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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.

ANTHONY JOSEPH MATOS,

Defendant and Appellant.

G049474

(Super. Ct. No. 13NF1009)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Joseph Matos appeals from a judgment after a jury convicted him of attempted second degree robbery. Matos argues the following: (1) there is insufficient evidence to support his attempted second degree robbery conviction; (2) the trial court erred in admitting video surveillance evidence; (3) the prosecutor committed misconduct; and (4) the cumulative effect of the errors was prejudicial. None of his contentions have merit, and we affirm the judgment.

FACTS¹

After an incident at the drive-thru lane of a Carl's Jr. Restaurant (the Restaurant) in Anaheim, an information charged Matos and Joel Junior Albear with one count of attempted second degree robbery (Pen. Code, §§ 664, subd. (a), 211, 212.5, subd. (c), all further statutory references are to the Pen. Code, unless otherwise indicated), of Bonifacio Bautista Mena (Bautista). Matos and Albear were tried together.

Before the presentation of evidence, Matos moved to exclude a portion of what would be identified as prosecutor's exhibit No. 1, video surveillance footage from two cameras showing different angles of the Restaurant's drive-thru lane. Matos moved to exclude footage from one of the cameras, camera 14, showing a white Volkswagen Bug (the VW) backing out of the drive-thru lane followed by two men walking because the evidence was too speculative. The trial court ruled the evidence admissible. The court explained it was reasonable to infer the person or people who confronted Bautista were the same as the person or people who walked towards the VW. The court opined the evidence was relevant to the assailant(s)'s intent, and the jury would not use the evidence for an improper purpose.

Crystal Rivera, a loss prevention specialist with the Restaurant, testified concerning the prosecutor's exhibit No. 1, the Restaurant's video surveillance footage.

¹ In his opening brief, Matos cites to his probation report to support his factual summary concerning what happened before the incident. These facts were not before the jury, and we will not consider them.

She explained one of the cameras, camera 14, was a view of the drive-thru lane entrance—it showed the back door and side of the Restaurant, and the other camera, camera 15, was a view of the drive-thru lane window—it showed the point where a vehicle would turn left from the drive-thru lane entrance and drive to the drive-thru lane window. The video was played for the jury.

The footage from camera 14 showed the following: a white Audi (Audi) entered the drive-thru lane; about two minutes later, Bautista's truck entered the drive-thru lane; less than a minute later, one man walked into the drive-thru lane followed by another man about five steps behind; the VW entered the drive-thru lane; the VW backed out of the drive-thru lane; and two men walked out of the drive-thru lane towards the VW.

The footage from camera 15 showed the following: the Audi drove left from the drive-thru lane entrance and stopped at the first window; Bautista's truck stopped at the curved portion of the drive-thru lane; the Audi drove forward; as Bautista slowly moved forward he stopped when one man approached his driver's side window and the shadow of a person was reflected on his driver's side door; when Bautista slowly drove forward, the man who stood at the door moved with the truck; the man walked away and two shadows appeared on the driver's side door; and Bautista drove forward to the drive-thru lane window.

Sixty-seven-year old Bautista testified he was alone in his truck at the Restaurant drive-thru lane one evening about 9:30 p.m. His doors were locked, the passenger side window was up, and the driver side window was down "about halfway." Bautista had ordered, and he was waiting to drive to the window to pick up his order; the Audi was ahead of him. When the prosecutor showed Bautista video surveillance footage from its exhibit No. 1, Bautista agreed footage from both cameras 14 and 15 showed his truck stopped and waiting to drive forward to the window. As Bautista waited, Albear appeared and grabbed his left arm and the collar of his shirt and pulled him towards the

window. With one hand, Matos pulled Bautista's arm, to get the \$20 bill he was holding, and put his other hand into Bautista's pocket. When the prosecutor showed Bautista video surveillance footage from exhibit No. 1, Bautista said camera 15 showed the people in the Audi paying, but he "[could] not see anything about [his] truck[]" and "[he did not] see anything." When the Audi drove away, Bautista took his foot off the brake and his car rolled forward. Albear and Matos left. Bautista told the cashier someone tried to rob him. Matos's defense counsel elicited from Bautista on cross-examination he was not wearing glasses as his driver's license indicated he should. He explained he had cataracts and they healed so he did not need to wear glasses. Officer Willie Triplett testified he found Matos and Albear minutes later sitting on the sidewalk "almost right across the street" from the Restaurant.

After the close of evidence, the trial court denied Matos's section 1118 motion to dismiss. During a conversation on the jury instructions, the trial court noted it included an aiding and abetting instruction, despite the fact the prosecutor did not request one, and the court asked the prosecutor whether she was relying on that theory of liability. The prosecutor indicated she was and the omission was an oversight. Over both defense counsels' objection, the court stated it would instruct on aiding and abetting. The court explained that Bautista's testimony established both Albear and Matos were "both doing the act[.]" but "[t]he video does show perhaps one person." The court added though a fact finder "could conclude . . . it was a combination of going over there, that one person was actually doing all the act and the other person was there for that purpose." The court instructed on aiding and abetting.

During closing argument, the prosecutor recounted Bautista's testimony two men attacked him and discussed the video surveillance footage. She stated the video's quality was poor "and it doesn't necessarily capture the entire incident." The trial court overruled Matos's defense counsel's objection the prosecutor misstated the evidence and instructed the jury it was the judge of the facts. After the prosecutor

showed the jury footage from camera 15, the prosecutor stated the following: “Well, we can’t see on the other side of the wall so we’re not sure exactly where that person was standing before the surveillance starts. The incident could have started on the other side of the wall. It’s just not totally clear based on this surveillance alone.” The prosecutor then showed the jury footage from camera 14, specifically the footage of the VW backing out of the drive-thru lane followed by two men walking, and argued the men walking towards the VW was consistent with them approaching Bautista. The prosecutor argued the two men were preying on defenseless people sitting in their cars in the drive-thru lane holding cash with their windows down. The prosecutor said the following: “Now, in the video, I’m sure the defense attorneys will point out that in camera 15, you see one individual and the shadow of another. But as I said before, one of the problems is that we don’t have -- we don’t see the entire drive-thru lane. We just don’t.” The prosecutor argued Bautista’s testimony concerning what happened was the best evidence.

Matos’s defense counsel argued the videotape surveillance footage showed the entire incident and Bautista lied. Counsel added that because the driver’s side window was up halfway, it was impossible for two people to reach into the truck.

The jury convicted Matos and Albear of attempted second degree robbery. The trial court suspended imposition of the sentence and placed Matos on five years of formal probation.

DISCUSSION

1. Sufficiency of the Evidence

Matos argues there is insufficient evidence to support his attempted second degree robbery conviction. We disagree.

“In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of

fact could find the defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] The same standard of review applies to cases in which the prosecution relies primarily on circumstantial evidence and to special circumstance allegations. [Citation.] “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ [Citations.] ‘Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction.’ [Citations.]” (*People v. Brown* (2014) 59 Cal.4th 86, 105-106 (*Brown*).

“Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.” (§ 211.) “An attempt to commit a crime requires a specific intent to commit the crime and a direct but ineffectual act done toward its commission. [Citation.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 376; § 21a.)

Here, there was sufficient evidence Matos both directly perpetrated and aided and abetted Albear in committing the attempted second degree robbery. Bautista testified two men tried to rob him. He explained that while Albear grabbed his left arm and the collar of his shirt, Matos used one hand to try to grab the \$20 bill he was holding and put his other hand into Bautista’s pocket. Bautista’s testimony alone was sufficient to support Matos’s attempted robbery conviction unless it was physically impossible or inherently improbable. (*Brown, supra*, 59 Cal.4th at pp. 105-106 [testimony of single witness sufficient to support conviction unless improbable or impossible].)

Matos relies on the “unrefuted surveillance video” evidence to claim Bautista’s version of the incident was unbelievable. In claiming he did not take “any” act

or possess the required intent, Matos claims the video showed he was 15 to 20 feet away, only his shadow was visible, and Bautista's window was halfway up "making it virtually impossible for two men to have reached into the truck simultaneously." Based on our review of the video, we disagree with Matos the video surveillance footage conflicts with Bautista's testimony and renders his testimony physically impossible or inherently improbable and thus without any evidentiary value.

At oral argument, Matos's counsel seemed to feel that the fact Matos could not be seen on the videotape compelled a reversal. It does not. The victim identified Matos as one of his two assailants and the fact he clearly misrecalled which robber did what was a fact for the jury to weigh. They found his identification credible. "The final determination as to the weight of the evidence is for the jury to make. We do not reweigh it and substitute our view for theirs. [Citations.]" (*Brown, supra*, 59 Cal.4th at p. 106.)

"To be guilty of a crime as an aider and abettor, a person must 'aid[] the [direct] perpetrator by acts or encourage[] him [or her] by words or gestures.' [Citations.] In addition, . . . the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[] the full extent of the [direct] perpetrator's criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' [Citation.]" (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.)

Here, the evidence also supported the conclusion Matos aided and abetted Albear in committing the offense. The video showed Bautista drove his truck into the drive-thru lane. Soon thereafter, a man, presumably Albear, walked into the drive-thru lane followed by Matos, who was about five steps behind him. As Bautista sat in his

stopped truck, Albear confronted Bautista. At the very least, Matos stood nearby as his shadow was cast on the driver's side door. When the robbery failed, Albear and Matos walked back out the drive-thru lane. Minutes later, Triplett found Matos sitting with Albear across the street from the Restaurant. Based on this evidence, the jury could reasonably conclude Albear and Matos worked in concert to rob Bautista with Albear robbing Bautista and Matos acting as backup. Thus, sufficient evidence supports Matos's conviction for second degree attempted robbery.

2. *Admission of Evidence*

Matos contends the trial court erred in admitting a portion of the prosecutor's exhibit No. 1 from camera 14 showing the VW backing out of the drive-thru lane followed by two men who were walking. Not so.

Evidence Code section 350 states: "No evidence is admissible except relevant evidence." Relevant evidence is "evidence . . . having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Although "there is no universal test of relevancy, the general rule in criminal cases [is] whether or not the evidence tends logically, naturally, and by reasonable inference to establish any fact material for the prosecution[.]" (People v. Freeman (1994) 8 Cal.4th 450, 491.)

Evidence Code section 352, however, authorizes a trial court to exclude relevant evidence. "The court in its discretion may 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." (Evid. Code, § 352.) For purposes of Evidence Code section 352, prejudice means "evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]" (People v. Heard (2003) 31 Cal.4th 946, 976.) We review a trial court's evidentiary rulings for an abuse of discretion.

Here, the video surveillance evidence of two men walking towards the VW as the VW backed out of the drive-thru lane was relevant on the issue of the men's intent. As we explain above, the video surveillance footage from camera 14 showed a man approach Bautista as he sat in his truck in the drive-thru lane. The video also showed the shadow of another man reflected on the truck. A little later, the video surveillance footage from camera 15 showed the VW back out of the drive-thru lane. This evidence tended to establish the men intended to approach the people in the VW to rob them.

Matos asserts this portion of the video surveillance evidence was too speculative because it showed nothing more than two men walking out of the drive-thru lane. That certainly is one reasonable inference a juror could draw from the evidence. But another reasonable inference a juror could draw is that after the two men failed to rob Bautista, they turned their attention to the people in the VW and in concert walked toward the VW to rob its occupants. After seeing the video surveillance evidence of the men walking into the drive-thru lane and the encounter with Bautista, this evidence provided the jury with the complete picture of what happened that night. Counsel had the opportunity to argue the significance, or insignificance, of this evidence, and it was for the jury to draw the inference.

Finally, we disagree with Matos the trial court's reasoning implicated Evidence Code section 1101, subdivision (b), and its requirements for a common design or plan pursuant to *People v. Ewoldt* (1994) 7 Cal.4th 380. Neither party mentioned that section of the Evidence Code, nor did the trial court rely on it as part of its reasoning. We decline Matos's invitation to imply the trial court relied on that section to then conclude the court erred because the incident with the VW was not sufficiently similar to the incident with Bautista.

With respect to Evidence Code section 352, the video surveillance evidence of the VW was not unduly prejudicial because it would not evoke an emotional bias against Matos. The evidence simply showed the VW backing out of the drive-thru lane

followed by two men walking out of the drive-thru lane toward the retreating VW. The men did not confront the people in the VW as they backed away or engage in any other confrontational conduct. We conclude there is no possibility this evidence would evoke an emotional bias against Matos or that the jury would prejudge Matos based on this evidence. Thus, we conclude the trial court properly admitted this evidence.

3. *Prosecutorial Misconduct*

Matos asserts the prosecutor committed misconduct when she told the jury the video surveillance evidence was incomplete. Again, we disagree.²

“““““A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’” [Citation.] Conduct by a prosecutor that does render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”” [Citation.]” (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) “[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” [Citation.]” (*Id.* at p. 284.) “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, overruled on other grounds in *People v. Doolin* (2009)

² Although the Attorney General provides the legal principles concerning forfeiture of a claim of prosecutorial misconduct, the Attorney General does not provide any argument of the issue. Matos’s defense counsel objected but on the grounds the prosecutor misstated the evidence, not on the grounds she committed misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 766 [counsel must object on ground prosecutor committed misconduct or forfeited].) Because the Attorney General does not provide any reasoned argument that appellate review of this issue is forfeited, we will address the merits of Matos’s claim.

45 Cal.4th 390, 420.) “[W]e may not reverse the judgment if it is not reasonably probable that a result more favorable to the defendant would have been reached in its absence. [Citation.]” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

“At closing argument a party is entitled both to discuss the evidence and to comment on reasonable inferences that may be drawn therefrom. [Citations.]” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) It is impermissible however, for a prosecutor to “go beyond the evidence in his argument to the jury. [Citation.] To do so may suggest the existence of ‘facts’ outside the record—a suggestion that is hard for a defendant to challenge and hence is unfair.” (*People v. Benson* (1990) 52 Cal.3d 754, 794-795.)

Here, the prosecutor did not commit misconduct because she fairly commented on the evidence. The video surveillance footage did not capture the entire encounter because there is a person hidden behind the wall. As we explain above, the video surveillance footage from camera 14 shows a shadow reflected on Bautista’s driver’s side door. Matos’s admission his shadow was visible necessarily means he was hidden behind the wall. Bautista’s truck sat on the curved portion of the drive-thru lane with the back end hidden behind the wall. The video from camera 14 does not show what happened behind that wall. Thus, it was a fair comment on the evidence to argue the video surveillance evidence did not show a complete picture of what happened in that blind spot.

Contrary to Matos’s suggestion, we do not interpret the prosecutor’s argument to mean missing evidence establishes his guilt. The prosecutor did not go beyond the evidence or refer to facts outside the record. Rather, the prosecutor argued that because the video surveillance evidence does not show the entire encounter, the jury had to consider that evidence in conjunction with Bautista’s testimony. That was proper, and the prosecutor did not commit misconduct. The cases Matos relies on, *People v. Kirkes* (1952) 39 Cal.2d 719, 724 [no factual support for prosecutor’s argument that star witness’s long silence due to fear of defendant], and *People v. Varona* (1983)

143 Cal.App.3d 566, 570 [prosecutor argued victim was not prostitute when he knew she was], do not persuade us otherwise.

4. Cumulative Error

Matos claims there was cumulative prejudicial error. We have concluded there were no errors, and thus, Matos's claim is meritless.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.