well as some other utensils. Fork Spatula, [o]ther things I don’t remember. There were a lot of things at the BBQ. I know he seems to have trouble remembering where he puts things occasionally. I know he is a nice person, and I have never had any trouble with him. He is usually very helpful, and caring. He seems very docile to me. I don’t think he did anything wrong intentionally. I thought you should know what happened.”

In her new trial motion, defense counsel stated that during the trial, she had believed the incident with the prosecutor had been just “something that should be put on

the record and inappropriate.” But defense counsel concluded from Linda N.’s letter that “it did, in fact, have a prejudicial effect upon the presentation of evidence during [defendant’s] trial.”

The trial court ruled: “Okay. Well, I heard her testimony at trial, and I have reviewed this letter, and I’m going to consider it for the purposes of sentencing, those aspects that relate to sentencing. But my view is the jury found her less than credible, and I did not find her particularly credible at trial myself. I was able to observe her mannerisms, her behavior while testifying. She has a vested interest in the verdict and the sentence, and of course she has a built-in bias. ¶¶ And so putting that aside for a moment, even based on what you’ve told me, her response to what I consider to be reasonable conduct on the part of the prosecutor doesn’t justify a new trial. I don’t find any misconduct, certainly not misconduct that would rise to the level of warranting a new trial. So that motion is denied.”

“ ‘ “ ‘The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.’ ” [Citations.] “ ‘[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.’ ” [Citation.]’ ” (*People v. Howard* (2010) 51 Cal.4th 15, 42-43, quoting *People v. Delgado* (1993) 5 Cal.4th 312, 328; see *People v. Dyer* (1988) 45 Cal.3d 26, 52.)

“When assessing evidence produced in support of a new trial motion, the trial court may consider its credibility as well as its materiality.” (*People v. Avila* (2004) 117 Cal.App.4th 771, 782; see also *People v. Beyea* (1974) 38 Cal.App.3d 176, 202, disapproved on other grounds in *People v. Blacksher* (2011) 52 Cal.4th 769, 808.)

In this case, the trial court expressly addressed Linda N.’s credibility at trial but not in her letter for the new trial motion. However, two factors the court cited--her “built-in bias” and her “vested interest in the verdict”--applied equally to her trial

testimony and her post trial letter. Moreover, as the prosecutor noted in opposition to the motion, Linda N.'s letter lacked credibility in that it ignored the presence of defense counsel whose subsequent "heads up" to the trial court did not suggest that the prosecutor had "cornered" or "badgered" Linda N. Nor did Linda N.'s letter explain why she had failed to consult with defense counsel who had been present and could have advised her as to "what was appropriate" in that situation and "how [Linda N.] should respond." Finally, although the court could not observe Linda N.'s "mannerisms" or "behavior" while composing the letter, it had no basis to conclude that Linda N. was more credible in her letter than she had been at trial. Thus, the record supports an implied finding that Linda N.'s posttrial letter was not credible.

Defendant disagrees, contending the trial court's reliance on Linda N.'s "mannerisms" and "behavior" on the witness stand was improper because "the prosecutor's actions shook her up, causing her to be on the verge of a panic attack." The argument fails because its premise--that the prosecutor's actions shook up Linda N.--is not consistent with defense counsel's failure to note cornering or badgering the witness or any such conduct by the prosecutor when the attorneys returned to the courtroom.

Defendant relies on *People v. Hill* (1998) 17 Cal.4th 800, in which a prosecutor's threat of a perjury prosecution resulted in the witness "evidencing a hesitancy that [the prosecutor] exploited in closing argument." (*Id.* at p. 835.) But here, unlike as in *Hill*, the trial court discerned a lack of credibility on Linda N.'s part regarding her testimony and, impliedly as to her letter as well. Linda N.'s letter acknowledged that the prosecutor's actions had not caused her to "lie intentionally." There is no indication that Linda N.'s lack of credibility resulted from the prosecutor's questioning. No error appears.

II

Witness Intimidation

“A defendant’s constitutional right to compulsory process is violated when the government interferes with the exercise of his right to present witnesses on his own behalf. [Citations.]” (*In re Martin* (1987) 44 Cal.3d 1, 30; see also *People v. Warren* (1984) 161 Cal.App.3d 961, 971.) In order to establish a violation of his constitutional compulsory-process right, a defendant must demonstrate (1) a government agent persuaded a willing witness not to testify by engaging in activity that was wholly unnecessary to the proper performance of his official duties; (2) the activity was a substantial cause of the witness’s refusal to testify; and (3) a reasonable probability that the witness’s testimony would have been material and favorable to the case. (*In re Martin, supra*, at pp. 31-32.)

In her letter, Linda N. claimed that she “remember[ed defendant] having the knife in his backpack, as well as some other utensils.” This statement arguably is more favorable to defendant than her direct testimony that “[w]hat’s in his backpack is none of [her] concern.” There is no evidence, however, that the prosecutor “persuaded” Linda N. not to testify by engaging in activity unnecessary to his duties.

We assume for present purposes that *In re Martin, supra*, 44 Cal.3d 1 applies to a witness like Linda N. who testifies but omits particular facts, as well as to someone who fails to testify at all. The trial court could find it improbable that the prosecutor dissuaded Linda N. from giving favorable testimony, precisely *because* her post trial letter is not credible. Specifically, the court could deduce that the probability of truth favored Linda N.’s trial testimony that what was in defendant’s backpack was not her concern. Thus, even if Linda N. had not encountered the prosecutor before she testified, it is improbable that she would have testified to seeing a knife and other utensils in the backpack.

In order to establish a violation of his compulsory-process right, a defendant is not required to show that the prosecutor acted in bad faith or with improper motives. (*In re Martin, supra*, 44 Cal.3d at p. 31.) Defendant claims the trial court erroneously placed a burden on the defense to show bad faith when it characterized the prosecutor's actions as "reasonable conduct." We disagree. In context, the court's comments appear to reflect its finding that the prosecutor did not engage in activity that was wholly unnecessary to the proper performance of his official duties. (*Ibid.*) The record supports this finding.

The relationship between defendant and Linda N. was material to the credibility of her testimony. Although no evidence supported the prosecutor's speculation that defense counsel intended to question Linda N. in a suggestive manner, the trial court could properly find that the prosecutor's questioning was not *wholly* unnecessary. Contrary to defendant's suggestion, the trial court was not compelled to find that the prosecutor had threatened reprisal in advance of Linda N.'s testimony. (*People v. Hill, supra*, 17 Cal.4th at p. 835.)

In a separate argument, defendant contends he had no duty to raise the present issue at trial prior to his receipt of Linda N.'s letter. The Attorney General counters that, because defense counsel knew of Linda N.'s expected testimony; was present when the prosecutor spoke with Linda N.; and then examined Linda N. at trial, defense counsel had sufficient knowledge and opportunity to object to any possible witness intimidation.

The Attorney General's argument fails because it puts the onus on defense counsel to divine from Linda N.'s trial testimony alone (and not from her subsequent letter) the effect, if any, that the interaction with the prosecutor may have had upon her testimony. The forfeiture argument fails because there is no reason in law or logic to require counsel to raise the issue without having any opportunity to discuss the matter with the allegedly intimidated witness.

For the first time in his reply brief, defendant contends the italicized portion of the prosecutor's cryptic comment, "there's a possibility, of course, that if she is aware of the

defendant's record and the possibility of defendant facing enhanced penalties--as the Court knows, I've been down this road before with people--I'd prefer to know about that ahead of time before asking it, *and probably defendant should know about it,*" somehow suggested "that Ms. [N.] could get in legal trouble were she to testify for the defense." (Italics added.) Defendant argues the prosecutor's intent was to "purge the court of a witness who might possibly offer perjured testimony." (*People v. Bryant* (1984) 157 Cal.App.3d 582, 592, fn. 5.)

Because the cryptic comment is susceptible of multiple meanings, only one of which has been advanced in the briefing, the rule precluding consideration of arguments tendered for the first time in the reply brief applies here with special force. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10; *People v. Dunn* (1995) 40 Cal.App.4th 1039, 1055; *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.)

Were the issue properly before us, we would find no error. The trial court's response to the disputed remark demonstrates that it understood the prosecutor very differently than the reply brief suggests. After the prosecutor said, "probably defendant should know about it," the court turned to defense counsel and asked, "*Right. Do you know?*" (Italics added.) Defense counsel answered, "I don't know how long she's known him." Clearly, the court understood the remark, not as a sinister attempt to deter Linda N. from testifying, but as an innocuous suggestion that defendant, or defense counsel, might know the answer to the prosecutor's question. Defendant's contrary suggestion, which ignores the trial court's response and defense counsel's reply has no merit.

DISPOSITION

The judgment is affirmed.

HULL, Acting P. J.

We concur:

MAURO, J.

HOCH, J.