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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.

HUAN TA,

Defendant and Appellant.

G045658

(Super. Ct. No. 10WF0176)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed as modified.

Phillip I. Bronson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Gil Gonzalez and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Huan Ta was convicted by a jury of aggravated assault (Pen. Code, § 245, subd. (a)(1)) and battery with serious injury (Pen. Code, § 243, subd. (d)). He admitted several enhancements for prior convictions and commitments to state prison. He was sentenced to the upper term of four years on the aggravated assault, a term that was doubled because of his two prior strike convictions. The same sentence computation was applied to his battery with serious injury term, that sentence ordered to run concurrently. Additionally, the court imposed one-year enhancements for appellant's two prior state prison commitments and an additional 16 months for one of the two unrelated driving under the influence charges (Veh. Code, § 23152, subd. (a), punishments increased under the Three Strikes Law) he pled guilty to, and stayed the same sentence on the second. Appellant's total term came to 11 years and 4 months. The court awarded 519 days of actual custody credits and 77 days of conduct credits for a total award of 596 days against his sentence.

Ta complains of two instances of prosecutorial misconduct in closing argument and a miscalculation of his presentence custody credits. He is right about the credits, and we order 258 days added to the 519 originally computed. But the first putative misconduct assignment fails on its merits and the second was cured by an admonition by the trial court, so we affirm his conviction.

DISCUSSION

I

Use of Inappropriate Simile

Since appellant's contentions are not fact-related, we need only note that appellant was involved in a bar fight and identified as one of the men responsible for badly beating Than Tran. Appellant does not contest the adequacy of the evidence upon which he was convicted, but objects to two points made by the prosecutor during her closing argument.

Appellant's primary contention is that the prosecutor committed misconduct by using a simile involving filling a car with gasoline: "The prosecutor engaged in misconduct by misstating the law on reasonable doubt." His complaint is that "the prosecutor referred to the 'gasoline example' in the context of reasonable doubt." In fact, the prosecutor did not do so. She started to, but was stopped by defense counsel's objection and the trial court's ruling sustaining that objection. What she got out was not enough for us to completely evaluate it, but it seems not only harmless but probably helpful to the defense.

What happened was the prosecutor first discussed gasoline in explaining circumstantial evidence to the jury. She talked about the task of filling a car with gasoline, "You didn't test the gasoline, you didn't see the gasoline go in, but based upon everything that you do when you load up your car with gasoline you know it's gasoline beyond a reasonable doubt. And that[']s all circumstantial evidence." So this reference to the "gasoline example" was in the context of circumstantial evidence. To that end, it was an unobjectionable argument.

Shortly thereafter, the prosecutor began discussing reasonable doubt and returned to the gasoline example: ""That is the area where you're going to have to decide do you have an abiding conviction, do you know that the defendant committed the crime based upon all the evidence, do you feel comfortable. You do it every day. It's like the gasoline example. Is it possible that's not gasoline? Yeah, it's possible. Can you imagine that somebody put something else in that gasoline container? Yeah, you can imagine that."" At this point an objection was interposed and a hearing held in chambers.

Trial counsel's objection was that the gasoline example "waters down" reasonable doubt. He complained that it trivialized the jury's decision by making it sound like "an everyday decision" instead of "a very important decision" employing the highest standard of proof in the law. But if he understood the example as suggesting a

lighter burden on the prosecution than the law actually imposes, he seems to have misapprehended the only way this analogy could have turned out.

Indeed, if the prosecutor had been allowed to finish this simile, she could only have come to grief. If the jury thought they had to be as sure about the defendant's guilt as they were that the liquid that comes out of a gasoline pump and powers their automobile is gasoline, they would almost certainly have acquitted. We're confident none of these jurors had ever had an experience in which *anything but* gasoline came out of a gas pump. We have looked in vain – in both law and literature – for any example of anything other than gasoline coming out of a gas pump.

So a prosecutor who told a jury they should measure reasonable doubt by that standard would almost certainly fail. Very few prosecutions provide evidence that strong. Telling a jury that level of certainty had to be reached to prove something beyond a reasonable doubt would be perilously close to directing a verdict of acquittal.

We need not, therefore, spend a great deal of time with whether this argument rises to the level of reversible prosecutorial misconduct. It is not misconduct of any kind. It was a perfectly appropriate argument with regard to circumstantial evidence and the fragment that was presented during the reasonable doubt discussion – left unfinished – could only have helped the defense. The court refused an admonition about the fragment, but gave the jury the standard CALCRIM No. 220 instruction on reasonable doubt. It told the jury that, “Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true.” There is nothing to suggest misinterpretation of the prosecutor's arguments caused the jury to disregard this instruction.

II

Comment on Witness's Imagined Fear of Testifying

A somewhat closer call is Ta's complaint the prosecutor committed misconduct by “appealing to the sympathy and passion of the jury.” This argument is

based on the prosecutor's explanation of fragmentary and self-contradictory testimony by eyewitness Anna Pham as, "This is what happens when somebody is afraid to testify in a criminal case."¹

When the prosecutor tried to explain the tortuous testimony of Ms. Pham by blaming it on her fear, defense counsel objected. In fact, counsel interposed a speaking objection, following the statement of his legal grounds for the objection with a reminder to the jury that, "There is no evidence she was afraid. And I think it's improper and violates Mr. Ta's due process rights." The trial court sustained the objection and reiterated what the jury had already heard from defense counsel, admonishing them that there was no evidence the witness was afraid. Defense counsel did not request a stronger or more detailed admonishment, but appellant complains the admonition was insufficient because the prosecutor's statement was highly inflammatory in that it implied, "that appellant was a violent and dangerous man whom Pham had good reason to fear and this was the reason her testimony veered away from what she had told to [O]fficer Capps, and secondly, that appellant had threatened Pham with harm if her testimony did not veer away from the statement that she had given to [O]fficer Capps."

This is an awful lot to get out of a suggestion the witness was afraid.

We simply find nothing in that statement that implies "appellant was a violent and dangerous man whom Pham had good reason to fear." Nor do we see any suggestion the witness was threatened. People can be afraid to testify without any threat from the other side, and commenting on that fear is not the same as saying the witness "had good reason to fear."

The argument was improper. There was simply nothing to back it up. As the court recognized during a sidebar, it was pretty clear the witness "does not want to be here" and equally clear she was testifying from a "selective memory." But in the absence

¹ The Attorney General inexplicably fails to respond to this argument. There is, however, no concession of the point, so we are required to decide it without the Attorney General's assistance.

of any testimony connecting her discomfiture to fear, the prosecutor could not attribute those things to fear. But the prosecutor did not attribute that fear to appellant, and did not remotely suggest it was well-founded fear. The idea that she was actually threatened with harm by appellant is as bereft of foundation as the prosecutor's argument she was afraid.

Defense counsel said there was no evidence she was afraid and the court backed him up. The court twice told the jury there was no evidence of fear on her part. And contrary to appellant's argument, this was not an inflammatory statement that could not be overcome with an admonition. Had the prosecutor made the allegations attributed to her – about a threat having been made against the witness by appellant and the witness having good reason to be afraid that threat would be carried out because appellant was violent and dangerous – we might feel otherwise. But she didn't, and the court's admonition seems to us – as it apparently did to appellant's trial counsel – to have been the proper response.

The primary case authority relied upon by appellant in no way undercuts our confidence in the trial court's resolution of the issue. As pointed out by appellant, the California Supreme Court, in *People v. Pantages* (1931) 212 Cal. 237, 249, noted that “repeated acts of misconduct of the same tenor may present a situation radically different from a single isolated transgression of the same general nature; . . .” Here we had a single, isolated transgression. The trial court handled it appropriately.

III

Incorrect Limitations on Presentence Custody Credits

Appellant's final argument fares better than his first two. He correctly argues the trial court erred in limiting his presentence custody credits to 77 days, applying the 15 percent limit required by Penal Code section 2933.1. As the Attorney General concedes, appellant's conviction for battery with serious bodily injury does not qualify as a “violent felony” under Penal Code section 2933.1, so the limitation should

not have been applied. As was held in *People v. Hawkins* (2003) 108 Cal.App.4th 527, 531, “[B]attery with serious bodily injury cannot qualify as a violent felony . . . even if it includes a great bodily injury allegation under [Penal Code] section 12022.7, unless the crime was committed under circumstances involving domestic violence.”

Both sides now agree appellant should have received 777 days of credits under Penal Code section 4019, subdivisions (b)(2) and (c)(2) which give him 2 days credit for every four days served – a total of 258 days of credits added to his 519 spent in custody. The judgment of the court, so modified, is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.