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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.

GREGORY ALLEN MURPHY,

Defendant and Appellant.

E053704

(Super.Ct.No. FMB900212)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Kathleen M. Redmond, 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, Barry Carlton and Joy Utomi, Deputy Attorneys General, for Plaintiff and Respondent.

Following a jury trial, defendant Gregory Allen Murphy was convicted of the lesser included offense of resisting a peace officer, a misdemeanor (Pen. Code, § 148, subd. (a)), and was sentenced to serve 270 days in jail. On appeal, he contends the trial court erred in failing to give a unanimity instruction to the jury, and the prosecutor committed prosecutorial misconduct. He further requests that we independently review the sealed record of the court's in camera *Pitchess*¹ review of one deputy's personnel files.

I. PROCEDURAL BACKGROUND AND FACTS

On May 4, 2009, Deputies Erik Smoot, Christopher Coillot, Roger Meyer, and Michael Sellers of the San Bernardino County Sheriff's Department responded to a call regarding a suicide attempt by a woman in Yucca Valley. Prior to that call, there had been an assault with a deadly weapon at the Yucca Valley Community Center, where five White males had severely beaten up a Hispanic male.

At the scene of the suicide attempt, Deputy Meyer observed five White males hanging around an "ampm" convenience store. He thought the men may have been involved in the prior fight, so he asked Deputies Smoot and Coillot to investigate and contact the men. As the deputies approached, the five men split into two groups; two walked east and the other three, including defendant, walked west. As the deputies drove up to the three men, they spontaneously turned around and put their hands in the air. Deputy Smoot was suspicious, because in his eight years of patrolling he had never seen

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

any person respond in such a manner. The deputies asked the men to put their hands down and turn around. Deputy Coillot told the men they were investigating a prior fight in the park that involved assault with a deadly weapon. Fearing weapons, Deputy Coillot asked the men if he could pat them down. At this point, defendant looked “panicked”; he was breathing fast and his eyes were wide. As Deputy Coillot began to search one of the other men, defendant took off running.

Deputy Smoot chased defendant, telling him to stop. As defendant ran away, he fell and slid head first into the ground. Deputy Smoot got on top of him and yelled “Sheriff’s department. Get on the ground. Put your hands behind your back.” Defendant struggled to get up and pushed back into the deputy. Deputy Smoot struggled back and hit defendant in the lower back with his flashlight. The deputy did not have a Taser, pepper spray, or any other tools to defend himself, so he punched defendant five or six times. Defendant continued to resist. The deputy got defendant in a headlock, and as they continued to fight, Deputy Smoot felt defendant weigh down on his gun. To stop defendant from grabbing the gun, the deputy let go of defendant, pushing him away. Defendant took off running again.

Deputy Meyer heard the calls for help on his police radio and joined in the chase. Defendant continued to run west. Deputy Meyer drove a police vehicle and spotted defendant near an open field with an adjacent wash. There was soft sand and rocks all over the ground. He jumped out of the vehicle and chased defendant. When the deputy caught up with defendant, they stumbled into each other as the deputy tried to take defendant down. Defendant was swinging punches and cursing at Deputy Meyer, who

swung back. Deputy Sellers caught up, joined in the struggle, and they were able to subdue defendant and cuff him. Defendant refused to walk, forcing the deputies to carry him about 150 yards. Medical aides on the scene put defendant face up on a backboard, with his handcuffed hands behind his back, and took him away in an ambulance bound for the hospital. Deputy Smoot also received medical treatment for his hand, which was sprained in the fight with defendant.

In his defense, defendant testified that he was walking with two men near the ampm store when two strangers approached them to talk about “fake ID’s or something.” Defendant and his group “laughed it off” and walked away. When defendant saw the deputies driving towards him, he got nervous and put his hands in the air. He knew they were officers because he saw their marked patrol car, uniforms, and sheriff’s vests. The deputies asked permission to search them and then told them to get against the wall. Defendant heard a scuffle, and when he turned to see what had happened, Deputy Smoot hit him in the face with a flashlight. When defendant asked Deputy Smoot why he had hit him, the deputy hit him again. Defendant was scared, started covering his face, and ran to avoid being hit again. As he was running, he was hit on the side of his head, fell, and then Deputy Smoot clubbed him on his back. Defendant tried to get up, but the deputy put him in a choke hold. Defendant denied trying to grab the deputy’s gun, claiming he pushed away and continued to run because he was scared he was “going to get beaten more.” Defendant stated that as he ran away, he was struck from behind and was knocked out. He regained consciousness as he was being carried by the deputies, who then dropped him “face first” onto the ground. Defendant claimed that a deputy

“stomped [him] in the face” and “smashed [his] face back into the dirt.” Defendant had bruises all over his body, a red mark on his arm, blood stains from his nose around his mouth, a swollen cheek, and bruised lips and ears. His nipple ring was also ripped out.

Larry Smith, a use of force expert, testified that if a suspect started to run away, it is appropriate for an officer to hit him once with a baton or Taser, or tackle him in order to apprehend him; however, it is not appropriate to hit a suspect five times with a baton unless he is on the ground and continues to resist and pose a threat. He stated that officers are taught not to hit a person in the head, if possible, and not to use headlock maneuvers. Rather, weaponless defenses such as arm bars, wrist locks and other control holds are taught.

II. UNANIMITY INSTRUCTION

Defendant contends the trial court sua sponte should have given a unanimity instruction (CALCRIM No. 3500) because the evidence showed more incidents than were necessary to prove that defendant resisted arrest and there were reasons to distinguish among the various incidents. He claims “the three incidents [[his] running on two occasions and going ‘limp after he was handcuffed] were distinguishable because they occurred at different times and defendant set forth a defense for each act.” Specifically, he argues that initially he ran from Deputy Smoot because the deputy was using excessive force; next, he ran because he was scared after the deputy put him in a headlock; and finally, he went limp after being handcuffed because he was temporarily unconscious. Thus, defendant argues, “there was every danger that the jury convicted

[him] of resisting arrest, despite the lack of unanimity as to the specific act constituting the offense.”

“We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. [Citation.]” (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 850.)

“It is fundamental that a criminal conviction requires a unanimous jury verdict [citations].’ [Citation.]” (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) “Where the jury receives evidence of more than one factual basis for a conviction, the prosecution must select one act to prove the offense, or the court must instruct the jury that it must unanimously agree on one particular act as the offense. [Citations.]” (*People v. Jantz* (2006) 137 Cal.App.4th 1283, 1292.) However, no unanimity instruction is required when the offense constitutes a continuous course of conduct: “A requirement of jury unanimity typically applies to acts that could have been charged as separate offenses. [Citations.] A unanimity instruction is required only if the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 423.) “The ‘continuous conduct’ rule applies when the defendant offers essentially the same defense to each of the acts, and there is no reasonable basis for the jury to distinguish between them. [Citation.]” (*People v. Stankewitz* (1990) 51 Cal.3d 72, 100; see also *People v. Jennings* (2010) 50 Cal.4th 616, 679-680.)

Here, from the time the deputies tried to question defendant, he took off running. From that point on, he continuously resisted the deputies. He ran, tripped, fell, was

temporarily detained by a deputy, struggled, broke free, ran off again, and then when he was handcuffed, he went limp. There was no break in his resistance or the deputies' chase. Thus, during closing argument, the prosecutor identified defendant's entire course of running away from the deputies as the basis for the resisting charge.

The People analogize the facts in this case to those in *People v. Lopez* (2005) 129 Cal.App.4th 1508 (*Lopez*). In *Lopez*, the defendant fought off the officers' attempt to take him into custody. He was tackled twice by various officers, and after being handcuffed, he dragged his feet, forcing the officers to carry him away. (*Id.* at pp. 1518-1519, 1533.) The prosecutor argued that the jury should consider the defendant's entire struggle against the various officers as the basis for the Penal Code section 148 violation. (*Lopez, supra*, at p. 1534.) Defendant was convicted, and on appeal he challenged the trial court's failure to give a unanimity instruction to the jury. (*Id.* at p. 1533.) Rejecting the defendant's argument, our colleagues in the Sixth District stated, "When two offenses are so closely connected in time that they form part of one transaction, no unanimity instruction is required. [Citation.]" (*Ibid.*) As in *Lopez*, the jury in this case did not need to agree on a specific act where all the acts were part of a continuous crime. (*Id.* at pp. 1533-1534.)

Moreover, as the People point out, defendant did not present different defenses for each incident of resistance. Defendant testified that the two times he ran away, it was because he was scared and did not want the deputies to beat him. Because the prosecutor identified defendant's running as the evidence that supported the criminal resistance charge, as the People argue, defendant's claimed defense that he went limp because he

was unconscious is irrelevant. Thus, the trial court did not err in failing to instruct the jury on unanimity.

III. PROSECUTORIAL MISCONDUCT

Defendant contends the prosecutor committed misconduct when she violated the trial court's ruling by eliciting evidence of a fight that occurred earlier on the same night in the same area where defendant and his friends were stopped. Specifically, defendant claims the prosecutor improperly (1) elicited testimony that the prior fight was a "hate crime" in which the victim was "jumped," and (2) referenced the specifics of the fight, insinuating defendant committed it. Defendant argues that even though his counsel did not always object to the misconduct or request an admonition, he did not forfeit his right to object on appeal because objecting would have been futile and thus did not have to be raised in the trial court. Defendant alternatively argues if this court concludes he forfeited his objections, his attorney's failure to object constituted ineffective assistance of counsel.

A. Further Background Facts

Before trial, defendant moved to exclude any mention of the prior fight. The trial court ruled that it would not allow evidence that defendant was identified by witnesses of the fight or was in a lineup for the fight; however, it would allow evidence to establish "why the officer was making contact, [which] was that they were looking for some individuals" The court ruled, "we won't be getting into any specifics about the actual 245 itself." The court stated its ruling was contingent on defendant not opening the door to the issue of whether he was identified as a participant in the fight during his

questioning. Later, the court repeated its ruling that the fight could be used to establish why the officers contacted defendant. The court again cautioned defense counsel: “But then if you go into more details about this fight on your cross-examination or details about whether or not your client was identified or not identified in that, being involved in that fight, then [the prosecutor] would have an opportunity to bring out information as to whether or not he made any admissions about being involved or if anyone personally identified him as being present.”

During trial, the prosecutor asked Deputy Smoot whether he received another call while he was responding to the suicide attempt. The deputy replied that he had received a call about an assault just prior to the suicide incident. He described the assault as a fight “where five [W]hite males had beaten up a Hispanic male pretty severely” Defense counsel did not object.

Later, the prosecutor asked Deputy Meyer whether, prior to arriving at the suicide call, he had received any information relevant to this case. The deputy stated he had received information on an incident he described as a “245 hate crime” where “four or five [W]hite males that beat [someone] up because he was Hispanic, yelling things like ‘peckerwood’ while they were doing it and beating him up.” Deputy Meyer said that because of this information, when he saw the five White males, he asked Deputy Smoot to investigate. Again, defendant did not object.

Later, the prosecutor asked Deputy Sellers if he had witnessed a third party visit defendant in the hospital. Sellers answered “yes,” and identified Samuel Arredondo. The

prosecutor asked Sellers if he knew whether Arredondo was a suspect in the fight.

Defendant's hearsay objection was overruled. The following exchange occurred:

“Q [PROSECUTOR] Were you aware of who Arredondo was in connection with the 245?

“A He was another suspect.

“Q . . . [S]o at this point was [defendant] under arrest for this?

“A No.

“Q So were these questions investigatory or specific to him being a suspect?

“A They're investigatory.

“Q And what was the question that you asked [defendant]?

“A If I can review my report, it would refresh my recollection.

[¶] . . . [¶]

“[DEFENSE COUNSEL]: I'm going to object to this line of questioning on relevance.

“THE COURT: Overruled.

“THE WITNESS: (The witness looks at a document).

“Q [PROSECUTOR]: Did you ask him what happened that night at the park?

“A Yes, I did.

“Q And what did he tell you?

“A He told me—

“[DEFENSE COUNSEL]: Again . . . calls for hearsay. Relevance.

“THE COURT: . . . [Y]ou're just wondering about what occurred at the park?

“[PROSECUTOR]: Yes.

“THE COURT: Sustained.

“[THE COURT]: Next question.

“[PROSECUTOR]: May I be heard?

“THE COURT: No. Next question.

“Q [PROSECUTOR]: Did [defendant] indicate to you that he had been at the park that night?”

“A Yes.

“[DEFENSE COUNSEL]: Objection.

“THE COURT: Sustained. It’s stricken. We’re not getting into the park. It’s not relevant. You know why the officer made contact with them so get to the issue.

“[PROSECUTOR]: May I be heard?

“THE COURT: No.

“Q [PROSECUTOR] Was there indication that [defendant] had been in an altercation at the park?

“[DEFENSE COUNSEL]: Objection. Calls for speculation. Hearsay.

“THE COURT: Sustained.

“[PROSECUTOR]: I have nothing further of this witness at this time.”

Defendant did not object on grounds of misconduct. Further, he did not ask the court to admonish the jury or strike any other parts of the testimony. Later, out of the presence of the jury, the prosecutor explained to the court that she had been trying to elicit evidence that would explain defendant’s injuries as not resulting from police

violence. She explained there was evidence (two witnesses) that defendant was involved in a fight in the park and sustained injuries that were not the product of the deputies' violence. The court stated it wanted to hear from the two witnesses before the prosecutor could question Deputy Sellers regarding defendant's statement. The court did not limit the prosecutor's questioning of defendant himself.

Defendant testified that he was not involved in a fight prior to his contact with the deputies. The prosecutor questioned defendant about statements he made to the deputies on the night of his arrest, which indicated that he was at the park and had witnessed a fight. Defendant stated he did not remember. Defense counsel's relevance and hearsay objections were overruled. Defendant did not object on misconduct grounds.

Defendant recalled Deputies Sellers and Meyer to testify. Defense counsel asked if defendant was a suspect in the prior fight or whether witnesses had identified him as one of the attackers. Deputy Meyer testified that the victim did not identify defendant as participating in the fight.

During closing arguments, the prosecutor described the fight in the same manner Deputies Smoot and Meyer described it in their testimonies. Defendant did not object. In his closing argument, defense counsel noted that no one ever implicated defendant as a suspect in the prior fight. He also stated defendant was not involved in the fight and did not have a motive to run from the deputies. On rebuttal, the prosecutor argued that if defendant felt he was a suspect in the fight, he would have had a motive to run from the deputies; however, the prosecutor noted the prior fight was not the issue at hand. At no time during these statements or the earlier statements made by the prosecutor did

defendant make an objection, move to strike, or request the court to admonish the jury regarding the prior fight.

B. Standard of Review

In order to prove misconduct, defendant must establish that the prosecutor's behavior at trial was far below the standard of behavior for prosecutors. Prosecutors are generally given wide latitude in arguing a case. (*People v. Hill* (1998) 17 Cal.4th 800, 819.) However, prosecutors may commit misconduct by disregarding the ruling of the trial court or by eliciting inadmissible evidence during questioning. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) For misconduct to cause a case to be overturned on review, it must have been prejudicial. In order for misconduct by the prosecutor to be prejudicial under the federal standard, the misconduct must ““so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.”” [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if the action does not render the trial fundamentally unfair. [Citations.] [¶] Nevertheless, as a general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm.” (*People v. Frye* (1998) 18 Cal.4th 894, 969, overruled on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) However, an objection need not be made if an admonition would not have cured the harm caused by the misconduct (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333) or concerns deprivation of a constitutional right (*People v. Vera* (1997) 15 Cal.4th 269, 276).

C. Analysis

Defendant cites several instances where the prosecutor allegedly made improper statements or questioned witnesses regarding the prior fight. More specifically, defendant contends it was misconduct for the prosecutor to elicit testimony or make statements during closing that described the fight as a “hate crime” where the Hispanic victim was “jumped” while five White males yelled “racial epithets.” In response, the People argue that the trial court’s ruling did not restrict how the fight could be described. We agree with the People.

Turning to the record before this court, the trial court’s ruling prohibited evidence suggesting that defendant had participated in the prior fight.² There was no limitation on the words which could be used to describe the fight. Rather, it appears that both parties believed the testimonies describing the fight were within the court’s ruling, as evidenced by the lack of any objection on the part of defense counsel. As the People point out, the prosecutor was allowed to establish why the Deputy Smoot was sent to investigate defendant and his friends, i.e., five White males. The prior fight was a “hate crime” where four or five White males beat up on a Hispanic. Thus, a description of the fight explained why the deputies were interested in questioning defendant. Because the trial court’s ruling failed to put any limitations on the manner in which the fight was described, neither the prosecutor’s questions to the witnesses nor her closing argument

² “I’ll allow reasons why the officer was making contact, was that they were looking for some individuals, but we won’t be getting into any specifics about the actual 245 itself.”

amounted to disregarding the trial court's ruling. Moreover, we reject defendant's claim that there was no reason to refer to or describe the prior fight because the "crux of the defense case was that Deputy Smoot used excessive force in his attempt to detain [defendant]." In closing, defense counsel commented there was no reason to stop defendant and his four male friends; however, given the defense of excessive force, the reason why the deputies focused on defendant and his four friends was important to know. This was not a case where deputies randomly choose five young males to exert their force over.

Next, defendant faults the prosecutor for eliciting testimony that Samuel Arredondo, a suspect in the prior fight, stopped by the hospital to talk to defendant. It appears defendant is arguing that reference to Arredondo is another example of how the prosecutor continued to bring specifics of the prior fight in order to establish that defendant was involved in the fight. However, the reference to Arredondo visiting defendant does not show that defendant was involved in the prior fight. In fact, the evidence established that defendant was not identified by the victim and thus was not involved in the prior fight. Likewise, the prosecutor's questions regarding defendant's statements about the fight in the park neither suggested nor elicited evidence that defendant was a participant in the fight. The questions were directed towards whether defendant was present at the park around the time of the fight. There was no mention that defendant was one of the assailants. Rather, given the fact that the victim did not identify defendant as being one of the attackers, the question suggested that defendant may have witnessed something. There was no misconduct.

Similarly, the prosecutor did not commit misconduct when she questioned defendant whether he had told the deputies he had witnessed an incident in the park. Although the trial court had earlier ruled the prosecutor could not question Deputy Sellers regarding defendant's statements, there was no suggestion that she could not ask defendant himself as to whether he had been at the park that night. In fact, the trial court allowed the questioning, overruling defense counsel's objections. More importantly, the fact that defendant was at the park does not suggest he was an assailant in the fight. Again, the victim said defendant was not one of the assailants. Following defendant's testimony, the trial court allowed the prosecutor, over defendant's objections, to question Deputy Sellers regarding defendant's statements about what he had witnessed at the park. By overruling defendant's objections to the prosecutor's questions, the trial court indicated that the prosecutor had correctly interpreted its ruling. (*People v. Price* (1991) 1 Cal.4th 324, 453.)

Finally, defendant faults the prosecutor for questioning Sergeant Casas regarding his observations at the hospital the night defendant was taken for treatment. Defendant's objections were overruled, and the sergeant described the hospital as being crowded; he was not sure if anyone seeking medical assistance was associated with the prior fight. Because this evidence does not implicate defendant in the prior fight, we reject defendant's challenge to the questioning as constituting misconduct.

Based on our review of the record, we cannot conclude that the prosecutor disregarded the trial court's rulings. Thus, defendant has failed to support his claim of misconduct.

IV. *PITCHESS* MOTION

Defendant requests that we review independently the sealed transcript of the *Pitchess* motion and the documents during the hearing to determine whether the trial court abused its discretion in ruling that there were no discoverable materials to be produced to the defense.

A criminal defendant has a limited right to discovery of peace officer personnel records based on the fundamental proposition that a defendant is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (*City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1141.) An accused may compel discovery by demonstrating that the requested information will facilitate the ascertainment of facts and a fair trial. (*Ibid.*)

In order to obtain discovery of the personnel records of a peace officer, the moving party must submit affidavits showing good cause for such discovery and setting out the materiality of the information requested. (Evid. Code, § 1043, subd. (b).) Under *Pitchess*, a defendant demonstrates good cause for discovery when the defendant shows the information requested is (1) relevant to a defense of self-defense, (2) necessary in that the defendant could not readily obtain the information through his own efforts, and (3) described with adequate specificity to preclude the possibility that the defendant was engaging in a fishing expedition. (*Pitchess, supra*, 11 Cal.3d at pp. 537-538.) Evidence Code section 1045 provides that if production is warranted, the trial court must examine the personnel files in camera to determine whether they contain any relevant information.

Defendant filed his *Pitchess* motion on September 29, 2009, and on November 6, the trial court granted the motion and conducted an in camera review of the materials pertaining to Deputy Smoot. The court found no discoverable material and ordered the records sealed. Because defendant was not present at the records review hearing, he requests this court to conduct an independent review of the sealed transcript of the hearing and the records produced to determine whether any error occurred. The People do not oppose this request.

We have reviewed the sealed records, and based on our review of the sealed reporter's transcript of the in camera *Pitchess* motion proceeding and the sealed record of the documents reviewed during the trial court hearing, we conclude the trial court properly exercised its discretion in excluding from disclosure the deputy's personnel records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

V. DISPOSITION

The judgment is affirmed.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MILLER

J.