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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS PENA OSEGUERA,

Defendant and Appellant.

C068570

(Super. Ct. No.  
CRF06584)

A jury convicted defendant Luis Pena Oseguera of first degree murder and found that he personally used a deadly weapon (a knife). The trial court sentenced him to an indeterminate term of 25 years to life in prison for the murder, plus one year for using a deadly weapon.

Defendant contends (1) there is insufficient evidence of premeditation to support the conviction for first degree murder; (2) the trial court provided an inadequate response to a jury question during deliberations; (3) the trial court erred in

instructing the jury on flight because defendant did not flee; and (4) the prosecutor committed prejudicial misconduct during closing argument.

We conclude (1) although there is little, if any, evidence of planning, the evidence of motive and manner of killing is sufficient to support defendant's conviction for first degree murder; (2) defendant forfeited his challenge to the trial court's jury response because he affirmatively consented to the response, did not object or request clarifying language during trial, and an objection or request for clarification would not have been futile; (3) the trial court did not err in instructing on flight given the evidence that defendant immediately left the crime scene with his children and considered fleeing to Mexico; and (4) defendant forfeited his claim of prosecutorial misconduct during closing argument because he did not object or request a jury admonition and there is no indication such efforts would have been futile; in any event there was no misconduct because the prosecutor made a fair comment on the evidence.

We will affirm the judgment.

#### BACKGROUND

Defendant was married to the victim, Reyna de Pena. They had two minor children together and additional children from other relationships.

On the day of the murder, defendant left work early and went home. His family was at the house, including Reyna,

defendant's minor children, defendant's adult daughter Helen Reyes and Helen's husband Jose.

When the telephone rang, Helen answered it. The caller asked in Spanish, "How are you my love?" or something like that. Helen responded, "Who do you want to speak to?" The caller hesitated and then said, "Uh, Juana." Nobody named Juana lived at the house. Helen "told him a couple bad words" and then said, "You know who you're trying to speak with," or something to that effect. Defendant could hear Helen's side of the conversation, but Helen could not remember if she told defendant about the caller's initial comment. After hanging up, Helen said, "He knew who he wanted to speak to" or "He knew where he was calling."

Helen and Jose left a few minutes later. Soon after, according to defendant's statement to the police, defendant approached Reyna in the kitchen and asked her to identify the caller. Reyna said she did not know. When defendant tried to kiss her, however, she told him she "had another man."

According to Yuba County Sheriff's Detective Stephanie Johnson, defendant said he stabbed Reyna three times, twice in the front and once in the back. Defendant told Detective Johnson that he "thought he had missed, so he stabbed [Reyna] again." Reyna died from one of the stab wounds that pierced her heart and collapsed her lung. Defendant testified he did not remember stabbing Reyna.

After the murder, defendant gathered the children and took them to Helen's house. He told Helen that he stabbed Reyna.

Defendant asked Helen, "What should I do? Should I leave or what?" He considered fleeing to Mexico but then decided to turn himself in. Defendant asked Helen to take him home.

Defendant and Helen entered through the back door of defendant's home and found Reyna's body on the floor. Helen called 911. A sheriff's deputy responded and asked defendant what happened. Defendant replied, "Me fight with me wife; me stab her."

A jury convicted defendant of first degree murder (Pen. Code, § 187, subd. (a); count I) and found that he personally used a deadly weapon (a knife) (Pen. Code, § 12022, subd. (b)(1)). The trial court sentenced him to an indeterminate term of 25 years to life in prison for the murder, plus one year for using a deadly weapon.

## DISCUSSION

### I

Defendant contends there is insufficient evidence of premeditation to support his conviction for first degree murder.

In considering a challenge based on sufficiency of the evidence, we review the entire record in a light most favorable to the judgment to determine whether the record contains evidence that is reasonable, credible, and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Silva* (2001) 25 Cal.4th 345, 368.) We will not reverse if the circumstances reasonably justify the jury's findings. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

Deliberation and premeditation can occur in a brief interval. (*People v. Solomon* (2010) 49 Cal.4th 792, 812.) The test is not time but reflection; thoughts may follow each other with great rapidity and calculated judgment may occur quickly. (*Ibid.*) Generally, there are three categories of evidence, referred to as the *Anderson*<sup>1</sup> factors, sufficient to support deliberation and premeditation: (1) planning activity, (2) preexisting motive, and (3) deliberate manner of killing. (*People v. Solomon, supra*, 49 Cal.4th at pp. 812-813; *People v. Elliot* (2005) 37 Cal.4th 453, 470-471.) To convict, a jury need not hear evidence in all three categories. (*People v. Elliot, supra*, 37 Cal.4th at pp. 470-471.) If evidence of all three categories is not present, then “we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing.” [Citation.]” (*Ibid.*) The *Anderson* factors are not exhaustive; the prosecution need not offer evidence of all three types to support a finding of deliberation and premeditation. (*People v. Perez, supra*, 2 Cal.4th at p. 1125.)

Addressing the second *Anderson* factor, defendant argues there is insufficient evidence that he had a preexisting motive to kill Reyna. We disagree. Defendant told Detective Johnson that Reyna considered leaving defendant. In addition, defendant told Jose on the day of the murder that he thought Reyna was

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<sup>1</sup> *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*).

growing "distant." Moreover, defendant told Helen before the murder that his home phone was busy every time he called. Helen said defendant was within earshot when she angrily spoke to another man who called the house. Defendant asked Reyna to identify the caller. When defendant tried to kiss Reyna, she told him she had another man. This evidence was sufficient for a reasonable jury to infer that defendant believed Reyna was having an affair, and that his belief motivated him to kill her.

Regarding the third *Anderson* factor, defendant argues the manner of killing was inconsistent with premeditation. Again, we disagree. Particular and exacting killings, such as firing a gun at close range, permit a jury to infer deliberation and premeditation. (*People v. Garcia* (2000) 78 Cal.App.4th 1422, 1428.) Here, defendant stabbed Reyna three times. The fatal stab wound directly penetrated Reyna's heart. Defendant told Detective Johnson he stabbed Reyna more than once because he thought he had missed. The manner of killing permitted a reasonable jury to infer that the murder was committed with deliberation and premeditation.

Accordingly, even without evidence of planning, the evidence regarding motive and manner of killing was sufficient to support defendant's conviction for first degree murder.

## II

Defendant next contends that the trial court committed prejudicial error when it inadequately responded to a jury question. During deliberations, the jury asked for a "clear

distinction between first and second degree murder if possible."

The following colloquy occurred:

"THE COURT: [¶] . . . [¶] . . . I am going to advise them, 'Please reread CALCRIM 520, 521, 522, 570 and 640,' and then supplement that, that 'Murder first is a killing that is willful, deliberate and premeditated. All other kinds of murders are of the second degree. Murder in the second degree does not require premeditation but does require malice aforethought.'

"[PROSECUTOR]: I think the reference to -- I understand counsel's desire to have that included. I think the reference to the voluntary manslaughter instruction is beyond the scope of their question.

"THE COURT: It is beyond the scope, but I'm going to include 640, which is the order in which they deliberate, so I think in -- for the totality of their consideration, I should also have 570, which is the voluntary manslaughter.

"[DEFENSE COUNSEL]: Thank you.

"THE COURT: [¶] . . . [¶] I'll allow counsel to read my response, and I do note the objection of [the prosecutor] to 570 being included, but -- is there any other objection?

"[PROSECUTOR]: None other, Your Honor.

"THE COURT: [Defense counsel], is it acceptable?

"[DEFENSE COUNSEL]: It is, Your Honor.

"THE COURT: Thank you. [¶] Then please provide the Court's response to the jury. We'll be in recess."

A defendant who consents to the trial court's proposed response to a jury question waives a claim of error. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.) If a defendant believes an instruction is unclear, he has an obligation to request clarifying language. (*Id.* at p. 1192.) Defendant's failure to do so forfeits the claim on appeal. (*People v. Marks* (2003) 31 Cal.4th 197, 237.)

Defendant nonetheless contends his claim is preserved on appeal because an objection during trial would have been futile, citing *People v. Smithey* (1999) 20 Cal.4th 936, 992, and *People v. Bolton* (2008) 166 Cal.App.4th 343, 355-356. But in this case, the trial court provided its planned response, entertained an objection from the prosecution, and then explicitly asked defense counsel if the response was "acceptable." Defense counsel responded, "It is, [y]our Honor." This record indicates that an objection would not have been futile. Accordingly, the challenge is forfeited.

### III

Defendant further asserts that the trial court erred when it instructed the jury regarding defendant's flight pursuant to CALCRIM No. 372. We conclude there was no error.

The trial court instructed the jury as follows: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct.

However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

A flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.'" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055, quoting *People v. Ray* (1996) 13 Cal.4th 313, 345.) The circumstances of departure must suggest "a purpose to avoid being observed or arrested.'" (*People v. Bradford, supra*, 14 Cal.4th at p. 1055, quoting *People v. Visciotti* (1992) 2 Cal.4th 1, 60.) However, the prosecution "need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence." (*People v. Bonilla* (2007) 41 Cal.4th 313, 328, original italics.) The sole fact that a defendant left the scene of the crime may be sufficient evidence for a flight instruction; it is for a jury to determine the significance of the departure. (*People v. Turner* (1990) 50 Cal.3d 668, 694.)

In this case, after stabbing Reyna in the couple's home, defendant did not immediately call for help even though he told Detective Johnson that he "thought [Reyna] was moving a little bit" when he left. Instead, defendant left the scene of the crime and took his children to Helen's home. He told Helen that he stabbed Reyna and asked Helen, "What should I do? Should I leave or what?" He considered fleeing to Mexico but then asked Helen to take him home.

Defendant argues the trial court should not have given the instruction because defendant never actually fled to Mexico. But based on the evidence, a reasonable jury could have found that defendant initially left his home to avoid arrest. It was for the jury to determine the significance of his departure. Under these circumstances, the trial court did not err in instructing on flight.

Defendant next argues that the instruction violated his due process rights under the Fourteenth Amendment. He asserts that due process "prohibits an instruction that allows a permissive inference where there is insufficient evidence to support that inference."

A "permissive inference violates the Due Process Clause only if the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." (*People v. Mendoza* (2000) 24 Cal.4th 130, 180.) As we have explained, however, the record supports the conclusion that defendant initially left the crime scene, however briefly, because he knew he was guilty and wished to avoid detection. Such a conclusion is neither unreasonable nor contrary to common sense. The instruction did not violate defendant's due process rights.

#### IV

In addition, defendant contends the prosecutor committed misconduct during closing argument by expressing his personal opinion regarding the evidence and insinuating that defendant killed his first wife.

During closing, the prosecutor argued:

"I don't believe he blacked out and forgot everything that would make him guilty of this crime. I don't believe he blacked out and then had the wherewithal to load kids into the Expedition or -- the Expedition, drive them across town, remembering that he stopped at a light, showing up at the residence of Jose and Helen, walking in saying, 'I killed her. She's a cheater.'"

In further argument, the prosecutor asked the jury to consider defendant's background in determining whether he was provoked:

"Consider his background to talk about how this provocation may have affected [defendant]. He's almost 30 years older than this lady. He's been married before. He's had kids with people that aren't married. He's got ten kids -- nine kids -- nine kids if you believe him; ten if you believe Helen. He was married to Helen's mom. She passed away somehow. He was not married to the next mother of his children. And he was not married to Reyna for the first five years of their relationship."

A defendant must raise a contemporaneous objection and seek a jury admonition if he believes a prosecutor committed misconduct during closing argument. (*People v. Gamache* (2010) 48 Cal.4th 347, 371.) Otherwise, a defendant may not raise the issue on appeal. (*Ibid.*) The rule is remedial in nature; it seeks to give the trial court the opportunity to admonish the jury and forestall the accumulation of prejudice before a

retrial is necessary. (*People v. Brown* (2003) 31 Cal.4th 518, 553.)

Defendant never objected during closing argument to the challenged statements by the prosecutor and never sought an admonishment from the trial court. Nevertheless, defendant argues his claim is preserved on appeal because an objection and admonition would have been futile, citing *People v. Sapp* (2003) 31 Cal.4th 240, 279. Defendant's basis for futility is that the "bell" could not be "unrung" once the prosecutor made the statements. But the comments were a brief portion of the closing argument and there is no indication that a jury admonishment could not have resolved any concern. Under the circumstances, defendant forfeited his contention of prejudicial prosecutorial misconduct.

In any event, there was no misconduct. Although prosecutors may not depart from admissible evidence in closing argument or attempt to use their own credibility to persuade a jury of defendant's guilt (*People v. Morrison* (2004) 34 Cal.4th 698, 717; *People v. Kirkes* (1952) 39 Cal.2d 719, 723-724), they nonetheless have wide latitude to make fair commentary on the evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 337-338.) In drawing on evidence presented at trial, prosecutors may call a defendant a liar. (*Id.* at p. 338.)

Here, the prosecutor said he did not believe defendant blacked out when he stabbed the victim. The prosecutor based this statement on the evidence: defendant went to Helen's home

immediately after the murder and told her he killed Reyna. The prosecutor's statement was a fair commentary on the evidence.

Defendant contends the prosecutor also implied that defendant was a "Black Widower" and hinted of other inadmissible evidence by saying defendant's first wife "passed away somehow." But the jury heard the evidence at trial that defendant's first wife died of natural causes. On this record, the word "somehow" did not rise to the level of misconduct.

In defendant's opening brief he also asserts cumulative prejudice. Because we conclude there was no error, his claim of cumulative prejudice lacks merit.

DISPOSITION

The judgment is affirmed.

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MAURO, J.

We concur:

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ROBIE, Acting P. J.

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MURRAY, J.