Filed 4/18/12 P. v. Hillman CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 Appellant, v. CHRISTOPHER V. HILLMAN, Defendant and Respondent.	E052664 (Super.Ct.No. RIF152103) OPINION

APPEAL from the Superior Court of Riverside County. Larrie R. Brainard, Judge. (Retired judge of the San Diego Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Order reversed.

Paul E. Zellerbach, District Attorney and Alan D. Tate, Deputy District Attorney, for Plaintiff and Appellant.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Respondent.

A jury convicted defendant, Christopher Hillman, of seven counts of attempting to influence a juror (Pen. Code, § 95).[1] Before he could be sentenced, the trial court granted his motion for a new trial and the People appeal, claiming the trial court abused its discretion in granting the new trial. We agree and reverse that order.

FACTS

In February 2009, Raymond Oyler, brother of defendant's wife, was facing the death penalty for the special circumstance multiple murders of firefighters who died fighting the Esperanza fire on the theory that he had set the fire. During a pretrial hearing, the Oyler trial court denied Oyler's request to introduce evidence that a third party had set the fire. Articles about this evidence appeared in the Los Angeles Times and the Riverside Press Enterprise. On February 26, 2009, the parties were preparing for closing arguments to the Oyler jurors. After lunch, several jurors who were parked in lots designated with signs for juror parking only, reported that fliers, composed of copies of the two articles, had been left on their cars over the lunch hour. A bailiff collected seven such fliers from Oyler jurors' cars in the lots, even though there were six or seven non-Oyler juror cars nearby.

The print of defendant's right middle finger and three prints of his palm were found on these fliers. None of the fliers had defendant's wife's prints on them. Only defendant's prints and his wife's prints were tested, even though other prints were on the

[1] All further statutory references are to the Penal Code unless otherwise indicated.

fliers. Once the first print on a flier was determined to be defendant's, none of the other prints on that flier was tested to see if it belonged to him.

On August 6, 2009, an investigator from the District Attorney's Office went to defendant's house to serve a search warrant. He called the house phone and defendant answered. The investigator identified himself and said he would like to talk to defendant if the latter would come outside. After asking a few questions, which were answered, defendant agreed to speak to the investigator and he said he would put on his pants and come outside. A short time later, defendant's wife came outside and was asked where defendant was. She said he was inside putting his pants on. Ten to fifteen minutes after the investigator's initial call to the house phone, another investigator went to the open front door, announced who he was and called for defendant to come out. Defendant never walked out the door nor did he walk from the side of the house out into the street. Five minutes later, officers surrounded the house, which had a chain link fence on the back and on both sides, with an additional wooden fence in the back. Defendant's minor children and an elderly relative were removed from the house. One to two hours after the initial call, officers entered the house and discovered that defendant was not there. A sliding glass door was ajar and there were marks in the dirt below the backyard fence and marks on the fence which suggested that someone had climbed it. While the search was being conducted, defendant called and the investigator asked defendant to return to the house and defendant said he would not because he was afraid they were going to arrest him. The investigator told defendant he was not going to arrest him, but he did have a search warrant for evidence of jury tampering. Defendant did not return to the house

during the four or five hours that elapsed after the initial call into the house. In a Federal Express box in the closet in the master bedroom, where defendant and his wife kept their clothes, searches found what was believed to be the originals used to make the LA Times article portion of the fliers and various versions of the Press Enterprise article. There were also articles about the Oyler trial. The box was on the side where mostly men's clothes were hanging. There were also fliers in the master bedroom and more in the computer hutch in the kitchen/dining room area. None of the items found in the home were tested for prints.

Defendant's wife, among others, testified for the defense, against the advice of counsel, and her testimony will be described below. No doubt having a dramatic impact on the jury, she cried during her testimony and so did defendant.

ISSUE AND DISCUSSION

On the day set for sentencing, after defense counsel, who was retained, stated that there was no legal cause why sentencing should not proceed, the trial court said it was going to interrupt proceedings and ask defense counsel and defendant for permission to appoint another attorney to possibly bring a new trial motion because there might be cause for such a motion. The trial court explained that there were questions in its mind about the quality of representation provided by retained counsel and "other avenues" for a new trial. Retained counsel responded that the way the trial "went" was a bit unusual,

but defendant had "made . . . the decisions."[2] She suggested that defendant be asked whether he wanted to make a new trial motion, because he may be satisfied with the anticipated outcome that he would receive probation, with seven months of local time as a condition, rather than going through a new trial. The trial court asked defendant if he wanted another attorney to look into bringing a new trial motion, adding that it was obvious that it felt that should be done, but if defendant did not want it, that was his decision. Defendant responded that some of the attorneys he had spoken to wanted $55,000 to take the case and he did not have the money.[3] The trial court said it would appoint counsel for defendant. Defendant said he did not know if he could go through a trial again. Retained counsel asked that an attorney be appointed to help defendant decide what to do. She reiterated that defendant was willing to live with receiving probation with the seven month term condition, which had been the recommendation of the probation officer. She added, "We have the specter that if he is acquitted [of] this, his wife could go to prison. He has children." The trial court appointed counsel to determine whether to bring a new trial motion.

---

[2] After what turned out to be the last defense witness testified, when the trial court pressed retained counsel to get the defendant to decide whether he was going to testify, she stated, in the presence of defendant, "I'll do my best. But, again, it's not my decision to make. It's his."

[3] It cannot be determined from defendant's statement whether he meant that he had looked into hiring a second lawyer after the verdict, or he was referring to the lawyer shopping he had done before trial.

Three weeks later, with defendant's permission, the trial court relieved his retained counsel and appointed one from Conflict Defense Lawyers. The following month, appointed counsel filed a motion to a new trial.[4]

In the motion,[5] appointed counsel asserted that the prosecutor committed *Griffin* error by commenting on defendant's failure to testify. However, what the prosecutor did do was to comment on the failure of the defense to produce any evidence to support the statement it made during opening statement that defendant's prints got on the fliers when he swatted some of them that had been left in his truck cab as they flew around the cab while he was driving with the windows down.[6] A prosecution expert testified that unless a person is "really" sweating, they would not leave their prints on a piece of paper they had batted at as it flew through the air and, if so, it would not produce the clear ridges

---

[4] The motion was poorly written, contained many assertions that were mischaracterizations of what had occurred during trial, cited cases that did not specifically apply to the facts and referred to defendant, who is a man, as "her" and to trial counsel, who is a woman, as "his," as though it had been written for another case and used for defendant.

[5] We comment at length about the merits of appointed counsel's motion for a new trial because "'It is not material, upon . . . appeal, as to the particular ground upon which the court based its order granting a new trial; for if the order should have been made upon any one of the grounds raised by defendant, it will be affirmed.' [Citation.]" (*People v. Montgomery* (1976) 61 Cal.App.3d 718, 729.) Therefore, if any of the grounds appointed counsel asserted in the motion for a new trial was meritorious, we must affirm the trial court's granting of the motion.

[6] We assume, for purposes of this discussion only, because it was not expressly stated during opening statement, that defendant was the only person in the truck at the time, and, therefore, no one but defendant could have testified to this incident and he did not talk about it to anyone who could have testified to his recounting of the story.

that were on the sets of prints found on the fliers that were left on the cars.[7] Appointed counsel cited no authority holding that the prosecutor's comment was an improper attempt to call attention to the fact that defendant chose not to testify at trial.

Appointed counsel further asserted that the prosecutor committed misconduct by commenting on defendant's failure to talk to the investigator who came to his house on August 6, 2009, and leaving after being asked to speak to the investigator. However, appointed counsel mischaracterized the prosecutor's argument. He asserted that defendant displayed his guilt, in part, when he lied and told the investigator that he would put on his pants and come out and talk to him, and, instead, he fled, leaving his wife and minor children to contend with the search that was about to take place. Again, appointed counsel cited no authority holding that this constituted an improper comment on defendant's invocation of his right not to answer the officer's questions. Moreover, defense counsel drove home the point twice during her cross-examination of the investigator that defendant had a right not to answer his questions.

Appointed counsel further asserted that retained counsel's failure to object to these two incidents constituted incompetency requiring a new trial. Appointed counsel added,

[7] He allowed that it was plausible that one would leave prints if a paper were thrown at the person and the person caught it, but he said he would not expect to find this.

without citing the record or elaborating further, that these deficiencies existed in addition to "the circus-like atmosphere" at trial.[8]

Appointed counsel also accused retained counsel of not adequately investigating and preparing for trial, although her "proof" of this assertion did not lead to the conclusion it was designed to support. As further proof that retained counsel was unprepared, appointed counsel asserted that retained counsel had told defendant during the trial "that she was running for District Attorney within her county in Nevada and believed that this trial would ruin her chances of winning the election."[9] However, at the hearing on the motion, the prosecutor pointed out that that election had taken place one month before trial in this case had begun and retained counsel had lost the election.

Appointed counsel further asserted that retained counsel advised defendant not to testify and did so without thought.[10] However, there was no supporting affidavit or

---

[8] Appointed counsel repeated this at the hearing on the motion, accusing retained counsel of engaging in antics that were distracting to the jury without saying what they were or citing to the record.

[9] At the hearing on the motion, appointed counsel added that retained counsel had told defendant that this case would ruin her career and her chances of becoming a district attorney in Nevada.

[10] Appointed counsel repeated this assertion at the hearing on the motion, saying, "[I]t comes down to the attorney being that competent legal advocate to allow him [*sic*] to explain to the client exactly what needs to be done, what the jury needs to know, what they need to go with the case. That wasn't given to [defendant]. That wasn't explained to him. That wasn't told to him. He wasn't just told, go ahead and make a decision of where you want go. He was dissuaded." Appointed counsel also said, "[Defendant] was not informed of the gravity and the impact that his testimony would have had in this . . . trial . . . [and] . . . about how his testimony would be the piece that would probably move the jury into either guilty or not guilty. . . . [H]e was actually dissuaded

[footnote continued on next page]

testimony from defendant or retained counsel[11] on this point, and, as already stated, retained counsel had previously represented to the trial court, and her comments during trial corroborated this, that *defendant* had made the decisions not to testify.

Appointed counsel accused retained counsel of spending too much time on to what extent the juror parking lot signs were visible to one walking into and through the lots, which she asserted "caused a multitude of confusion with the jury [*sic*]." Actually, the prosecutor spent a great deal of time on this issue also because it was crucial to establish that either defendant or his wife saw the signs and put the fliers on the vehicles *of jurors* and not just on random vehicles, in order to prove that defendant or his wife was attempting to tamper with the Oyler jury, and, if the latter, that he assisted her at some point in the process and was therefore guilty as an aider and abettor. As for retained counsel, she correctly anticipated the aiding and abetting theory of liability, which created the incentive for her to assert that the signs were not visible to someone walking through the juror parking lots, whether that person was defendant or his wife.

This reality impacts another complaint of appointed counsel, i.e., that one of retained counsel's defenses was that defendant's wife had a First Amendment free speech right to distribute the fliers, which, appointed counsel asserts, demonstrates that retained counsel had a conflict of interest in that she was attempting to defend the wife, not

---

[footnote continued from previous page]
from testifying by being given facts of the blame going onto somebody else he loves [(meaning his wife)]."

[11] She stated on the record that she would make herself available, without subpoena, for the new trial motion.

defendant. During opening argument, retained counsel stated that the wife's statement to defendant that she did not mean to put the fliers on Oyler jurors' vehicles was plausible because the juror signs, which "weren't put there to warn somebody not to exercise their First Amendment rights on that lot because it could be construed as jury tampering[,]" were not visible. Once during trial, retained counsel unsuccessfully attempted to sneak in a reference to the act of putting a flier on any vehicle as a "little First Amendment activity going on." Finally, during argument to the jury, retained counsel said, "It was quite possible that whoever put those fliers [on the jurors' cars] was simply exercising his or her First Amendment rights." However, to the extent the jury might conclude that defendant was liable as an aider and abettor of his wife, the suggestion that she was merely exercising her First Amendment rights may have persuaded the jury that she was doing nothing wrong, and, therefore, he was aiding and abetting something that was not a crime. Thus, this does not suggest that retained counsel had a conflict of interest and this conflict negatively impacted defendant.

Appointed counsel also claimed that retained counsel's "[failure to] call [defendant] to the stand due to the possibility [that he would] incriminat[e his wife]" and "to protect [the wife]" created a conflict of interest.[12] Again, the record supports the conclusion that it was *defendant*, and not retained counsel, who made the decision that defendant not testify. Defendant made this decision the day after his wife testified, consistently invoking her Fifth Amendment rights when questions were asked about these

---

[12] Also see footnote ten, *ante*, page eight.

crimes, during which both she *and* he cried in front of the jury. Defendant may well have decided not to testify in order to protect her,[13] but there is no support in the record that there was a conflict of interest for appointed counsel which infected her representation of defendant in this regard. In fact, at the hearing on the motion, the trial court shot down one of appointed counsel's accusation that retained counsel dissuaded defendant from testifying, when it said, "[Defendant] was not denied his right to testify. [¶] . . . And I asked him on several occasions if he was sure about that because I was a bit shocked that he didn't testify . . . ."

Despite the deficiencies in appointed counsel's motion, as already discussed, the trial court went on to grant it, saying, "It was clear to me as I watched this trial unfold that it was a real racehorse. There was substantial evidence on behalf of the People and substantial evidence on behalf of the defense. And then it kind of fell apart with the way [appointed counsel] handled everything. It became a bit of a farce going on in terms of the way it was presented. [¶] . . . [¶] . . . I invited the motion [for a new trial because] I wasn't really all that sure that justice was occurring, that [defendant] was being represented appropriately and presented to the jury appropriately and his side of the situation all considered appropriately. And all of that comes back to the handling of the matter by his [retained] counsel. She was very scattered. She was obviously distracted. [¶] . . . I'm not sure justice was done in this case. That's different than simply saying

---

[13] In fact, the trial court said, "[I]t would be impossible to believe that this case occurred and it was only [defendant] that was involved. Obviously it would have to involve [the wife] as well in some fashion."

could there have been a different result with a better lawyer? Well, that's always possible. But most of the time that isn't the case that . . . I would have this overriding sense that things didn't go right and justice just doesn't necessarily prevail. [¶] . . . [Granting a motion for a new trial] isn't something that I do willy-nilly . . . . [¶] But I am going to grant the motion . . . because of that and for the reasons indicated." When the prosecutor asked the trial court to be more specific about its conclusion that retained counsel was scattered, the court said, "[S]he seemed to be taking a tack to go one way, and then she'd go another way, and then she would be needing time to be on the phone to Nevada. And there just seemed to be confusion at all times in . . . her opening statement and in her closing argument. It just wasn't communicating appropriately. [¶] . . . [¶] Her scattered approach was that she was sometimes effective in what she was doing and then sometimes not effective and [she went] off on tangents. [¶] . . . I don't feel justice prevailed."

We may not reverse a trial court's decision to grant a new trial unless there is a manifest and unmistakable abuse of discretion. (*People v. Earp* (1999) 20 Cal.4th 826, 890.) When a trial court grants a new trial on the basis of incompetency of trial counsel, there must be a showing that trial counsel's performance was deficient and that this deficiency resulted "'in prejudice to defendant in the sense that it "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." [Citations.]' [Citation.]" (*People v. Callahan* (2004) 124 Cal.App.4th 198, 212.) "Where a defendant contends that a verdict was the result of ineffective assistance, he bears the burden of proving the claim. [Citation.] . . . [Where

the burden of showing incompetency and that it] resulted in the withdrawal of a potentially meritorious defense or that it is reasonably probable a more favorable result would have occurred in the absence of counsel's failings . . . is met[,] then the inquiry must be directed to whether there is an explanation which shows that counsel did in fact act in the manner of a diligent and conscientious advocate. [Citations.] Conduct which might appear incompetent on its face might well be explained with evidence dehors the record. [Citation.] . . . [C]laims of ineffective assistance of counsel will frequently be unresolved on the record. . . . [¶] . . . [¶] . . . Since the burden is upon the defendant to prove his claim of ineffectiveness of counsel, . . . silence will not support a motion for a new trial." (*People v. Dennis* (1986) 177 Cal.App.3d 863, 872, 873.) A trial court's determination, in the context of a new trial motion, that trial counsel was incompetent must be highly deferential and must overcome a strong presumption of competency, or reversal is required. (*People v. Stewart* (1988) 202 Cal.App.3d 759, 764, 765.)

We have read the entire transcript of this trial. Nowhere in that transcript is there an indication that retained counsel needed time to be on the phone to Nevada or that she was distracted. This may have indeed occurred, but the record does not so indicate. The record also does not support the trial court's conclusion that retained counsel was scattered, that she started on one track, then went off on another or went off on tangents unrelated to important issues or that the trial was a farce. While it is true that retained counsel promised things in her opening statement that she was ultimately unable to produce because defendant decided late in the trial not to testify, she could reasonably rely on defendant's representations as to the facts surrounding the case and defendant's

willingness to testify to those facts. (See *Strickland v. Washington* (1984) 466 U.S. 688, 691; *People v. Stewart* (1988) 202 Cal.App.3d 759, 764.) If defendant told retained counsel that he anticipated testifying, and she relied on that representation in making her opening statement, she cannot be faulted for doing so. On the first day of trial, retained counsel represented to the trial court that defendant would be testifying. By the end of the defense case, retained counsel had learned that defendant's mind could change minute by minute. Without an explanation on the record as to why retained counsel made promises in her opening statement, and then was unable to fulfill them, we cannot conclude that she acted incompetently.

On the other hand, retained counsel's cross-examination of the investigator did seem to jump from one subject to the other, but we do not have the benefit of knowing whether counsel took pauses between subjects, which might have made it seem less fractured. Retained counsel also could have been much more organized in her argument to the jury. Again, she jumped from subject to subject as she mounted a shotgun defense—defendant did nothing, defendant accidentally touched the fliers and nothing more or touched the paper they were printed on before they were printed, if defendant assisted in making or distributing the fliers, he didn't know or didn't intend that they be used to attempt to influence the Oyler jury, including the possibility that their distribution was merely an attempt to exercise a First Amendment right to comment about the Oyler case and nothing more. Retained counsel could have done a much better job at organizing her argument to the jury, but we cannot say that the quality of her cross-examination and argument was such that there is a reasonable probability that had she done a better job at

both, defendant would have enjoyed a different outcome, given the strength of evidence against him as recounted above.[14]

The record discloses that retained counsel succeeded in presenting four witnesses who testified to an alibi for defendant at the time of the crimes, two witnesses who contradicted the investigator's assertion that defendant fled from his home when the investigator wanted to speak to him and presented evidence that the juror parking signs were not visible from certain angles, that defendant hated Oyler, did not want his children to know that Oyler, a convicted multiple murderer, was their uncle and that defendant believed Oyler should have been convicted, presented evidence calling into question where in the master bedroom closet the Federal Express box was found, presented evidence that defendant was angry at his wife and wanted to divorce her and that she believed in Oyler's innocence and presented evidence that there were prints on the flier's other than defendant's or his wife's and that someone can touch an object without leaving prints that can be identified. Defense counsel also successfully fought against the prosecutor's request that the jury be instructed on a third theory of liability, i.e., that defendant and his wife conspired together to influence the Oyler jury.

It is telling that the grounds the trial court cited as the basis for its conclusion that retained counsel did not adequately represent defendant did not match, in any regard, the

---

[14] We note that the trial court denied defendant's motion for acquittal of the charges, finding sufficient evidence to allow the case to go to the jury.

bases appointed counsel asserted for the new trial.[15] Additionally, we note that defendant never complained about his retained attorney's performance, even as to non-technical matters, such as her level of distraction, when his attention was called to the matter.

Defendant did not carry his burden of proving incompetency of retained counsel that prejudiced him such that reversal of his convictions was appropriate. With great reluctance, we conclude that the trial court abused its discretion in granting the new trial motion.

DISPOSITION

The order granting a new trial is reversed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P.J.

We concur:

RICHLI
J.

MILLER
J.

[15] The only exception was appointed counsel's claim, during the hearing on the motion, that retained counsel was "distracted" by her run for District Attorney in Nevada, which was undermined by the prosecutor's uncontested statement that the election took place over a month before this trial. The trial court, for its part, did not specify why or in what way, in its opinion, retained counsel was "distracted."