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

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS HURTADO,

Defendant and Appellant.

C069580

(Super. Ct. No. 10F08189)

A jury convicted defendant Luis Hurtado of willful, deliberate, and premeditated attempted murder (Pen. Code, §§ 187, subd. (a), 664—count one);¹ corporal injury to a spouse (§ 273.5, subd. (a)—count two); and aggravated mayhem (§ 205—count three). The jury found that defendant personally caused great bodily injury under circumstances of domestic violence (former § 12022.7, subd. (e)) and personally used a dangerous and deadly weapon (former § 12022, subd. (b)(1)) in committing the offenses.

¹ Undesignated statutory references are to the Penal Code.

Sentenced to seven years to life in state prison, defendant appeals. Defendant raises prosecutorial misconduct, ineffective assistance of counsel, and challenges the sufficiency of the evidence. We shall affirm.

FACTUAL BACKGROUND

Defendant and Irma Guerra had been married for 11 years, but were separated. They remained “good friends” and did not have sex. Guerra lived with her two daughters in an apartment on Rockingham Drive. For a week, defendant had been sleeping on the couch, but did not live there.

In the mid-afternoon on December 14, 2010, defendant arrived at the apartment, smelling of alcohol. He continued drinking beer. About 10:00 p.m. Guerra’s boyfriend, Augustine Lopez, and his boss, Jesus Ramirez, arrived at the apartment. About a week before, defendant had seen Lopez leave Guerra’s room in the morning. Shortly after Lopez and Ramirez arrived, defendant became angry and called Guerra a “bitch” in front of her daughters. Guerra told defendant to leave when defendant said something to her daughters. Defendant then started arguing with Lopez. Ramirez left when the argument began. Although Guerra threatened to call 911, defendant refused to leave. Defendant’s argument with Lopez became physical and defendant punched Guerra in the face when she intervened. Defendant immediately apologized. Guerra told them to take the fight outside and both defendant and Lopez walked out the door.

Using Lopez’s phone, Guerra dialed 911 and walked outside. She stood or sat on the stairs as she spoke on the phone. Defendant crept up behind her with a knife, pulled her head back by the hair, exposing her neck, and began “sawing” and “stabbing” at her neck. She dropped the phone and screamed. As defendant started to drag Guerra by her hair up the stairs, Lopez hit defendant in the head a few times with a car stereo as Guerra struggled. Guerra finally escaped defendant’s hold.

Guerra fled to the parking lot where she collapsed, losing consciousness. Defendant had cut her with the knife several times. Lopez assaulted defendant on the stairs and Ramirez and Armando Garcia, a neighbor, assisted Guerra.

About 11:00 p.m., deputies arrived and detained defendant. He seemed calm and offered no resistance. He had an odor of alcohol on his breath, blood on his clothing, and minor wounds on his nose and right palm. Ramirez told a deputy that defendant attacked Guerra from behind although Ramirez denied saying so at the time of trial when he was in custody on an unrelated matter.

Guerra was transported to the hospital where she stayed for three days. She suffered a complex laceration that extended along the jaw line from the right of her chin to just below her earlobe, slicing through the skin and several layers of tissue and missing the carotid artery by about an inch. The injury required several hours of surgery. She also suffered a cut on the back of her head and a laceration from her lip to her ear. Guerra told deputies that defendant had cut her throat.

A deputy found a knife on the concrete outside the apartment directly beneath Guerra's apartment. The knife came from Guerra's kitchen. A smaller knife was found on the kitchen floor.

Guerra admitted that she had lied at the preliminary hearing when she testified that defendant was not staying at her apartment. She explained that she had feared that her daughters would be removed from her care. At trial, she received immunity from prosecution for perjury based on her preliminary hearing testimony.

We address the procedural issues raised by defendant in the Discussion that follows.

DISCUSSION

I. Alleged Prosecutorial Misconduct

Defendant contends the prosecutor committed misconduct during closing argument. Defense counsel did not object; thus, defendant has forfeited this claim. (*People v. Parson* (2008) 44 Cal.4th 332, 359; *People v. Ghent* (1987) 43 Cal.3d 739, 762.) Since defendant also contends defense counsel rendered ineffective assistance by failing to object, we reach the merits.

A. Background

In his opening argument, the prosecutor stated:

“[Defendant] has that right [to a jury trial], and he’s exercised it, and he said ‘not guilty.’ And he’s *presumed innocent until the case begins, and it’s that simple.* [¶] But *once the evidence has come out, you can all see that he is guilty.* He isn’t not guilty. [¶] I want to talk to you about the presumption of innocence that you heard about. It’s another very important principle that our Constitution provides that means that you can’t have any prejudice against the guy because he’s been charged with a crime. You can’t assume anything just because he’s sitting there at counsel table with the defense attorney with him and he’s been charged with this. You must presume that he is innocent because you haven’t heard anything up to that point. [¶] *Once the evidence starts, once the facts come piling up, it erodes that presumption of innocence that he has, and what you’re left with is a guilty man.* [¶] There is another very important principle: That’s proof beyond a reasonable doubt. [¶] I would have to prove to you, proof beyond a reasonable doubt to convict that man. [¶] And the definition that the judge just read to you is that that proof must be that which leaves you with an abiding conviction that the charge is true. [¶] *And the way that I like to look at it and explain it is that, Is there a reasonable alternative based on all of the evidence that points to his innocence?* [¶] *Based on everything you heard, Is there a reasonable situation that you all can put your finger on*

and say, *You know what? This is it.* He’s innocent, based on everything I heard. [¶] If you can’t do that, the evidence stands as it is, and he’s guilty. [¶] I call this convicting evidence; that [*sic*] what you heard in this case. You make your own opinions, obviously.” (Italics added.) Defense counsel did not object.

B. Analysis

Defendant contends the prosecutor’s argument misstated his burden of proof and the presumption of innocence and that defense counsel rendered ineffective assistance in failing to object.

“Under California law, a prosecutor commits reversible misconduct if he or she makes use of ‘deceptive or reprehensible methods’ when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ‘so infected the trial with unfairness as to make the resulting conviction a denial of due process.’ ” (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

“[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements [citation].” (*People v. Marshall* (1996) 13 Cal.4th 799, 831.)

“In order to preserve a claim of [prosecutorial] misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.” (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328.) “This general rule, however, does not apply if a

defendant's objection or request for admonition would have been futile or would not have cured the harm caused by the misconduct; nor does it apply when the trial court promptly overrules an objection and the defendant has no opportunity to request an admonition." (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.)

Here, defense counsel did not object. Had counsel objected, an admonition would have cured any error. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36.) Defendant has not shown that an exception applies. The issue would be forfeited but for the fact defendant raises ineffective assistance of counsel. To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) That is, "there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." (*People v. Kelly* (1992) 1 Cal.4th 495, 520.)

In not objecting, defense counsel's performance was not deficient. It is not reasonably probable that the jury understood the prosecutor's opening argument as placing the burden on defendant to prove his innocence. The court had previously instructed the jury thoroughly and correctly on the meaning of reasonable doubt. And the prosecutor prefaced his now allegedly objectionable comments with the instruction's definition of proof beyond a reasonable doubt as that "which leaves you with an abiding conviction that the charge is true" and again referred to his "burden of proving the case beyond a reasonable doubt" toward the end of his closing argument. Then again, by arguing that defendant was guilty if the jurors could not identify and agree upon a reasonable theory of innocence, the prosecutor arguably attempted to lessen his burden. (See *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1351-1353.) Defense counsel chose

to address the issue in her closing argument. Defense counsel discussed the presumption of innocence and reasonable doubt at length, correcting the prosecutor's misinterpretation. (See *People v. Martinez* (2010) 47 Cal.4th 911, 957 [without objecting to prosecutor's allegedly improper argument, defense counsel responded effectively during his closing argument].)

The record provides ample support for a reasonable tactical decision not to object to the prosecutor's allegedly improper argument and to address the same during her closing argument. “ ‘Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” ’ [Citations.] ‘[W]e accord great deference to counsel's tactical decisions’ [citation], and we have explained that ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ [citation]. ‘Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.’ ” (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Defense counsel's decision should not be second-guessed. The fact that the prosecutor did not make the same improper argument in his rebuttal shows that defense counsel's tactic was effective. Defendant has failed to demonstrate that counsel's performance was deficient. Thus, we do not reach prejudice.

II. Sufficiency of the Evidence of Attempted Murder

Defendant contends insufficient evidence supports his conviction for attempted murder, specifically his intent to kill. We disagree.

Attempted murder “requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623; *People v. Perez* (2010) 50 Cal.4th 222, 229.)

“One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he [acts]. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer’s actions and words. Whether a defendant possessed the requisite intent to kill is, of course, a question for the trier of fact.” (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Here, defendant crept up on Guerra from behind, pulled her head back by her hair, exposing her neck, and began “stabbing” and “sawing” at her neck. Guerra escaped when Lopez intervened. Defendant’s acts showed a specific intent to kill and he committed a direct act toward accomplishing that killing. We reject defendant’s arguments to the contrary.

Defendant argues that there was no “indication that [defendant] . . . ‘desire[d]’ Guerra’s death” Defendant’s conduct in a fit of jealous rage is consistent with desiring Guerra’s death. (See *People v. Avila* (2009) 46 Cal.4th 680, 701-702 [substantial evidence of the defendant’s intent to kill where the defendant “repeatedly attempted to stab” an “unarmed and trapped victim, and succeeded in stabbing him in the arm and leg”]; *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552 [intent to kill shown in part by evidence that the defendant repeatedly stabbed unarmed victim in an unprovoked attack].)

Defendant argues that he missed a vital organ or blood vessel, so he lacked intent to kill. “The fact that [defendant] missed [the victim’s] heart and lungs was fortuitous rather than indicative of the absence of an intent to kill.” (*People v. Gonzalez, supra*, 126 Cal.App.4th at p. 1552; see also *People v. Avila, supra*, 46 Cal.4th at p. 702 [“a defendant may properly be convicted of attempted murder when no injury results”]; *People v. Lashley, supra*, 1 Cal.App.4th at p. 945 [fact shooter fired only once and then abandoned efforts out of necessity or fear, and victim’s escape from death due to “poor

attack was deliberately and reflectively conceived in advance.”].) There was evidence of motive. Defendant and Guerra were married and she allowed her “boyfriend” into her home. Defendant called Guerra a “bitch” shortly before attacking her. (*People v. Barthleman* (1898) 120 Cal. 7, 14 [in murder prosecution, “language expressing hostility to and dislike of the deceased” admissible “in some degree to show malice and motive”].)

Defendant suggests that his attack on Guerra was “a rash, spontaneous reaction to the situation.” Although defendant may have arrived at his decision to kill Guerra in a short period of time, it does not necessarily mean he acted on a rash impulse. A jury is free to draw its own reasonable conclusions but the evidence supports the jury’s express finding of deliberation and premeditation. Defendant obtained a knife, crept up behind Guerra, and slashed repeatedly at Guerra’s face and neck while she was vulnerable and unarmed. A jury could reasonably infer from the manner in which the crime took place that defendant acted on a “ ‘preexisting reflection rather than unconsidered or rash impulse.’ ” (*People v. Sanchez* (1995) 12 Cal.4th 1, 33, disapproved on a different ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

Defendant argues that had he planned to kill Guerra, “he had the means at his disposal—he simply could have used the knife for those purposes. Nothing external had impeded him from doing so.” But for Lopez’s intervention, defendant may have been successful. Substantial evidence supports the jury’s express finding.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

MURRAY, J.