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

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN CALVIN GRAVES,

Defendant and Appellant.

C067857

(Super. Ct. Nos.
10F3478 & 06F8530)

A jury convicted defendant Marvin Calvin Graves of receiving stolen property in case No. 10F3478. (Pen. Code,¹ § 496, subd. (a).) Based on his conviction, the trial court revoked defendant's probation in case No. 06F8530.

Defendant was sentenced to state prison for seven years eight months, consisting of seven years in case No. 06F8530 and eight months consecutive in case No. 10F3478. In case No. 06F8530, he received 105 days of actual custody credit and 52

¹ Further undesignated statutory references are to the Penal Code.

days of conduct credit; in case No. 10F3478, he received 104 days of actual custody credit and 52 days of conduct credit.

On appeal, defendant contends (1) the prosecutor committed prejudicial misconduct during his closing argument, and (2) he is entitled to an additional 52 days of conduct credit in case No. 10F3478. The People concede the latter point.

On our own motion, we deemed defendant's notice of appeal in case No. 10F3478 to include case No. 06F8530. We ordered simultaneous letter briefs addressing the calculation of conduct credits in case No. 06F8530. Both parties agree that defendant is entitled to an additional 53 days of conduct credit in that case, for a total of 210 days of credit.

We shall affirm but agree with the parties as to the need to correct the credit determinations in both cases; we shall modify the judgments accordingly.

FACTS

People's Case-in-Chief

James Harrison was a rancher who tended approximately 500 cows for the Elwood Ranch, which maintained several properties including one in the Igo-Ono area. He visited the property once a week to tend the cows. During a visit in January 2010, he noticed that three green metal gates were missing. The gates had been on the property approximately 10 years. One of them was unique in that ranch personnel had welded a metal loop onto the gate. Harrison did not report the theft to law enforcement until later that same month when California Highway Patrol Officer Randy Rudd requested to hunt on the property.

After noticing that his gates were missing, Harrison drove past defendant's property off of Gas Point Road where he recognized one of the missing gates. The gate had been painted white, but the welded loop was visible on the top of the gate. Harrison confronted defendant and requested that he return the gate within 24 hours. Defendant denied taking the gate.

Officer Rudd photographed gates on the Elwood Ranch property and the white gate on defendant's property. Defendant told Rudd that a couple of his "buddies" had hung up the gate three or four years ago. Defendant said he painted the gate white and reinstalled it. Defendant also said that "if Mr. Harrison would have been more cordial about the gate he would have [given] it back to him."

Defense

Brian Smith was defendant's friend and a handyman who maintained equipment on defendant's property. In 2010, defendant painted a gate on his property white. Before it was painted, the gate had been rusty brown in color. Harrison confronted defendant about the gate in a rude and angry manner. Smith believed that the same gate had been on the property for five years.

Christina Simon lived with defendant for five years. Around December 1, 2009, she repainted the gate on the property and defendant fixed the post. The gate was "[t]he only gate that's ever been there." Before it was repainted, the gate was green in color. She also witnessed Harrison's angry confrontation with defendant.

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends the prosecutor committed prejudicial misconduct during his closing argument when he argued that, "Mr. Harrison, as a victim of crime, deserves to have this crime solved." We are not persuaded.

A. *Background*

The prosecutor commenced his closing argument as follows:

"Right off, this probably hasn't been the most interesting of case [*sic*] you've ever sat on as a juror. But Mr. Harrison was a victim of crime: He had his property stolen and he wanted to get it back. As you heard in voir dire, rarely are the police ever able to solve a theft crime unless it was witnessed. In this case, it wasn't witnessed but evidence was produced that showed who took the property and who had a property [*sic*]. *And Mr. Harrison, as a victim of crime, deserves to have this crime solved.*" (Italics added.)

At that point, defense counsel objected that the prosecutor was "vouching for the witness." The trial court overruled the objection.

The prosecutor continued: "And my job as a district attorney is to try to prove those crimes and your job as a juror

is to take your job seriously and listen to the evidence and come to a determination of whether or not [defendant] is guilty whether or not it's a gripping case, whether or not it seems like the most serious crime in the world or not. As we pointed out in voir dire, it's not your job to determine punishment or grade of offense or anything like that, just hear the evidence and come to a conclusion."

B. Forfeiture

"To preserve a misconduct claim a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the misconduct claim preserved for review." (*People v. Cook* (2006) 39 Cal.4th 566, 606 (*Cook*)). Here, no misconduct objection was made to the disputed portion of the People's argument--although an objection was made to "vouching," there was clearly no vouching, and an objection to vouching is not the same as a misconduct objection in any event. Further, there was no request for an admonition. Thus, defendant's claim of misconduct is forfeited. (*Cook, supra*, 39 Cal.4th at p. 606.)

C. Analysis

In any event, defendant's claim lacks merit. "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper

or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Thus, we should not lightly infer that the jury drew a more damaging meaning from the prosecutor's remarks than did we: that Harrison was a victim of a property crime with no witnesses and that although police rarely solve such crimes (and such crimes are not particularly interesting), here the police found at least *some* evidence that solved the crime (i.e. "evidence was produced that showed who took the property"); thus, Harrison deserved to have that evidence considered. We do not agree that it is an unavoidable inference that any juror understood the disputed remark as asking *the jury* to "solve" this crime by returning "a guilty verdict against [defendant]." (*People v. Frye, supra*, 18 Cal.4th at p. 970.) The remarks that *police* rarely "solve" similar crimes and that Harrison deserves to have this crime "solved" clearly referred to the People's argument that although this was not "the most serious crime in the world" the police had indeed "solved" it and obtained the evidence now before the jury regarding defendant's culpability.

Contrary to defendant's argument, nothing in the prosecutor's comments implied that he was relying on information outside of the evidence and unknown to the jury. (See, e.g., *People v. Bain* (1971) 5 Cal.3d 839, 848.) Rather, the prosecutor spoke to the facts of the case, even commenting that they probably were not the "most interesting" facts the jurors had encountered. Nothing in the statement posed any danger of "unduly inflam[ing] the jury against the defendant." (*People v. Ghent* (1987) 43 Cal.3d 739, 772.) There was no prosecutorial misconduct.

II

Credits

Defendant next contends, and the People concede, that his 104 days in actual custody on case No. 10F3478 entitle him to 104 days of conduct credit. The parties agree that none of the statutory exceptions to enhanced conduct credit applies in this case. We agree and shall modify the judgment accordingly. (Former § 2933, subd. (e)(1) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

When it sentenced defendant on case No. 10F3478, the trial court also revoked probation and imposed sentence in case No. 06F8530. The two cases share an abstract of judgment, and the same conduct credit error appears in both cases. Accordingly, defendant's 105 days of custody credit in case No. 06F8530

entitled him to 105 days of conduct credit. We shall modify the judgment.

DISPOSITION

In case No. 10F3478, the judgment is modified to award defendant 104 days of conduct credit. In case No. 06F8530, the judgment is modified to award defendant 105 days of conduct credit. As modified, the judgments are affirmed. The trial court is directed to prepare an amended abstract of judgment and to forward a certified copy to the Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.