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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LAWRENCE MCFADDEN,

Defendant and Appellant.

C069162

(Super. Ct. No.
11F00301)

A fight in the parking lot of a bowling alley ended in a stabbing. A jury convicted 17-year-old defendant James McFadden of assault with a knife (Pen. Code, § 245, subd. (a)(1)) and found he inflicted great bodily injury on his victim (Pen. Code, § 12022.7, subd. (a)). Sentenced to five years in prison, defendant appeals. He claims prosecutorial misconduct, instructional error, and error in the trial court's imposition of certain fees. As we explain, we find no error and shall affirm.

FACTS

Derreq Knaules went to Country Club Lanes with friends one night, and left the building about 4:00 a.m. the morning of January 9, 2011. In the parking lot, Knaules became involved in a fight and was stabbed. He spent a month in the hospital and had several surgeries. The wound penetrated his left kidney, which was removed.

Fights were common in that parking lot, occurring about once every two weeks. Country Club Lanes had two security guards; on the weekends there were also two deputy sheriffs working off-duty outside.

Testimony of Allen Marinovich

Before the stabbing, the night manager, Allen Marinovich, learned there was a fight and went outside. He saw three people fighting--it appeared to him to be two against one other person. After that fight had "broken up," another man ran up to the one man who had been involved in the earlier fight and punched him in the side of the face, a "blind-side punch," as a result of which he "flew" onto Marinovich's car hood and rolled off, where he "continued to get beat." Security arrived and used pepper spray to break up that fight. Then the man who had "sucker punched" the man being beaten "threw an awkward downward punch" at him in a downward thrusting motion. The victim of the punch (Knaules) grabbed himself and bent down, "kind of slouched over."

Marinovich did not see anything in the hand of the man who threw the last punch. The man was wearing a black jacket and a

black bomber hat with ear flaps. He sprinted toward Watt Avenue. Marinovich told security to detain the man in the black bomber hat, who was later identified as defendant.

Marinovich did not realize that what he had seen was a stabbing until he heard screaming that someone had been stabbed. He did not see a knife or blood. Knaules went up to a police officer and told him he had been stabbed.

Trial Testimony of Officer Alexander Conroy

Officer Alexander Conroy was a police officer for the Los Rios Community College District who also worked as a security guard at Country Club Lanes. He saw an individual "sucker-punch" Knaules, who fell over the car and was attacked on the ground. Another person joined the fight. Conroy tried to use pepper spray to break up the fight, and was able to push the man with the black hat off of Knaules, who was on the ground.

Conroy saw the man with the black hat run behind a minivan and adjust something at his waist. Conroy heard the sound of metal falling to the ground and saw the man with the black hat make a kicking motion. The object "skittled" and came to rest under the van. Conroy saw the man in the black hat and another walking away quickly, but trying to appear casual.

Conroy first detained a man in a gray bomber hat. He then detained the man in the black hat (defendant) and his companion.¹

¹ There was conflicting evidence presented as to whether Conroy realized on his own he had first detained the wrong suspect or whether Marinovich told Conroy he had the wrong man. This detail is not material to our analysis.

When Marinovich saw the two men in the police car, he immediately pointed to defendant and said "that's him." The police took defendant out of the car and Marinovich identified him. Marinovich had no doubt about his identification.

Additional Trial Evidence

The police retrieved a knife from under the van. The knife was not bloody, nor was its sheath. There was human tissue on the knife--DNA testing showed it was consistent with Knaules's DNA. There was a mixture of DNA from five individuals on the sheath; a profile was inconclusive. There was not enough DNA on the handle for a comparison. There was no blood on defendant's clothes or shoes.

Knaules and his friend testified the man who stabbed Knaules was different than the man with whom Knaules had fought.

A psychology professor testified for the defense about the problems with eyewitness identification. He testified that accuracy is greatly compromised at the distance Marinovich was from the fight. Also, focusing on multiple targets and on persons of a different race reduces accuracy.

DISCUSSION

I

Prosecutorial Misconduct

Defendant first contends the People committed misconduct by comparing the trial to a jigsaw puzzle in opening statement. Defendant labels the comparison misconduct, arguing that it undermined both the constitutional requirement that guilt be

proven beyond a reasonable doubt and the presumption of innocence, because it suggested defendant's guilt was a foregone conclusion. He contends any failure to object was ineffective assistance of counsel.

A. Forfeiture

The People began their opening statement by explaining the purpose of an opening statement, comparing it to the picture on a jigsaw puzzle box. Defendant, through counsel, raised no objection. By failing to object, defendant has forfeited his challenge to statements made during the People's opening statement. (*People v. Foster* (2010) 50 Cal.4th 1301, 1352.)

However, because defendant also argues his counsel was ineffective in failing to object to the People's analogy, we reach the merits immediately *post*.

B. Jigsaw Puzzle Analogy

In the disputed portion of their opening statement, the People told the jury: "Now, the purpose of the opening statement, it's kind of like when you are doing a jigsaw puzzle and you are looking at the box to see what the end product is going to be. [¶] All the witnesses that come in are like the pieces of the puzzle that at the conclusion are going to put together the entire picture of what happened in the early morning hours of January 9th."

Defendant relies on *People v. Katzenberger* (2009) 178 Cal.App.4th 1260 (*Katzenberger*). In *Katzenberger*, the prosecutor used a Power Point presentation in closing argument to illustrate the reasonable doubt standard. The presentation

consisted of eight puzzle pieces forming the Statue of Liberty. When the first six pieces came on the screen, the prosecutor argued it was possible to know what was depicted beyond a reasonable doubt. (*Katzenberger, supra*, 178 Cal.App.4th at pp. 1262, 1264.) This court found the use of the presentation was misconduct. (*Katzenberger, supra*, at p. 1268.)

We found two problems with the use of jigsaw puzzle presentation. First, it suggested the reasonable doubt standard could be met by a few pieces of evidence, inviting the jury to guess or jump to a conclusion; second, the argument improperly suggested a quantitative measure of reasonable doubt.

(*Katzenberger, supra*, 178 Cal.App.4th at p. 1267.) "The prosecutor's use of an easily recognizable iconic image along with the suggestion of a quantitative measure of reasonable doubt combined to convey an impression of a lesser standard of proof than the constitutionally required standard of proof beyond a reasonable doubt." (*Katzenberger, supra*, at p. 1268.)

We find no comparable problems with the use a jigsaw puzzle analogy here. The People were not arguing what amount of evidence was sufficient to meet the reasonable doubt standard. Indeed, the People were not *arguing* at all, but only *describing* the purpose of an opening statement. "The purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present, and the manner in which the evidence and reasonable inferences relate to the prosecution's theory of the case. [Citation.]" (*People v. Millwee* (1998) 18 Cal.4th 96, 137.) "The function of an opening statement is not

only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Dennis* (1998) 17 Cal.4th 468, 518.)

In its opening statement, the People may properly predict that the evidence presented at trial will show the defendant is guilty. Here, the prosecutor did not invite the jury to jump to conclusions, but stated only what he believed the evidence would show--a completed picture of what happened. Moreover, the trial court repeatedly admonished the jury about the importance of keeping an open mind until the conclusion of the evidence.

Defendant next contends the analogy improperly compared the jury's deliberative process to the everyday activity of completing a jigsaw puzzle. "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. . . . But in the decision of a criminal case involving life or liberty, something further is required." (*People v. Brannon* (1873) 47 Cal. 96, 97.) Courts have "strongly disapproved arguments suggesting the reasonable doubt standard is used in daily life to decide such questions as whether to change lanes or marry." (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.)

"A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law

only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, it is not reasonably probable that the jury understood the People’s opening statement to compare jury deliberations on the question of guilt to the everyday act of doing a puzzle or to signal that the reasonable doubt standard is one applied to everyday affairs. In the remainder of his opening statement, the prosecutor outlined what the witnesses would testify to and ended with, “at the conclusion of this case, I am going to ask you to hold him accountable for what he did that night.” There was no mention of the reasonable doubt standard. There was no misconduct.

C. Ineffective Assistance of Counsel

We need not consider defendant’s claim of ineffective assistance of counsel because we have found no prosecutorial misconduct. “Trial counsel is not required to make futile objections, advance meritless arguments or undertake useless procedural challenges merely to create a record impregnable to assault for claimed inadequacy of counsel.” (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

II

Flight Instruction

Defendant contends the trial court erred in instructing the jury it could consider defendant's flight as consciousness of guilt.² At trial, defense counsel objected to the instruction, contending there was no evidence of flight as defendant merely walked away while others were dispersing.

In *People v. Anjell* (1979) 100 Cal.App.3d 189, at page 199, the court stated: "The fact that the perpetrators fled the scene of the crime cannot warrant an instruction on flight where identity is a contested issue." In *People v. Batey* (1989) 213 Cal.App.3d 582 (*Batey*), this court found that statement dictum and declined to follow it. Instead, we held: "A flight instruction is appropriate where there is substantial evidence of flight by the defendant apart from his identification as the perpetrator." (*Batey, supra*, 213 Cal.App.3d at p. 587.) Relying on *Batey*, defendant contends that here there was no evidence of defendant's flight apart from his identification as the one who stabbed Knaules.

Our Supreme Court has rejected the rule that a flight instruction is error when identity is a contested issue, disapproving *Anjell* and its progeny on this point. (*People v.*

² The instruction reads: "If the defendant 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 tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant tried to flee cannot prove guilt by itself."

Mason (1991) 52 Cal.3d 909, 943, fn. 13 (*Mason*.) "If there is evidence identifying the person who fled as the defendant, and if such evidence 'is relied upon as tending to show guilt,' then it is proper to instruct on flight." (*Mason, supra*, 52 Cal.3d at p. 943.)

In general, 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. [Citations.]" (*People v. Ray* (1996) 13 Cal.4th 313, 345.) There was such evidence here. Marinovich testified he saw defendant, in the black jacket and bomber hat, sprint or jog towards Watt Avenue. Conroy testified defendant and his companion were walking away quickly, but they were trying to appear casual. Under the instruction, the jury was permitted to decide if there was evidence of flight, and if so, what weight to give that evidence. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) There was no error in so instructing.

III

Booking and Jail Classification Fees

Defendant contends the trial court erred in imposing criminal justice administration fees without a finding of an ability to pay or that the fees reflected actual costs.

At sentencing, defendant (through counsel) asked the trial court to impose the minimum restitution fine of \$200, given his lengthy prison sentence. The trial court declined. Instead, it followed the statutory formula and fixed the restitution fine at \$1,000, stating: "I find that he is able to pay the fine out of

prison earnings. He is able-bodied." Defendant does not challenge the restitution fine or the finding of his ability to pay it.

The court then imposed other fines and fees without objection by defendant. On appeal, defendant challenges two: the \$287.78 main jail booking fee and the \$59.23 main jail classification fee. He contends the trial court failed to make a finding that he had the ability to pay these fees and failed to find the amounts reflected the actual administrative costs.

The parties disagree under what statutory authority these fees were imposed as the trial court did not cite any statutory bases. The probation report cited to Government Code section 29550.2.³ The People contend that the applicable statute is Government Code section 29550 and under subdivisions (c) and (d) of that statute, the fees were discretionary and did not require

³ Government Code section 29550.2 provides in relevant part: "Any person booked into a county jail pursuant to any arrest by any governmental entity not specified in Section 29550 or 29550.1 is subject to a criminal justice administration fee for administration costs incurred in conjunction with the arresting and booking if the person is convicted of any criminal offense relating to the arrest and booking. The fee which the county is entitled to recover pursuant to this subdivision *shall not exceed the actual administrative costs*, as defined in subdivision (c). . . . *If the person has the ability to pay*, a judgment of conviction shall contain an order for payment of the amount of the criminal justice administration fee by the convicted person, . . ." (Italics added.) Subdivision (c) of the same section authorizes fees for booking and classification while in jail.

a finding of an ability to pay.⁴ In response, defendant raises an equal protection claim for the first time in his reply brief.

We decline to reach any of these disputed issues, because we hold any challenge to the amount of these fees and the sufficiency of the evidence of defendant's ability to pay them has been forfeited by defendant's failure to object below. This court has previously held that if a defendant does not object in the trial court to the imposition of a fee or fine, the issue is forfeited. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371 [crime prevention fine—Pen. Code, § 1202.5, subd. (a)]; *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [jail booking fee—Gov. Code, § 29550.2]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468–1469 (*Gibson*) [restitution fine—Gov. Code, former § 13967, subd. (a).) We have applied the forfeiture rule even when the defendant claims on appeal that there is not sufficient

⁴ Government Code section 29550, subdivision (c) provides: "Any county whose officer or agent arrests a person is entitled to recover from the arrested person a criminal justice administration fee for administrative costs it incurs in conjunction with the arrest if the person is convicted of any criminal offense related to the arrest, whether or not it is the offense for which the person was originally booked." "A judgment of conviction *may* impose an order for payment of the amount of the criminal justice administration fee by the convicted person . . ." (Gov. Code, § 29550, subd. (d)(1).) "The court *shall*, as a condition of probation, order the convicted person, *based on his or her ability to pay*, to reimburse the county for the criminal justice administration fee, including applicable overhead costs." (Gov. Code, § 29550, subd. (d)(2).) (Italics added.)

evidence to support the imposition of the fine or fee. (*Gibson, supra*, 27 Cal.App.4th at pp. 1468-1469.)

The Sixth Appellate District, however, has concluded that appeals challenging the imposition of fines and fees based on claims of insufficient evidence "do not require assertion in the court below to be preserved on appeal." (*People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397, citing *People v. Viray* (2005) 134 Cal.App.4th 1186, 1217.) This issue is currently before the California Supreme Court. (See *People v. McCullough* (2011) (formerly at) 193 Cal.App.4th 864, review granted on June 29, 2011, S192513.)

Until our Supreme Court issues further guidance, we continue to adhere to our holding in *Gibson*--that a failure to object to a fee or fine in the trial court forfeits the right to contest the fee or fine on appeal, even where the statute contemplates a judicial finding of ability to pay and the defendant challenges the sufficiency of the evidence to support such a finding. (*Gibson, supra*, 27 Cal.App.4th at pp. 1467, 1468-1469.) "As a matter of fairness to the trial court, a defendant should not be permitted to assert for the first time on appeal a procedural defect in imposition of a restitution fine, i.e., the trial court's alleged failure to consider defendant's ability to pay the fine. [Citation.] Rather, a defendant must make a timely objection in the trial court in order to give that court an opportunity to correct the error; failure to object should preclude reversal of the order on appeal." (*Gibson, supra*, at p. 1468.) Requiring an objection

in the sentencing court imposes no undue burden on defendant who was given notice of the fees in the probation report and judicial economy demands application of the forfeiture rule. (*Id.* at pp. 1468-1469.)

Defendant's failure to raise the issue of his ability to pay or the justification of the amount of the main jail classification fee and main jail booking fee in the trial court precludes review for the first time on appeal.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment that includes the statutory bases for all imposed fines and fees, and to forward it to the California Department of Corrections and Rehabilitation.

DUARTE, J.

We concur:

RAYE, P. J.

HULL, J.