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

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MANUEL TAFOLLA,

Defendant and Appellant.

F068788

(Super. Ct. No. 1228035)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Valli K. Israels, Judge.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and William K. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Franson, J. and Smith, J.

A jury convicted appellant Luis Manuel Tafolla of attempted murder (count II/Pen. Code, §§ 664 & 187),¹ assault with a semiautomatic firearm (count III/§ 245, subd. (b)), and active participation in a street gang (count IV/§ 186.22, subd. (a)). The jury also found true a gang enhancement (§ 186.22, subd. (b)(1)(C)) and a great bodily injury enhancement in counts II and III (§ 12022.7, subd. (b)), arming enhancements pursuant to section 12022.53, subdivisions (d), (e)(1) and (f) in count II, and an arming enhancement pursuant to section 12022.5 in count III.

On December 10, 2013, the court sentenced Tafolla to a determinate term of seven years on count II, an indeterminate term of 25 years to life on one of the arming enhancements in that count, and stayed terms on the remaining counts and enhancements.

On appeal, Tafolla contends the court abused its discretion when it denied his motion for a new trial. We affirm.

FACTS

The Trial

Codefendant Ricardo Ordaz testified for the prosecution pursuant to a plea bargain through which he avoided a life sentence for his role in the underlying crimes. Ordaz testified he was a member of the Westside Via Locos Trece (Westside Locos), a clique of the Sureño gang. On the afternoon of April 30, 2007, he was “kickin’ it” at his “lady’s house” in Ceres, California, drinking with fellow gang members including Tafolla, Armando Zaragoza, and Marcus Robles. At some point, the group began talking about shooting a Norteño gang member in retaliation for Norteño gang members shooting at his mother’s house. Eventually, Ordaz, Tafolla, Zaragoza, and Robles took a .25-caliber semiautomatic handgun, got into Robles’s white Honda with Robles driving and Tafolla in the front passenger seat, and drove to Turlock to look for a Norteño gang member to

¹ All further statutory references are to the Penal Code.

shoot. According to Ordaz, Tafolla's involvement in the shooting resulted in Tafolla becoming a member of the Westside Locos.

Eric Carrillo testified that on April 30, 2007, at approximately 9:00 p.m., he was walking down a street in Turlock talking on his cellphone to his girlfriend, Jessica Lugo. A white older model Honda hatchback with black bumpers slowly drove up with the driver and a passenger looking at him and stopped across the street. A male, whom he identified in court as Tafolla, got out of the car, approached him, and asked if he "banged." Carrillo became a little upset and said, "No, is that a problem?" Tafolla responded that he was a Sureño and shot Carrillo twice.

According to Ordaz, after the shooting, Tafolla ran back to the car and the group drove away. A blue rag attached to the gun, which the gang members knew as a "brass catcher," contained two casings. Tafolla told the group that he said, "Via Locos" after he shot Carrillo and that he saw a hole in Carrillo's neck. Sometime after the shooting, Ordaz painted the bumpers on the white Honda because a newspaper reported that a white hatchback with black bumpers had been used in the shooting.

Investigators located the car involved in the shooting and determined it was registered to Marcus Robles. On May 24, 2007, Tafolla was arrested and interviewed at the Turlock police station.² During the interview, Tafolla stated that on the day of the shooting, Robles drove him, Ordaz, and Zaragoza to Turlock. As they were driving back to Ceres, Tafolla saw Carrillo wearing a red jersey and he told Robles to stop. Tafolla got out of the car, approached Carrillo as Carrillo spoke on a cellphone and asked him if he "banged." Carrillo replied, "[N]o, why, what are you a scrap?" Tafolla replied that he was a Sureño and shot at Carrillo twice, striking him once. According to Tafolla, he was drunk and high when the shooting occurred.

² A video and a transcript of the interview were submitted into evidence.

District Attorney Investigator Froilan Mariscal testified as an expert on criminal street gangs. According to Mariscal, the Westside Locos was a clique of the Sureño gang. He further testified that Sureños and Norteños were rival gangs, and that Sureños identified with the color blue and Norteños with the color red. Using 12 different criteria, Mariscal identified Tafolla, Ordaz, and Zaragoza as active Sureño gang members and Robles as a Sureño gang associate, i.e., a person who associated with the gang because they wanted to become a gang member. Mariscal testified that Carrillo was shot for the benefit of the Sureño gang because the shooting allowed the gang to control the community and its own members through fear and it instilled fear in rival gang members. It also benefited Tafolla personally because it elevated his status in the gang.

After the shooting, Carrillo was airlifted to a hospital by helicopter. For the first two or three days after the shooting, he was paralyzed. At the trial in this matter, which began more than five years after the shooting, a bullet remained lodged in Carrillo's neck and he still suffered from paralysis and had to use a walker. Carrillo also took medication for nerve pain and muscle spasms.

The defense did not present any evidence.

Closing Arguments and the Motion for New Trial

Just before ending a lengthy closing argument, the prosecutor, without objection, told the jury:

“At this point, I would like to draw an analogy as to what the defense has done in this case.

“If one can picture an octopus in the sea and a predator approaches, what does an octopus do? It immediately -- immediately throws out a plume of black ink to hide.

“But what I ask you to do in this case, is to travel straight through that black ink to get to the truth. Because all that's occurring here is that ink to cover up the very simple and straightforward guilt of Mr. Tafolla.

“I’m going to ask that you find Mr. Tafolla, this gentleman at the end of counsel table, guilty of all of the crimes and enhancements. Thank you.”

The court then charged the jury:

“At this time, to the jurors, I want to take some time to admonish you while Prosecution is finishing and defense is getting ready for theirs.

“As you listen to these arguments, these are just arguments. You are the judges of the facts in this case. So what the attorneys say are not facts. What the attorneys believe are not facts. You are the judges of what the facts are in this case, but they are making arguments.”

In addition to the crimes he was convicted of and the enhancements and allegations the jury found true, the information charged Tafolla, in pertinent part, with conspiracy to commit murder in count I and an allegation that the attempted murder was willful, deliberate, and premeditated. During her closing argument, defense counsel conceded that Tafolla shot the victim in the face with a firearm. Defense counsel’s argument focused primarily on undermining the conspiracy charge in count I and arguing that the shooting was not premeditated and that Tafolla was guilty only of attempted voluntary manslaughter. She also argued that the People failed to prove the specific intent element of the participating in a criminal street gang offense charged in count IV.³

On September 25, 2013, Tafolla filed a motion for new trial alleging several grounds for relief, including prosecutorial misconduct based on the prosecutor’s use of the octopus ink analogy during closing argument.

On December 10, 2013, in denying the motion, the court found that the prosecutor’s use of the octopus ink analogy did not constitute prosecutorial misconduct.

³ The jury did not reach a verdict on the conspiracy charge or the allegation that the attempted murder was willful, deliberate, and premeditated.

DISCUSSION

Tafolla contends the prosecutor committed prejudicial misconduct during closing argument when she used an analogy involving octopus ink to imply that defense counsel was hiding the truth from the jury. Thus, according to Tafolla, the court abused its discretion when it denied his motion for new trial. Alternatively, Tafolla contends he was denied the effective assistance of counsel if he forfeited this issue by defense counsel's failure to timely object to the alleged misconduct and not raising it until she filed a motion for new trial. There is no merit to either contention.

“Under California law, a prosecutor commits reversible misconduct if he or she makes use of “deceptive or reprehensible methods” when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant’s specific constitutional rights—such as a comment upon the defendant’s invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action “so infected the trial with unfairness as to make the resulting conviction a denial of due process.”” [Citations.] In addition, “a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]” [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm.” (*People v. Dykes* (2009) 46 Cal.4th 731, 760 (*Dykes*).

Tafolla did not object to the prosecutor’s octopus ink analogy. Thus, he forfeited this alleged misconduct as a ground for his motion for new trial. (Cf. *People v. Mitchell* (1966) 239 Cal.App.2d 318, 328 [“Where no objection is made to alleged misconduct of the prosecuting attorney, such claimed misconduct will not furnish grounds sufficient to justify the granting of a new trial or the reversal of a judgment.”].) Tafolla, however, contends he did not forfeit this issue because an admonition would not have cured the

harm because the prosecutor's analogy left the jury with the inference that anything defense counsel said was a lie. We disagree.

The analogy did not suggest that defense counsel was lying. (See discussion, *infra*.) Further, almost immediately following the octopus ink analogy, the court instructed the jury that the attorneys' arguments were just that, arguments, that they were the judges of the facts, and that what the attorneys said and believed were not facts and the court repeated similar admonitions during jury instructions.⁴

“[I]t is axiomatic that ‘[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court’s instructions.’” (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1502.) Tafolla, however, does not explain why this presumption should not apply here particularly since the octopus ink analogy was a single brief comment in a lengthy closing argument. (Cf. *People v. Bell* (1989) 49 Cal.3d 502, 538 (*Bell*) [to the extent the prosecutor’s remarks during closing argument could have been understood to suggest counsel was obligated or permitted to present a defense dishonestly, misleading aspects of argument regarding counsel’s responsibility could have been cured by admonition].)

In any event, even if Tafolla did not forfeit this issue by his failure to object, the record supports the court’s finding that the prosecutor’s use of the octopus ink analogy did not amount to misconduct.

“It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.” (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) However, “[i]t is misconduct when a prosecutor in

⁴ During jury instructions, the court instructed the jury that evidence was the sworn testimony of witnesses, the exhibits submitted into evidence, and anything else the court told them to consider as evidence. It also instructed them that nothing the attorneys said was evidence.

closing argument ‘denigrat[es] counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues.’” (*People v. Welch* (1989) 20 Cal.4th 701, 753.) Thus, “[i]f there is a reasonable likelihood that the jury would understand the prosecutor’s statements as an assertion that defense counsel sought to deceive the jury, misconduct would be established.” (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302 (*Cummings*)). However, we will “not lightly infer” that the prosecutor intended her remarks “to have their most damaging meaning, or that the jury would draw that meaning from the other, less damaging interpretations available.” (*People v. Young* (2005) 34 Cal.4th 1149, 1192.) “An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper.” (*Cummings, supra*, at p. 1302, fn. 47.) Neither is an argument that “[does] little more than urge the jury not to be influenced by [defense] counsel’s arguments, and to instead focus on the testimony and evidence in the case.” (*Dykes, supra*, 46 Cal.4th at p. 771.)

In *Cummings*, the Supreme Court found that a prosecutor’s argument accusing the defense of attempting to hide the truth and comparing the defense to octopus ink was “nothing more than urging the jury not to be misled by defense evidence.” (*Cummings, supra*, 4 Cal.4th at p. 1302, fn. 47.) In *People v. Marquez* (1992) 1 Cal.4th 553, the court found that a prosecutor’s argument comparing defense to a “smokescreen” to hide the truth from the jury “was proper argument against the jury’s acceptance of the defense presented.” (*Id.* at pp. 575-576.)

Arguably more egregious comments have not been found to have crossed the line into misconduct. (See, e.g., *People v. Williams* (1996) 46 Cal.App.4th 1767, 1781-1782 [prosecutor’s remarks that defense counsel’s argument intended to “obscure the truth” in order to “deceive,’ ‘distract,’ and ‘confuse” the jurors, properly reminded the jury it should not be distracted from relevant evidence and inferences that might logically be drawn therefrom]; *Bell, supra*, 49 Cal.3d at p. 538 [comments that defense counsel’s job

is to ““throw sand in your eyes,”” and ““get his man off”” gives the same reminder]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [saying any experienced defense attorney can ““twist”” and ““poke”” at the prosecution’s case to get the jury to speculate and ““buy something”” is “unobjectionable”]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [in saying defense counsel ““tried to smoke one past us,”” the ““prosecutor simply used colorful language to permissibly criticize counsel’s tactical approach””].) We think the prosecutor’s comments were clearly recognizable as an advocate’s hyperbole by the jury. Accordingly, we do not find misconduct occurred.

However, assuming arguendo, that there was misconduct, the prosecutor’s single brief comment was not part of a pattern of misconduct elevating the error to one of federal constitutional dimension or necessitating application of the federal standard of review. (*Chapman v. California*. (1967) 386 U.S. 18, 24; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1106-1107.) We therefore apply our state Constitution’s *Watson* standard of prejudice and determine if there is a reasonable probability of a different result. (*People v. Watson* (1956) 46 Cal.2d 818, 836-839.) Given the strength of the prosecution’s case, which included Tafolla’s confession that he shot the victim, we find no reasonable probability the jury would have reached a more favorable result absent the prosecutor’s use of the octopus ink analogy. ““We review a trial court’s ruling on a motion for a new trial under a deferential abuse-of-discretion standard.’ [Citations.] ““A trial court’s ruling on a motion for new trial is so completely within that court’s discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion.””” (*People v. Thompson* (2010) 49 Cal.4th 79, 140.) Since we concluded earlier that the prosecutor’s use of the octopus ink analogy did not constitute misconduct or prejudice Tafolla, we further conclude that the court did not abuse its discretion when it denied Tafolla’s motion for new trial.⁵

⁵ ““A defendant claiming ineffective assistance of counsel under the federal or state Constitutions must show both deficient performance under an objective standard of

DISPOSITION

The judgment is affirmed.

professional reasonableness and prejudice under a test of reasonable probability of a different outcome.” (*People v. Osband* (1996) 13 Cal.4th 622, 664.) Since Tafolla can show neither, we also reject his ineffective assistance of counsel claim.