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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMARIO DEWAYNE HILL,

Defendant and Appellant.

C065736

(Super. Ct. Nos.
10F00083 & 08F04418)

In this appeal we must decide whether the prosecutor's use of a *Far Side* cartoon during closing argument went too far.

A jury found defendant Jamarío DeWayne Hill guilty of first degree burglary (Pen. Code, § 459)¹ and resisting a peace officer, a misdemeanor (§ 148, subd. (a)(1)). The jury also

¹ Further undesignated section references are to the Penal Code.

found true allegations that a person other than an accomplice was present in the residence during the commission of the burglary (§ 667.5, subd. (c)(21)), and that defendant had one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12).

Sentenced to eight years in state prison,² defendant appeals, contending “[t]he prosecutor committed misconduct in closing argument by using a visual aid that improperly trivialized and quantified the reasonable doubt standard.” Having reviewed the visual aid and the circumstances surrounding its use, we shall conclude that neither the visual aid nor the prosecutor’s comments concerning it amounted to misconduct and affirm the judgment.

DISCUSSION³

“A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ‘unfairness as to make the resulting conviction a denial of due process.’” [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial. [Citation.]” (*People v. Alfaro* (2007) 41 Cal.4th 1277,

² The trial court sentenced defendant to the middle term of four years, doubled for the prior strike, and a concurrent 60 days for resisting a peace officer.

³ The underlying facts are not relevant to the issue raised on appeal.

1328.) In evaluating a prosecutor's remarks, "we must view the statements in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "Although counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law. [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 702, quoting *People v. Bell* (1989) 49 Cal.3d 502, 538.) "In particular, it is misconduct for counsel to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citations.]" (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266 [*Katzenberger*].)

Here, immediately before closing arguments, the trial court instructed jurors in pertinent part as follows: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt, because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial." The court also instructed jurors that they must follow the law as explained by the court, and to the extent the attorneys' comments on the law conflict with the court's instructions, jurors must follow the court's instructions.

During her initial closing argument, the prosecutor reiterated the court's instructions on reasonable doubt, telling the jury that "proof beyond a reasonable doubt is proof that

leaves you with an abiding conviction that the charge is true," which she described as a lasting confidence in the verdict. She also told the jury that "it's proof beyond a reasonable doubt, not all possible doubt, not all imaginary doubt. It's what is reasonable."

In her rebuttal, the prosecutor responded to what she described as defense counsel's attempt to "pick apart little pieces of evidence" to establish reasonable doubt by showing a single-panel cartoon from *The Far Side*, a popular and syndicated comic. The cartoon depicted a man standing alone on a deserted island with the word "HELF" written in the sand, and another man flying overhead in a helicopter, looking down, and stating into his radio, "'Wait! Wait! Cancel that, I guess it says 'helf.''" The prosecutor argued that "[j]ust because there is a small line that doesn't connect does not mean that that person is asking for help. That's not reasonable doubt."

Defense counsel objected. The trial court overruled the objection but during a side bar directed the prosecutor to "remind the jury that this example was not an attempt to quantify" reasonable doubt. When the prosecutor resumed her rebuttal, she stated that the cartoon is "just an example. I'm not quantifying what reasonable doubt is and what adds up to reasonable doubt. That's for you to decide. [¶] It's just simply an illustration for you. That when you go back in the jury room and you put all the pieces together and you take a step back, you will see that the defendant is guilty of both charges."

After the jury left the courtroom to begin its deliberations, defense counsel indicated that she wished to place her objection to the cartoon on the record. She explained that during the side bar she brought up *Katzenberger, supra*, a recent case involving the use of a jigsaw puzzle, which she stated held that "[a] prosecutor cannot attempt to quantify reasonable doubt or say that well, one piece is missing or this piece is missing. However, . . . you can still look at something and determine . . . that the case has been proven beyond a reasonable doubt." She argued that the prosecutor's use of the cartoon here was an attempt by the prosecutor "to quantify reasonable doubt."

The trial court disagreed. It "did not believe that the [prosecutor] was in fact quantifying." Rather, it found that, when considered in context, the prosecutor's point was that reasonable doubt "is not beyond all possible doubt because everything is open to some possible doubt." The court also found that the prosecutor's statement following the side bar cured "any appearance of quantification." The court explained that it did not admonish the jury itself because it believed having the prosecutor do so was a more effective way "to focus the attention of the jury on that correction" because she was the one who presented the cartoon.

We find nothing deceptive or reprehensible in the prosecutor's use of the cartoon. Consistent with the court's instructions, the prosecutor urged the jurors to consider *all* the evidence in making their determination, and urged them not

to reject what they otherwise knew to be true based on one minor inconsistency in the evidence, as the helicopter pilot in the carton had done by calling off the search upon seeing the word "HELF."

Katzenberger, referred to by defense counsel at trial and relied on by defendant on appeal, is readily distinguishable. There, the prosecutor made a PowerPoint presentation during closing argument to illustrate the reasonable doubt standard. (178 Cal.App.4th at p. 1262.) "The . . . presentation consisted of eight puzzle pieces forming a picture of the Statue of Liberty. The first six pieces came onto the screen sequentially, leaving two additional pieces missing. The prosecutor argued it was possible to know what was depicted 'beyond a reasonable doubt' even without the missing pieces. The prosecutor then added the two missing pieces to show the picture was in fact the Statue of Liberty." (*Ibid.*) This court found the presentation "misrepresented the 'beyond a reasonable doubt' standard." (*Id.* at p. 1266.) We first observed that "[t]he Statue of Liberty is almost immediately recognizable in the prosecution's . . . presentation," and on that basis concluded that "[t]he presentation, with the prosecutor's accompanying argument, leaves the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence" and "invites the jury to guess or jump to a conclusion" (*Id.* at p. 1267.) We further found that the prosecutor inappropriately suggested a specific quantitative measure of reasonable doubt, i.e. 75 percent, by telling the

jury that this picture is beyond a reasonable doubt [the Statute of Liberty] when six of the eight pieces were in place. (*Id.* at pp. 1267-1268.) We nevertheless affirmed the judgment of conviction, finding the prosecutor's conduct "was not prejudicial, even under a standard of beyond a reasonable doubt." (*Id.* at 1269.)

Unlike *Katzenberger*, the prosecutor's presentation here did not leave the distinct impression that the reasonable doubt standard may be met by a few pieces of evidence, invite the jury to guess or jump to a conclusion, or suggest a specific quantitative measure for reasonable doubt. To the contrary, the presentation left the impression that jurors should consider *all* the evidence in making their determination and, unlike the helicopter pilot in the cartoon, should not disregard what they otherwise know to be true based on a minor inconsistency in the evidence. Nor was there any quantitative element to the presentation. Defendant's assertion that "[l]ike the puzzle analogy in *Katzenberger*, the argument here implied a quantitative measure of reasonable doubt, i.e., three out of four letters (75%) is enough" ignores the other aspects of the cartoon that made plain the man was stranded and needed help. No reasonable juror would have understood the prosecutor's presentation to include a quantitative element. There was no misconduct.

In sum, "[t]he record does not demonstrate that the prosecution employed deceptive or reprehensible methods to persuade the jury, and, in light of the entire record, there was

no reasonable likelihood that the jury erroneously construed the prosecution's burden of proof." (*People v. Samayoa* (1997) 15 Cal.4th 795, 842.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.