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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MANUEL VARGAS MERAS,

Defendant and Appellant.

F062654

(Super. Ct. No. VCF244039)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

William W. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

* Before Hill, P.J., Levy, J. and Kane, J.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Heather S. Gimle, Deputy Attorney General, for Plaintiff and Respondent.

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Appellant Manuel Vargas Meras was convicted after a jury trial of one felony count of dissuading a witness from reporting a crime (Pen. Code, § 136.1, subd. (b)(1)) and one misdemeanor count of disobeying a domestic relations court order (Pen. Code, § 273.6, subd. (a)). The trial court sentenced appellant to a total prison term of two years. On appeal, appellant contends: (1) the trial court prejudicially erred in admitting statements containing improper lay opinion; and (2) the prosecutor committed prejudicial misconduct in closing argument. We affirm.

FACTS

Antonia P. testified that she and appellant had lived together for almost five years and that they had a four-year-old son. Antonia acknowledged that on October 25, 2010, she called law enforcement to report a fight she had with appellant. Antonia recalled telling the responding sheriff's deputy that she and appellant had not lived together for two years and that they separated because she had obtained a domestic violence restraining order against him.¹ When asked whether she told the deputy that appellant had been calling and harassing her, Antonia testified: "Yes, because he wanted to see his child."

Antonia also acknowledged telling the deputy that she had been afraid to call law enforcement because appellant had threatened her with bodily harm if she did so. However, Antonia claimed she was not actually fearful of appellant at the time. Antonia went on to testify to both remembering and not remembering telling the deputy that she

¹ A certified copy of the restraining order was admitted into evidence as People's exhibit No. 1.

was fearful because appellant was capable of carrying out his threat of killing her.² She continued to maintain that she was not actually afraid of appellant in October 2010.

Antonia confirmed that a prior incident occurred in July 2008, which brought law enforcement to her house. She recalled that it involved a fight she had with appellant, but she could not remember what the fight was about. Antonia acknowledged telling the responding deputy that appellant pushed her up against the living room wall, choking her.

Antonia testified she could not remember too well a second incident involving appellant that occurred in September 2008. She remembered a deputy coming over and speaking with her about an argument she had with appellant. She did not remember telling the deputy that appellant was physically aggressive with her and hit her with closed fists. But she did recall telling the deputy that appellant threw a partially empty beer can, which struck her in the chest. She did not remember receiving any injuries or telling the deputy that appellant hit her because she threatened to call the police.

Antonia's 16-year-old daughter, R.S., testified that she remembered a deputy coming to her house on October 25, 2010. Although she remembered talking to the deputy, she could not remember exactly what she told him. When asked if she knew why her mother called law enforcement, R. testified: "Because [appellant] had gone to the house. I don't know. He wanted to talk to her and she didn't want to talk to him." R. recalled that appellant came to the house once or twice. On these occasions, nothing happened; appellant just wanted to talk to Antonia. Afterwards, appellant left on his own. R. could not recall telling the deputy that appellant became angry and told Antonia she would regret it. R. testified that her relationship with appellant was "[n]ormal" and that "he was my mom's husband, so we got along."

² The record reflects that Antonia, and her daughter, R.S., were reluctant witnesses, and their testimony included frequent protestations of the inability to recall specific details of incidents involving appellant and some of the statements they made to investigating sheriff's deputies. Consequently, much of the incriminating evidence against appellant came from the deputies' testimony recounting the witnesses' prior statements.

Deputy Luis Carrillo testified that on October 25, 2010, around 8:30 a.m., he was called out to a particular address because “[a] female ... wanted to file a report regarding a violation of a restraining order.” When he arrived at that location, he came into contact with Antonia and R. Afterwards, Deputy Carrillo completed his report of what they told him.

The trial court admitted the following testimony, which is the subject of appellant’s first contention on appeal, pursuant to Evidence Code section 1237 (past recollection recorded):

“[DEPUTY CARRILLO]: Page 4 of my report, line 64 to 71 would be [R.S.]’s statement. It reads, ‘I contacted [R.S.] and obtained her statement. She has been present several times when [appellant] comes to the residence and attempts to talk to her mother. The most recent incident was on 10/22 of 2010. She saw [appellant] come over to the residence and insisted on her mother going with him.... [I]t’s a typo, an error. It should have been ‘when her mother refused,’ but it says, ‘when her mother, [appellant] became angry and told her mother she would regret it. He then threatened to kill her if she called law enforcement. [R.] believes [appellant] is capable of carrying out the threats.’

“[DEFENSE COUNSEL]: I’m sorry, your Honor. I do have to object to that part as speculation.

“[THE PROSECUTOR]: There’s more as to reasons why in her statement.

“THE COURT: Overruled. Go ahead.

“[DEPUTY CARRILLO]: ‘He has assaulted her mother in the past. [R.] believes it is more likely for [appellant] to carry out his threats now that her mother is dating somebody else.’

“[DEFENSE COUNSEL]: And I would object to that as improper character evidence, as well.

“THE COURT: Overruled.”

Deputy Carrillo further testified that when he arrived on October 25, 2010, he asked Antonia what happened and she told him that appellant had not been obeying a

restraining order. Antonia told Deputy Carrillo that she was fearful of appellant. She stated that appellant had been calling her. Deputy Carrillo looked at the caller identification feature on Antonia's phone and noted there were calls from appellant on October 23, October 24, and October 25, 2010.

Antonia told Deputy Carrillo the reason she finally called law enforcement was because appellant was "coming around more often harassing her, and she felt that he was capable of carrying [out] any threats now that she was dating somebody else." Antonia also told the deputy that she felt threatened by appellant because "he had threatened to kill her if she called law enforcement." She never told Deputy Carrillo that appellant was calling just to talk to his son or that appellant came over just to see his son.

Deputy James Woolen testified that he was dispatched to Antonia's residence on July 14, 2008, in response to a domestic violence call. There, he made contact with Antonia and her daughter, R. Antonia was visibly distraught, shaken, and crying. Deputy Woolen took a statement from Antonia through the assistance of R., who acted as an interpreter throughout the conversation. Antonia provided a detailed description of the incident and reported that, just before appellant left, he threatened to kill her if she contacted the police.

Deputy Woolen contacted Antonia a second time on September 24, 2008, at her cousin's house. She was more distraught than she had been after the July 2008 incident, and had visible injuries, including scratches, an injury to her ear, and a bump on her head. Antonia provided a detailed description of what happened through the assistance of another relative. Antonia described how appellant had shown up drunk and had become angry when she told him to leave. When Antonia told appellant she was going to call the police if he did not leave, this "set him off" and he began striking her, threw a beer can at her, and punched her several times in the head with closed fists.

DISCUSSION

I. Admission of Lay Opinion

Appellant contends the trial court abused its discretion in admitting R.'s statements to Deputy Carrillo that she believed appellant was capable of carrying out his threats to kill her mother, Antonia, and was more likely to do so because Antonia was dating somebody else. Appellant argues these statements were improper lay opinion evidence because they essentially constituted "a prediction of appellant's future behavior" and, as such, were "speculative because appellant's future likelihood to kill [Antonia] could not have been rationally based on anything [R.] personally observed."

"A lay witness may testify to an opinion if it is rationally based on the witness's perception and if it is helpful to a clear understanding of his testimony." (*People v. Farnam* (2002) 28 Cal.4th 107, 153; Evid. Code, § 800.) We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Cowan* (2010) 50 Cal.4th 401, 462.) We find none here. R.'s opinion concerning appellant's present capacity to carry out his threats against her mother and the likeliness of his doing so was rationally based on her own perceptions of appellant, and her opinion was helpful to a clear understanding of her testimony. R. told Deputy Carrillo that she was personally present when appellant contacted her mother and threatened to kill her if she called the police. R. also indicated that her opinion was based on her personal experience and observations of appellant's assaultive conduct towards her mother in the past. We thus disagree with appellant's claim that R.'s opinion was improper lay opinion evidence because it was based on speculation rather than her own personal observations.³

³ We have also reviewed the authorities appellant cites and find none directly supports his suggestion that an opinion that touches on how someone is likely to behave in the future can never be "[r]ationally based on the perception of the witness" and, therefore, the proper subject of lay opinion testimony. (Evid. Code, § 800, subd. (a).) We also note that, although not mentioned by the parties on appeal, the trial court duly instructed the jury on how to evaluate opinion testimony of lay witnesses pursuant to CALCRIM No. 333.

II. Prosecutorial Misconduct

Appellant claims the prosecutor committed prejudicial misconduct in closing argument by improperly shifting the burden of proof to the defense, particularly with respect to the willfulness element of the misdemeanor offense of disobeying a domestic relations court order.⁴ We disagree with appellant's characterization of the prosecutor's statements. The statements were permissible comments on the state of the evidence.

The challenged portion of the prosecutor's argument is as follows:

“[THE PROSECUTOR]: And finally, the defendant willfully violated the Court order. Here, someone commits an act willfully when done willingly or on purpose. Well, there's been no evidence that someone was dragging [appellant] to the victim's house.

“[DEFENSE COUNSEL]: I'm gonna object to that as burden shifting.

“THE COURT: Okay. Overruled.

“[THE PROSECUTOR]: There's no evidence someone was dragging defendant over to the house. There was no evidence that someone else was at the door with the defendant. And when you heard from Antonia, she had said, you know—I know she said she didn't want to be here. But remember, in voir dire I even asked you that even—it's not up to the victim or complaining witness to go ahead with the charges, it's up to the People. And why? Because people just can't go violating restraining orders. It's a Court order.

“Again, here, defendant willfully violated that Court order by going to her house, by calling her. And we had no testimony that Antonia was calling her—calling the defendant on October 22nd or October 23rd or 24th or 25th.

“[DEFENSE COUNSEL]: I'm going to object to that as burden shifting again, your Honor.

⁴ The jury was instructed, pursuant to CALCRIM No. 2701, that in order to prove appellant was guilty of violating Penal Code section 273.6, subdivision (a), the prosecution was required to prove, among other things, “[t]he defendant willfully violated the court order” and “[s]omeone commits an act *willfully* when he or she does it willingly or on purpose.”

“THE COURT: Overruled. This is argument, and she can—she’s just indicating what she believes the evidence showed.”

“A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44 (*Morales*)). “In other words, the misconduct must be ‘of sufficient significance to result in the denial of the defendant’s right to a fair trial.’ [Citation.]” (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.) Under state law, “[c]onduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct ... only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” (*Morales, supra*, 25 Cal.4th at p. 44.) “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. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Appellant contends:

“Here, the prosecutor argued that the defendant committed the acts alleged willfully because there was no evidence to the contrary. The prosecutor also argued that appellant violated the restraining order as charged under count three by contacting the victim because there was no evidence that the victim initiated the contact. [¶] These arguments essentially shifted the burden to the defense, by claiming that the elements are proven simply because of the lack of evidence to the contrary.”

We disagree with appellant’s characterization of the prosecutor’s statements. When viewed in context, the prosecutor’s statements were fair comments on the lack of evidence contradicting the prosecution’s evidence that appellant acted unilaterally in going to the victim’s house and phoning her multiple times. Pointing out the lack of

evidence that the victim initiated these contacts with appellant did not shift the burden of proof or imply that the “elements [of an offense] are proven simply because of the lack of evidence to the contrary.”

As our Supreme Court explained in *People v. Bradford* (1997) 15 Cal.4th 1229, “[a] distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.” (*Id.* at p. 1340.) We find the complained-of arguments in this case fall into the former category and find unpersuasive appellant’s arguments that they fall into the latter. It was not improper for the prosecutor in this case to argue, essentially, that appellant’s conduct in going to the victim’s house by himself and calling her multiple times supported an inference that he acted willfully (i.e., willingly or purposefully) and to point out the lack of defense evidence to the contrary.

In sum, the prosecutor’s arguments did not shift the burden of proof to the defense but constituted permissible comments on the state of the evidence. The prosecutor did not use deceptive or reprehensible methods to persuade the jury, nor did her statements deny appellant a fair trial. There was no prejudicial prosecutorial misconduct.

DISPOSITION

The judgment is affirmed.