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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ANTONIO FLORES,

Defendant and Appellant.

F060929

(Super. Ct. Nos. SF15613A &
SF15104A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Judith K. Dulcich, Judge.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Juan Antonio Flores was convicted of making a criminal threat against his girlfriend. On appeal, he contends (1) the trial court erred in ordering that he be shackled during trial, (2) the trial court erred in denying his motion for a new trial based on prosecutorial misconduct, and (3) the abstract of judgment is incorrect. We will direct the trial court to correct the abstract of judgment, and we will affirm in all other respects.

PROCEDURAL SUMMARY

On May 14, 2010, the Kern County District Attorney charged defendant with inflicting corporal injury upon a cohabitant (Pen. Code, § 273.5, subd. (a));¹ counts 1 & 2), making a criminal threat (§ 422; count 3), and assault by force likely to produce great bodily injury (§ 245, subd. (a)(1); count 4). As to counts 1 and 2, the information further alleged that defendant had a prior conviction within the meaning of section 273.5, subdivision (e)(1).

The jury found defendant guilty on count 3 and not guilty on count 2, but the jury was unable to reach a verdict on counts 1 and 4. The trial court declared a mistrial on those two counts.

Defendant unsuccessfully moved for a new trial on the ground of prosecutorial misconduct (§ 1181).

The trial court sentenced defendant to the upper term of three years for count 3. Counts 1 and 4 were dismissed pursuant to section 1385. The court also imposed a three-year concurrent term in Kern County Superior Court case No. SF15104A, in which defendant violated his probation.

FACTS

April Sandoval

Defendant's girlfriend, April Sandoval, was pregnant with defendant's child. April was frustrated and going through hard times. She had three children, defendant had

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

three children, and her hormones were “going really bad.” She wanted defendant to leave. She just wanted to be alone. She did not tell anyone she wanted to be alone because she kept everything to herself. She felt a lot of anger and she was not herself. So, around 7:30 a.m. on April 28, 2010, she called the police and made a false report about defendant. Officers responded to her apartment, and she told them various things, but they were all lies that she made up to get defendant out. She told one of the officers that the previous night defendant asked her to “go down on him” and she refused; that defendant grabbed her by the throat and strangled her with both hands, leaving marks; that he told her he would hurt her children if she ever left him; and that he told her he would hurt her if she did not listen to him. April said defendant let go of her throat when she told him she would listen to him and not leave him. April told the officer that defendant inflicted a bruise on her side when he “body slammed” her, and he left marks on her when he choked her. These were lies; in reality, the bruise was from her daughter’s bicycle and the marks were hickeys.

After defendant was arrested, April apologized to him on the telephone. She told him she should not have done it, but she was not herself. She did not ever tell him she was scared of him; she was never scared of him. She did not tell him that he hurt her or tried to kill her. But she did tell him that he body slammed and punched her because she knew the call was being recorded. She was upset and angry, and she wanted to get him in trouble.

Defendant made several telephone calls from jail. The recorded calls were played for the jury. In one call, apparently to his mother, defendant said she should tell April that he was “going to be out pretty soon, and she better watch it.” His mother repeatedly told him he needed to change. She said that April was going to press charges. He said April was lying.

When he called April the day after he was arrested, she accused him of hurting her. She said he hit her on the head four times, choked her, and body slammed her. She

said she was scared of him, and she was going to press charges. He repeatedly told her she was “trippin’.” She said she did not want him around her anymore. Their relationship was over. She needed to protect herself and her children. Defendant either denied hurting her or changed the subject, but when she said, “You just fucking hit me yesterday, really hard, Johnny. Four times on my fucking head,” defendant told her to “[g]et over it.”

In a short subsequent call, April and defendant declared their love for each other, affirmed that they were still together, and planned for April to visit defendant in jail.

In another call, April again told defendant he hurt her and she was scared of him. He told her she did not have to be, then he asked her if she was going to marry him. He told her many times he was going to marry her. She eventually said she was not going to press charges and she would marry him. They declared their love for each other.

According to April, she said incriminating things to defendant in the calls only because she knew they were being recorded. She loved defendant.

Later, April went to the police and told them she had made a false report. She also went to the district attorney’s office and asked to drop the charges. April was not scared of defendant and she never told him she was.

At the time of trial, April and defendant were still together. April felt sad and depressed. She realized what she had done was wrong and she felt bad for it. Defendant had nothing to do with what she was going through and all the anger she felt. Defendant showed her love. He was there for her and her children. April had been in an abusive relationship in the past, but defendant did not do anything wrong.

On cross-examination, April explained that the responding officers thought she was scared because she was *acting* scared. It was part of the routine she was playing. It was all planned out. She had told defendant to leave, but he would not go. So she figured out a plan. She knew he had priors and she used them against him. She knew the

officers would believe her if she said the same thing his wife would say, and they did believe her. She was not actually scared.

April agreed that she sounded scared in the recorded calls, but she was just acting then too. She knew the calls were being recorded and she wanted them to be used as evidence against defendant. She thought, however, she would be able to tell the police or the district attorney that nothing really happened and it would all go away. She did not know anything about the law. This was all new to her. She did not understand things, and she had a history of frustration, especially during pregnancies. Four days after defendant was arrested, April realized she needed to tell the truth. She went to the district attorney's office.

April had been in a 13-year relationship with an abusive man. When she left that relationship, she vowed never to be abused again.

Responding Officers

Officer Milligan was dispatched on April 28, 2010. When he arrived, April came out of the apartment and ran toward his patrol car, wrapped in a blanket. She was very frightened. She cried as she told him that her boyfriend had assaulted her the night before and had just woken up. Milligan went inside and arrested defendant.

Officer Parra was also dispatched on April 28, 2010. When she arrived, Milligan was in the back bedroom with defendant. April was sitting on the couch covered with a blanket, shaking and crying. She appeared to be physically scared. She told Parra that around 9:00 p.m. the previous night, defendant, who was her live-in boyfriend, hit her head approximately four times, causing her to black out. She said defendant also strangled her, threw a plate at her, and body slammed her about a week earlier. Parra saw April's bruises and felt the lumps on her head.

As Milligan drove defendant to the police department, he spontaneously stated: "I did not hit that bitch. She is lying just like the last bitch.... I told her not to call the police and that I would leave the house if she did not call."

Prior Incident

Anna Marie Flores was defendant's wife. They had known each other for about 14 years and had been married for over nine years. On June 6, 2009, she and defendant got into a fight and hit each other. Defendant punched her and kicked her. Eventually, she went to the ground and curled into a fetal position to protect herself from being kicked. Their five-year-old son tried to intervene as defendant kicked Anna Marie. As a result, she had an injured elbow and a lump on her head. Some of her hair was pulled out. Anna Marie truthfully told the police what happened, and defendant served his time for what he had done. At the time of trial, Anna Marie and defendant were getting along well, but she had no interest in getting back together with him.

Milligan was dispatched to this prior incident as well. He observed that Anna Marie was injured. She had two golf ball-sized lumps on her head and an abrasion on her arm. Also, an area of her hair had been pulled out. En route to the police department, defendant spontaneously stated to Milligan: "Yeah, I hit her. You would have too if your wife was writing to a prisoner in Wasco. Fuck that bitch. I messed up. Man, my kids were there."

DISCUSSION

I. Shackling

Defendant contends the trial court abused its discretion by ordering him to remain shackled during trial. The People concede, but maintain the error was harmless because the shackling was not visible to the jury. Defendant responds that even if the shackling was not visible, the jurors were made aware of it when the trial court instructed them to disregard defendant's shackles. We conclude the error was harmless.

"When a defendant is charged with any crime, and particularly if he is accused of a violent crime, his appearance before the jury in shackles is likely to lead the jurors to infer that he is a violent person disposed to commit crimes of the type alleged." (*People v. Duran* (1976) 16 Cal.3d 282, 290 (*Duran*).) Further, the use of shackles may deter a

defendant from taking the stand to testify on his own behalf and may interfere with the clear exercise of his mental faculties. (*Id.* at pp. 288, 290; *People v. Hill* (1998) 17 Cal.4th 800, 846.) Accordingly, to avoid these potential impediments to a fair trial, a defendant may not be required to wear physical restraints during trial unless there is a manifest need for such restraints. (*People v. Mar* (2002) 28 Cal.4th 1201, 1216, 1219 (*Mar*)). The United States Supreme Court has confirmed that “the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial.” (*Deck v. Missouri* (2005) 544 U.S. 622, 629.)

The showing of manifest need, “which must appear as a matter of record [citation], may be satisfied by evidence, for example, that the defendant plans to engage in violent or disruptive behavior in court, or that he plans to escape from the courtroom [citation].” (*People v. Anderson* (2001) 25 Cal.4th 543, 595 (*Anderson*)). “A shackling decision must be based on facts, not mere rumor or innuendo.” (*Ibid.*) The fact that a defendant is charged with a violent crime does not, without more, justify the use of physical restraints. (*Mar, supra*, 28 Cal.4th at p. 1218.) Rather, the trial court must make the decision whether to use physical restraints on a case-by-case basis. (*Ibid.*) “The court cannot adopt a general policy of imposing such restraints upon prison inmates charged with new offenses unless there is a showing of necessity on the record.” (*Duran, supra*, 16 Cal.3d at p. 293.) “The trial court may not delegate to law enforcement personnel the decision whether to shackle a defendant.” (*People v. Seaton* (2001) 26 Cal.4th 598, 651.) When physical restraints are used, they ““should be as unobtrusive as possible, although as effective as necessary under the circumstances.”” (*Mar, supra*, at p. 1217.) The imposition of restraints in the absence of a showing of a threat of violence or other nonconforming conduct constitutes an abuse of discretion. (*Id.* at p. 1221.)

Error in the use of restraints, however, is harmless if there is no evidence the jury saw the shackles during trial and no evidence the shackles impaired or prejudiced the

defendant's right to testify or participate in his or her defense. (*Anderson, supra*, 25 Cal.4th at p. 596; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584 [Supreme Court has "consistently found any unjustified or unadmonished shackling harmless where there was no evidence it was seen by the jury"].) Similarly, a jury's brief observation of physical restraints is generally viewed as nonprejudicial. (*People v. Cleveland* (2004) 32 Cal.4th 704, 740.) The key concerns are that the defendant not be placed in unjustified restraints visible to the jury for a protracted period during trial, that the defendant not be deterred from taking the stand on his own behalf because of restraints, and that the defendant's mental faculties or ability to communicate not be impaired by embarrassing or uncomfortable restraints. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 988-989; *Anderson, supra*, at p. 596.) When a trial court permits a defendant to be *visibly* shackled without manifest need, reversal is required unless it is established beyond a reasonable doubt that the shackling did not contribute to the verdict. (*People v. Ervine* (2009) 47 Cal.4th 745, 773; *Deck v. Missouri, supra*, 544 U.S. at p. 635; *Chapman v. California* (1967) 386 U.S. 18, 24.)

In this case, during motions in limine, defense counsel requested that defendant not be shackled when he was in the presence of the jury. The following occurred:

“THE COURT: I will have to deal with the bailiffs on that. I know they will unshackle his hands while he is at the jury table. *There is a privacy wall on*, let me ask my bailiff.

“THE BAILIFF: We leave the leg irons on but his hands will be free and he will not have a waist chain.

“THE COURT: So the jury, he will be seated before the jury is brought in or exited so they do not witness that and if he does choose to testify please let us know that or ask for a sidebar conference so we can have the jury exit and have him take the witness stand outside of their presence. And if you want any special instructions sometimes it's obvious when we have more than one bailiff in the courtroom that someone is in custody so if you have something special you want, I'm open to that as well.” (Italics added.)

Later, when the trial court was discussing the jury instructions with counsel, the following occurred:

“THE COURT: ... I did note that there is an instruction [CALCRIM] number 204 that deals with a defendant who is physically restrained in court. *I don't think the jury had any viewing of him being shackled.* Were you requesting that at this time?

“[DEFENSE COUNSEL]: I think it's pretty clear that he is in custody.

“THE COURT: So you are not requesting or do you want to hear the language?

“[DEFENSE COUNSEL]: I would like, if you can include that, *I think the shackles can be seen.* Even though they may be in custody [*sic*], *they may not understand why his legs are shackled.*

“THE COURT: All right” (Italics added.)

Based on this, defendant contends “the record supports the conclusion that the jury saw that [he] was restrained during trial. [¶] Based on the record, it is more than fair to assume that the jury did see, and was fully aware, that [he] was restrained throughout the entirety of his trial.”

We, however, will not assume the jurors saw the shackles during the trial. Such an assumption would be based on speculation rather than record evidence. The record reflects that the trial court explained before trial that defendant's table was equipped with a privacy wall. Later, the court specifically stated it did not think the jury had seen the shackles. Defense counsel stated she thought it was obvious defendant was in custody and she thought the shackles could be seen. This statement alone does not amount to evidence the shackles were visible to the jury, especially in light of the trial court's contrary opinion. And based on the evidence presented at trial, the jurors likely were already aware defendant was in custody. Furthermore, there is no evidence the shackles impaired or prejudiced defendant's right to testify or participate in his defense. On this record, defendant's claim of prejudice fails. (*People v. Pride* (1992) 3 Cal.4th 195, 233-

234 [defendant asked court “to ‘assume’ that his restraints were actually seen by the jury and that they affected his ability to assist in his defense”; these assertions were speculative and court rejected claims of constitutional error and prejudice]; *Anderson, supra*, 25 Cal.4th at p. 596; *People v. Tuilaepa, supra*, 4 Cal.4th at pp. 583-584; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [on appeal, defendant must affirmatively demonstrate trial error].)

We reject defendant’s argument that even if the jurors did not see the shackles, he was prejudiced by the trial court’s instruction. As we have explained, the instruction was given because defendant “made a conscious and deliberate tactical choice to request it.” (*People v. Enraca* (2012) 53 Cal.4th 735, 761.) As a consequence, he is barred by the doctrine of invited error from challenging the instruction. (*Ibid.*) In any event, we see no prejudice from the instruction. The jurors were also instructed to disregard the shackles, as follows: “The fact that physical restraints have been placed on the defendant is not evidence. Do not speculate about the reason. *You must completely disregard this circumstance in deciding the issues in this case. Do not consider it for any purpose or discuss it during your deliberations.*” (CALCRIM No. 204, italics added.) We presume the jurors followed this instruction in the absence of any evidence to the contrary. (*People v. Mendoza* (2007) 42 Cal.4th 686, 699.) Moreover, the jurors’ verdict was apparently unaffected by their learning that defendant was or had been restrained. Had the jurors inferred that defendant was “a violent person disposed to commit crimes of the type alleged” (*Duran, supra*, 16 Cal.3d at p. 290), they presumably would have convicted him of the alleged violent crime of inflicting corporal injury upon April. Instead, they convicted him only of making a criminal threat against her, a crime that involved no physical violence. Under these circumstances, we conclude the improper shackling was harmless under any standard. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *Chapman v. California, supra*, 386 U.S. at p. 24.)

II. Motion for New Trial

During defense counsel's closing argument, the prosecutor interjected, "Counsel is lying[;] there is no evidence of that." In response, the trial court stated, "Sustained." After trial, defense counsel moved for a new trial based on the prosecutor's comment. Defendant now argues that the trial court abused its discretion by denying that motion. Defendant explains that the prosecutor's misconduct so denigrated defense counsel that the burden of proof was affected, and that the trial court tacitly approved the comment with its response. The People concede the comment was improper, but assert that by failing to request an admonition, defendant has not preserved the claim of prosecutorial misconduct underlying the new trial motion, and that the prosecutor's comment did not prejudice defendant. We conclude the comment was harmless.

"A criminal defendant may move for a new trial on specified grounds. (§ 1181.)" (*People v. Ault* (2004) 33 Cal.4th 1250, 1260.) Section 1181 provides that a trial court may grant a new trial "when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury." (§ 1181, subd. 5.) "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears." (*People v. Williams* (1988) 45 Cal.3d 1268, 1318, abrogated on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 560–561; *People v. Ault, supra*, at p. 1260.)

A prosecutor engages in misconduct by impugning the integrity of defense counsel. (*People v. Bell* (1989) 49 Cal.3d 502, 538.) Here, we agree that the prosecutor's comment in this case constituted misconduct. (*People v. Young* (2005) 34 Cal.4th 1149, 1193 ["to the extent the prosecutor characterized defense counsel as 'liars' or accused counsel of lying to the jury, the prosecutor's remarks constituted misconduct"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302.) But we also conclude the comment was harmless. The comment was made in response to defense counsel's

argument implying the prosecution did not care about April because it did not offer her help, such as services and a place to stay, when defendant was arrested. Defense counsel argued that the prosecutor's claim that April called the police because she needed help was disingenuous because no help was offered to her. This argument was not only a personal affront to the prosecutor, it was so nonsensical and baseless that the jurors surely recognized its absurdity and understood the prosecutor's comment as a mere retort to the unjustified personal attack. (See *People v. Young, supra*, at p. 1193 [prosecutor's remarks were made in response to counsel's erroneous argument implying misconduct by officer; it was "reasonably likely that the jurors viewed the prosecutor's remarks as mere reciprocal retort in an effort to rehabilitate the integrity of the maligned law enforcement officer and gave it little to no consideration"].) The trial court properly sustained the prosecutor's objection. "Further, the trial court instructed the jury that it was to decide the case based on the evidence admitted at trial and that the arguments of counsel were not evidence." (*Ibid.*; CALCRIM No. 222.) Under these circumstances, the prosecutor's remark did not result in prejudice. (*People v. Young, supra*, at p. 1193; *People v. Stewart* (2004) 33 Cal.4th 425, 499.) Accordingly, the trial court did not abuse its discretion when it denied the motion for a new trial based on prosecutorial misconduct.

III. Abstract of Judgment

Lastly, the People concede that the abstract of judgment incorrectly identifies defendant's crime in Kern County Superior Court case No. SF15104A. The abstract identifies the crime as "Spousal Support," but the trial court identified it as a violation of section 273.5. In addition, the abstract fails to include the three-year concurrent term imposed for that conviction. We will remand.

DISPOSITION

The judgment is affirmed. The case is remanded to the trial court with directions to modify the abstract of judgment to correctly reflect the crime and sentence imposed in Kern County Superior Court case No. SF15104A and to forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

Kane, J.

WE CONCUR:

Dawson, Acting P.J.

Franson, J.