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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

WOODROW TERRANCE WALKER,

Defendant and Appellant.

D060858

(Super. Ct. No. SCE309881)

APPEAL from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

Woodrow Terrance Walker appeals a judgment following a jury verdict convicting him of one count of resisting an executive officer (Pen. Code., § 69)¹ and one count of battery on an officer (§ 243, subd. (b)). Walker contends the trial court abused its discretion by halting his cross-examination of a witness and commenting that the witness's prior statement was ambiguous, rather than inconsistent. He argues the court

¹ All statutory references are to the Penal Code unless otherwise specified.

violated his rights to confront a witness and present a complete defense. We conclude Walker forfeited these claims on appeal because he did not raise the issues at trial. Nevertheless, we conclude the court's curtailment of the cross-examination and ambiguity comment were not an abuse of discretion, and even if the court erred, the error was harmless.

FACTUAL AND PROCEDURAL BACKGROUND

On March 28, 2011, San Diego County Sheriff's Deputies Matthew Dolmage and Michael DaSilveira responded to a 911 call from Walker's mother, Curtistine Walker (Curtistine). She complained that Walker was causing a disturbance at her workplace. She told the operator Walker had a history of mental illness and had fought with deputies before. When Dolmage and DaSilveira arrived, Walker was in an adjacent parking lot. He told the deputies his mother was harassing him. The deputies decided they had no reason to detain Walker and told him he was free to go. Walker walked towards the bus stop and Curtistine came outside to speak with the deputies. She told them she wanted Walker taken to County Mental Health. Walker approached the deputies and Curtistine a few minutes later and yelled that she was a liar and was harassing him.

The deputies put Walker in the back of a locked patrol car to separate him from his mother but did not handcuff him. It is unclear how long Walker was in the patrol car. While he was in the car, Curtistine told the deputies Walker had thrown her to the ground. Walker became agitated and started yelling and punching the car doors. The

deputies called the Psychiatric Emergency Response Team² (PERT) but no team was immediately available to pick up Walker. The deputies decided to take Walker to County Mental Health themselves and when they told him he became upset.

The deputies opened the patrol car door to handcuff Walker and he tried to push past them to escape. Dolmage grabbed him Walker by his shoulders and was dragged a couple of feet as Walker continued to move forward. DaSilveira then grabbed Walker by his shoulders and Walker grabbed DaSilveira by the shoulders and they struggled back and forth. DaSilveira struck Walker on the side of the head to get him to release his grasp. Walker swung his hands wildly and DaSilveira felt an impact on the side of his head. The deputies dragged Walker to the ground, handcuffed him in full restraints and arrested him. Both officers suffered minor cuts, scrapes and damage to their uniforms and DaSilveira had a headache. Walker was charged with resisting an executive officer and battery on an officer.

At trial, Walker represented himself and asserted the defense that he was unlawfully detained. Both charges against him require his detention to have been lawful. He tried to use Dolmage's testimony at the preliminary hearing to show Walker was detained for 45 minutes in the police car prior to his arrest. Walker asked Dolmage if he testified at the preliminary hearing that he did not call the PERT team because he "had already been waiting 45 minutes," while Walker was detained in the police car. When

² PERT is a service provided by San Diego County to intervene and render aid when a person is experiencing a mental health emergency.

Dolmage responded that was not correct, Walker stated that in the preliminary hearing transcript Dolmage said he was waiting 45 minutes.

Next, Walker asked if Dolmage had made the determination to take him to County Mental Health before Walker got out of the car. Dolmage replied that it sounded like there was a mix-up in the timeline, and Walker stated there was no mix-up. He asked if Dolmage previously testified he had been waiting for 45 minutes while Walker was in the police car. Dolmage refused to answer, stating that it was a "trick question." Walker then asked if he had been in the car for 45 minutes when Dolmage decided to take him to County Mental Health.

At that point, the court interrupted, explained what a preliminary hearing is, and defined the level of proof required at a preliminary hearing. The court instructed Dolmage to read the transcript of the preliminary hearing to himself and the court read the pertinent lines to the jury as follows: "Question: What was the estimated time of arrival from the psychiatric response team? [¶] Answer: There was no estimated time given, they just said it was extended, and we had already been waiting; I believe it was more than 45 minutes to an hour."

After the court read the lines into the record it asked if Dolmage recalled that question and giving that answer. Dolmage replied that he did. The court further questioned Dolmage about what he meant by his statement in the transcript. Dolmage said that he meant "[they] had been waiting approximately 45 minutes to an hour." The court asked him to clarify whether he "had already been waiting that period of time, or that it would be [an] additional period of time before [PERT] responded." Dolmage

responded, "[t]he way it is written, that could have been taken either way. But I believe what I meant was it was going to take another additional 45 minutes plus." The court asked if Dolmage knew how long he had been on the scene with Walker at the time he requested the PERT team to respond. Dolmage said, "I don't recall the exact amount of time." The court then allowed Walker to continue cross-examination.

Walker again asked Dolmage, "we had already been waiting 45 minutes, that is what you said. You said -- it says right here?" The court admonished Walker for being argumentative with the witness and told Walker the answer had been read to the jury "and [the preliminary hearing testimony] is capable of different interpretations. There is some ambiguity." Walker then asked Dolmage if he said PERT would take another 45 minutes, and Dolmage replied he was not sure what he meant and it was ambiguous.

Walker asked Dolmage, "you don't know what you meant by that at the time? . . . I would take it that you had already been with Mr. Walker 45 minutes; is that correct?" Dolmage replied that it was possible and Walker countered that the transcript said they had been waiting 45 minutes. The court admonished Walker to frame the question appropriately and move on. Walker began to state that Dolmage testified under oath he had been waiting and the court stopped him. The court told Walker "we already covered that. It has been asked and answered two or three times now. Let's move on to other matters."

The jury convicted Walker of both counts. The court sentenced him to three years in county jail for count 1 and 315 days for count 2, which Walker had already satisfied with presentence custody credits.

DISCUSSION

I

Walker Forfeited the Claim

We conclude Walker forfeited his appellate claims because he did not raise the issues in the trial court. Constitutional claims and claims of improper judicial comment generally are not preserved for appellate review unless they were raised at trial. (*People v. Burgener* (2003) 29 Cal.4th 833, 869; *People v. Cash* (2002) 28 Cal.4th 703, 730.) Walker argues an objection would have been futile, thus excepting him from the standard forfeiture rules. (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237.) He contends the court showed a hostile attitude prior to trial when it discouraged him from representing himself and told him to not "run [his] mouth" and "ramble on." However, the court made these statements after Walker interrupted the court before trial, and this attitude did not pervade into trial. It is not "evident from the attitude of the trial judge . . . that any assignment of misconduct would have been disregarded" or "brought upon [Walker] further attack." (*People v. Mahoney* (1927) 201 Cal. 618, 622; *Sturm*, at p. 1237.)

Walker also asserts his claims can be raised for the first time on appeal because the court characterized Dolmage's prior testimony as ambiguous and Dolmage later agreed the testimony was ambiguous. He argues an objection or admonition could not have cured the court's error. However, Dolmage had already said his prior testimony could be "taken either way" before the court stated there was some ambiguity. The court's characterization was not incurable error and did not show insurmountable bias.

Any perceived error should have been brought to the court's attention and could have been cured with an admonition. The purpose of the forfeiture requirement is to allow courts an opportunity to cure any alleged misconduct or infringement. Walker had a " 'duty of looking after his legal rights and of calling the judge's attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal.' " (*Sommer v. Martin* (1921) 55 Cal.App. 603, 610.) We conclude Walker forfeited his appellate claims because he was required to object absent a compelling showing of judicial hostility. We nevertheless address and reject the substance of his claims.

II

The Court Did Not Abuse Its Discretion

A. Opportunity to Cross-examine

Walker contends the trial court abused its discretion by limiting the scope of his cross-examination. (*U.S. v. Larson* (9th Cir. 2007) 495 F.3d 1094, 1101.) The Sixth Amendment to the United States Constitution guarantees defendants the right to confront and cross-examine witnesses. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 678; *Davis v. Alaska* (1974) 415 U.S. 308, 315-317 (*Davis*).) However, the Sixth Amendment Confrontation Clause only "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v. Fensterer* (1985) 474 U.S. 15, 20.)

"[T]he accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The right to cross-examine is not unlimited, and judges "retain wide latitude" to impose reasonable limits on defense counsel's cross-examination if the examination is harassing, confuses the issues, or is repetitive, among other reasons. (*Delaware v. Van Arsdall, supra*, 475 U.S. at p. 679.) Courts also " 'may exercise a reasonable judgment in determining when the subject [on cross-examination] is exhausted.' " (*McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal.App.2d 500, 507.)

Walker had an opportunity to fully cross-examine Dolmage. Walker asked Dolmage similar questions six times before the court instructed him to stop that line of questioning. Each time, Dolmage either disagreed that he meant Walker had been detained in the car for 45 minutes, said it was possible, or was unsure of what he meant at the preliminary hearing. Although Walker was not getting the response he wanted from Dolmage, the question of whether Walker had been detained in the police car for 45 minutes prior to his arrest had been asked and answered.

Walker's repetition of the question created a legitimate interest in the court's curtailment of the questioning. Dolmage may have been a forgetful or even challenging witness, but allowing Walker to continue to ask the same question would have been repetitive and could have confused the jury. The court reasonably exercised its broad discretion to curtail the cross-examination after the subject was exhausted.

B. Right to Present a Complete Defense

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment [*Chambers v. Mississippi, supra*, 410 U.S. 284], or in the Compulsory Process or Confrontation clauses of the Sixth Amendment [*Washington v. Texas* (1967) 388 U.S. 14, 23; *Davis, supra*, 415 U.S. 308], the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' " (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) The jury must have " 'the benefit of the defense theory before them so that they [can] make an informed judgment as to the weight to place on [the Government witness'] testimony,' " (*U.S. v. Larson, supra*, 495 F.3d at p. 1102; *Davis*, at p. 317) and "sufficient information to assess the credibility of the witness." (*Larson*, at p. 1103.)

Walker argues the court's curtailment of his cross-examination of Dolmage denied him his due process right to present a complete defense. We agree Walker's goal of asserting he was unlawfully detained for 45 minutes was important to his defense. (*In re Manuel G.* (1997) 16 Cal.4th 805, 815 [a defendant cannot be convicted of an offense against an officer if the officer is performing his or her duties unlawfully].) However, the pertinent question was asked and answered as stated above, and the court recited to the jury the preliminary hearing testimony on which Walker relied. As the preliminary testimony was the basis for Walker's illegal detention defense, the jury had the benefit of his defense theory. The jury also had sufficient information to assess Dolmage's credibility because it heard both the preliminary hearing testimony and his testimony at trial regarding the detention. (*Davis, supra*, 415 U.S. at p. 318.)

Moreover, the court questioned Dolmage in an attempt to clarify the testimony. (*People v. Cook* (2006) 39 Cal.4th 566, 597 (*Cook*.) The court asked the question Walker had been attempting to get Dolmage to answer when it asked, "Do you recall at the time you made the request for the PERT team to respond, how long you had been on the scene with Mr. Walker?" and Dolmage replied, "I don't recall the exact amount of time." The court's discretionary interruption and curtailment of the questioning did not deprive Walker of his right to present a complete defense.

C. Judicial Comment

We "evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 770.) "The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made." (*People v. Melton* (1988) 44 Cal.3d 713, 735.) Trial courts "may comment on the . . . credibility of witnesses, so long as its remarks are accurate, temperate, and 'scrupulously fair.'" (*Id.* at p. 735.)

The court's comment that Dolmage's prior testimony was capable of different interpretations and ambiguous was proper, although not perfect. The court's comment was accurate, as Dolmage's prior testimony could be interpreted in more ways than one. The testimony could be interpreted to mean the officers assumed PERT would be at the scene in an additional 45 minutes to an hour, or it could be interpreted to mean the officers had been waiting for 45 minutes before calling PERT. The court's statement was temperate and fair because it did not indicate what it believed Dolmage meant by his

prior testimony or whether he was credible. Considering the circumstances surrounding the ambiguity comment, the court's comment was not error.

D. Any Error Was Harmless

Even if the court's curtailment of the questioning and ambiguity comment were error, any error was harmless. The court's curtailment of questioning and ambiguity comment made no difference to the outcome of the trial under the "harmless beyond a reasonable doubt" standard articulated in *Chapman v. California* (1967) 386 U.S. 18. The court read the disputed testimony to the jury in open court, allowed Walker to cross-examine Dolmage at length, and its ambiguity comment was cured by jury instructions.

Contrary to Walker's assertion, the court did not create the prejudicial impression that Walker was conducting unskilled and frivolous cross-examination. There was no repeated and improper disparaging of Walker in the presence of the jury. (*People v. Sturm, supra*, 37 Cal.4th at p. 1240.) The court did not intervene and disallow questioning inappropriately. (*Id.* at p. 1230, 1241, 1243, 1245 [holding it was reversible error when the trial court made inappropriate comments during the entire trial and gave the jury the impression the court aligned with the prosecution].) Here, the court only intervened when the questioning became repetitive, unclear or otherwise violated the ordinary rules of evidence.

Moreover, the court instructed the jury multiple times that it was the trier of fact and sole judge of witnesses' credibility. It further instructed the jury not to assume anything the court said suggested anything about the facts. "We must assume that jurors followed their instruction not to 'disbelieve any witness' or to decide the facts based on

anything the court said or did, and to disregard any intimations or suggestions the court may have made regarding the believability of any witness." (*People v. Harris* (2005) 37 Cal.4th 310, 350, referring to CALJIC No. 17.32.) The instructions sufficiently conveyed that the jury had the responsibility of determining what Dolmage meant by his prior statement and if it was inconsistent with his testimony at trial.

The court's conduct would not reasonably lead a juror to believe the court was advocating on behalf of the prosecution or otherwise "abandoned its role as a neutral arbiter." (*Cook, supra*, 39 Cal.4th at p. 597.) Any error in the court's curtailment of cross-examination and ambiguity comment was harmless beyond a reasonable doubt.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.