

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY L. McCULLOUGH,

Defendant and Appellant.

E052601

(Super.Ct.No. FSB048689)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza, Judge. Affirmed with directions.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, and Ronald A. Jakob, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony L. McCullough stabbed his girlfriend, Shicole Bester, multiple times in the bathroom of a motel. At trial, he claimed he thought she was a man, although he had been intimately involved with her for two months, and he asserted he stabbed her in self-defense after she pulled a knife on him. Defendant was found guilty of first degree murder and then was found sane in a separate trial. He was sentenced to 75 years to life for the murder, under the Three Strikes law, plus one year for use of the knife, and appealed.

On appeal, defendant claims (1) the prosecutor engaged in misconduct by misstating the law of imperfect self-defense during summation to the jury; (2) insufficiency of the evidence to support a finding of premeditation; (3) errors in the sentencing minutes and abstract regarding the fees imposed by the trial court; and (4) miscalculation of his custody credits. The People concede the errors in the abstract and minutes regarding the fees imposed, as well as the miscalculation of defendant's custody credits. With the exception of these modifications to the judgment, we affirm.

BACKGROUND

On March 8, 2005, defendant's brother, James Campbell, rented a room at the Econo Lodge Motel with two friends, Nathan Powell and Gerald Montfleury. Campbell's girlfriend, Maritza Garnett, and his three-year-old daughter J., were with them. Defendant also came to the room at some point.

Powell fell asleep, and was known to be a heavy sleeper. The others drank and "hung out." Montfleury talked with defendant, who seemed depressed, and may have

been drinking or doing drugs. While they watched television, Montfleury commented that a person on the television was a “faggot,” which upset defendant. Defendant mumbled and started crying, and pulled his brother into the bathroom. The defendant tried to tell Campbell something in the bathroom but Campbell couldn’t understand what he was saying. He was saying things that were strange. Campbell told defendant to “Get a grip on it.”

Campbell left the room to go to the store across the street. On the way to the store, he encountered Shicole Bester, defendant’s girlfriend, in the parking lot. Shicole asked Campbell what room they were in, and he told her. When Shicole entered the room, she and defendant talked really low. Shortly after Shicole arrived, Montfleury left the room.

Defendant came and went from the room throughout the evening, but the last time he returned to the room, he was in a hurry. He pushed Maritza outside, and told her not to say anything or he would kill her. Maritza was locked outside and did not have a key with her. She did not knock on the door because she could hear arguing inside, and a shrieking scream or a wailing cry. She also thought she heard Shicole fall over something inside the room. She telephoned Campbell and told him to come back because there was something going on in the room.

Campbell returned to the room and knocked on the door, but no one opened it. Campbell looked through a small opening in the window, but all he could see was Powell asleep on the floor. He heard Shicole scream from inside the room. Campbell went to the motel office to get another key from the manager and returned to the room. Upon

entering the room, Campbell found defendant standing naked, looking like he was in shock. Campbell punched defendant, because he was upset that he could not get into the room. Then he went into the bathroom and found Shicole, lying dead on the floor in a pool of blood. Campbell punched defendant and asked why he had done it. Defendant was “out of it,” but told Campbell to be quiet because Campbell might wake up the baby, and then told his brother he would take credit for it.

Campbell woke up Nathan and told him they were leaving, and after Maritza picked up the child, they left the room. Campbell went down to the motel office and told the manager that something had happened in the room, but he did not do it and he did not want to be responsible. He also told the clerk to call the police. The clerk called the room and told the gentleman who answered that Campbell had left and was not going to be responsible for the room. The person who answered the phone said okay. The clerk called security to check the room, and the police arrived minutes later.

Officer Reynolds received the dispatch and at 3:03 a.m. she arrived at the motel, where other officers were present. Officer Reynolds obtained a passkey from the motel manager to enter the room. In the bathroom, one of the other officers found a Black female on the floor with a large amount of blood beneath her.

Defendant was arrested later that day at his grandmother’s house. The detective obtained defendant’s backpack, which contained bloody clothes. Defendant was transported to a medical center because he had a laceration on his right hand. When defendant removed his shoes and socks, the detective observed dried blood on the tops of

defendant's feet. Samples were taken of the blood found on defendant's feet and were determined to have come from both the victim and the defendant. Blood found on defendant's T-shirt was determined to have come from both defendant and the victim as well.

An autopsy revealed that the cause of Shicole's death was multiple sharp force injuries of the head, neck and chest. The pathologist noted a lump with a hemorrhage in the center of her forehead and a bruise on her left lower lip. Shicole's tongue had been sliced. There was also hemorrhage in Shicole's scalp, caused by blunt force to her forehead. There were stab wounds on the right side of her face, below and behind the ear. There was also a stab wound in the left neck and in the left scalp above the ear. One of the head wounds went all the way through the scalp and into the skull. A broken knife blade was embedded in one of the wounds in Shicole's neck. Two stab wounds in her chest punctured Shicole's right lung.

The pathologist also found a combination of an abrasion and contusion to Shicole's left breast, stab wounds in the neck, upper chest, and right forearm near the elbow, and a bite mark on the left shoulder. The bite mark pattern was compared with dental impressions taken from the defendant. A comparison of the two revealed the bite mark had been made by defendant.

Defendant was charged with murder (Pen. Code, § 187, subd. (a)), in the commission of which he was alleged to have personally used a deadly weapon, a knife. (Pen. Code, § 12022, subd. (b)(1).) It was further alleged that defendant had suffered two

prior serious felony convictions within the meaning of the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d)), two prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)), one prior prison term for a violent felony (Pen. Code, § 667.5, subd. (a)), and one prior prison term. (Pen. Code, § 667.5, subd. (b).) Defendant entered pleas of not guilty and not guilty by reason of insanity.

At trial, defendant testified that he thought Shicole was a man at the time of the crime. He became agitated and started thinking about how he was molested by an uncle when he was a child. He testified that in the bathroom there was a fight, during which Shicole pulled the knife, but that he grabbed it and killed her in self-defense. Defendant was convicted of first degree murder. The jury also made a true finding on the knife use enhancement allegation. In the sanity phase, the jury determined that defendant was sane at the time he committed the murder. In a separate court trial, the court found all the prior conviction allegations were true.

Defendant made a motion for a new trial on the ground he was deprived of his right to effective assistance of counsel which was denied. He was sentenced to state prison for 75 years to life (25 years to life tripled under the Strikes law), plus one year for the knife use allegation. On motion by the People, the court stayed the imposition of terms for the enhancements under sections 667, subdivision (a)(1), 667.5, subdivision (a), and 667.5, subdivision (b). Defendant timely appealed.

DISCUSSION

1. There Was No Prosecutorial Misconduct.

The defendant argues that his conviction should be reversed based on prosecutorial misconduct in misstating the elements of imperfect self-defense. Anticipating the People's claim of forfeiture for failing to object to the alleged misconduct, defendant also claims his attorney was ineffective for failing to object. We conclude the claim was forfeited and that defendant was not deprived of effective assistance of counsel.

a. Background

At trial, the defendant relied on a theory of self-defense, based on the premise that Shicole pulled a knife on defendant in the bathroom, he grabbed it from her, and stabbed her during a fight. During discussions regarding instructions, the People requested an instruction on imperfect self-defense. Defense counsel objected to instructions on voluntary manslaughter: "We are objecting. We feel this was not an imperfect self-defense. It was self-defense. It has – our position is that it was self-defense. And we are not requesting the voluntary manslaughter." In addition to counsel's objection, the defendant personally agreed with that position. The court, however, determined that the facts in the case as presented were sufficient for voluntary manslaughter, and agreed to so instruct the jury over defendant's objection.

During the People's argument to the jury, the prosecutor discussed the elements of murder and the defendant's theory of self-defense. The prosecutor then discussed

imperfect self-defense, stating: “You must honestly believe, but unreasonably believe, that you have to use deadly force to defend against great injury or death. You all know what self-defense is. Someone’s attacking you, you can attack back. This is when it’s an unreasonable belief is – it becomes voluntary manslaughter. So if the defendant did not honestly believe he needed to use deadly force to avoid imminent injury, it’s not manslaughter, it’s murder. A reasonable person would not have killed. If a reasonable person would not have killed Shicole, then it’s murder, not manslaughter.”

Defendant did not object.

b. Forfeiture

Generally, a defendant may not complain on appeal of prosecutorial misconduct unless the defendant made an assignment of misconduct in a timely fashion—and on the same ground—and requested that the jury be admonished to disregard the impropriety. (*People v. Fuiava* (2012) 53 Cal.4th 622, 679.) A defendant’s failure to object and to request an admonition is excused only when “an objection would have been futile or an admonition ineffective.” (*People v. Arias* (1996) 13 Cal.4th 92, 159; see also *People v. Hill* (1998) 17 Cal.4th 800, 820.) Any claim of error has been forfeited, unless defendant can establish that his trial counsel was ineffective for failing to make a timely objection.

c. Effective Assistance of Counsel

To demonstrate that his right to effective assistance of counsel was violated, defendant must satisfy a two-pronged test: He must show (1) performance below an objective standard of reasonableness by his attorney, and (2) prejudice sufficient to

establish a reasonable probability he would have obtained a more favorable result in the absence of counsel's error. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 693-694 [104 S.Ct. 2052, 80 L.Ed.2d 674].)

As a general rule, the failure to object is a matter of trial tactics as to which we will not exercise judicial hindsight. (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) A defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics. (*People v. Jimenez* (1992) 8 Cal.App.4th 391, 397.) Where the record sheds no light on why counsel acted in the manner challenged, we will affirm unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation for the action. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.)

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. (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 305.) 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.) When a claim of misconduct 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. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 [overruled to the extent it required a showing of bad faith to establish misconduct in argument to the jury].)

It is improper for the prosecutor to misstate the law generally, and particularly to attempt to absolve the prosecution from its burden of proof. (*People v. Hill* (1998) 17 Cal.4th 800, 829 [overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13], citing *People v. Bell* (1989) 49 Cal.3d 502, 538; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215.) Arguments of counsel which misstate the law are subject to objection and to correction by the court. (*Boyde v. California* (1990) 494 U.S. 370, 384 [110 S.Ct. 1190, 108 L.Ed.2d 316].) This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. (*Id.* at pp. 384-385.) And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made. (*Id.* at p. 385.)

Here there was no misconduct. The prosecutor clearly misspoke, but did not misstate the law in a manner which could mislead the jury. The misstatement was fleeting, involving a single inadvertent misstatement, which was made immediately following the correct statement of the law. Further, the trial court gave the proper instructions on the theory of imperfect self-defense for voluntary manslaughter, thus curing any harm if there had been any misconduct. Arguments of counsel generally carry less weight with a jury than do instructions from the court. (*People v. Mendoza* (2007)

42 Cal.4th 686, 703, citing *Boyde v. California*, *supra*, 494 U.S. at p. 384.) We must presume that the jury relied on the instructions, not the arguments, in convicting defendant. (*People v. Morales*, *supra*, 25 Cal.4th at p. 47; see also *People v. Boyette* (2002) 29 Cal.4th 381, 436.)

More significantly, even if we were to determine that a competent attorney would have objected to the misstatement, we cannot find that defendant would have obtained a more favorable result in the absence of any purported error, as required by the second prong of *Strickland*. The defendant did not rely on a theory of imperfect self-defense. To the contrary, the defense theory was that the killing was justifiable as self-defense. Additionally, the court properly instructed the jury on the elements of imperfect self-defense and the jury presumably followed those instructions.

The failure to object, therefore, was a knowledgeable tactical decision. There was no violation of defendant's right to effective assistance of counsel.

2. There Was Substantial Evidence to Support the Finding of Premeditation.

Defendant argues that the evidence was insufficient to support the jury's finding of premeditated murder. We disagree.

An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125, applying *People v. Anderson* (1968) 70 Cal.2d 15, 26–27.) The requisite reflection need not span a specific or extended period of time. (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) “The true test is not the duration of time

as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.” (*People v. Thomas* (1945) 25 Cal.2d 880, 900; see also *People v. Young* (2005) 34 Cal.4th 1149, 1182.)

Appellate courts typically rely on three kinds of evidence in resolving the question raised here: motive, planning activity, and manner of killing. (*People v. Perez, supra*, 2 Cal.4th at p. 1125, applying *People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation. (*People v. Pride* (1992) 3 Cal.4th 195, 247.) However, when the record discloses evidence in all three categories, the verdict generally will be sustained. (*People v. Proctor* (1992) 4 Cal.4th 499, 529.) Nevertheless, the presence of the *Anderson* factors is not the sine qua non to a finding of premeditated murder. (*People v. Perez, supra*, 2 Cal.4th at p. 1125.)

When considering a challenge to the sufficiency of the evidence to support a criminal conviction, we must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Mayfield* (1997) 14 Cal.4th 668, 767, quoting *People v. Johnson* (1980) 26 Cal.3d 557, 578; see also *Jackson v. Virginia* (1979) 443 U.S. 307, 319-320 [61 L. Ed. 2d 560, 572-574, 99 S. Ct. 2781].) The judgment challenged on appeal is presumed correct, and it is defendant’s burden to affirmatively demonstrate error. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567,

1573.) We cannot substitute our judgment for that of the jury, even if the circumstances might also support a contrary finding. (*People v. Gonzales and Soliz, supra*, 52 Cal.4th at p. 295, citing *People v. Ceja* (1993) 4 Cal.4th 1134, 1139.)

Here, there was substantial evidence to support the jury's verdict. The defendant excluded Maritza from the motel room, telling her to be quiet or she would be killed. This suggests planning activity.

The manner of the killing also suggests premeditation: defendant inflicted numerous stab wounds, one of which was made with such force that it penetrated her skull. The stab wounds to Shicole's chest punctured her right lung. The final stab wound was made with such force that the blade broke and was embedded in her neck. The force of the stab wounds and the number of wounds inflicted over a period of time was a factor supporting premeditation because it suggested the defendant had an opportunity to consider the consequences of his actions. (See *People v. Stitely, supra*, 35 Cal.4th at p. 544.)

There was also evidence of motive to support a finding of premeditation, insofar as defendant acknowledged that Shicole had threatened to call his parole officer. He admitted he had "snort[ed] a little coke" the week before the murder, which would have been in violation of his parole.

The People argue that there was also evidence of planning in that a reasonable trier of fact could conclude that defendant left the motel room to obtain the murder weapon. We cannot so speculate in the absence of any evidence that he brought the knife with

him. In any event, we do not need to speculate about who brought the weapon into the room, because defendant's conduct of pushing Maritza out of the room is sufficient to show he planned to attack Shicole and did not want Maritza, the only awake adult in the room, to witness his actions or attempt to interfere.

The fact that the circumstances may have supported a finding that defendant acted on a rash impulse does not give rise to a determination that the jury's verdict was not supported by substantial evidence. There is sufficient evidence to support the finding that the murder was premeditated.

3. The Clerk's Minutes and the Abstract of Judgment Are Ordered to Be Amended.

a. The Security Fee

Defendant asserts that the clerk's minutes of the sentencing and the abstract of judgment need to be amended because they incorrectly recite that a court security fee of \$70 was imposed. He points out that the reporter's transcript of the oral proceedings reveals that the court imposed a \$60 security fee. The People agree, as do we.

Rendition of judgment is an oral pronouncement. (*People v. Mesa* (1975) 14 Cal.3d 466, 471.) Entering the judgment in the minutes being a clerical function, a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. (*Ibid.*) An abstract of judgment cannot add to or modify the judgment which it purports to digest or summarize. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1075.) Because the rendition of judgment is the oral

pronouncement, the minutes and abstract of judgment must conform to the oral pronouncement of judgment. All fees and fines must be set forth in the abstract of judgment. (*People v. High* (2004) 119 Cal.App.4th 1192, 1200.)

Courts may correct clerical errors at any time, and appellate courts have jurisdiction to order the corrections of abstracts of judgment that do not accurately reflect the oral judgments of sentencing courts. (*People v. High, supra*, 119 Cal.App.4th at p. 1200, citing *People v. Sanchez* (1998) 64 Cal.App.4th 1329, 1332.) In light of the discrepancies between the oral pronouncement and the minutes and the abstract of judgment, we direct the clerk of the superior court to amend the abstract of judgment to conform with the oral pronouncement of judgment.

b. Defendant Is Entitled to Additional Presentence Custody Credits.

Defendant argues that the trial court erred in its calculation of appellant's actual days of presentence custody credits. Respondent agrees.

Defendant was continuously in custody between March 8, 2005 (the date of his arrest), and December 15, 2010 (the sentencing date). Defendant's actual custody time between his arrest date and sentencing date is 2,109 days. However, the court awarded defendant only 1,827 days of presentence custody credit. Defendant is entitled to credit for any presentence time spent in custody against his prison term. (Pen. Code, § 2900.5, subd. (a); *People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) The calculation of the presentence credit must include the date of arrest and the date of the sentencing hearing. (*People v. Morgain* (2009) 177 Cal.App.4th 454, 469.)

Defendant is entitled to an additional 282 days of presentence custody credit. The judgment must be modified to reflect that he is credited with 2,109 days of custody credit.

DISPOSITION

The superior court is directed to issue an amended abstract of judgment and an amended minute order to (a) delete reference to a security fee of \$70, replacing it with a security fee in the amount of \$60; and (b) award an additional 282 days of presentence credit against defendant's sentence, for total credits of 2,109 days. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

RICHLI
J.

KING
J.