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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL EUGENE WATSON,

Defendant and Appellant.

G044416

(Super. Ct. No. 10CF1411)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Quisteen S. Shum and Daniel Rogers, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Daniel Eugene Watson and Samuel Rivera of attempted carjacking and attempted second degree robbery. Upon the recommendation of the probation department, they were each placed on three years' formal probation.

On appeal, Watson¹ challenges the sufficiency of the evidence to support the attempted carjacking conviction. He also raises claims of prosecutorial misconduct, ineffective assistance of counsel and trial court evidentiary and instructional error, all of which he argues prejudicially skewed the jury's perception of the complaining witness's credibility. We reject Watson's contentions for reasons stated below and affirm the judgment.

FACTS

On May 31, 2010, at approximately 10:20 p.m., Danny Medina called 911. After identifying himself, Medina told the operator "some guys just tried to carjack me." He said there had been two assailants, one of them armed with what looked like a semi-automatic handgun. Medina had fled the scene unharmed and parked his car in a nearby grocery store parking lot. He described the assailants as two Hispanic males in their late 20's. The gunman was wearing black pants and a black hooded sweatshirt. His accomplice had on black pants and a gray sweatshirt.

Within minutes, Santa Ana Police Officer Duane Greaver arrived at Medina's location. About five minutes later, Greaver transported Medina to a nearby location where Santa Ana Detective Gil Hernandez had detained two suspects. When Medina saw Watson, he told Greaver, "That's him. He's the one who walked out in front of my car and pointed the gun at me." Hernandez had already searched Watson and discovered a black replica handgun tucked into his waistband. He also indentified Rivera and said Rivera tried to open his passenger door, but it was locked.

¹ Rivera is not a party to this appeal.

Greaver drove Medina back to his car after he identified Watson and Rivera and obtained a statement from him. Medina explained that he had been driving on McFadden Avenue near the Standard Avenue intersection when Watson “stumbled out into the road directly in front of his car.” Medina stopped his car, at which point Watson faced him and pointed a gun at him. Medina then saw Rivera approach his passenger door and he heard him try to open the car door. Medina said he put his car in reverse and accelerated backwards in an effort to escape them. Watson, gun still raised and pointed at Medina, started to run after him. At this point, Medina put his car in drive and accelerated around both men. Once he managed to escape, he pulled over and called 911.

Although it is not clear exactly when Medina learned Watson did not have a real gun, he was aware of this fact by the time of trial. The prosecutor acknowledged Medina was apprehensive during his testimony, and that his testimony differed from his pretrial statement in some respects, but was also more detailed.

Medina testified he was driving to work when a person stepped off the curb, into the street and directly in front of his car. He stopped immediately and initially thought it was just an inattentive pedestrian. However, it became clear that the young man, whom he later identified as Watson, intended to stop his car, and he actively moved to block Medina’s initial attempt to drive around him. When Medina tried instead to back away from Watson, he ran toward Medina’s car while carrying what looked like a semi-automatic handgun in his right hand. As Medina continued to back up, he noticed a second person, Rivera, standing by his passenger door and looking through the window, but he did not actually hear him attempt to open the car door. When Medina looked back at Watson, he saw the gun pointed directly at him and he backed his car a second time, stopping about 30 feet away from Watson. When it looked like Watson was walking back toward the sidewalk, Medina decided to drive forward regardless of whether or not he hit Watson or Rivera because by now he “was pissed.” Medina opined that he might have been the target of a prank, testifying, “they were just being kids or I don’t know. I

think everybody does stupid things at some point in their life, and they just happened to get caught.” He said he saw Rivera laughing “the whole time,” but he did not see Watson laugh.

Neither Medina nor Watson testified at trial. The defense argued they were in fact just pranksters, inebriated and without any intent to take Medina’s car. At most, they intended to take personal items Medina had in his car that night. The jury deliberated for less than three hours total before rendering its verdict.

DISCUSSION

Sufficiency of the Evidence

Watson challenges the sufficiency of the evidence to prove the attempted carjacking conviction, arguing the evidence fails to demonstrate he intended to use force or fear in an attempt to take Medina’s car. We disagree.

Our role in assessing the sufficiency of the evidence to sustain a conviction is quite limited. We review the entire record and draw all reasonable inferences in the light most favorable to the judgment. The conviction will be upheld if it is supported by substantial evidence, i.e., evidence that is solid, credible, and of reasonable value.

(*People v. Johnson* (1980) 26 Cal.3d 557, 576.) A judgment will be reversed only when the evidence would not permit any reasonable trier of fact to have found the defendant guilty beyond a reasonable doubt. (*Id.* at pp. 576-578; see also *People v. Williams* (1997) 16 Cal.4th 635, 678.)

Most important here, it is the exclusive province of the jury to determine the credibility of witnesses and determine the facts. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) And while evidence of a defendant’s state of mind is generally circumstantial, circumstantial evidence is sufficient to support a conviction. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; see also *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) With these principles in mind, we consider the elements of the offense of attempted carjacking and the evidence presented as to each.

Penal Code section 215 defines carjacking as “the felonious taking of a motor vehicle in the possession of another, from his or her person or immediate presence, or from the person or immediate presence of a passenger of the motor vehicle, against his or her will and with the intent to either permanently or temporarily deprive the person in possession of the motor vehicle of his or her possession, accomplished by means of force or fear.”²

An attempt to commit a crime consists of the specific intent to commit the crime and a direct but ineffectual act done towards its commission. (CALCRIM No. 460.) The pattern instruction defines a direct but ineffectual act as “one that goes beyond planning or preparation” and demonstrates the person’s “definite and unambiguous intent to commit carjacking.” It is enough that a person attempts the crime “even if, after taking a direct step towards committing the crime, he abandons further efforts to complete the crime” (*Ibid.*) While the commission of an element of the underlying crime other than formation of intent to do it is not necessary, there must be evidence of acts which indicate a certain, unambiguous intent to commit that specific crime. In other words, when the design of a person to commit a crime is clearly shown, slight acts done in furtherance of that design will constitute an attempt. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1385-1386.) Here, we conclude the jurors could have reasonably concluded Watson and Rivera attempted to carjack Medina’s car.

First, Watson stepped off a sidewalk and into oncoming traffic. He blocked Medina’s further movement while Rivera approached the passenger door and tried to open the door. Watson pursued Medina with what looked like a real semi-automatic

² The court instructed the jury, “To prove that a defendant is guilty of carjacking, the People must prove that: [¶] The defendant took a motor vehicle that was not his own; [¶] 2. The vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; [¶] 3. The vehicle was taken against that person’s will; [¶] 4. The defendant used force or fear to take the vehicle or to prevent that person from resisting; [¶] AND [¶] 5. When the defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently. [¶] . . . [¶] *Fear*, as used here, means fear of injury to the person himself or herself, injury to the person’s family or property, or immediate injury to someone else present during the incident or to that person’s property.” (CALCRIM No. 1650.)

handgun pointed directly at him when he tried to back away. When Rivera ultimately failed to gain access – probably because Medina’s doors were locked – and Medina decided to drive away, the attempt to enter the car and forcibly overpower Medina proved unsuccessful. Nevertheless, the fact these acts proved ineffectual does not diminish the fear Medina felt nor the perpetrators’ culpability. Luckily for Medina, Watson’s gun was not real, or his decision to drive around Watson and Rivera might have proved fatal. And, neither the jury nor we are persuaded Watson and Rivera were just out to have a little fun at Medina’s expense. The acts were stupid and ultimately harmless, but not so ridiculous or innocent that no reasonable juror could have rejected the defense.

Watson’s reliance on *People v. Gomez* (2011) 192 Cal.App.4th 609 (*Gomez*) is misplaced. There, three men attacked the victim very early in the morning while he was patrolling his apartment complex. During the assault, the men took the keys to the victim’s truck, which was parked about 10 feet away. The men fled in their own car, but returned about 10 to 20 minutes later. After two of the men unsuccessfully tried to enter the victim’s apartment, the assailants decided to steal his truck. Gomez argued there was insufficient evidence he intended to take the truck or that he took it from the victim’s immediate presence. (*Id.* at p. 618.)

The appellate court stated, “The requisite intent – to deprive the possessor of the possession – must exist before or during the use of force or fear. [Citations.]” (*People v. Gomez, supra*, 192 Cal.App.4th at p. 618.) The court reasoned that although there was no evidence defendant intended to take the truck before or during the assault, the victim’s keys were taken directly from him while he was a mere 10 feet from his truck and the truck was taken by force when they returned and attempted to enter his apartment. (*Gomez, supra*, 192 Cal.App.4th at p. 625.) That was held to be sufficient to constitute an intent that preceded the taking.

Here, as the Attorney General points out, Watson and Rivera’s actions evidenced a clear intent to stop and then enter Medina’s car. Watson forcibly detained

Medina – albeit with a gun replica rather than a gun – while Rivera attempted to enter the passenger side. Watson argues the evidence shows at most an attempt to steal articles in Medina’s car, and he insists “to affirm the attempted carjacking conviction under these facts would allow every attempted robbery of a person in a car *to also be punished as an attempted carjacking* unless the record unambiguously showed the defendant intended only to take personal property from the car.” He also cites and distinguishes several affirmances of cases with stronger circumstantial evidence of the defendant’s intent. But to say some cases present additional evidence along the intent continuum in no way detracts from the quantum of evidence presented here. Watson insists on viewing the evidence in a fashion that is both factually narrow and most favorable to his defense. However, that is not the applicable standard of review. We must view the evidence in a light most favorable to the judgment. (*People v. Staten* (2000) 24 Cal.4th 434, 460.) Ultimately, we conclude the jury could readily infer from the entire sequence of events that Watson intended to forcibly deprive Medina of the possession of his car. Therefore, substantial evidence supports the judgment of conviction and reversal is not possible.

Prosecutorial Misconduct

1. *Fear of retaliation*

During direct examination, the prosecutor asked Medina if he was “reluctant to testify . . . for some reason?” Medina replied, “No.” But on redirect, the prosecutor returned to this area, asking Medina if he still drove his car around Santa Ana. Defense counsel objected on grounds of relevance and the court and counsel held a brief side-bar discussion. Apparently, sometime the day before, an investigator had mentioned to the prosecutor that Medina told him he was “afraid and didn’t want to come in to testify.” When the prosecutor talked to Medina, he confirmed he was afraid after the incident and “no longer drives [his 1997 silver BMW with ‘pimped-out rims’] because it’s got fancy rims, and he’s afraid the defendants will identify him in it and potentially

follow him, know where he lives, things like that, which is why I think that the fact that he no longer drives the BMW is relevant”

The court considered the fancy car theory “rank speculation” on Medina’s part, but acknowledged that regardless of whether driving his easily recognizable car exposed him to danger, his fear itself would be relevant. He ruled, “I think it’s [Medina’s fear] relevant. I’m going to allow the People to inquire. But the way the People need to do this is you need to ask him whether he’s afraid. If he says no, like he did yesterday when you asked him if he is reluctant to testify, then we’re not getting into his change of habits . . . [¶] . . . [¶] in terms of how he drives the car. [¶] Probably the fact that he may not be driving the car down those streets anymore is probably [Evidence Code section] 352. But the fact that he is afraid is relevant and it’s fair game. It goes to evaluation the credibility of this witness.”

When questioning resumed, the prosecutor returned to the issue of Medina’s fear. She did so through reference to the car, but the court overruled objections to the question. Medina testified he was afraid to drive his car through Santa Ana, and the prosecutor asked if it was because of this incident and Medina said it was. Finally, the prosecutor asked, “Are you afraid that someone is going to retaliate against you for reporting this incident?” Medina answered, “Correct.” Defense counsel’s objection to this question was sustained on the ground it was leading, and Medina’s answer was stricken from the record.

Watson argues the prosecutor engaged in misconduct when she asked Medina whether he no longer traveled the same streets in Santa Ana. He concedes trial counsel failed to object on grounds of prosecutorial misconduct. However, he argues the issue is not forfeited because counsel correctly challenged the question as eliciting irrelevant testimony, citing again the court’s comments during the side-bar discussion. Alternatively, he contends we must consider the issue of ineffective assistance of counsel if we reject the forfeiture analysis. Although the issue was forfeited, we find no

prosecutorial misconduct, and see no reason to question defense counsel's performance either.

The applicable standards regarding preserving an issue of prosecutorial misconduct are well established. The California Supreme Court has held “[a]s a general rule 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.” (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Watson's counsel did not object to the prosecutor's questioning on grounds of prosecutorial misconduct. Counsel did object on relevancy grounds, but under the standard set forth in *People v. Samayoa, supra*, 15 Cal.4th 795, a specific objection on grounds of prosecutorial misconduct is required to preserve the issue for appeal. If not, the claim is deemed waived, and this record fails to suggest a reason for applying any exception to the general rule requiring both an objection and a request for a curative instruction. This issue was forfeited.

But we also reject Watson's alternative claim counsel's failure to pose a specific objection and request an admonition constitutes ineffective assistance of counsel. The standard for establishing ineffective assistance of counsel is also well-settled. There is a two-step test for determining the adequacy of counsel: “[The defendant] must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, [he or she] must establish that counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense.” (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Thus, Watson's ineffective assistance of counsel claim will prevail only if he can establish deficient performance, i.e., representation below an objective standard of reasonableness which also results in

prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216, 217.) Watson cannot show deficient performance. The issue was properly handled by defense counsel.

In the first place, Watson's concession the witness's fear was "hypothetically relevant" does not go far enough. A witness's apprehension about testifying is relevant. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368-1369. True, Medina once said no when asked if he was afraid to testify, but he also repeatedly admitted being fearful after the crime and apparently looked fearful. His responses when questioned about the basis of his fear were somewhat non-responsive and at times obtuse, and even the cold record indicates he genuinely felt apprehension about what had happened and having to confront his attackers. The prosecutor made reference to his anxious demeanor at trial, a part of the record Watson did not challenge at trial and does not question on appeal. In short, the whole of Medina's testimony supports a finding he was fearful of testifying, despite his initial denial of such fear.

The prosecutor received new information about Medina's fear and tried again to elicit an acknowledgement of it from him. At a sidebar, the prosecutor received permission to elicit evidence of the witness's fear. The trial judge acted well within his discretion in giving her that permission³, and in prescribing the way in which he felt it best to approach the topic. It appears the prosecutor did not approach it the way the court directed. But once the witness testified to his lingering fear, there was no question she was going to be able to get that fear testimony into evidence, and probably spend some time with it. When defense counsel was able to limit the questioning, and his objection to a leading question caused the prosecutor to abandon the inquiry, he had nothing to gain from further objections or motions to strike. Indeed, an objection would only have told the jury that this issue – upon which it was clear defense was going to lose – was

³ A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) An abuse of discretion is found when the court rules in an "arbitrary, capricious, or patently absurd manner." (*People v. Foster* (2010) 50 Cal.4th 1301, 1328-1329.)

important. Another sidebar followed by more testimony about how frightened Mr. Medina was could not turn out well for the defense.

Tactical errors generally are not deemed reversible, predominantly because we evaluate counsel's decision in the context of the available facts. (*Strickland v. Washington* (1984) 566 U.S. 668, 690.) Every trial lawyer faces choices between strategic retreats and Pyrrhic victories, and we see nothing unreasonable about counsel's decision to choose the former here. We understand appellate counsel's concern over the prosecutor's apparent disregard of the court's directive, but that is something that could have been addressed by trial counsel at the next recess. It might have resulted in an action against the prosecutor, but would not have changed the evidence in the case or provided a basis for relief on appeal. We think – given what Medina had told the investigator, and what defense counsel knew to be a likely unwinnable battle – defense counsel acted reasonably. The uncomfortable fact here is that it is often tactically wiser to remain mute in the face of brief, objectionable testimony lest unnecessary attention be drawn to it. This is especially true when the objection is to the form of the question rather than the evidence itself.

Nor are we able to agree with Watson that his trial counsel failed adequately to represent him because he failed to obtain a definitive ruling excluding this evidence. As we have explained, we believe counsel fought for – and obtained – as favorable a ruling as he could get on the issue of Medina's fear. Excoriating him for failing to get "more clarification" truly seems like searching for Justice Gardner's "fly specks in black pepper." (*In re Lower* (1979) 100 Cal.App.3d 144, 147.) Watson cannot demonstrate deficient performance, let alone prejudice.

2. *Statements Made During Closing Argument*

Watson also complains the prosecutor "repeatedly asserted to the jury that Medina's alleged fear of retaliation [was solely an attempt] to excuse[] the significant discrepancies between Medina's testimony at trial and his earlier statements to the

police.” He provides three citations to the record in support of his contention. And he is correct there were no objections.

But there were no objections because there was nothing objectionable. Of course the prosecutor was trying to explain the discrepancies between Medina’s trial testimony and his earlier statements to the police. That was the whole point of eliciting testimony about his fear. And it profits no one to argue that those efforts could be misconstrued. Reversal is required only when “‘there is a reasonable likelihood that the jury construed or applied any of the complained of remarks in an objectionable fashion.’ [Citation.]” (*People v. Ochoa, supra*, 19 Cal.4th at p. 431.) We conclude no such likelihood exists here.

Medina did testify he was afraid because of “what happened.” The exact meaning of this response, and the inferences to be drawn from it and others he made pertaining to this issue calls for the interpretation of the evidence, which is a proper subject for the arguments of both counsel, with the jury deciding which interpretations are the more persuasive. (See *People v. Dennis* (1998) 17 Cal.4th 468, 521.) The prosecutor’s discussion of this was not objectionable.

Watson also complains the prosecutor denigrated defense counsel by arguing, “They wanted to pull the wool over your eyes” But we do not read this statement as denigration of counsel so much as denigration of a defense theory – something the prosecutor is entitled to do. The prosecutor’s statement referred to the defense theory Medina was merely the target of a cruel joke. It is difficult to conclude her “wool-pulling” statement about this theory exceeded the bounds of “vigorous yet fair argument,” or constitutes an outrageous epithet. (*People v. Sandoval* (1992) 4 Cal.4th 155, 180; *People v. Sanders* (1995) 11 Cal.4th 475, 527.) While cases seldom turn on pronoun usage, it is worth noting here that the prosecutor said, “*They* wanted to pull the wool over your eyes.” Since there was only one defense attorney, the reference could not

have been a personal denigration, but had to be a reference to what the prosecutor was entitled to characterize as a disingenuous defense. We find no prosecutorial misconduct.

Instructional Error

The result is the same with respect to Watson's complaint regarding a modification the court made to CALCRIM No. 226. CALCRIM No. 226, which is derived from Evidence Code section 780, delineates factors the jury may consider in assessing witness credibility. In addition to several mandatory factors, the instruction contains bracketed or optional factors. The court is required to "[g]ive all of the bracketed factors that are relevant based on the evidence." (Bench Notes to CALCRIM No. 226 (2012) p. 68; Evid. Code, § 780, subs, (e), (i), and (k).) In this case, the court gave one of those bracketed factors ("Did other evidence prove or disprove any fact about which the witness testified?"), and added its own factor ("Was the witness afraid of retaliation?"), which was characterized as a "bullet point."

Watson complains the court's bullet point modification "substantially strengthened the prosecution's case by providing [] a way to excuse the inconsistencies in Medina's testimony," citing *People v. Olguin, supra*, 31 Cal.App.4th 1355, 1368-1369.) But, as noted above, *Olguin* expresses the propriety of exactly what Watson is now complaining about. The passage cited does nothing to undermine the trial court's decision to list fear of retaliation as a factor to consider when determining Medina's credibility. (See *Id.* at pp. 1367-1369.) Throughout this appeal, Watson focuses on Medina's initial statement he was not afraid to testify and refuses to acknowledge the other repeated expressions, both verbal and nonverbal, of fear and trepidation contained in the record. This fear of retaliation – if it existed – required some mention in the charge to the jury because it was relevant to Medina's credibility as a witness. The court carefully formulated the issue in the form of a question which in no way led the jury to conclude it did or did not exist. That was their call and they were properly directed to consider it. In short, Watson fails to demonstrate how the trial court's modification of

CALCRIM No. 226 violated its sua sponte duty to instruct the jury on factors pertaining to the very important task of assessing witness credibility. (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 883-884.)

Cumulative Error

Finally, Watson argues if none of the errors individually require reversal of the judgment, then the cumulative effect of these errors must. We disagree.

“Under the ‘cumulative error’ doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial. [Citations.]” (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32 (dis. opn. of Mosk, J.)) The litmus test for cumulative error is whether defendant received due process and a fair trial. (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

We have individually considered each claim of error, whether raised as prosecutorial misconduct, ineffective assistance of counsel, or trial court error. We have concluded no error occurred or the claimed error was harmless under the appropriate standard of review. In sum, Watson was not deprived of the rights guaranteed under either the state or federal Constitutions on any ground asserted. He was entitled to a fair trial, not a perfect one. (*People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on another ground in *People v. Martinez* (2010) 47 Cal.4th 911, 948, fn. 10) and he received a fair trial.

DISPOSITION

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.