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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.

DEVIN MCLEAN WILSON,

Defendant and Appellant.

E053440

(Super.Ct.No. SWF10000986)

OPINION

APPEAL from the Superior Court of Riverside County. Eric G. Helgesen, Judge.
(Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI,
§ 6 of the Cal. Const.) Affirmed.

Denise M. Rudasill, 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 Lynne G. McGinnis and Eric A. Swenson, Deputy Attorneys General, for Plaintiff and Respondent.

On March 8, 2011, a jury convicted defendant Devin McLean Wilson of two counts of assault with a deadly weapon other than a firearm. (Pen. Code,¹ §§ 245, subd. (a)(1), 667, and 1192.7, subd. (c)(31).) In a bifurcated proceeding, defendant admitted he had suffered four prior convictions within the meaning of section 667.5, subdivision (b). On April 8, he was sentenced to state prison for an aggregate determinate term of nine years.

I. PROCEDURAL BACKGROUND AND FACTS

On April 16, 2010, James Church drove James Darryl Brooks (the victim) to the Arbors Apartments in Murrieta, where the victim could visit a friend. When the victim arrived, his friend was in the parking area. As the victim walked towards his friend, Church stayed in the vehicle. After a few minutes, Church saw defendant and his brother (sometimes, “the brother”) walk up to the victim, and shortly thereafter, walk away.

Church was changing songs on his radio when he heard someone yelling, “stop” and the victim saying, “ow.” He heard a thumping noise, and when he got out of his vehicle, he saw the victim on the ground, in a fetal position, with his hands and arms up in an effort to ward off the blows he was receiving. Church also saw defendant striking the victim repeatedly in a “whipping motion” with a sock “with something in it.” The sock was stretched to a length of about two feet by a “fist-sized object” that it contained. Church speculated the object was a rock.

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

The victim explained that when defendant walked up to him, he (the victim) was not expecting trouble, but defendant started telling him “it was going to go down, me and him right then and there.”² The victim tried to talk defendant out of fighting, and defendant began to walk away; however, the victim noticed defendant stopping to say something to his brother, who then walked up to the victim and began accusing the victim of pulling a knife on defendant. The victim denied doing so, but the brother pressed forward threateningly.

As the victim was backing away, defendant returned, saying, “I’m going to fuck you up.” While able to avoid a punch from the brother, the victim felt a hard blow to the back of his head. He fell to the ground, and the brother began kicking the victim while defendant continued striking him with the sock.³

Lee Vollick,⁴ who been standing outside smoking a cigarette, ran up and yelled, “Get off of him.” Defendant appeared to ignore Vollick, but the brother came back punching, knocking Vollick to the ground. While Vollick was on the ground, the brother continued striking with his fists, and defendant swung a sock at him that contained “some

² Defendant and the victim had been friends at one point; however, their relationship had deteriorated after some property was stolen from a house belonging to a friend.

³ The victim admitted having a prior felony conviction for possession of drugs. He had also lied to the police in the past and had been found in possession of stolen property. He admitted being on probation.

⁴ Prior to the attack, Vollick had been inside the brother’s apartment.

sort of a very hard object” that felt like a can. Vollick testified the weight of the object extended the sock to a length of two and a half feet.⁵

The victim testified that he experienced “[e]xcruciating pain” during the beating, which left marks all over his body. He had difficulty walking and breathing immediately afterwards. In addition, the victim complained of some lingering memory impairment. Vollick also sustained a number of injuries from the beating. He was in a “complete daze” for between 30 and 45 minutes following the attack, and he experienced blurred vision and vertigo. He had a headache the rest of the evening, as well as neck and back pain that persisted for several days. Both men refused medical treatment; the victim because he was uninsured and concerned about potential costs, and Vollick because he did not believe his injuries were serious enough.

Officer Eduardo Vazquez opined that a sock containing a hard, “fist-sized” object was capable of causing great bodily injury or death.

The brother testified that he and defendant were walking through the apartment complex when a gray truck pulled up and the victim got out. Defendant walked up to the victim and asked if he wanted to take a walk and “talk about something that happened prior to that date.” The brother claimed the victim pulled out a knife. When the brother caught up with defendant, he asked the victim, “Did you just pull a knife out on [defendant]?” The victim replied, “Yes, and I’ll kill [him].” The brother testified that he

⁵ Vollick had prior convictions (drugs, possession of burglary tools, receiving stolen property, and criminal threats against his mother) and admitted he might have previously lied to the police when he was under the influence of drugs.

punched the victim on the side of the head, “and I just kept going.” Vollick jumped into the fray, and the brother began fighting with both men. The brother did not recall what defendant was doing during that time, but eventually defendant came back to “break it up.” At some point, defendant also began “tussling” with Vollick. The brother was never stabbed, and he had no idea what happened to the knife.⁶

The brother acknowledged defendant left and came back with a weapon, and that he had been hit by it at one point. He described it as some kind of object that “[c]ould have been a bar of soap,” but added, “[i]t wasn’t hard though. It wasn’t nothing that could have hurt nobody.”

Defense Investigator Sherrie Jones, who had previously interviewed the brother, confirmed that his testimony was consistent with the statements he had previously made to her. The brother also told the investigator that defendant was swinging the sock at the victim in order to knock the knife out of his hands. In contrast, Officer Vazquez testified that when he interviewed the brother in the evening after the assault, the brother acknowledged he never saw the victim wielding a knife but that he believed the victim had one because that is what defendant had told him.

⁶ No knife was recovered at the scene of the attack.

II. OFFICER VAZQUEZ'S OPINION THAT THE SOCK CONTAINING A HARD OBJECT WAS CAPABLE OF CAUSING GREAT BODILY INJURY OR DEATH

A. Further Background Information

At an Evidence Code section 402 hearing, the prosecution moved to allow Officer Vazquez to testify as an expert that the hard heavy object placed in the bottom of the sock used by defendant was a deadly or dangerous weapon capable of causing serious injury or death if it hit a person in the correct spot or in the head. Defendant objected to the proposed testimony on the grounds that it constituted a legal definition or instruction and it was up to the jury to decide whether the described item was a deadly weapon. After further briefing, the trial court denied the prosecution's motion; however, over further objection from defendant, the court ruled the officer could offer his opinion on the matter as a lay witness.

Officer Vazquez testified as to his extensive training and experience with regard to deadly weapons. The officer had interviewed both victims and had heard their testimonies at trial. Although the victims described the item used as a black sock containing a fist-sized hard object at the tip, no such item was found. Based on the testimonies of the victim and Vollick and their prior description of the item, Officer Vazquez opined that "if [a] black sock or black object containing a fist sized object at the tip of the sock would have struck them, again on the temple, head, orbital area, nose, around the throat . . . it could possibly cause great bodily injury, visible bruising, bleeding, possibly broken bones and ultimately death."

The prosecutor then displayed to the officer three socks with different heavy items in them and asked if each, when swung in a downward motion, could cause great bodily injury. One sock contained a can of vegetables, one a box containing a bar of soap, and one a Master lock. Officer Vazquez testified that it did not matter what heavy item was contained in the sock, because any heavy object in the bottom of a sock is capable of causing great bodily injury. On cross-examination, defense counsel elicited the officer's opinion that a pair of pants, a pillow, a pencil, a piece of paper, and even water could be deadly weapons depending on how they are used by an assailant. On redirect, the officer clarified his opinion that anything could be used as dangerous weapon was based on "the manner in which the object is used."

On appeal, defendant contends the trial court abused its discretion when it permitted Officer Vazquez's opinion that the sock containing a hard object was a deadly weapon capable of causing great bodily injury or death. According to defendant, the officer's testimony constituted "an opinion as to the definition of a crime," and "invaded the trial court's province for providing legal definitions as well as the jury's province for determining [his] guilt or innocence." He faults the court for allowing the prosecution to present the officer's testimony as expert testimony "cloaked under the guise of a lay opinion," and that the "undue prejudicial impact of this evidence was severe."

B. Standard of Review

A lay witness may offer opinion testimony that is rationally based on the witness's perception and "[h]elpful to a clear understanding of his testimony." (Evid. Code, § 800.) "A lay witness is occasionally permitted to express an ultimate opinion based on his

perception, but only where ‘helpful to a clear understanding of his testimony’ [citation], i.e., where the concrete observations on which the opinion is based cannot otherwise be conveyed. [Citations.]” (*People v. Melton* (1988) 44 Cal.3d 713, 744.) In *People v. Farnam* (2002) 28 Cal.4th 107, for example, our Supreme Court concluded it was within a trial court’s discretion to allow a correctional officer to testify the defendant stood “‘in a posture like he was going to start fighting’” and was being “‘very defiant.’” (*Id.* at p. 153.) According to our Supreme Court, such perceptions are within common experience and certainly within the common experience of the correctional officer who offered testimony. (*Ibid.*) Courts have also admitted lay opinion testimony on such evidentiary issues as whether a defendant was under the influence of alcohol or drugs (*People v. Williams* (1988) 44 Cal.3d 883, 914-915); whether someone appeared to understand a conversation (*People v. Medina* (1990) 51 Cal.3d 870, 886-887); and whether it appeared the defendant was the person directing another in a drug transaction (*People v. Hinton* (2006) 37 Cal.4th 839, 889).

We review a trial court’s decision to admit or exclude lay opinion testimony for an abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128-130.) “It is fundamental that a trial judge has wide discretion to admit or reject opinion evidence, and that a court of appeal has no power to interfere with the ruling unless there is an obvious and pronounced abuse of discretion” (*People v. Clark* (1970) 6 Cal.App.3d 658, 664.)

C. Analysis

In response to defendant's claims, the People contend the officer's lay opinion "was rationally based on his perceptions." He had interviewed victims who described the weapon used by defendant, along with how it was used. He observed the injuries caused by the use of the weapon. And, the prosecutor showed him three items, each of which was similar to the weapon used by defendant, namely, "a sock containing a can, another sock containing a padlock, and a third sock containing a bar of soap." Additionally, the People claim the officer's testimony "concerned matters that were too subtle to convey accurately to the jurors in any other manner." Thus, Officer Vazquez explained that "anything can be used as a dangerous weapon," depending on the manner in which the object is used. Moreover, the People maintain that because the officer's opinion did not rest on matters beyond the jury's common experience, it did not amount to expert opinion. We agree.

Defendant's claim that Officer Vazquez gave an opinion as to the definition of a crime or whether a crime was committed and thus defendant was guilty, is misplaced. As the People point out, despite the officer's testimony, the jury was still required to determine whether the sock containing the hard object *as used by* defendant was "capable of causing and likely to cause death or great bodily injury." The officer's testimony did not include any opinion that defendant had committed an assault with a deadly weapon, or that he had committed any crime at all. Rather, the officer testified as to many different items that could possibly cause great bodily injury. This case is not like *People v. Torres* (1995) 33 Cal.App.4th 37, where the opinion testimony found

objectionable was testimony by an expert who was not a percipient witness. (*Id.* at pp. 43-45.) In *Torres*, the defendant, who was charged with murder with robbery as a special circumstance and attempted robbery, collected money from drug dealers in his gang's territory in exchange for the gang allowing the dealers to conduct business there. (*Id.* at p. 42.) The gang expert, who described this activity, went on to define robbery and categorize the above-described activity as such. (*Id.* at p. 44.) The appellate court concluded the expert should not have defined robbery and should not have expressed his opinion that the defendant was a robber. (*Id.* at pp. 46-47.) The court added, "There are some crimes a jury could not determine had occurred without the assistance of expert opinion as to an *element* of the crime. Robbery . . . however, [is] not among them." (*Id.* at p. 47, fn. omitted.) Accordingly, we conclude the trial court did not abuse its discretion in admitting Officer Vazquez's opinion.

Notwithstanding the above, even if we were to assume the trial court erred in permitting the officer's opinion, it is not reasonably probable that the admission of such opinion affected the outcome. (*People v Watson* (1956) 46 Cal.2d 818, 836.) To begin with, the defense was allowed to cross-examine Officer Vazquez, who acknowledged that "[j]ust about anything you could find" could be used as a deadly or dangerous weapon, including a pencil, a piece of paper, water, a pillow, and the prosecutor's pants. Looking at the physical evidence, the victim described the pain as "excruciating." His injuries included bruises all over his body, difficulty walking and breathing immediately afterwards, and some lingering memory impairment. Vollick's injuries included being in a "complete daze" for between 30 and 45 minutes following the attack, blurred vision and

vertigo, a headache the rest of the evening, and neck and back pain that persisted for several days.

During closing argument, the prosecutor informed the jury that it probably did not “even need” Officer Vazquez’s experience to know that the weapon used by defendant was capable of causing more than minor damage. In response, defense counsel argued the officer was of the opinion that “anything at all can be used as a deadly or dangerous weapon,” and she reminded the jurors it was their duty to decide whether the weapon used was a deadly weapon. The jury was instructed that it need not accept a lay opinion but should give it the weight, if any, to which it is entitled.

Even without Officer’s Vazquez’s opinion, the jury would have decided that the sock containing a heavy object, as used by defendant, was a “deadly weapon” within the meaning of the statute, and thus, defendant was guilty as charged. Defendant disagrees, contending the jury did not find the evidence of guilt overwhelming, as demonstrated by its request for a read back of the testimonies of the victim, the brother, and a defense investigator, along with the jury’s request for clarification as to what parties were involved and what verdict forms the jury needed if it had a verdict of a greater crime on one count and a lesser crime on another. Thus, defendant argues it is reasonable to assume the jury was considering simple assault rather than assault with a deadly weapon.

The People point out that the jury returned a verdict in less than five hours and informed the court that it did not need to have its question regarding a potential alternative verdict answered. The jury decided that defendant had committed an assault with a deadly weapon, rejecting any argument that he was acting in self-defense or

defense of others. Thus, even if, as defendant argues, we may assume the jury was “at least considering finding” defendant guilty of simple assault, the fact that the jury quickly reached the verdict that was reached speaks volumes. Based on the record before this court, the admission of Officer Vazquez’s opinion, even if error, could not have been prejudicial. (*People v. Hinton, supra*, 37 Cal.4th at p. 911.)

III. DENIAL OF DEFENDANT’S MOTIONS FOR MISTRIAL/NEW TRIAL

A. *Further Background Information*

The People called Officer Matthew Mozingo as a rebuttal witness regarding the issue of the presence of a knife. He testified that he had seized a knife from defendant’s apartment in a common area on the day of the incident. When asked why he collected the knife, the officer replied it was because defendant was “on parole, and it’s a violation of his conditions.” Defense counsel’s objection was sustained, and the trial court ordered the officer’s reply stricken from the record. In response to defense counsel’s request to make a record, a chambers conference was held. The next day, defense counsel stated his objections on the record and moved to dismiss the case based on prosecutorial misconduct. Counsel opined the prosecutor had violated a pretrial order that any references to the defendant’s criminal past be excluded. The trial court did not recall the order, and thus, ordered a full transcript of the hearing on the motions in limine. The transcript showed no such limiting order had been made. Defense counsel then argued that the fact that the officer had mentioned defendant’s parole status would lead one or more jurors “to the conclusion that he has suffered a felony conviction and that it’s a recent felony conviction which effectively . . . prejudiced [his] trial so that he could not

get a fair trial.” Counsel further noted the trial court had not admonished the jury to disregard the inappropriate testimony. In response, the prosecutor pointed out the officer’s testimony occupied only 15 minutes of a trial that spanned five days. The purpose of calling the officer to the stand was to impeach the brother’s testimony regarding the description of the knife he claimed to have seen in the victim’s hand. The mention of defendant’s parole status was fleeting and unintentional. Further, given the trial court’s ruling, the prosecutor argued it was likely the jury was completely unaware of anything inappropriate occurring in front of it.

The trial court denied the motion for mistrial on the grounds that it had sustained defense counsel’s objection and the jurors had previously been admonished not to consider any testimony that had been struck by the judge. The trial court further declined to provide another admonition that the jury disregard the fact that defendant was on parole because it did not want to highlight the inadmissible testimony.

At sentencing, defendant renewed his motion for mistrial and moved for a new trial on the same grounds stated above.

B. Standard of Review

“A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ [Citation.]” (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) We review the matter of the mistrial motion under an abuse of discretion standard. (*Ibid.*) Likewise, we apply the same standard of

review to the denial of a motion for new trial. (*People v. Davis* (1995) 10 Cal.4th 463, 524.)

C. Analysis

The officer's reference to defendant being on parole was isolated and brief. The court promptly sustained defense counsel's objection and struck the testimony from the record. There was no further mention of defendant's parole status before the jury from witnesses or counsel. In contrast, the jurors heard testimony about the criminal records of Vollick and the victim. In instructing the jurors prior to deliberations, the court reminded them that they "must not be biased against the defendant just because he has been arrested, charged with a crime, or brought to trial." (CALCRIM No. 220.) The court further charged the jury: "If I ordered testimony stricken from the record you must disregard it and must not consider that testimony for any purpose." (CALCRIM No. 222.) The jury presumably followed the instruction. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1121.) Under these circumstances, the trial court did not abuse its discretion in denying either defendant's motion for mistrial, or his motion for new trial.

IV. PROSECUTORIAL MISCONDUCT

A. Further Background Information

During closing, the prosecutor argued, "And of course how do we determine these truths? Right? You do it based on the evidence. So is this a case of whodunit? Is it in your mind? Is there any doubt who the defendant in this case is? Has anybody raised a reasonable doubt in your mind that this is the man that committed this crime with this deadly weapon?" Defense counsel objected on the grounds the remarks amounted to an

inappropriate shifting of the burden of proof to defendant, which constituted prosecutorial misconduct. The trial court admonished the jury that the burden was not on the defense to raise a reasonable doubt, but that the People had to prove the issue beyond a reasonable doubt.

Later on, the prosecutor noted, “For self-defense or defense of another to exist, another factor that must be present is a reasonable belief of imminent danger of suffering bodily injury.” The prosecutor added, “By the way, let me ask you, ladies and gentlemen, has there been any evidence of what the defendant believed in this case?” Defendant objected, and following an unrecorded sidebar conference, the trial court admonished the jury as follows: “Ladies and gentlemen, as I told you during jury selection, the defendant has no obligation to prove anything to you or present any evidence whatsoever. The burden of proof rests entirely on the prosecution. In deciding the case, you should look at the totality of the evidence.”

Based on the prosecutor’s statements, defendant moved for a mistrial or a new trial. However, as defendant points out, the trial court did not hear argument on the issue of whether the prosecutor’s alleged misconduct supported a mistrial. Rather, the court interpreted the issue to be more appropriate for a motion for new trial, as the jury had already convicted defendant. Defense counsel argued that the prosecution’s comment regarding a lack of evidence of what defendant believed was an indirect reference to defendant’s failure to testify, and thus, was prejudicial to defendant. In response, the prosecutor explained he was only talking about what defendant believed with regard to the immediacy of threat in regard to his defense of self-defense, which was an affirmative

defense. He further argued he was only telling the jury to follow the evidence; he was not commenting on defendant's failure to testify.

The trial court denied defendant's motion, stating: "As to the issue of the comments made during closing argument, obviously commenting on the state of the evidence is appropriate. If something had been said along the lines of, well, the defendant didn't get up here and tell you what his state of mind was, that I think would have obviously crossed the line, but the fact of the matter is there was no evidence showing what his state of mind was to be received from any source. The Court believes that that was a fair comment. [¶] I did indicate after that objection was made during the argument, I did go ahead and tell the jury that, to quote, ladies and gentlemen, as I told you during jury selection the defendant has no obligation to prove anything to you or present any evidence whatsoever. The burden of proof rests entirely on the prosecution in deciding the case. You should look at the totality of the evidence. And I believe that if there was anything improper in the statement, that would have taken care of curing it. [¶] On that basis, I'll deny the motion for new trial and/or mistrial." On appeal, defendant challenges the court's ruling, contending the prosecutor committed *Griffin*⁷ error.

B. Standard of Review

The standard of review with respect to motions for mistrial and new trial was set forth in the prior section. Regarding defendant's claim of *Griffin* error, "It is a bedrock

⁷ *Griffin v. California* (1965) 380 U.S. 609.

principle in our jurisprudence that one accused of a crime cannot be compelled to testify against oneself. [Citations.] In order that an accused not be penalized for his invocation of this fundamental right, the prosecutor may neither comment on a defendant's failure to testify nor urge the jury to infer guilt from such silence. [Citations.]" (*People v. Hardy* (1992) 2 Cal.4th 86, 153-154.) In determining whether the prosecutor's comments constitute *Griffin* error, we look to whether there is a "reasonable likelihood that any of the comments could have been understood, within [their] context, to refer to defendant's failure to testify." (*People v. Clair* (1992) 2 Cal.4th 629, 663.) We independently consider the record. (*Ibid.*)

C. Analysis

According to defendant, the prosecutor's comment as to whether anyone had raised a reasonable doubt of defendant's commission of the crime "suggested that [defendant] not only had a burden to produce evidence, but that he had a duty to produce enough evidence to raise a reasonable doubt." Regarding the second comment about evidence of defendant's belief, defendant contends the word "believed," as used by the prosecutor, "had the same effect as the word, 'deny,' which the prosecution used in its closing statement in *Vargas*⁸ and, which the reviewing court found to be a *Griffin* error. [Citation.]" According to defendant, just as in *Vargas*, where the defendant was the only person who could deny his presence at the scene of the crime, so too in this case,

⁸ *People v. Vargas* (1973) 9 Cal.3d 470, 476.)

defendant was the only one who could testify as to what he believed, and thus, the prosecutor's remark amounted to commenting on defendant's failure to testify.

The prosecutor did not engage in improper argument in this case. His argument was a permissible comment on the state of the evidence. There was no evidence that anyone other than defendant was the primary assailant. Furthermore, while the defense offered the testimony of the brother, who claimed that the victim had pulled a knife on defendant, the brother also testified that defendant responded to this threat by leaving and then returning with a weapon that he used on the victim. Based on this evidence, there was no showing that defendant believed he was in imminent fear of death or serious injury. It is well settled that a prosecutor may comment in closing argument "on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses. [Citation.]" (*People v. Brady* (2010) 50 Cal.4th 547, 566.) Although the issue in *Brady* was whether the prosecutor committed so-called *Griffin* error by commenting directly or by inference on the defendant's failure to testify at trial, the above-noted principle is equally pertinent to defendant's claim that the prosecutor's argument effectively shifted the burden of proof to him to raise a reasonable doubt about his guilt. Because we conclude the prosecutor's argument was not improper, we must reject this claim of error.

V. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.