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

THE PEOPLE,

Plaintiff and Respondent,

v.

JAYSON ALLEN MAGLAYA,

Defendant and Appellant.

C075803

(Super. Ct. No. TF12000453)

A jury convicted defendant Jayson Allen Maglaya of attempted murder and assault with a deadly weapon and found that he had two prior serious or violent felony convictions. The trial court sentenced defendant to 28 years to life in prison.

Defendant now contends the prosecutor engaged in prejudicial misconduct during closing argument. Acknowledging that his trial counsel did not object to the alleged

misconduct, defendant argues an objection would have been futile. In the alternative he claims his trial counsel provided ineffective assistance.

We conclude objection was not futile and defendant's contentions are forfeited. Regarding defendant's alternative claims of ineffective assistance, we conclude he has not established prejudice. We will affirm the judgment.

BACKGROUND

Defendant worked as a produce clerk and bagger for a grocery store in July 2012. The grocery store issued him a box cutter in connection with his duties.

On July 15, 2012, the grocery store suspended defendant due to an incident in the store. Later that day, defendant saw an acquaintance named Joshua Kelgard at a shopping center. The two spoke cordially for a few minutes, but Kelgard was uncomfortable because he was a protected party in a restraining order against defendant. Kelgard's ex-wife, who was involved in a relationship with defendant's brother at the time, had filed for the restraining order three to four years earlier. Defendant and Kelgard ended their conversation, shook hands, and parted ways.

Kelgard met his friend Ashley Nachand and they walked to get something to eat. As Kelgard and Nachand stood next to each other at a deli counter, defendant approached them from behind, stepped between them, put his hand on Kelgard's left shoulder, and used a sharp instrument to strike him in the chest and face. Kelgard ran away from defendant and defendant fled the grocery store.

The treating physician testified that Kelgard suffered a circular stab wound to his chest and a laceration to his face. The chest wound had clean margins and no bruising. The wound had characteristics of a penetrating injury from a sharp object. The face wound was linear with no oozing. Either wound could have been life-threatening if it had penetrated deeper into the body. The injuries were not consistent with being punched, and it was unlikely that the injuries were caused by keys or a credit card. No stabbing instrument was ever recovered.

That evening, police officers found defendant hiding underneath his stepfather's deck and arrested him. Defendant spontaneously stated, "I did not stab anyone."

Against the advice of counsel, defendant testified that he did not remember going to the grocery store on the day of the incident or trying to stab Kelgard. Defendant said he liked Kelgard and had no intention of killing him. Defendant denied carrying a box cutter.

Defendant said that at the time of the stabbing he was paranoid and believed that his parents were poisoning his food. He said he observed unplugged electrical devices turning on in his presence, experienced a high-pitched ringing in his ears that may have been caused by sensitivity to electricity, noticed the presence of "condensed energy" in his neighborhood, perceived people acting in a threatening manner towards him, and perceived that people in the community were communicating in code. Defendant deciphered the code by assigning numerical values to letters of the alphabet. Defendant thought Kelgard and his friends may have been threatening him because they had put the restraining order on him.

During closing argument, the prosecutor stated: "I talked briefly in the beginning about concept [*sic*] of reasonable doubt, as well as the judge's instructions, boiled down is reasonable equals reason. Again, it does not mean beyond all doubt, it's a doubt with a reason you can attach to it. It's a reason you can explain to your fellow jurors and you can all agree on." Defense counsel did not object.

Then, during defense counsel's closing argument, defense counsel addressed the absence of a weapon: "I think we can take a look at the evidence and look at it really closely and you will find there wasn't much in the way of a weapon there; that it probably, in fact, was the box cutter that I held up. That there was a big knife there, no one found a knife, no one saw a knife, no one testified that they saw him throw a knife away, anything like that. [¶] Officers looked around his house, they looked in the vicinity, they said they looked in the bushes, no one found a sharp-edge weapon or

anything like that. [¶] I simply can't believe that my client was attempting to kill Mr. Kelgard.”

In his closing summation, the prosecutor responded: “The next thing [defense counsel] also decided to talk about was box cutters, not much of a weapon. [¶] Do you remember 9-11? Box cutters were on that plane and yet the whole plane of people did not stop there [*sic*]. [¶] . . . I want you to look at the photos of the [location] where the blood trail leads out and the trail of blood at the very end. You have to ask yourself, at that point, is it not reasonable to think that a sharp object is not used? I say that it's not.” Again, defense counsel did not object.

Then, when the prosecutor turned to a different subject, defense counsel objected and the trial court stated: “Did I mention objections during closing arguments? Let's let him finish and if that's an issue, we'll deal with it.” No objections were made at the conclusion of the closing arguments.

The jury found defendant guilty of attempted murder (Pen. Code, §§ 187, subd. (a), 664 -- count 1)¹ and assault with a deadly weapon (§ 245, subd. (a)(1) -- count 2). The jury also found true an allegation that defendant personally used a deadly and dangerous weapon in committing the attempted murder. In a bifurcated proceeding, the jury found that defendant had two prior serious or violent felony convictions. (§§ 667, subds. (b)-(i), 1170.12.) The trial court sentenced defendant to 28 years to life in prison for attempted murder, including 12 months for the weapon enhancement, and stayed the sentence for assault with a deadly weapon pursuant to section 654.

At the end of the sentencing hearing, the following discussion occurred:

“[DEFENSE COUNSEL]: Your Honor, could I make just a few additional comments?”

¹ Undesignated statutory references are to the Penal Code.

“THE COURT: Usually I get the last word, but sure if you’d like to, go ahead.

[¶] . . . [¶]

“[DEFENSE COUNSEL]: The Court also asked me to discuss with my client issues involving a motion for a new trial. My client provided three requests to me. He complained that I didn’t produce as evidence a computer, a telephone, both of which I believe are inanimate objects and would have gone nowhere in terms of a motion for a new trial. He’s also informed me that I never showed him the video that was used in the trial. I very clearly know I showed him the video. I just simply showed it to him on a much smaller screen than was available in the trial. And what I found somewhat troubling during [the prosecutor’s] closing were references to 9-1-1, which I believe were--

“THE COURT: You mean September 11th?

“[DEFENSE COUNSEL]: Exactly. 9/11, excuse me. Which I believe were improper. I didn’t, however, feel that any of those issues would raise a need for a new trial.

“THE COURT: I didn’t take action on the 9/11 argument at trial because I felt like you invited that with your description of box cutters, and his argument seemed to be responsive to a point that you had raised. So, was it proper? Probably not. Was it prejudicial in that context? I didn’t believe so at the time. I still don’t.

“[DEFENSE COUNSEL]: I’ll let the Appellate Court make that decision, because my reading of some of the case law is it just shouldn’t have happened.

“THE COURT: Sure. Well, it’s first my job to make the determination which I just got through making.

“[DEFENSE COUNSEL]: And I understand.

“THE COURT: And it’s the Court of Appeals’ job to decide if I’m right or wrong on that score.

“[DEFENSE COUNSEL]: And I understand that, and I’m not arguing past that.

“[THE PROSECUTOR]: If I could make a comment on that?

“THE COURT: You may.

“[THE PROSECUTOR]: The People at this time would respectfully disagree with the Court that it was improper. There were no inflammatory statements regarding that -- September 11th being anything other than the fact that I was rebutting [defense counsel’s] argument that box cutters were not dangerous. It was one -- it was a sentence. Nothing else. I did not have any kind of descriptive verbs that may have caused any kind of inflammatory or undue prejudice towards the Defendant. If that’s the Court’s determination that it was improper, I would disagree with that.

“THE COURT: Well, there are certain things that are exceptionally powerful that we have to be very careful if and when we invoke them. The holocaust, 9/11. There are others, but those are the two we most commonly hear about. You haven’t changed my mind that it wasn’t proper, but in the context I understand why it was done, and I didn’t deem it to be prejudicial or to require court intervention”

DISCUSSION

Defendant contends the prosecutor engaged in prejudicial misconduct during closing argument. Specifically, defendant argues it was misconduct for the prosecutor to dilute the reasonable doubt standard and to refer to September 11, 2001 (September 11 or 9/11). Acknowledging that his trial counsel did not object to the alleged misconduct, defendant argues an objection would have been futile. In the alternative he claims his trial counsel provided ineffective assistance.

“A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such ‘ “unfairness as to make the resulting conviction a denial of due process.” ’ (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [91 L.Ed.2d 144, 157]; see *People v. Cash* (2002) 28 Cal.4th 703, 733.) Under state law, a prosecutor who uses deceptive or reprehensible methods commits misconduct even when those

actions do not result in a fundamentally unfair trial.” (*People v. Cook* (2006) 39 Cal.4th 566, 606; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 923, disapproved on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 920; *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) A prosecutor may commit misconduct by making an inappropriate analogy to the events of September 11. (*People v. Zurinaga* (2007) 148 Cal.App.4th 1248, 1254-1260 (*Zurinaga*).)

However, “[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” (*People v. Thornton* (2007) 41 Cal.4th 391, 454.) Nonetheless, “[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if ‘ “an admonition would not have cured the harm caused by the misconduct.” ’ [Citations.]” (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Moreover, a defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel’s inaction violated the defendant’s constitutional right to the effective assistance of counsel. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) “ ‘In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel’s performance was deficient because it “fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.” [Citations.] Unless a defendant establishes the contrary, we will presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” [Citation.] If the record “sheds no light on why counsel acted or failed to act in the manner challenged,” an appellate claim of ineffective assistance of counsel must be rejected “unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no

satisfactory explanation.” [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” [Citation.]’ [Citation.]” (*People v. Lopez* (2008) 42 Cal.4th 960, 966 (*Lopez*).

A

Defendant contends the prosecutor committed misconduct when he said that reasonable doubt, boiled down, “equals reason.” “[I]t’s a doubt with a reason you can attach to it. It’s a reason you can explain to your fellow jurors and you can all agree on.” Defendant argues his claim is not forfeited, despite his trial counsel’s failure to object, because an objection would have been futile. He asserts that an objection would have highlighted the objectionable argument and would have given it greater prominence in the jurors’ minds.

We disagree that an objection was futile. A timely objection would have allowed the trial court to cure any harm by admonishing the jurors that the jury instructions articulate the People’s burden of proof. It would not be necessary to repeat or highlight the prosecutor’s comments. Because an objection was not futile, defendant’s contention is forfeited.

Anticipating this conclusion, defendant argues his trial counsel’s failure to object constituted ineffective assistance. The People counter that any deficiency was not prejudicial. We agree with the People that defendant has not shown prejudice.

The trial court instructed the jury consistent with CALCRIM No. 220, explaining that the People had the burden of proof beyond a reasonable doubt; that proof beyond a reasonable doubt is “proof that leaves you with an abiding conviction that the charge is true”; and that unless the evidence proved defendant guilty beyond a reasonable doubt, he was entitled to an acquittal and the jury must find him not guilty. In addition, the trial court instructed the jury consistent with CALCRIM No. 3550, stating: “It is your duty

to talk with one another and to deliberate in the jury room. You should try to agree on a verdict if you can. Each of you must decide the case for yourself, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind if you become convinced that you are wrong. But do not change your mind just because other jurors disagree with you.” Those instructions accurately defined proof beyond a reasonable doubt, required each juror to decide for his or herself whether the evidence proved the defendant guilty beyond a reasonable doubt, and emphasized that a single juror could harbor a reasonable doubt even if other jurors disagreed. Moreover, the trial court instructed the jury: “If you believe that the attorneys’ comments on the law conflict with the Court’s instructions, you must follow the Court’s instructions.” That instruction directed the jury to follow the trial court’s instructions regarding proof beyond a reasonable doubt and to disregard the prosecutor’s contrary argument.

Defendant nonetheless argues the jurors would not know to disregard the challenged comments because they would not know the prosecutor’s comments conflicted with the jury instructions. We assume, however, that jurors are intelligent persons capable of understanding and following the given jury instructions. (*People v. Mills* (1991) 1 Cal.App.4th 898, 918.)

Defendant has not established ineffective assistance of counsel because he has not shown a reasonable probability that, if his trial counsel had objected, the ultimate result would have been different. (See *Lopez, supra*, 42 Cal.4th at p. 966.)

B

Defendant further contends the prosecutor committed misconduct when he aroused the jurors’ emotions by stating during closing argument: “The next thing [defense counsel] also decided to talk about was box cutters, not much of a weapon. [¶] Do you remember 9-11? Box cutters were on that plane” The People counter that the contention is forfeited because defendant’s trial counsel did not object when the statement was made or even at the end of closing arguments. Defendant replies that the

contention is not forfeited because objection was futile. He claims the September 11 analogy was inflammatory and an objection and admonition would simply draw further attention to it. (*People v. Hill, supra*, 17 Cal.4th at p. 820.)

We disagree that an objection was futile. At sentencing, the trial court agreed the comment was improper but concluded the comment was not prejudicial. If an objection had been asserted during or at the end of closing argument, the trial court could have admonished the jury to consider only the evidence in this case. Because objection was not futile, defendant's contention is forfeited.

Anticipating this conclusion, defendant argues his trial counsel's failure to object constituted ineffective assistance. The People counter that any deficiency was not prejudicial. We agree with the People that defendant has not shown prejudice.

In *Zurinaga, supra*, 148 Cal.App.4th 1248, the defense counsel argued it was unlikely that the defendant could have committed a home invasion robbery with 10 victims. In summation, defense counsel posited: "Whoever heard of a robbery or a burglary or whatever the prosecution is trying to call it that took two hours where nobody was hurt, where nothing of significance was taken, where the so-called invaders were outmanned and outsized." (*Id.* at pp. 1250, 1254-1255.) In response, the prosecutor showed the jury a chart listing the airlines, flight numbers, departure times, and numbers of passengers and crew on each of the airplanes involved in the September 11 attacks. (*Id.* at pp. 1254-1255.) Over objection and motion for mistrial, the prosecutor argued that the September 11 attackers, in small groups of four or five, were able to take control of planes with 50 to 80 passengers. (*Id.* at p. 1256.)

The court in *Zurinaga* held that the prosecutor's reference to the September 11 attacks was not brief and was improper. (*Zurinaga, supra*, 148 Cal.App.4th at p. 1259.) The court in *Zurinaga* noted the detailed visual aid containing information beyond common public knowledge, explained that the analogy was inapt and called for speculation, and said that by analogizing to the plight of September 11 victims, the

prosecutor “improperly sought to place the jury in their shoes.” (*Id.* at pp. 1259-1260.) The court in *Zurinaga* determined that the prosecutor’s tactics were “beyond the pale” and struck “the sort of ‘foul blow’ that exceeds the legitimate bounds of advocacy.” (*Ibid.*) Nonetheless, the court concluded the prosecutor’s conduct was not prejudicial because some jurors appeared to be offended by his reference to September 11; the jurors were instructed that counsel’s arguments were not evidence and that they should not be influenced by sympathy for the victims in reaching their verdict; and the evidence of the defendants’ guilt was overwhelming. (*Id.* at p. 1260.)

Unlike in *Zurinaga*, here the prosecutor’s two-sentence reference to September 11 was brief and there was no visual aid. But like in *Zurinaga*, the trial court here instructed the jury, consistent with CALCRIM Nos. 104 and 200, that nothing the attorneys said was evidence and that the jurors must not let bias, sympathy, prejudice, or public opinion influence their verdict.

Moreover, the evidence, even if not overwhelming, was stronger than defendant acknowledges. Defendant states that Kelgard’s injuries “were not life-threatening,” but the treating physician testified that either wound could have been life-threatening if it had penetrated deeper into the body. Defendant claims the physician “did not even estimate the blood loss because it was so little,” but the physician was referring only to the blood Kelgard lost during treatment. She never estimated the total blood lost as a result of the stabbing and never suggested the total loss was minimal.

Although defendant claims it is “unknown whether the weapon used was capable of inflicting a mortal injury,” the physician testified that the wound to the face was in the vicinity of the carotid artery and jugular vein, as well as several nerves. There was evidence that the weapon was capable of producing a significant or substantial physical injury.

Defendant has not established ineffective assistance of counsel because he has not

shown a reasonable probability that, if his trial counsel had objected, the ultimate result would have been different. (See *Lopez, supra*, 42 Cal.4th at p. 966.)

DISPOSITION

The judgment is affirmed.

_____ MAURO _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ DUARTE _____, J.