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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RODELIO LIMPO CATAROJA,

Defendant and Appellant.

E052897

(Super.Ct.No. SWF023407)

OPINION

APPEAL from the Superior Court of Riverside County. Robert E. Law, Judge. (Retired Judge of the former Mun. Ct. for the Orange Jud. Dist. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Catherine White, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Alana Butler and Michael T. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury found defendant Rodelio Limpo Cataroja guilty of multiple firearm-related offenses, including, as pertinent to this appeal, assault with a firearm (Pen. Code, § 245, subd. (a)(2);¹ count 1) and brandishing a firearm at a motor vehicle occupant (§ 417.3; count 2). Fabian Rosales was the victim of these crimes. The jury further found that defendant personally used a firearm in count 1.

The jury also found defendant guilty of multiple theft-related offenses, unrelated to the firearm assault and brandishing offenses. Most of the theft-related offenses involved unauthorized purchases at Target and Best Buy stores by defendant and a female accomplice, using the credit cards, personal checks, and driver's licenses of several women whose purses were stolen from their cars while their cars were parked in their garages.

Based in part on his recidivism, defendant was sentenced to 29 years 8 months in prison. Defendant appeals, raising two due process claims.

First, defendant claims the state violated his due process rights in destroying, 180 days after it was made and in accordance with its normal practice, an audio recording of a 911 call by Rosales just after defendant either *pointed at or showed* a firearm to Rosales on an Interstate 15 (I-15) on-ramp. Defendant argues that the state knew or should have known that the recording contained potentially exculpatory evidence, in the form of Rosales's statement that defendant merely showed, rather than pointed, a firearm at

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

Rosales. For this reason, defendant claims the destruction of the tape violated his due process rights, and the trial court erroneously refused to instruct the jury that the defense to counts 1 and 2 was “hampered” by the destruction of the recording. We reject this claim because defendant did not demonstrate that the recording was destroyed in bad faith. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 55-59 (*Youngblood*)). In fact, defendant conceded that the recording was not destroyed in bad faith, but in accordance with the normal practice of the California Highway Patrol (CHP).

Second, defendant claims the trial court violated his due process right to a fair trial in admonishing female jurors and other women in the courtroom to drive away after they get into their cars, because at that point they are “most vulnerable” to being accosted or having their purses and property stolen. Though the court’s comments were wholly unnecessary and ill-advised, they did not amount to a due process violation. The court twice admonished the jurors that the comments had nothing to do with the case. Moreover, the jury could not have reasonably understood the remarks as reflecting negatively on defendant. None of the evidence showed or even remotely suggested that defendant accosted any of the identity theft victims in their cars. Instead, the evidence indicated that defendant stole women’s purses from several cars when the cars were parked in garages and the women were not present.

Accordingly, we affirm the judgment in all respects.

II. BACKGROUND

A. *The Firearm Assault and Brandishing Charges (Counts 1 and 2)*

On September 28, 2007, while turning onto the southbound on-ramp of I-15 at Central Avenue in Lake Elsinore, Rosales nearly sideswiped a car driven by defendant. Defendant had just exited the I-15, but instead of turning onto Central Avenue he proceeded onto the southbound I-15 on-ramp. On the on-ramp, Rosales drove behind and slightly to the left of defendant's car, and raised his hand to apologize for nearly sideswiping defendant's car. Defendant slowed his car to around 10 miles per hour on the on-ramp, causing Rosales to slow to the same speed. Defendant then extended his right hand outside his driver's side window, and "flashed a gun" at Rosales.

Rosales was able to see the gun very clearly, and identified it as a silver or chrome revolver. Rosales immediately called 911 on his cellular telephone, and followed defendant southbound on the I-15. Peace officers stopped defendant near Rainbow Valley Road south of Temecula. At that location, Rosales identified defendant as the person who displayed the gun.

B. *The Theft-related Charges*

When the officers stopped defendant south of Temecula, they found two handguns inside his car, including a loaded silver revolver in working order. The revolver belonged to a Las Vegas police sergeant, and had been stolen from the front seat of the officer's vehicle while the vehicle was parked in the officer's garage, and the garage doors were

open. The other gun was a semiautomatic handgun. A female, Khamla Vongvichith, was also in the car.

In the backseat and trunk of defendant's car, officers found large amounts of clothing and electronic merchandise, including a Play Station 3, a plasma television, an iPod, and a laptop and printer combination. They also found several checkbooks, driver's licenses, and credit cards belonging to several people other than defendant and Vongvichith. Additional checks, credit cards, and driver's licenses belonging to other people were found at defendant's residence.

All of the items found in defendant's car and residence had been stolen. Either defendant or Vongvichith had used other people's credit cards and driver's licenses to purchase goods at Target, Best Buy, and other stores. Three women testified that their purses, including their credit cards, checkbooks, and driver's licenses, had been taken from their cars while their cars were parked in the garages of their residences. One witness testified she saw defendant enter the garage of her employer, while the car was parked in the garage, and it was later discovered that defendant had taken the employer's purse and other belongings from the car.

III. DISCUSSION

A. The Trial Court Properly Found No Due Process Violation and Properly Denied Defendant's Request for an Evidentiary Sanction Due to the State's Failure to Preserve the Audio Recording of Rosales's 911 Call

Defendant claims his convictions in counts 1 and 2 for, respectively, assault with a firearm (§ 245, subd. (a)(2)) and brandishing a firearm in the presence of a person in a moving vehicle (§ 417.3), together with the personal use enhancement on count 1 (§ 12022, subd. (a)(1)), must be reversed, because his due process rights were violated when the state failed to preserve the audio recording of Rosales's 911 call. We reject this claim. The recording contained potentially exculpatory evidence because it may have included statements by Rosales that defendant did not point a gun directly at him but only showed him a gun. Nevertheless, the defense failed to show that the recording was destroyed in bad faith, and thus failed to establish a due process violation. (*Youngblood*, *supra*, 488 U.S. at pp. 55-59.)

1. Procedural Background

Rosales called 911 immediately after his September 28, 2007 encounter with defendant on the I-15 on-ramp. On November 9, 2007, a felony complaint was filed charging defendant with violations of assault with a firearm, crimes based on the on-ramp incident. On November 13, defendant appeared in court and was arraigned on the charges, with the public defender representing him. Deputy Public Defender H. Williams

appeared on defendant's behalf, and acknowledged receiving "discovery" on November 13.

A settlement conference was scheduled for November 20, 2007, but was continued to December 18. On December 18, the public defender was relieved and a private attorney began representing defendant. The settlement conference was continued several more times, ultimately to April 16, 2008. On April 16, 2008, defendant failed to appear in court and a bench warrant was issued for his arrest.

After April 16, 2008, defendant did not appear in court in this case again until March 30, 2010. Between April 2008 and March 2010, he was arrested and prosecuted for crimes he allegedly committed in San Diego County. On April 1, 2010, the public defender was again appointed to represent defendant, and on that date was again provided with discovery. A settlement conference was scheduled for April 8, but was continued to June 3, 2010.

On April 9, 2010, defendant filed an "informal request" for discovery, including "[a]udio recordings of all 911 calls." On July 17, 2010, the CHP sent a letter to the district attorney certifying that the recording of the 911 call had been purged from the CHP's records 180 days after the call, consistent with the CHP's normal practice.

On October 5, 2010, shortly before jury selection, defense counsel made a "*Trombetta*^[2] motion" to counts 1 and 2 based on the state's failure to preserve the audio recording of the 911 call. Counsel argued that because the call had not been preserved,

² *California v. Trombetta* (1984) 467 U.S. 479.

he was unable to determine whether Rosales made any statements during the 911 call that were inconsistent with statements he made to investigating officers shortly after the incident, at the preliminary hearing, and to the defense investigator. Counsel said he did not believe the recording was purged in bad faith, and he was not asking the court to dismiss the charges. Instead, counsel asked the court to “at least” instruct the jury “as to [the recording] being purged and the defense being hindered in that regard.”

The court denied the request, stating:

“Obviously, the defense was aware of the case. He had an attorney, an interview, and all the charges are mentioned, including the [section] 245 and the [section] 417. Any attorney [who read the file] would have known there was a recording and it would be purged unless something happened, and no one did anything. [¶] . . . [¶] So the defense failed to investigate as far as I’m concerned, so you’re not going to get any [evidentiary] sanctions in this purging in the ordinary course of events unless someone requested it. So that takes care of that issue.”

Whether defendant pointed a gun directly at Rosales or merely showed Rosales he had a gun was a disputed issue at trial. Relevant to this issue was whether Rosales told the dispatcher during the 911 call that defendant pointed a gun directly at Rosales, or instead only showed Rosales that he had a gun.

At trial, Rosales testified that defendant did not point the gun directly at him, but merely showed him he had a gun. Specifically, Rosales said that defendant extended his right hand across his body, positioned his right hand outside his driver’s side window

approximately eight inches, and “waved or flashed” a gun at Rosales, in order to show Rosales he had a gun. Rosales was able to see the gun “perfectly clear” and saw it was a revolver. When the prosecutor asked Rosales whether defendant ever pointed the gun directly at him, Rosales answered: “I wouldn’t say pointed. It’s kind of hard to point. Like more at an angle just kind of showing me . . . So I was able to see the gun perfectly clear.”³

CHP Officer Steven Jio spoke with Rosales near Rainbow Pass Road south of Temecula, after Rosales identified defendant and defendant was taken into custody. According to Officer Jio, Rosales told him that defendant twisted his body outside the driver’s side window of his car, and pointed the gun behind him, directly at Rosales. When confronted at trial with his prior statement to Officer Jio, Rosales did not recall telling Officer Jio that defendant leaned his body outside the car. Still, Rosales testified that what he told the officer was “[100] percent . . . accurate.”

In closing argument, the prosecutor urged the jury to find defendant guilty of the assault with a firearm and brandishing charges (counts 1 and 2), and find the personal use allegation in count 1 true, based on Rosales’s statement to Officer Jio that defendant pointed the gun directly at Rosales.⁴ By contrast, defense counsel urged the jury to

³ Rosales’s trial testimony was consistent with his preliminary hearing testimony, where he testified that the gun “wasn’t back toward me” and defendant’s “wrist was sticking out of the window with the gun” but not “his torso.”

⁴ More specifically, the prosecutor argued that defendant was guilty of assault with a firearm because, in pointing the gun at Rosales, he “[did] an act that by its nature would directly and probably result in application of force to a person[.]” (§ 245, subd.

[footnote continued on next page]

believe Rosales’s testimony that defendant only showed Rosales he had a gun, and did not point a gun at Rosales or exhibit a gun in a threatening manner. Counsel argued it was unlikely that defendant could have positioned his entire body outside the window and pointed the gun behind him, while still maintaining control of his car. Thus, counsel argued that Officer Jio must have misinterpreted Rosales’s statement or recorded it incorrectly in his report, and defendant was not guilty of assault with a firearm or brandishing a firearm.

2. Applicable Legal Principles

The due process clause of the Fourteenth Amendment requires law enforcement agencies to preserve evidence that is of apparent exculpatory value to the defendant and not obtainable by other reasonably available means. (*California v. Trombetta, supra*, 467 U.S. at pp. 488-489.) When, however, evidence is only potentially exculpatory or potentially useful to the defense, the state’s failure to preserve the evidence does not violate due process unless the defendant demonstrates that law enforcement acted in bad faith in failing to preserve the evidence. (*Youngblood, supra*, 488 U.S. at pp. 57-58.)

The court in *Youngblood* explained the reason for requiring the defendant to show bad faith in order to establish a due process violation for the destruction of potentially

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(a)(2); CALCRIM No. 875.) Similarly, the prosecutor argued defendant was guilty of brandishing the gun at Rosales, because he “exhibited a firearm in the presence of another person who was in a car [¶] . . . in a threatening manner that would cause a reasonable person to fear bodily harm.” (CALRIM No. 980.) The prosecutor argued that the personal use allegation was true because defendant displayed the firearm “in a menacing manner.” (CALCRIM No. 3146.)

exculpatory evidence: “Part of the reason . . . is found in the observation made by the Court in *Trombetta* . . . that ‘[w]henver potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.’ Part of it stems from our unwillingness to read the ‘fundamental fairness’ requirement of the Due Process Clause, [citation], as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police’s obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.*, those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” (*Youngblood, supra*, 488 U.S. at pp. 57-58.)

3. Analysis

Defendant claims that because the state knew or should have known that the recording of the 911 call contained potentially exculpatory evidence, the state’s failure to preserve the recording was in bad faith and violated his federal due process rights. Thus, defendant argues, the court erroneously refused to impose the evidentiary sanction he

sought for the due process violation, namely, a jury instruction that his defense to counts 1 and 2 was “hindered” by the destruction of the recording.

Defendant’s argument is based on a misreading of the law. That the state knew or should have known that the 911 recording contained potentially exculpatory evidence is insufficient to establish a due process violation. (*Youngblood, supra*, 488 U.S. at pp 57-58.) In order to establish a due process violation, defendant had the burden of demonstrating that the state acted in bad faith in destroying the recording of the 911 call (*id.* at p. 58), but defendant failed to make this showing. Indeed, defense counsel essentially conceded there was no indication that the recording was destroyed in bad faith, but in accordance with the “normal practice” of the CHP, 180 days after the call was made. Thus here, defendant failed to establish that his due process rights were violated by the state’s destruction of the recording of the 911 call.

B. The Trial Court’s Remarks Concerning Women Getting Into Their Cars Did Not Violate Defendant’s Due Process Right to a Fair Trial

Defendant claims that certain comments the trial court made to the jury, before closing arguments, violated his due process right to a fair trial. Here again, there was no due process violation.

1. The Trial Court’s Remarks

Following the presentation of the evidence but before closing arguments, the court made the following comments to the jury, without objection by the defense:

“Before I forget, this has nothing to do with the case, and I do get to talk about things, but I’m just going to talk to you women. I’m going to remind you of something, about purses and stuff, okay?”

“I am certain that you all shop and that you come to your car with your purse and bags and you put them in the car, and then you sit down in your car and you move your purse and you look for your keys, and you do this and you do that. At that time in life you are the most vulnerable. You’re in a car, you’re inattentive, keys are in the car, your property is in the car. Those people who wish to prey on you know that.

“I have a recommendation for you. As a matter of just practice, when you get to your car, you load stuff, you have your keys out, you get in your car, you put the keys in, you start the car and you drive away. And then if you want to rearrange stuff, drive away a couple of blocks and pull over and do it. You understand what I’m talking about?”

“Yeah. I mean, you truly are there with all your property, with your car, with your keys, and you’re doing—you’re looking, okay? And I’ve tried a lot of cases where that is your vulnerable spot. So I just throw that out to you to think about. Because I know you don’t do that. And you all know you should. Okay. That’s all I have to say. It has nothing to do with this case, it has to do with life.”

2. Analysis

Defendant claims the court’s remarks deprived him of his due process right to a fair trial, because they caused the jury to sympathize with the identity theft victims and to harbor prejudice against defendant on the ground he was a dangerous person. The People

claim that defendant has failed to preserve this due process claim for appeal because his counsel did not object to the trial court's comments, or seek a jury admonition to disregard the comments in their deliberations. Though we agree the claim has been forfeited (*People v. McWhorter* (2009) 47 Cal.4th 318, 373), we nevertheless address the claim on its merits.

A criminal defendant has a due process right to an impartial trial judge under the state and federal Constitutions. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111.) A court "commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is allying itself with the prosecution." (*People v. Carpenter* (1997) 15 Cal.4th 312, 353.) Nevertheless, "[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." (*People v. McWhorter, supra*, 47 Cal.4th at p. 373.)

The court's comments were ill-considered and better left unsaid, but they did not deprive defendant of a fair trial. The jury could not have reasonably understood the comments as discrediting the defense or prejudicing the charges against defendant. The court twice told the jurors, both before and after the court made the comments, that the comments had "nothing to do with the case." Additionally, none of the evidence showed that defendant confronted or assaulted any of the women whose purses, checkbooks,

credit cards, driver's licenses, and other possessions were taken from their cars when their cars were parked in their garages. Thus, the jury must have understood the court as commenting on "life," as the court put it, not on defendant's conduct. Thus the court's remarks were not so prejudicial that they denied defendant a fair trial.

IV. DISPOSITION

The judgment is affirmed.

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KING
J.

We concur:

HOLLENHORST
Acting P. J.
MCKINSTER
J.