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

THE PEOPLE,

Plaintiff and Respondent,

v.

DVANTE JAVAR MACKEY,

Defendant and Appellant.

F063290

(Super. Ct. No. F10904544)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Kim Malcheski, 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, Eric L. Christoffersen and John W. Powell, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a jury trial, Dvante Javar Mackey (appellant) was convicted of home invasion robbery (Pen. Code,¹ §§ 211, 212.5) with findings that he acted in concert with two other persons (§ 213, subd. (a)(1)(A)) and personally used a firearm (§ 12022.53, subd. (b)) in the commission of the offense. He was sentenced to prison for 16 years. On appeal, appellant contends: (1) the prosecutor committed misconduct by asking appellant whether a sheriff's deputy was lying in his testimony; (2) the trial court erred under Evidence Code section 352 by admitting evidence that appellant's girlfriend "flashed" him during a jail visit; and (3) the cumulative prejudice of the errors compels reversal of the judgment. We affirm.

FACTS

In the early morning hours of May 20, 2010, someone knocked on the back door of a house in Clovis. The door was opened by Kellie Bryant, a houseguest, who had herself just arrived and entered the house through the same door. Appellant quickly stepped inside, pointed a gun at Bryant's head, and threatened to kill her if she did not give him \$1,000 from the house. Bryant screamed, pushed appellant back out the door, and locked it.

Appellant kicked down the door and pointed his gun at Roger Luntz, the homeowner who had just emerged from the master bedroom. Appellant ordered Luntz to get down on the ground. Two more men entered the house through the back door. One of them went into the master bedroom, where Luntz's wife was sleeping, and took her purse.

Appellant followed Bryant to the living room and interrupted her attempt to call 911. He then grabbed Bryant's purse and ordered her to lie on the ground.

¹ Further statutory references are to the Penal Code unless otherwise specified.

After the three intruders left the house, sheriff's deputies arrived and Bryant reported that her purse had been stolen, along with several electronic devices, including her iPhone.

By working with Bryant's wireless carrier, Fresno Sheriff's Detective Michale Nulick was able to trace her iPhone to someone who had purchased it on Craigslist on May 20, 2010. The person who sold the iPhone on Craigslist told Detective Nulick he purchased it from a particular store.

Detective Nulick went to the store and spoke to the owner, Hector Palacios. Palacios told Detective Nulick that he bought the iPhone on May 20, 2010, from three men with whom he previously had done business. He later identified appellant as the person who sold him the iPhone.

Palacios provided Detective Nulick with two phone numbers he had used to contact appellant in the past. One of the numbers was for a cell phone, which was registered to an address on West Pico Street in Fresno.

On June 11, 2010, Detective Nulick arranged to have Palacios send appellant a text message and ask if he had any more phones to sell. Palacios reported that appellant sent an affirmative reply. About an hour later, Detective Nulick saw three men leave the West Pico address in a green Mustang.

Detective Nulick followed the Mustang to Palacios's store and saw the three men enter the store. Palacios shortly sent a text message to Nulick identifying appellant as the person who sold him the iPhone.

Based on Palacios's description, Detective Nulick was able to identify appellant as the driver of the Mustang. After the three men left the store and drove away, the detective arranged to have the Mustang stopped.

The traffic stop was conducted by Fresno Sheriff's Deputy James Dunn. Appellant told Deputy Dunn that he did not have a driver's license and that he had purchased the Mustang. When asked for his address and phone number, appellant

provided Deputy Dunn with the West Pico address and the cell phone number associated with the address.

The defense

Appellant presented an alibi defense, claiming he spent the entire night at the house of Marisha Iverson, his girlfriend at the time. Iverson testified that appellant arrived at her house around 5:00 or 6:00 p.m. on May 19, 2010, and left around 7:00 or 7:15 a.m. on May 20, 2010. Iverson's mother, a registered nurse, testified that she saw appellant arrive at the house sometime before she left for work at 6:30 p.m. on May 19, 2010, and she saw him leaving the house around 7:30 a.m. on May 20, 2010, as she was returning from work.

Regarding the trip to Palacios's store on June 11, 2010, appellant testified the Mustang did not belong to him but belonged to someone he knew by the nickname of "J-man." Appellant denied ever conducting any transactions with Palacios and claimed he was simply giving his friends a ride to the cell phone store because he was the only one who knew how to drive a stick shift. Appellant also denied that he provided Deputy Dunn the cell phone number associated with the West Pico address.

DISCUSSION

I. Prosecutorial Misconduct

During cross-examination, appellant denied telling Deputy Dunn that he had just purchased the Mustang. The prosecutor then asked appellant, "Do you have any reason to believe that Deputy Dunn had a reason to lie about something in this investigation?" After appellant answered no, the prosecutor asked, "But if you didn't say that, do you have any idea where he would have got that?" After appellant gave a nonresponsive answer describing his "shock[]" at reading the reports, the prosecutor again asked, "Do

you have any reason to believe that Deputy Dunn would lie in this investigation?”²

Appellant responded, “Well, if he—if he was asked to, well, you never know what people do. People do crazy things.” The prosecutor then asked, “But you don’t have any information as to why Deputy Dunn would say something if it weren’t true; correct?” to which appellant replied, “No, sir.”

Based on the above line of questioning, appellant now contends “the prosecutor committed intentional misconduct when he repeatedly asked appellant if [D]eputy Dunn had lied or fabricated evidence about their interaction in the field.”

Appellant’s trial counsel did not object to any of the challenged questions on the basis of prosecutorial misconduct. A defendant “must make a timely objection and request an admonition to cure any harm” in order to preserve a claim of prosecutorial misconduct. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) Appellant’s argument has been forfeited. (*People v. Brown* (2003) 31 Cal.4th 518, 553; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

On appeal, however, appellant has raised a claim of ineffective assistance of trial counsel, based on the failure to object to the allegedly improper questions. To demonstrate ineffective assistance of counsel, appellant must show that his trial counsel’s “representation fell below an objective standard of reasonableness” (*Strickland v. Washington* (1984) 466 U.S. 668, 688), and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different” (*id.* at p. 694). In light of the claim of ineffective assistance of counsel, we will address appellant’s claim of prosecutorial misconduct on its merits.

Appellant relies on a line of federal authority that categorically holds “were they lying” questions constitute misconduct. (E.g., *United States v. Sanchez* (9th Cir. 1999)

² The trial court overruled defense counsel’s objection to this question on the grounds it lacked foundation and had been asked and answered.

176 F.3d 1214; *United States v. Richter* (2nd Cir. 1987) 826 F.2d 206.) “The courts in these cases explain that these questions infringe on the jury’s right to make credibility determinations [citations], or that the questions are misleading because they suggest that the only explanation for the discrepancy between defendant’s testimony and the other witness’ testimony is that one of them is lying [citations]. Moreover, the questions might be considered misleading or calling for a conclusion in that they suggest that the defendant can know what another witness was thinking.’ [Citation.]” (*People v. Zambrano* (2004) 124 Cal.App.4th 228, 239.)

The California Supreme Court, in *People v. Chatman* (2006) 38 Cal.4th 344 (*Chatman*), declined to adopt this categorical approach.³ Instead, it held “courts should carefully scrutinize ‘were they lying’ questions in context. They should not be permitted when argumentative, or when designed to elicit testimony that is irrelevant or speculative. However, in its discretion, a court may permit such questions if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions.” (*Id.* at p. 384.)

“If a defendant has no relevant personal knowledge of the events, or of a reason that a witness may be lying or mistaken, he might have no relevant testimony to provide. No witness may give testimony based on conjecture or speculation. [Citation.] Such evidence is irrelevant because it has no tendency in reason to resolve questions in dispute. [Citation.]” (*Chatman, supra*, 38 Cal.4th at p. 382.) However, “[a] defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses

³ The court in *Chatman* also noted the defendant’s reliance on federal cases holding *were they lying* questions are always improper was “misplaced” because they “involve application of the Federal Rules of Evidence. They interpret a similar statutory framework but they do not establish constitutional principles binding on the states.” (*Chatman, supra*, 38 Cal.4th at p. 381, fn. 15.)

who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken.” (*Ibid.*) That is particularly true if a defendant knows these witnesses and knows of reasons why they might lie. (*Ibid.*)

Here, while appellant did not know Deputy Dunn personally, appellant testified as a percipient witness and had personal knowledge of events. (See *Chatman, supra*, 38 Cal.4th at p. 382.) The prosecutor was entitled to question appellant about why his perception about what transpired differed from the deputy’s. Appellant denied that he told Deputy Dunn that he had purchased the Mustang, implicitly charging that the deputy’s testimony could not be believed. “It was permissible for the prosecutor to clarify [appellant’s] own position in this regard. It was also permissible to ask whether he knew of facts that would show a witness’s testimony might be inaccurate or mistaken, or whether he knew of any bias, interest, or motive for a witness to be untruthful. The cross-examination was legitimate inquiry to clarify [appellant’s] position. The questions sought to elicit testimony that would properly assist the trier of fact in ascertaining whom to believe.” (*Id.* at p. 383.) The prosecutor’s questions here did not constitute misconduct.

II. Evidence Code section 352

At the outset of the defense case, defense counsel moved to preclude the prosecution from introducing, for impeachment purposes, evidence that appellant and Iverson were, in counsel’s words, “doing a little show and tell during a visit in the jail.” The prosecutor countered that evidence Iverson exposed her breasts to appellant (while he exposed himself to her) was “relevant to the bias that this particular witness would have for the defendant to show, at least at one point, her willingness to break rules for the benefit of the defendant” and was “something that the jury can use to help determine what her credibility may be and her motivation to testify in a certain manner for the defendant.” The trial court ruled to allow the prosecution “to question [Iverson] as to her

conduct in violation of rules there are at the jail just on the issue of bias” but excluded any evidence of appellant’s own misbehavior in jail. During direct examination, defense counsel preemptively questioned Iverson on the subject and elicited testimony that the police had asked her no longer to visit appellant in jail because she had “flashed him” during a visit in March 2011.

Appellant now challenges the trial court’s decision to admit the “highly prejudicial evidence,” arguing it “should have been excluded pursuant to Evidence Code section 352 as it was unduly prejudicial.” We find no abuse of discretion in the court’s decision.

Evidence Code section 352 gives trial courts discretion to “exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” “We will not disturb a trial court’s exercise of discretion under Evidence Code section 352 “*except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” [Citation.]” (*People v. Jones* (1998) 17 Cal.4th 279, 304.)

Appellant fails to make such a showing. As the prosecutor argued below, evidence of Iverson’s willingness to flout jail rules by flashing appellant was relevant to show her bias towards appellant and the issue of her credibility was important because she provided him with his alibi. On the other hand, the evidence was not unduly prejudicial. The kind of evidence that exceeds the bounds of a trial court’s discretion under Evidence Code section 352 is evidence that ““*uniquely* tends to evoke an *emotional* bias against the defendant”” and ““has very little effect on the issues.”” (*People v. Karis* (1988) 46 Cal.3d 612, 638, italics added.) The evidence here was brief and was limited to Iverson’s misbehavior during the jail visit. We do not believe the evidence was likely to invoke a unique emotional bias against appellant. Nor was it likely to confuse the jury,

as appellant asserts in his reply brief. Therefore, the trial court's decision to admit the evidence was not an abuse of discretion.

III. Cumulative Error

Having rejected appellant's individual claims of error, we necessarily reject his claim of cumulative error.

DISPOSITION

The judgment is affirmed.

HILL, P. J.

WE CONCUR:

KANE, J.

FRANSON, J.