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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ERICK MARTEE MILLER,

Defendant and Appellant.

F062266

(Super. Ct. No. F10904056)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Timothy Kams, Judge.

Richard Jay Moller, 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.

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A uniformed officer on proactive patrol in a marked police car drove along a frontage road toward Erick Martee Miller and Lionel Horton, who stood together on a sidewalk at the end of a driveway. Horton ran away immediately. Miller started to walk

away quickly, looking at the officer the whole time. As soon as the officer turned into the driveway, Miller started to run, stuck his hand under his shirt, “holding something or pulling something or doing something,” and threw a paper bag onto the ground. Inside the paper bag, packaged for sale in \$10 quantities, were 13 plastic bags of rock cocaine and eight plastic bags of marijuana. Stuffed into a pocket of his jeans was a \$10 bill.¹ He appeals his conviction of possession of cocaine for sale and possession of marijuana for sale. We affirm.

BACKGROUND

On October 19, 2010, an information charged Miller with possession of cocaine for sale (count 1; Health & Saf. Code, § 11351), possession of cocaine (count 2; Health & Saf. Code, § 11350, subd. (a)), and possession of marijuana for sale (count 3; Health & Saf. Code, § 11359), all on August 7, 2010. The information alleged a 2003 prior for discharge of a firearm (Pen. Code, § 246)² not only as a serious felony, violent felony, or juvenile adjudication within the scope of the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) but also as a prior prison term (§ 667.5, subd. (b)).

On December 17, 2010, Miller admitted the 2003 prior as alleged. On December 23, 2010, a jury found him guilty as charged in counts 1 and 3, and the court dismissed the lesser included offense in count 2. On March 24, 2011, the court sentenced him to an aggregate sentence of seven years – six years (double the three-year midterm) on count 1 plus one year on the prior prison term and four years (the two-year midterm doubled) concurrently on count 3. (§§ 667, subd. (e)(1), 667.5, subd. (b), 1170.12, subd. (c)(1).)

¹ The discussion sets out additional facts, issue by issue, as relevant. (*Post*, parts 1-2.)

² Later statutory references are to the Penal Code except where otherwise noted.

DISCUSSION

1. Conduct of Prosecutor

Miller argues that by introducing improper evidence and asking improper questions the prosecutor committed misconduct. Additionally, he argues that the issue is reviewable on appeal either because objections and admonitions could not have cured the harm or because his attorney rendered ineffective assistance of counsel. The Attorney General argues that Miller cannot satisfy his burden to show prejudice, that objections and admonitions could have cured any harm, and that his attorney's tactics did not show ineffective assistance of counsel.

The evidence that Miller characterizes as improper arose from the prosecutor's eliciting from three police officers, in Miller's words, "irrelevant" but "high[ly] prejudicial gang evidence." The first officer, asked if running was a "common response to the sight of a police officer," testified in the affirmative as to "gang members and criminals" but in the negative as to "most people." To be visible to customers, drug dealers "like to hang out on the corners," he testified, as do gang members, to "intimidate or fight" rival gang members. He "immediately recognized" Miller, he pointed out, since he had executed search warrants of the house where Miller's mother and stepfather and he lived, arrested Miller for reckless driving, and observed him yelling the name of, and throwing the gang signs of, the Strother Boys criminal street gang. He testified that during the investigation that led to one of the warrants he saw Miller sell rock cocaine to an informant, although he was not charged in connection with the ensuing warrant.

The second officer, asked by the prosecutor if he knew Miller "from anything before," testified he had "done a search warrant" and "recovered some illegal narcotics" at his mother's house but acknowledged he had had no personal contact with Miller. The third officer, asked by the prosecutor about the "typical response" of a group of people who see police approaching, testified that criminals "usually run" but that normal people

“usually stand still.” Asked about those who run, he listed narcotics possession, weapon possession, and outstanding warrants among the reasons. He testified that he recognized Miller, the prosecutor asked why, and he recounted his traffic stops of Miller and the execution of search warrants at the house where his mother and stepfather and he lived. Two of those warrants, he testified, led to the seizure of illegal substances. Asked if Miller was arrested either time, he testified that as to one he did not recall and that as to the other Miller’s mother and stepfather were arrested but Miller was not.

The questions that Miller characterizes as improper arose on cross-examination. “But if [Mr. Horton] was a friend of yours and he was next to you when this happened and he can verify all this,” the prosecutor asked him, “where is he?” Miller replied, “I don’t know.” The prosecutor then asked him, “So, since he’s your friend, he would have no other reason not to be here?,” and, “So if his friends told me he was scared to come to court because of retaliation from you and the Strother Boys, they would be lying?” To both questions, Miller’s attorney objected. Both times, the court sustained the objections. The prosecutor then asked, “So to your knowledge, there is no reason that he should be afraid to come to court today?,” and Miller replied, “No.” Then he asked, “If someone were to tell me the reason he’s not here today –,” and the court interjected, “No. Move on.” To his next question, “But as far as you know, he was with you, he saw everything happen, he’s your friend, but he’s not coming to testify for you?,” Miller’s attorney again objected. The court sustained the objection. The prosecutor dropped that line of inquiry.

At the next break, Miller’s attorney characterized the prosecutor’s inquiries as “prosecutorial misconduct implying” Miller’s commission of “a very serious crime of witness tampering with no foundation. The only purpose of that was to prejudice the jury. It wasn’t the least bit probative.” He asked for a mistrial. The court requested a response from the prosecutor, who said he pursued his line of inquiry only after Miller surprised him by replying, “I don’t know,” to his first question. He said he expected Miller to testify that people commonly “know not to come to testify” in an area “with the

Strother Boys or any other gang.” Denying the request for a mistrial, the court expressed disapproval of the prosecutor’s line of inquiry, acknowledged having “headed off” more questioning, and emphasized that Miller’s attorney could “argue against any suggestion” that Miller had anything to do with Horton’s not being at trial.

Under the federal standard, prosecutorial misconduct that infects a trial with such unfairness as to make the resulting conviction a denial of due process is reversible error. Under the state standard, prosecutorial misconduct is reversible error if the prosecutor uses deceptive or reprehensible methods to persuade either the court or the jury and a result more favorable to the defendant without the misconduct was reasonably probable. (*People v. Martinez* (2010) 47 Cal. 4th 911, 955-956, citing *Darden v. Wainwright* (1986) 477 U.S. 168, 181; *People v. Wallace* (2008) 44 Cal.4th 1032, 1071; *People v. Price* (1991) 1 Cal.4th 324, 447.)

The key issue at trial was whether Miller could be connected to the paper bag containing rock cocaine and marijuana packaged for sale. An officer testified that he saw Miller start to walk away, and then start to run away, and then look over his shoulder as he ran away, and that Miller was only about 50 feet away when he broke into a run. The officer testified that as he closed the distance he saw Miller put his right hand underneath his shirt, and then pull his hand out from underneath his shirt, and then throw the paper bag to the ground at the corner of an apartment building when the two were only 25 feet apart. The officer testified that after he helped other officers detain Miller he went back to the corner of the apartment building, “the same place” he had seen Miller throw the paper bag to the ground, and retrieved the paper bag there.

Nothing in the record casts any doubt on the officer’s trustworthiness. During his six-and-one-half years on the police force, he served on the Southwest District Crime Suppression Team, the West Fresno Gang Tactical Team, and the Violent Crime Impact Team, took part in 450 to 500 narcotics investigations (150 to 200 involving narcotics for sale), and testified in court about 30 times. Denying Miller’s new trial motion, the court

characterized the evidence against him as “significant and credible,” the prosecution’s case as “persuasive and compelling,” and the prosecution’s “primary witness” – the officer who testified to Miller’s throwing the paper bag to the ground – as “extremely credible.” We agree with the court’s characterizations. On a record of the exceptionally strong evidence of Miller’s guilt and the impeccable credibility of the key witness against him, his argument fails to persuade us.³

2. *Constructive Possession Theory*

Miller argues that the court erred and violated due process by instructing on constructive possession, by denying his new trial motion arguing an insufficiency of the evidence of constructive possession, and by declining to hold an evidentiary hearing or permit the release of juror information on the issue of constructive possession. The Attorney General argues that there was sufficient evidence of constructive possession to warrant the instruction, that the denial of Miller’s motions was proper, and that the juror information he sought was inadmissible.

Both parties requested, with no request for modification, and the court instructed with, *inter alia*, CALCRIM No. 2302 (“Possession for Sale of Controlled Substance”). Miller now challenges the constructive possession portion of the instruction: “A person does not have to actually hold or touch something to possess it. It is enough if the person has control over it or the right to control it, either personally or through another person.”⁴

After trial, Miller filed a new trial motion on the ground that juror number three told him that she and another juror initially “were holdouts for not guilty” because neither

³ In light of our holding, the ancillary issues of forfeiture and ineffective assistance of counsel are moot.

⁴ Additionally, both parties requested, with no request for modification, and the court instructed with, *inter alia*, CALCRIM Nos. 2304 (“Simple Possession of Controlled Substance”) and 2352 (“Possession for Sale of Marijuana”), each of which has identical language on constructive possession. Miller challenges neither of those instructions.

believed the officer's testimony that he saw Miller throw the paper bag to the ground but that "she and the other holdout juror were ultimately persuaded as to the issue of guilt by the remaining jurors." The motion challenged the verdict on the ground of insufficiency of the evidence, argued that there was no evidence from which the jury could have drawn a reasonable inference of constructive possession, and exhorted the court "to step in and exercise its independent judgment as to the veracity of that witness." In a declaration he attached to the motion, Miller's attorney noted that six jurors stayed behind to discuss the verdict with him and the prosecutor and that juror number three stated that the other holdout juror (whom she did not identify) was not one of those six. In opposition, the prosecutor argued that the juror statements in the declaration of Miller's attorney were inadmissible not only as hearsay but also as evidence to test a verdict. (Evid. Code, §§ 1150, subd. (a), 1200, subd. (b).)

Miller then filed a motion for an evidentiary hearing to present evidence from juror number three "to show that the verdict is contrary to the evidence." In a declaration he attached to the motion, Miller's attorney noted that he had no contact information for that juror but needed the information to subpoena her for the hearing on the new trial motion. He argued that an evidentiary hearing was likely to "produce evidence of such juror misconduct as to require a new trial." In opposition, the prosecutor again argued that the juror statements at issue were inadmissible and, while acknowledging the court's discretion to independently weigh the evidence, emphasized the presumption in favor of the correctness of the verdict. (§ 1181, ¶ 6.)

After argument at the hearing on the motions, the court observed that, by law, since jurors cannot "testify to the subjective reasoning process of the individual juror" the evidence that Miller sought to admit was inadmissible. On the basis of "an independent review and analysis of the case," the court found that the prosecution's evidence was "significant and credible," that the prosecution's case was "persuasive and compelling,"

and that the prosecution's "primary witness" was "extremely credible." The court denied the motions.

Giving an instruction that correctly states a principle of law but that has no application to the facts of the case is state law error requiring reversal only if a result more favorable to the defendant was reasonably probable had the error not occurred. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) Here, the record shows no evidence of, no argument to the jury about, and no inquiry by the jury about, constructive possession. The jury's request for a reread of the officer's testimony about "what hand Miller dropped the bag with" and "where the bag was when he retrieved it" and Miller's testimony about "how he was holding up [his] pants" shows careful scrutiny of key evidence connecting him to the paper bag with the rock cocaine and the marijuana packaged for sale. Including almost an hour of reread, the jury deliberated for only about three hours before finding him guilty.

The record persuades us that the court's denial of Miller's motions was within the scope of the court's sound discretion. "We emphasize that, when considering evidence regarding the jurors' deliberations, a trial court must take great care not to overstep the boundaries set forth in Evidence Code section 1150." (*People v. Hedgecock* (1990) 51 Cal.3d 395, 418.) "The statute may be violated not only by the admission of jurors' testimony describing their own mental processes, but also by permitting testimony concerning statements made by jurors in the course of their deliberations." (*Id.* at pp. 418-419.) Here, the declaration of Miller's attorney stated that juror number three told him she and another juror initially were holdouts for not guilty, since neither believed the officer's testimony, but that ultimately she and the other juror were persuaded as to the issue of guilt by the remaining jurors. "But when a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes," our Supreme Court admonishes. (*Id.* at

p. 419.) “Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.” (*Ibid.*)⁵

DISPOSITION

The judgment is affirmed.

Gomes, J.

WE CONCUR:

Wiseman, Acting P.J.

Levy, J.

⁵ The premise of Miller’s due process argument is that the court erred. Since there was no error, his due process claim likewise fails. (*People v. Sanders* (1995) 11 Cal.4th 475, 510, fn. 3.)