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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.

RAFAEL PINON FLORES,

Defendant and Appellant.

E061469

(Super.Ct.No. FSB1204730)

OPINION

APPEAL from the Superior Court of San Bernardino County. William Jefferson Powell IV, Judge. Affirmed as modified and remanded with directions.

Jill M. Klein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Peter Quon, Jr. and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Rafael Pinon Flores had a grudge against his brother-in-law. He waited outside the brother-in-law's apartment until he got home from work, then shot and killed him.

A jury found defendant guilty of first degree murder (Pen. Code, §§ 187, subd. (a), 189), with an enhancement for causing death by personally and intentionally discharging a firearm (Pen. Code, § 12022.53, subd. (d)). The jury also found true one strike prior (Pen. Code, §§ 667, subds. (b)-(i)), one prior serious felony conviction enhancement (Pen. Code, § 667, subd. (a)), and one 1-year prior prison term enhancement (Pen. Code, § 667.5, subd. (b)). Defendant was sentenced to 81 years to life in prison, along with the usual fines, fees, and directives.

Defendant now contends:

1. Defendant's trial counsel rendered ineffective assistance by failing to object to the prosecutor's misstatements of law in closing argument.
2. Defendant's trial counsel rendered ineffective assistance by failing to argue for the continued bifurcation of the trial of the prior conviction allegations.
3. The trial court erred by imposing both a prior serious felony conviction enhancement and a prior prison term enhancement based on the same underlying offense.
4. The trial court erred by ordering defendant to pay \$750 in appointed counsel costs.

The People concede that the prior prison term enhancement must be stricken. They also concede that the order to pay appointed counsel costs should be stricken. Otherwise, we find no error. We will modify the judgment accordingly.

I

FACTUAL BACKGROUND

A. *The Prosecution's Case.*

Defendant lived with his mother, father, and brother in an apartment at the rear of an apartment complex in San Bernardino. Defendant's sister Mirella Flores and her husband Adan Ruiz¹ lived in an apartment in the front of the same complex.

Defendant's family members believed him to be mentally ill. He acted "erratically." He was "verbally aggressive" and "irrational."

Defendant did not like Adan. He accused Adan of cheating on Mirella. Around January 2012, he threatened to shoot both Adan and Mirella. After that, they tried to avoid him. "[E]very now and then" he would stand outside their apartment. Whenever he did, Mirella was worried.

On October 17, 2012, Adan was expected home from work around 2:00 p.m.

Around 1:30 p.m., defendant's father saw defendant standing on the sidewalk out in front of Mirella's apartment.

¹ We use Mirella's first name because she and defendant have the same last name, and also to be consistent with the reporter's transcript. We use Adan's first name, again to be consistent with the reporter's transcript, and also to be consistent with our usage regarding Mirella.

Around 1:40 p.m., Mirella looked out the window and saw defendant standing on the porch immediately in front of her apartment.

Also around 1:40 p.m., a neighbor saw defendant outside Mirella's apartment.

Shortly before 1:50 p.m., defendant's father saw defendant out on the sidewalk again.

Around 1:50 p.m., Adan got home. Mirella saw him park in front of their apartment; she also noticed that defendant was still there. As she went to open the front door, she heard three shots. She opened the door, only to see Adan grab his chest and collapse onto the ground. Defendant was nowhere to be seen.

The neighbor heard the gunshots. She looked out a window and saw defendant, running and holding a gun.

The police arrived almost immediately. They found three fired nine-millimeter cartridge casings on the ground.

Adan had several graze wounds, but one bullet struck him in the center of his chest and pierced his heart, killing him.

That night, defendant did not come home. Early the next morning, however, around 5:00 a.m., police officers dispatched to the apartment complex found him in back, crouched down against a wall. They arrested him. He was in possession of a loaded nine-millimeter semiautomatic handgun. Testing revealed that the casings found at the scene had been fired from that gun.

Defendant told the police that he had been away from home from 11:00 a.m. until 5:00 a.m., attending church and walking around San Bernardino with his “homies.”

B. *The Defense Case.*

Defendant denied shooting Adan and denied threatening him.

He testified that, on the day of the shooting, he was out in front of the apartment complex, off and on, but only between 8:00 a.m. and 10:30 a.m.

Around 11:00 a.m., defendant’s friend Mike Moreno picked him up and drove him to Mike’s house in Lynwood. Defendant’s friends Rudy and Dominick met them there. They hung out there all day, playing pool, watching movies, eating, and drinking beer.

Around 5:00 p.m., Mike drove defendant back to San Bernardino, where they visited friends and attended church. Around 10:00 p.m., they went back to Mike’s house in Lynwood. The next day, around 5:00 a.m., Mike dropped defendant off at the apartment complex.

When defendant got to his front door, he found a gun lying on the doormat. He decided to keep it. He picked it up and tucked it into his waistband. As he was doing so, the police arrived. Defendant admitted that he was on parole at the time and was not supposed to be in possession of a gun.

Defendant explained that he did not tell the police about Mike or about going to Lynwood because he wanted to talk to his attorney first. After he was arrested, he thought about calling Mike; he could not explain why he did not.

Defendant testified that in 2005, he was diagnosed as schizophrenic. As of the date of the shooting, he was taking medication, so his symptoms were “[m]inor.” He admitted that he was hearing voices “that would keep [him] paranoid.” However, they did not say anything about Adan or about getting a gun or shooting anyone.

II

INEFFECTIVE ASSISTANCE: PROSECUTORIAL MISCONDUCT

Defendant contends that his trial counsel rendered ineffective assistance by failing to object to prosecutorial misconduct in closing argument.

A. *General Legal Background.*

“[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’ [Citation.]” (*People v. Centeno* (2014) 60 Cal.4th 659, 666–667.)

“[I]t is misconduct for a prosecutor, during argument, to misstate the law [citation]” (*People v. Whalen* (2013) 56 Cal.4th 1, 77.) “To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we “do not lightly infer” that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.’ [Citation.]” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1337.)

“As a general rule, “[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.” [Citation.]” (*People v. Centeno, supra*, 60 Cal.4th at p. 674.)

Here, defense counsel did not object to any of the instances of misconduct that defendant now asserts. Nor does defendant claim that there is any applicable exception (e.g., futility) to the objection and admonition requirement. Accordingly, defense counsel forfeited any contention that prosecutorial misconduct was, in itself, reversible error. Defendant contends, however, that defense counsel’s failure to object constituted ineffective assistance.

“Defendant . . . bears the burden of showing by a preponderance of the evidence that (1) counsel’s performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficiencies resulted in prejudice. [Citations.] ¶ ‘Unless a defendant establishes the contrary, we shall presume that “counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” [Citation.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was ““no conceivable tactical purpose”” for counsel’s act or omission. [Citations.]’ [Citation.]” (*People v. Centeno, supra*, 60 Cal.4th at pp. 674-675.)

B. *Misstating the Definition of Premeditation.*

Defendant argues that the prosecutor misstated the law by saying that premeditation can occur in a “split second.”

1. *Additional factual and procedural background.*

In closing argument, the prosecutor stated: “Now, premeditation and deliberation, when you read all the language about carefully weighing the considerations for and against a consequence and choice, that sounds like it requires a person to sit down at a desk and really make a list of pros and cons of to kill and not to kill. However, that is not what the law requires. There is no set amount of time that it required by the law when a person is premeditating and deliberating.

“For example, I mean you’re been here now several days, so you are familiar certainly in the morning how long the elevator line can be in the morning. So, for example, if I come in on a particular busy day, walk in, pass the metal detector, walk in and see that there are long lines, have one elevator working, I have a very quick decision to make. I have a choice. I can either wait in this line or walk up the stairs. I can make that decision in a split second. And in that split second I have deliberated and I have premeditated. I have considered if I wait in this line, am I going to make it to court? And if I walk, will I get there on time?”

2. *Discussion.*

“In the context of first degree murder, “premeditated” means “considered beforehand,” and “deliberate” means “formed or arrived at or determined upon as a result

of careful thought and weighing of considerations for and against the proposed course of action.” [Citation.]’ [Citation.] ‘The process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly” [Citations.]’ [Citation.]” (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

Defendant reads the words “split second” very literally. In context, however, it is apparent that the prosecutor was using them hyperbolically to mean “a relatively short time.” She began by indicating, in conformity with the law, that premeditation and deliberation require a weighing of considerations for and against a proposed course of action. In her example, she indicated again that there must be such a weighing: “[I]f I wait in this line, am I going to make it to court? And if I walk, will I get there on time?” Obviously, this could not occur in a literal split second.

Even assuming the prosecutor misstated the law, the misstatement was harmless. The evidence of premeditation and deliberation was quite strong. Defendant had a grudge against the victim and had threatened to shoot him. Defendant armed himself with a loaded gun, stationed himself outside the victim’s apartment, and waited there for 20 minutes. Defendant did not testify that he shot the victim spontaneously or impulsively; he denied shooting the victim at all. While there was evidence that defendant was schizophrenic, there was no expert (or other) testimony that this would

affect his ability to premeditate and deliberate. Defendant admitted hearing voices, but he denied that they told him to shoot the victim.

In her own closing argument, defense counsel stated: “[The prosecutor] has to prove beyond a reasonable doubt all the evidence that she has presented, not by speculation, . . . from that evidence can you really conclude that [defendant] deliberately — that he carefully weighed considerations for and against the choice and that he did this knowing the consequences, and then based on that weighing of consideration and consequences he made a decision to actually kill.” She argued that defendant “is not quite right in the head,” that “decision making is probably not his strong suit,” and that “[d]eliberation . . . is probably not something that he does with any regularity.” She concluded: “And, yes, the law says that the length of time a person spends considering whether to kill does not alone determine. But a decision to kill someone made rashly, impulsively, and without careful consideration is not deliberate and premeditated.”

Finally, the trial court instructed the jury on the legally correct definitions of premeditation and deliberation, using CALCRIM No. 521. It also instructed: “If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.” (CALCRIM No. 200.) “We presume the jury followed this instruction, and therefore, any misstatement was harmless.” (*People v. Pearson* (2013) 56 Cal.4th 393, 440.)

In sum, then, because the prosecutor did not misstate the law, defense counsel did not render ineffective assistance by not objecting. Also, it is not reasonably probable that,

even if defense counsel had objected and requested an admonition, defendant would have enjoyed a more favorable result.

C. *Misstating the Definition of Intent to Kill.*

Defendant argues that the prosecutor misstated the law by defining intent to kill as the absence of self-defense or accident.

1. *Additional factual and procedural background.*

In closing argument, the prosecutor stated: “[T]he defendant acted with express malice if he unlawfully intended to kill. And unfortunately intent to kill means it wasn’t a self-defense, that there’s no legal justification for killing someone.”

She also stated: “[T]here are multiple theories that bring[] a second degree murder . . . to first degree murder. . . . [¶] . . . The first theory . . . is that the defendant acted willfully, deliberately, and with premeditation. [¶] . . . [T]he defendant acted willfully if he intended to kill. This was not an accident. There was an intent to kill.”

2. *Discussion.*

Contrary to defendant’s contention, the prosecutor never *defined* intent to kill as the absence of accident or self-defense. The everyday, common-sense meaning of intent to kill is more than just the absence of accident or self-defense. And the prosecutor never stated that, in the absence of either accident or self-defense, the jury *had* to find intent to kill. She simply gave accident and self-defense as *specific instances* of situations in which express malice and intent to kill must be deemed absent. (See *People v. Elmore* (2014) 59 Cal.4th 121, 129-130 [malice “cannot coexist” with an actual belief in the

need to kill to prevent death or serious injury]; *People v. Wells* (1949) 33 Cal.2d 330, 338 [malice “denote[s] *purpose* and *design* in contradistinction to accident and mischance”], disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 327, fn. 7.)

This is clear from the fact that she discussed self-defense and accident separately. In defendant’s view, the jury could have understood the prosecutor’s initial statement that self-defense is inconsistent with intent to kill to mean that *absence* of self-defense is sufficient to *prove* intent to kill. But if so, how was the jury to understand her subsequent statement that accident is *also* inconsistent with intent to kill?

If there was any room for confusion, the rest of her argument would have dispelled it. She stated, “[T]he malice aforethought must be formed before the killing had occurred. He can’t be, well, I killed and then I decided to kill afterward, after the act had already occurred. That *decision to kill* had to have occurred before the kill.” (Italics added.)

Separately and alternatively, even assuming the prosecutor misstated the law, defendant cannot show prejudice. In part II.B, *ante*, we noted that the evidence of premeditation and deliberation was quite strong. A fortiori, the evidence of intent to kill was also quite strong. It was so strong that defense counsel did not even so much as argue that, if defendant pulled the trigger, he did so without the intent to kill; she merely argued that he did so “rashly [and] impulsively,” and hence without premeditation and deliberation. The trial court correctly instructed the jury regarding express malice and intent to kill. (CALCRIM No. 520.)

Thus, once again, the prosecutor did not misstate the law, and hence defense counsel did not render ineffective assistance by not objecting. Moreover, it is not reasonably probable that, if defense counsel had objected and requested an admonition, the result would have been any more favorable to defendant.

D. *Misstating the Definition of Lying in Wait.*

Defendant argues that the prosecutor misstated the law by saying that the fact that the victim did not know defendant's purpose was sufficient to prove lying in wait.

1. *Additional factual and procedural background.*

In closing argument, the prosecutor stated: “[The s]econd theory [of first degree murder] is that the defendant was also lying in wait

“What the law requires is that the defendant conceal his purpose from the person being killed. And that he waited and watched for an opportunity to kill and that from a position of advantage he intended to and did make a surprise attack and kill that person. And a person can conceal his or her purpose even if the person who is being killed is aware of that person's presence. So in this case Adan probably saw the defendant standing there, but . . . [¶] . . . [h]e didn't know the purpose of the defendant standing in front of the apartment complex on that particular day.

“And that's enough.” (Italics added.)

E. *Discussion.*

“Lying-in-wait murder consists of three elements: ““(1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act,

and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage’ [Citations.]” [Citation.]” (*People v. Russell* (2010) 50 Cal.4th 1228, 1244, fn. omitted.)

“The concealment required for lying in wait ‘is that which puts the defendant in a position of advantage, from which the factfinder can infer that lying-in-wait was part of the defendant’s plan to take the victim by surprise. [Citation.] It is sufficient that a defendant’s true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim. [Citations.]’ [Citation.]” (*People v. Webster* (1991) 54 Cal.3d 411, 448.)

The prosecutor listed all three of the elements of lying in wait. However, specifically with respect to the concealment-of-purpose element, she wanted to make the point that defendant did not have to conceal his presence — he only had to conceal his purpose. Thus, she stated that, even if the victim saw defendant standing there, the victim did not know defendant’s purpose, “[a]nd that’s enough.” Clearly she did not mean that the victim’s ignorance alone, absent any concealment by defendant, was enough. And clearly she did not mean that concealment of purpose alone, absent the other two elements, was sufficient to prove lying in wait.

Because the prosecutor did not misstate the law, defense counsel did not render ineffective assistance by failing to object and defendant cannot show prejudice from the failure.

III

INEFFECTIVE ASSISTANCE: BIFURCATION

Defendant contends that his trial counsel rendered ineffective assistance by failing to object when the trial court rescinded its previous order bifurcating the trial of the prior conviction allegations.

A. *Additional Factual and Procedural Background.*

The information alleged a strike prior, a prior serious felony conviction enhancement, and a one-year prior prison term enhancement, all based on the same 2003 robbery conviction. The trial court granted defense counsel's motion in limine to bifurcate the trial of these prior conviction allegations.

After the prosecution rested, defendant indicated that he intended to testify.

The trial court responded, "All right. Which . . . [¶] . . . obviates my previous ruling regarding bifurcation. It doesn't seem as though that is necessary anymore because I am assuming that the People . . . are asking to impeach the defendant with his prior. It does appear to me to be a crime of moral turpitude and readiness to do evil. Thus, I would allow the People to impeach the defendant with his prior which is the basis for the strike prior and nickel prior."

Defense counsel then said, "I think the only other item that would be bifurcated is a prison prior, but since that is only one year, I'm sure [defendant] has no objection to just withdrawing the need for bifurcation."

Accordingly, on direct, defense counsel had defendant admit that he had been convicted of robbery in 2003. However, because defendant had initially been placed on probation for the robbery, defense counsel also had defendant admit that he had been convicted of possession of methamphetamine in 2005 and that, as a result, his probation had been revoked and he had been sentenced to five years in prison.

On cross-examination, the prosecutor brought out the fact that, when defendant was released from prison, he violated his parole twice and was reimprisoned both times.

B. *Discussion.*

As a general rule, the trial court must bifurcate the trial of prior conviction allegations when necessary to avoid a substantial risk of undue prejudice to the defendant. (*People v. Calderon* (1994) 9 Cal.4th 69, 77-79.) Thus, bifurcation is not necessary “when, even if bifurcation were ordered, the jury still would learn of the existence of the prior conviction before returning a verdict of guilty.” (*Id.* at p. 78.) For example, “when it is clear prior to trial that the defendant will testify and be impeached with evidence of the prior conviction [citation], denial of a request for a bifurcated trial generally would not expose the jury to any additional prejudicial evidence concerning the defendant. Under such circumstances, a trial court would not abuse its discretion in denying a defendant’s motion for bifurcation.” (*Ibid*, fn. omitted.)

Defendant acknowledges that bifurcation would not have kept out his robbery conviction. Nevertheless, he insists that a request for bifurcation still had merit, because

it would have kept out his conviction for possession of methamphetamine, as well as his probation and parole violations.

It must be remembered, however, that we are discussing this issue under the rubric of ineffective assistance of counsel. Defense counsel could properly reason that, once defendant had admitted the conviction, the trial court was not to likely to hold a second, separate proceeding solely to prove up the fact that defendant had served a prison term for that conviction.

Moreover, the calculus of prejudice had changed. Defense counsel could reasonably view the incremental prejudice from a second conviction as de minimis. This is particularly true because, unlike robbery, possession of methamphetamine is not a violent crime with parallels to murder. The same is true of the incremental prejudice from defendant's (unspecified) parole violations. Defense counsel could also reasonably see some benefit in having defendant make the additional admissions. First, the fact that defendant candidly admitted his checkered past could be seen as increasing his credibility. And second, the robbery, which defendant had to admit anyway, was less likely to be inflammatory if the jury learned that he had already been punished for it. (Cf. *People v. Holford* (2012) 203 Cal.App.4th 155, 186 [fact defendant was punished diminished the danger of undue prejudice from evidence of uncharged bad act].)

Even if, with the benefit of hindsight, we were to weight the pros and cons differently, that would not establish ineffective assistance. “[A] defense attorney’s simple misjudgment as to the strength of the prosecution’s case, the chances of acquittal, or the

sentence a defendant is likely to receive upon conviction, among other matters involving the exercise of counsel's judgment, will not, without more, give rise to a claim of ineffective assistance of counsel. [Citations.]" (*In re Alvernaz* (1992) 2 Cal.4th 924, 937.) The same is true of a misjudgment as to plusses and minuses of equivocal evidence.

Accordingly, we cannot say that defense counsel's failure to press for bifurcation was objectively unreasonable. Also, for all the same reasons, defendant has not shown a reasonable likelihood that (1) if defense counsel had pressed for bifurcation, the trial court would have granted it, or (2) if the trial court had granted bifurcation, the outcome of the trial would have been more favorable to defendant.

IV

PRIOR SERIOUS FELONY ENHANCEMENT AND PRIOR PRISON TERM ENHANCEMENT BASED ON THE SAME OFFENSE

Defendant contends that the trial court erred by imposing both a prior serious felony enhancement and a prior prison term enhancement based on the same underlying offense.

The People concede that this was error. We agree. (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153.) Accordingly, we will strike the prior prison term enhancement. (See *id.* at p. 1153.)

V

APPOINTED COUNSEL COSTS

Defendant contends that the trial court erred by ordering him to pay \$750 in appointed counsel costs, because it did not find unusual circumstances and because there was insufficient evidence of unusual circumstances. (See Pen. Code, § 987.8, subds. (b), (g)(2)(B).)

While not conceding error, the People do concede that, “in the interests of fairness and judicial economy, this Court should order the trial court to strike the order assessing \$750 in attorney fees.” Rather than analyze the issue independently, we will accept the People’s concession.

VI

DISPOSITION

Both the true finding on the prior prison term allegation and the one-year term imposed on the prior prison term allegation are stricken. This reduces the aggregate sentence to 80 years to life. The order to pay \$750 in appointed counsel costs is stricken. The judgment as thus modified is affirmed.

The clerk of the superior court is directed to prepare an amended sentencing minute order and an amended abstract of judgment reflecting these modifications and to

forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. (Pen. Code, §§ 1213, subd. (a), 1216.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ

P. J.

We concur:

KING

J.

MILLER

J.