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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

DONNELL BOYCE,

Defendant and Appellant.

C069511

(Super. Ct. No. 11F00503)

A jury convicted defendant Donnell Boyce of second degree robbery, grossly negligent discharge of a firearm, possession of a firearm by a convicted felon, and assault with a semiautomatic firearm. The trial court denied defendant's motion for a new trial and sentenced him to 41 years in prison.

Defendant contends (1) the trial court erred in denying his request to instruct the jury with CALCRIM No. 306 [untimely disclosure of evidence], and (2) his trial counsel rendered ineffective assistance in connection with the motion for a new trial.

We conclude (1) the trial court did not err in declining to instruct the jury regarding the prosecutor's late disclosure of a gunshot residue report because the report was disclosed a week before trial, the trial court offered to continue the trial, and the late disclosure had no effect on the trial; and (2) defendant's claim of ineffective assistance lacks merit because he has failed to show prejudice.

We will affirm the judgment.

BACKGROUND

Jose Vazquez and his nephew Teodro Montalvo Escoto (Montalvo) went to a gas station and liquor store in Sacramento. Vazquez was carrying between \$800 and \$900 on him. As Vazquez returned to his truck with the beer he purchased, a young person struck him in the face, knocking Vazquez down. The person took Vazquez's telephone, wallet and money. Additional young men joined the assault, hitting and kicking Vazquez while he was on the ground. Another person pointed a gun at Montalvo, demanded Montalvo's money and took Montalvo's wallet.

When the assailants left, the robber with the gun fired it into the air. Montalvo ran into the store and the gunman fired another shot.

Theron Jiles was at the gas station and heard several shots fired. He looked up and saw a man walking down the street yelling and shooting into the air. Jiles could see the height and build of the shooter, but not his face. The shooter was tall, wore baggy pants and a dark "hoodie," and wore his hair in dreadlocks. The shooter fired more shots as he walked down the street.

Private security officer Casey Council was in the vicinity and heard the gunfire. Council drove slowly, with no lights on, in the direction of the shots and eventually saw some people "scattering at a jogging pace." As he reached the area of the gas station, he heard more shots. Still concealed, Council saw a group, including defendant, walking toward him. Defendant fired five or six more shots as he continued to walk.

Council radioed for assistance and then illuminated defendant with his car-mounted spotlight. Council saw a semiautomatic handgun in defendant's hand. Defendant fled into a field and ultimately tried to hide next to a building. Council approached him and ordered him to raise his hands. Defendant no longer had the gun in his hand. By that time sheriff's deputies arrived and took defendant into custody. The semiautomatic firearm was found where defendant had been running.

Jiles identified defendant as the shooter based on defendant's height, clothes and hair. Council also identified defendant as the shooter. Vazquez and Montalvo were intoxicated at the time and could not make an in-field identification.

Six shell casings from the semiautomatic firearm were located at the scene of the first shooting at the gas station. No fingerprints were found on the gun, but gunshot residue was found on defendant's hands.

Additional facts are included in the discussion as relevant to defendant's contentions on appeal.

A jury convicted defendant of two counts of second degree robbery (Pen. Code,¹ §§ 211, 212.5, subd. (c)--counts one & two), grossly negligent discharge of a firearm (§ 246.3--count three), possession of a firearm by a convicted felon (former § 12021, subd. (a)(1)--count four), and assault with a semiautomatic firearm (§ 245, subd. (b)--count five). The jury found that defendant personally used (§§ 12022.53, subd. (b), 12022.5, subd. (a)), and personally and intentionally discharged (§ 12022.53, subd. (c)), a handgun in the commission of counts one and two; and that defendant personally used a handgun in the commission of count five (§ 12022.5, subds. (a) & (d)). The trial court found that defendant had a prior serious felony conviction. (§§ 667, 1170.12, 1192.7, subd. (c).) The trial court sentenced defendant to 41 years in prison.

¹ Undesignated statutory references are to the Penal Code.

DISCUSSION

I

Defendant contends the trial court erred when it refused his request to instruct the jury with CALCRIM No. 306 [untimely disclosure of evidence].² Defendant requested the instruction based on the prosecutor's late disclosure of a gunshot residue report.

A

The trial court ordered the prosecutor to provide various discovery items to defendant, including forensic test results, reports, witness lists and witness statements. The deadline for disclosure was about a month before trial. After the discovery deadline and shortly before trial, defendant filed a trial brief and motions in limine seeking to exclude testimony concerning gunshot residue found on defendant, because the defense did not receive discovery of gunshot residue test results until a week before trial in violation of the trial court's discovery order. Defendant argued that the late disclosure put him in the position of either giving up his statutory speedy trial right or going to trial without adequate time to independently review the evidence. The prosecutor responded that she provided the test results the day after she received them, and that a backlog of work at the laboratory caused the delay.

The trial court found that the prosecution failed to provide the discovery within the ordered time, but that the discovery was provided a week prior to commencement of trial. After noting that exclusion of the evidence would be the "most prejudicial and most extreme" sanction available, the trial court decided instead to grant the defense a

² CALCRIM No. 306 provides in relevant part: "Both the People and the defense must disclose their evidence to the other side before trial, within the time limits set by law. Failure to follow this rule may deny the other side the chance to produce all relevant evidence, to counter opposing evidence, or to receive a fair trial. [¶] An attorney for the People failed to disclose [describe evidence that was not disclosed] [within the legal time period]. [¶] In evaluating the weight and significance of that evidence, you may consider the effect, if any, of that late disclosure."

continuance if one were requested. Defense counsel reiterated her objection to having to “choose between [defendant’s] constitutional rights.” The trial court responded that the trial had not started, no jury had been sworn, no defense strategy had been revealed, and no prejudice appeared.

Defense counsel requested, “[a]s a compromise,” that the trial court instruct the jury regarding the late disclosure. The prosecutor objected that the instruction would imply there had been bad faith by the prosecution, which everyone agreed was not the case. The trial court took the matter under submission, deferring the question of the jury instruction until later in the trial when the importance of the evidence could be determined.

At trial, a criminalist testified that gunshot residue particles were found on the front and back of both of defendant’s hands.

Near the conclusion of trial, when jury instructions were being discussed outside the jury’s presence, defense counsel renewed her request that the jury be instructed with CALCRIM No. 306. The trial court again acknowledged the prosecution’s failure to comply with the discovery deadline but noted that the defense received the evidence a week before trial and the trial court had been willing to grant a continuance. The trial court noted that the defense cross-examination of the criminalist had been “very effective,” giving the defense points it could argue. The trial court found that the late disclosure had not prejudiced the defense. The trial court said the instruction would be “telling the jury they can consider [the] effect” of the late disclosure, but the trial court did not “really see the effect.” The trial court declined to give the requested instruction.

B

“Section 1054.1 (the reciprocal-discovery statute) ‘ . . . requires the prosecution to disclose to the defense . . . certain categories of evidence “in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies.” ’ [Citation.] Evidence subject to disclosure includes . . .

‘[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged’ ‘Absent good cause, such evidence must be disclosed at least 30 days before trial, or immediately if discovered or obtained within 30 days of trial. [Citation.]’ [Citation.] [¶] Upon a showing both that the defense complied with the informal discovery procedures provided by the statute, and that the prosecutor has not complied with section 1054.1, a trial court ‘may make any order necessary to enforce the provisions’ of the statute, ‘including, but not limited to, immediate disclosure, . . . continuance of the matter, or any other lawful order.’ [Citation.] The court may also ‘advise the jury of any failure or refusal to disclose and of any untimely disclosure.’ [Citation.] A violation of section 1054.1 is subject to the harmless-error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 279-280.)

The record amply supports the trial court’s conclusion that no prejudice arose from the late disclosure. The defense had the gunshot residue report a week before trial, and the trial court was willing to grant a further continuance for the defense to review the evidence. The prosecutor’s failure to meet the discovery deadline did not prevent the defense from mounting an effective cross-examination of the criminalist.

Defendant argues the criminalist’s testimony about the gunshot residue evidence was “highly prejudicial” because the prosecutor relied on that evidence during her summation. But the issue presented on appeal is whether defendant was prejudiced by the trial court’s refusal to instruct the jury with CALCRIM No. 306, which would have directed the jury to consider the effect, if any, of the late disclosure. Contrary to defendant’s argument, the trial court found that it did not observe any effect of the late disclosure in the trial. Thus, as a matter of state law, the instruction was properly refused.

In any event, given the evidence that defendant committed the offenses for which he was convicted, it is not reasonably probable that he could have fared any better had the

instruction been given. (*People v. Verdugo, supra*, 50 Cal.4th at pp. 279-280; *People v. Watson, supra*, 46 Cal.2d at p. 836.)

Moreover, defendant's claim fares no better under the federal Constitution. He contends the trial court refused the instruction "because of defense counsel's 'effective' cross-examination of the criminalist who testified about the [gunshot residue] results." But the trial court refused the instruction because the predicate for the instruction--some "effect" from late disclosure--had not been shown. Defendant argues the trial court's conclusion was speculative, but he fails in his burden to show an effect upon which the jury instruction could have operated. Beyond a reasonable doubt, defendant would not have fared any better had CALCRIM No. 306 been given. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 710-711].)

II

Defendant also contends his trial counsel rendered ineffective assistance in connection with his motion for a new trial.

A

After the jury rendered its verdicts, the trial court instructed the jurors: "Now that the case is over, you may choose whether or not to discuss the case and your deliberations with anyone. I remind you that under California law, you must wait at least 90 days before negotiating or agreeing to accept any payment for information about the case."

After the other jurors departed, the foreman, a Sacramento Bee newspaper reporter, asked the trial court if he could keep his notes from the trial. The trial court said that would be acceptable, "but I also want to just make sure that you . . . understand . . . where I instructed that the law forbids you from accepting any payment for any information about this case within 90 days."

The foreman indicated that he understood and stated: "I don't anticipate writing about it, but for philosophical reasons, I don't think I should have to give up my notes."

The next day the foreman published an article or opinion piece on his newspaper's website. The article stated, among other things, that after the trial the foreman researched defendant's background and learned about defendant's criminal history. The website noted that the foreman has been "a Bee reporter since 2000."

Several e-mails were exchanged between defense counsel and the trial court. Defense counsel asked the trial court to schedule an order to show cause (OSC) hearing for the juror. The trial court declined.

Defendant filed a motion for a new trial, claiming the foreman "may have engaged in misconduct warranting a new trial." Although the foreman's article said his research on defendant's background occurred after the trial had concluded, the new trial motion speculated that the foreman conducted research during deliberations and thus had "improperly received information about [defendant's] prior criminal history during the trial."

The trial court denied the motion for a new trial, stating "there's been absolutely no evidence to show that the juror committed misconduct." The trial court added that to support a request for an OSC hearing, defense counsel had to file a sworn declaration.

B

Defendant claims his trial counsel rendered ineffective assistance regarding the motion for new trial. He claims the facts allow reasonable inferences that (1) contrary to his statement to the trial court, the foreman anticipated writing about the trial, (2) the foreman sought to keep his notes for that purpose, and (3) as a Bee reporter since 2000, the foreman was paid for his article in violation of the trial court's instruction. Defendant claims the article disclosed the foreman's actual bias against him, based on the article's concluding comment: "This was [defendant's] first jury trial--mine as well. I hope we never meet again."

In addition, defendant claims defense counsel did not adequately investigate the basis for the new trial motion and did not properly prepare the motion because she failed

to provide the trial court with a sworn declaration and formal application for an OSC to compel the juror to attend the hearing on the new trial motion, as required by Code of Civil Procedure sections 206 and 237.

“ ‘ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citation.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” [Citation.]’ ” (*People v. Avena* (1996) 13 Cal.4th 394, 418; footnote omitted.)

Defendant has failed to demonstrate prejudice. Even if defense counsel rendered deficient performance when she failed to submit a sworn affidavit, there is no showing of what such an affidavit would have stated or what the foreman’s testimony at an ensuing hearing would have been. As the Attorney General suggests, the foreman might have stated that, although he had no preconceived feelings about the case and did not anticipate writing about it, his feelings changed following the conclusion of the trial when, freed from the court’s admonition, he discovered defendant’s criminal history. The foreman could have said that, contrary to defendant’s suggested inference, the newspaper did not pay him for the article he wrote.

Defendant dismisses these possibilities as “blatant speculation.” However, defendant has the burden to *prove* prejudice; the Attorney General has no burden to prove its absence. (*People v. Avena, supra*, 13 Cal.4th at p. 418.)

Because defendant's claim of juror misconduct rests on nothing more than speculation, there is no basis to presume that the misconduct resulted in prejudice. (See *In re Hitchings* (1993) 6 Cal.4th 97, 119-120.)

DISPOSITION

The judgment is affirmed.

MAURO, J.

We concur:

ROBIE, Acting P. J.

HOCH, J.