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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.

DARRYL KENYATTA HAGGARD,

Defendant and Appellant.

G049830

(Super. Ct. No. FSB1001307)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,
Harold T. Wilson, Jr., Judge. Affirmed.

Athena Shudde, 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, Steve Oetting and
Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Darryl Kenyatta Haggard appeals from the judgment of conviction entered after a jury found him guilty of committing two counts of second degree robbery. Haggard contends the prosecutor engaged in misconduct during closing arguments because she “invad[ed] the province of jury deliberations,” mischaracterized the evidence, misstated the law, improperly shifted the burden of proof to Haggard, and improperly appealed to the jurors’ passions and fears.

We affirm. For the reasons we will explain, none of Haggard’s contentions of prosecutorial misconduct, whether considered individually or cumulatively, constituted prejudicial error.

FACTS

On March 31, 2010, Imelda Perez decided to close the cell phone store, which she and her husband, Mauricio Perez Lopez, owned, early. Before she finished closing for the night, around 6:15 p.m., two young men walked into the store. The taller of the two men, later identified as Haggard, was wearing all black clothing and a Jamaican-style beanie with attached dreadlocks. The other man was wearing all black clothing and a hoodie. Both men wore gloves, and each carried a large black gym bag.

Perez greeted the men, stating, “[h]i. May I help you?” The men told her, “[w]e want to look at some phones.” She handed them a pamphlet. Haggard asked about a particular phone. Perez handed him a fake phone used for demonstration purposes. He opened it, saw it was fake, and appeared to Perez to get “pretty upset” because he slammed the phone down on the counter.

The two men whispered to each other. Perez told them that she needed to call her “pedicure lady” and tell her that she would be a little late for her appointment;

instead, because she had a bad feeling, she called Lopez and, speaking in Spanish, urged him to “get over here now.”

The men walked around the glass counter toward Perez; she saw each take a gun out of his waistband. One of them whispered to her that this was a robbery. Haggard pointed his gun at Perez’s head. The other man, who pointed his gun at Perez’s side, took away her cell phone and told her, “[y]ou’re not making any more phone calls, Bitch.”

The men asked Perez where the phones and money were. She told them she did not have the phones there. They asked her about a safe. Perez told the men she did not have a safe and asked them to let her go. She showed them a little black box, in which she put money, and they “snatched it” from her; it contained about \$1,000 and prepaid phone cards. The men put the money into their pockets. They took her to the back room of the store.

Haggard looked around the back room of the store, ripping open and going through black bags that contained cell phone accessories, pouches, and carriers. The other man told Perez she was going to lock the front door and stay inside the store with them. When the man and Perez got to the front of the store, he noticed Perez’s purse under the counter, grabbed it, and started going through it, while holding his gun pointed at Perez’s head.

When Lopez received Perez’s call, he thought she sounded worried and scared. He drove from home to the store. When he arrived at the store, he saw a man, wearing all black clothing and a hood, going through Perez’s purse; the man was pointing a gun at Perez’s head. Lopez ran into the store and yelled at the man. The man pointed the gun at Lopez. Lopez jumped on him and attempted to disarm him. The man tumbled to the back wall.

As Perez stood in shock, Lopez told her to “[g]et out of here” and pushed her out of the way. Perez left the store through the front door.

The man ran toward the back of the store and Lopez pursued him. After rounding a corner, Lopez was preparing to jump on the man when he saw Haggard pointing a gun at Lopez's upper body and then raising the gun to point it at Lopez's head. Lopez jumped on Haggard and tried to push the gun upward when Haggard fired the gun. Lopez felt a bullet pass by him; he suffered burns to his face and arm. Lopez hunched down to the floor and then ran out of the front door of the store. He called 911.

At 6:56 p.m., officers from the San Bernardino County Sheriff's Department were dispatched to respond to the robbery. Officers working in a helicopter unit searched for the two male suspects wearing all black clothing. They spotted a man fitting the given description, later identified as Haggard, running away from the store. San Bernardino Police Department patrol officers drove to the area described by the helicopter unit, saw Haggard, and one officer gave chase. Haggard encountered one of the officers, ignored the officer's command to stop, and ran away.

The officer pursued Haggard and told him to stop and get down on the ground. Haggard complied. He had been carrying a blue sweatshirt which he dropped on the ground next to him. Inside the bundled-up sweatshirt, was a Jamaican-style beanie, with dreadlocks attached to it, a glove, and \$660.

Both Perez and Lopez identified Haggard during an in-field identification. Perez did not confirm the identification until after the beanie with dreadlocks was placed on Haggard's head. At the time of the in-field identification, Lopez's vision was still blurry as a result of the discharge of the gun so close to his face, but he nevertheless stated he was 70 percent sure of his identification of Haggard. At trial, both Lopez and Perez identified Haggard as the taller of the two men who had robbed their store.

Four gunshot residue particles were found on Haggard's left hand and one was found on his right hand.

Haggard testified that on March 31, 2010, he had been playing basketball with three friends, Terrence, Dell, and Mario, until shortly before 7:00 p.m., then started

walking home when he heard a gunshot and started running. An expert witness was called by the defense to testify regarding factors that affect the accuracy of in-field identifications. The defense also called an expert witness to testify regarding the ballistics investigation.

PROCEDURAL BACKGROUND

Haggard was charged in an amended information with two counts of second degree robbery in violation of Penal Code section 211, and one count of kidnapping to commit robbery in violation of Penal Code section 209, subdivision (b)(1).¹ The amended information alleged several enhancement allegations, including allegations Haggard personally used and intentionally discharged a firearm and suffered a prior strike conviction.

The jury found Haggard guilty of the two second degree robbery counts, but did not reach a verdict as to the kidnapping to commit robbery offense. The trial court granted the prosecution's motion to dismiss the kidnapping to commit robbery offense. Certain of the enhancement allegations were found true, none of which are at issue in this appeal.

The trial court sentenced Haggard to a total prison term of 26 years four months. Haggard appealed.

DISCUSSION

Haggard contends the prosecutor engaged in "systematic misconduct" during closing arguments, which included invading the province of jury deliberations,

¹ The amended information was filed after Haggard's first trial in which the jury found him not guilty of attempted murder, but could not reach a verdict as to the remaining two counts of second degree robbery and one count of kidnapping to commit another crime; the court declared a mistrial.

mischaracterizing the evidence, misstating the law, improperly shifting the burden of proof to Haggard, and appealing to the jurors' passions and fears. He argues the instances of prosecutorial misconduct, whether considered individually or cumulatively, were prejudicial and "depriv[ed Haggard] of due process and a fair trial under the United States Constitution and the parallel provisions of the California Constitution." We address and reject each of Haggard's contentions of prosecutorial misconduct.

I.

STANDARD OF REVIEW

““The standards governing review of misconduct claims are settled. ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.”’ [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ [Citation.] . . . When a claim of misconduct is based on the prosecutor’s comments 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.]” [Citation.]” (*People v. Bryant* (2014) 60 Cal.4th 335, 427 (*Bryant*)).

II.

THE PROSECUTOR’S COMMENTS REGARDING JURY DELIBERATIONS WERE HARMLESS.

Haggard contends he was prejudiced by the prosecutor’s comments during closing argument, asking the jurors to recall their promises during voir dire to “snitch’ out a nondeliberating fellow juror.” Haggard argues the prosecutor’s argument “improperly invaded and chilled the deliberative process.”

The prosecutor's comments were made at the beginning of her closing argument, in which she stated, inter alia: "Good afternoon. We're almost done here. [¶] Um, what the Judge just read to you is the law that applies in this particular case. Your task as a juror is to determine the facts in this case. The facts in this case are the testimony from all of the witnesses and the exhibits that will be introduced. Your job is to apply those facts to the law that has—that was given to you. [¶] When you go into the jury room, the first thing you're going to do is you're going to pick a foreperson. After you have chosen a foreperson, you're going to start deliberations. [¶] And what is [sic] deliberations? The deliberations is [sic] all of you discussing the case and what you believe about the case. [¶] At the beginning of this trial I asked some of you if you would be willing to snitch out a fellow juror; and you all told me that if somebody wasn't following the law, that you would do that. [¶] Deliberations is [sic] not someone sitting back there with their arms crossed saying, 'I have made up my mind. I'm not going to talk to you guys. I'm not going to discuss this case with you.' If there's an individual that refuses to deliberate, you have to inform the Court via the—the Bailiff—the Bailiff; and you have to let us know, because we are under the assumption that you're back there deliberating, having meaningful conversations."

At this point in the prosecutor's argument, Haggard's counsel objected on the ground the prosecutor was making "improper argument." The trial court sustained the objection.

After the court sustained the objection, Haggard did not request any admonition or curative instruction. He has therefore forfeited his argument that the trial court should have done more to cure any harm caused by the offending comments, by failing to make any such request. (*Bryant, supra*, 60 Cal.4th at pp. 426-427.)

Even if Haggard's argument is not forfeited, he has failed to show he was prejudiced by the prosecutor's comments because the trial court sustained his counsel's objection, and thereby signaled to the jury that the prosecutor's argument had gone too

far. After both the prosecutor and Haggard's counsel completed their closing arguments, the trial court gave the jury the following "last instruction" (based on CALCRIM No. 3550):

"When you go to the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried out in an organized way and that everyone has a fair chance to be heard.

"It is your duty to talk to one another and to deliberate in the jury room. You should try to agree on a verdict *if you can*. *Each of you must decide the case for yourself*, but only after you have discussed the evidence with the other jurors. Do not hesitate to change your mind *if you become convinced that you are wrong*. *But do not change your mind just because other jurors disagree with you*.

"Keep an open mind and openly exchange your thoughts and ideas about this case. Stating your opinions too strongly at the beginning or immediately announcing how you plan to vote may interfere with an open discussion. Please treat one another courteously. Your role is to be an impartial judge of the facts, not to act as an advocate for one side or the other." (Italics added, internal quotation marks & ellipses omitted.)

The court also instructed, "[i]f you need to communicate with me while you are deliberating, send a note through the Bailiff, signed by the foreperson or by one or more members of the jury."

Haggard does not contend any of the jury instructions given by the court in this case was inaccurate. Immediately before the jury began deliberations, the jury was instructed that each juror was to decide the case for himself or herself and unanimity for unanimity's sake was not appropriate. "We presume that jurors understand and follow the court's instructions." (*People v. Gray* (2005) 37 Cal.4th 168, 231.) We conclude the prosecutor's comments were harmless by any standard.

III.

THE PROSECUTOR'S RHETORICAL QUESTION ASKING WHY THE DEFENSE ELECTED TO PAY FOR EXPERT WITNESSES ON THE ISSUE OF IDENTIFICATION INSTEAD OF CALLING POTENTIAL ALIBI WITNESSES DID NOT CONSTITUTE PREJUDICIAL ERROR.

During closing argument, the prosecutor stated, “[a]nd look at the testimony of the experts that [Haggard’s counsel] brought. The identification expert, Davis: She got paid \$8,000 total in this case by the Defense attorney to testify. Look at Martini. Martini got paid about \$2,700 total to testify in this case. [¶] Why bring Davis? Why spend almost \$10,000, or why spend \$10,000 in experts, when all you needed to do was bring Terrence, Dell, and Mario in here to tell you that the Defendant was with ‘em?’”

Haggard’s counsel objected on the ground the argument was “[b]urden shifting” from the prosecution to Haggard; the trial court sustained the objection. Again, Haggard did not request an admonition or curative instruction and, consequently, has forfeited the argument the trial court should have given the jury a curative instruction or admonishment.

Even if we were to consider Haggard’s argument challenging the prosecutor’s statements on that subject, it is without merit. In his opening brief, Haggard argues that during closing argument, “the prosecutor mischaracterized the evidence, improperly commented on the failure to present alibi witnesses and shifted the burden of proof to [Haggard]—denying [him] his fair trial rights.”

“Although a prosecutor may not comment, directly or indirectly, on a defendant’s exercise of his privilege not to testify [citation], comment is permitted when a defendant fails ‘to call an available witness whose testimony would naturally be expected to be favorable.’” (*People v. Mendias* (1993) 17 Cal.App.4th 195, 203, quoting *People v. Ford* (1988) 45 Cal.3d 431, 446.) Therefore, as long as no comment is made or inference is drawn as to the exercise of the privilege, a prosecutorial comment “inviting

the jury to draw a logical inference based on the state of the evidence, including comment on the failure to call available witnesses, is permissible.” (*People v. Ford, supra*, at p. 449.)

In *People v. Mendias, supra*, 17 Cal.App.4th at page 202, in rebuttal to the defendant’s counsel’s argument that the defendant had “‘snap[ped]’” or “‘go[n]e[] nuts’” at the time of the charged offense, the prosecutor rhetorically asked where the evidence was that the defendant had “‘snapped’” or “‘gone ‘nuts.’” The prosecutor asked, “‘[w]here are the cousins who were there at the scene? Where is the defendant’s girlfriend?’” (*Ibid.*) The appellate court rejected the defendant’s argument that the prosecutor engaged in prejudicial misconduct by making those comments. (*Id.* at p. 203.) The court stated: “If, as his attorney argued to the jury, appellant had ‘snapped’ or gone ‘nuts’ appellant’s nephews and girlfriend should have been able to so testify. His failure to call them was properly subject to comment.” (*Ibid.*)

Here, Haggard’s defense was that he had been misidentified as one of the robbers. At trial, excerpts of Haggard’s testimony from the first trial in this case were admitted into evidence, which included his testimony that on March 31, 2010, he played basketball with his friends, Terrence, Dell, and Mario (Haggard did not know their last names), “[f]rom early in the afternoon until shortly before [he] was apprehended,” which he further testified was around 7:00 p.m. Haggard also testified that he played with his friends until “‘shortly before 7:00,” at which time he started walking home, saw or heard a helicopter, heard a gunshot, and started running. During cross-examination, the prosecutor asked Haggard, “[a]nd Terrence, Dell and Mario, what—if we were to call Terrence, Dell and Mario they would recall playing basketball with you on that day?” (Internal quotation marks omitted.) Haggard responded, “[y]eah. Probably.”

Haggard argues the prosecutor mischaracterized his testimony because Haggard “did not testify that he had some ironclad alibi for the time of the robberies. Rather, he testified that he played basketball until shortly before 7:00 p.m. and started

walking home. . . . The word ‘shortly’ was not explained, leaving the record ambiguous as to whether shortly meant 5, 10, 15, or 20 minutes or more before 7:00 p.m. . . . From this evidence, it was not reasonable for the prosecutor to conclude [Haggard]’s defense was alibi, nor was it reasonable to comment that the logical witnesses to call were the three men with whom he had played basketball.”

But, the trial evidence showed the two robbers entered the cell phone store around 6:15 p.m. Hence, Haggard had testified to an alibi—whether ironclad or not—that he could not reasonably have been executing a robbery with an accomplice that day because he was playing basketball until shortly before 7:00 p.m., at which time he started to walk home. The prosecutor did not err by commenting on the defense’s use of expert witnesses to show Haggard had been misidentified instead of calling any one of the friends with whom he claimed he had been playing basketball close to the time of the robbery.

Furthermore, the prosecutor did not err by commenting on the amount paid to the defense expert witnesses pursuant to Evidence Code section 722, subdivision (b), which provides: “The compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony.”

Even if the prosecutor’s comments constituted error, it is not reasonably likely the jury construed or applied any of the complained-of remarks in an objectionable manner. (*Bryant, supra*, 60 Cal.4th at p. 427.)

IV.

THE PROSECUTOR DID NOT APPEAL TO THE JURORS’ PASSIONS AND FEARS OR SOLICIT SYMPATHY FOR PEREZ.

Haggard contends that during rebuttal closing argument, the prosecutor improperly appealed to the passions and fears of the jury and improperly invited the jury

to feel sympathy toward Perez. Haggard's argument is based on the following sequence of events.

During his closing argument, Haggard's counsel argued Lopez and Perez had made a false identification because the robbery was a high-stress situation that affected their ability to accurately identify the robbers. He argued, *inter alia*:

“Looking at [Perez]: She explained there was a point where she couldn't move. She couldn't turn around. She felt as if she was frozen in place. She was blacked out. At one point [Lopez] had to push her toward the door. We also know that based on this experience she has been traumatized from this point forward. She gets afraid when she sees young black men wearing baggy clothing.^[2]”

“[The prosecutor]: Objection. Misstates the testimony.

“The Court: Sustained.

“[Haggard's counsel]: During [Perez]'s earlier testimony, we learned that she had actually had an experience at a Walgreens store involving an African-American homeless man. And based on that earlier testimony, she said she was so afraid she had to leave. When she testified at trial in this case, she explained that—that it wasn't an African-American, and she felt—and she explained that race was not something she took into consideration.”

During rebuttal closing argument, the prosecutor responded to Haggard's counsel's comments, stating:

“ . . . Defense Attorney's trying to tell you, 'Well, you know, [Perez]'s afraid of African-Americans.' That's not true, and that's not what she said.

“If you recall, there was another individual there. He's never been apprehended. She described him also as a black male adult. That person got away. That person was never caught. That person took her I.D.

² Haggard and the other man are African-American.

“[Haggard’s counsel]: Objection. Improper argument at this point.

“The Court: Overruled.

“[The prosecutor]: That person took her wallet with her I.D., and her family photos, and her credit cards. It’s just—it’s just reasonable that she would be afraid if she saw somebody who reminded her of that individual. That individual is still out there with her information. So it only makes sense that she is scared if she sees somebody who matches that description, which is what she told you.

“[Haggard’s counsel]: Objection. Improper argument as to the status of the possible—

“[The Court]: Sustained.

“[The prosecutor]: She told you that she is afraid of individuals who remind her of the suspect. That’s what she told you.

“[Perez] also told you that she did not know either one of these suspects, did not know [Haggard]. What is her motivation for lying? What is her motivation for falsely pointing the finger at [Haggard]? She has none. She has no reason to come in here and lie to you.”

During cross-examination, Perez testified that since the date she was robbed, it is not difficult for her to look at African-American men, and that although she feels fear, she is not more nervous when approached by African-American men. Haggard’s counsel impeached Perez with her prior testimony: “I just feel like whoever approaches me, especially African-American, is going to attack me, going to do something.” Perez explained, at the instant trial, that she is fearful when men, who are dressed the way the two men were dressed the day she was robbed, come into her store. Specifically, when people come into the store with baggy clothing, Perez testified she suspected “they [we]re hiding things inside their clothes.” She also testified that she has cousins who are African-American and whom she loves and that she does not “see people by their color.”

“As a general rule, a prosecutor may not invite the jury to view the case through the victim’s eyes, because to do so appeals to the jury’s sympathy for the victim.” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1406.) Here, the challenged comments by the prosecutor did not improperly appeal to the jury’s fears, passions, and sympathies, but were made for the purpose of responding to Haggard’s counsel’s suggestion that Perez’s testimony showed she was afraid of, and perhaps also biased against, African-American men. We find no error.

V.

THE TRIAL COURT CLARIFIED THE APPLICABLE STANDARD OF PROOF AND THEREBY RENDERED ANY MISSTATEMENTS BY THE PROSECUTOR ON THAT SUBJECT HARMLESS.

Haggard contends the prosecutor also misstated the burden of proof. During her rebuttal closing argument, the prosecutor stated: “Now, Defense Attorney said something during his closing argument. He said something that, ‘If you refuse[] to be the foreperson, you have doubt.’ That’s not true. The Judge is going to give you a set of jury instructions, a little packet, and you have to fill out those instructions. And it’s up to you—or the foreperson has to fill out those instructions. It’s up to you, whoever you pick as a foreperson. Sometimes jurors will pick a person with the neatest writing. It’s just random. I don’t—it doesn’t matter who you pick. It doesn’t mean that because you’re not jumping up and down to be the foreperson that you have doubts in this case. [¶] During jury selection, I talked to you about reasonable doubt. And what is not reasonable doubt? It’s not all possibilities. It’s not beyond what-ifs. It’s not beyond all doubt. It’s not beyond a shadow of a doubt. It’s not beyond a scientific certainty. It’s beyond a reasonable doubt.”

Haggard’s counsel objected “to the characterization of other burdens of proof besides reasonable doubt.” The court responded by stating, “[I]adies and

gentlemen of the jury, the standard of proof is beyond a reasonable doubt. That instruction will be contained within the packet. I previously defined reasonable doubt to you. That's the definition to use."

The trial court had already instructed the jury on the standard of proof, as follows: "The fact that a criminal charge has been filed against the Defendant is not evidence that the charge is true. You must not be biased against the Defendant just because he has been arrested, charged with a crime, or brought to trial. [¶] A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the Defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

A copy of that reasonable doubt instruction (CALCRIM No. 220) was included in the packet of instructions referenced by the trial court.

Haggard argues the trial court's statements were "insufficient to cure the defect and the damage done by the argument. The trial court did not intervene until after defense counsel's objection and it merely reminded the jury to follow the instructions. . . . It did not correct the prosecutor to [e]nsure that the jury understood that the totality of the prosecutor's remarks w[as] not a correct interpretation of the instruction. It did not tell the prosecutor to move on."

Our review of the record shows the prosecutor's burden of proof comments were brief before Haggard's counsel objected to them. In response, the trial court

immediately and expressly instructed the jury that the standard of proof was reasonable doubt, and the jury was to use the definition of reasonable doubt contained in the instructions packet and as previously read by the court. In light of the court's definitive response to counsel's objection, there was no need for the court to further discuss what the prosecutor had said and to what extent her comments might have correctly or incorrectly reflected the applicable standard of proof.

To the extent Haggard contends the trial court should have done more to mitigate the harm done by the prosecutor's statements, any such contention is forfeited by Haggard's failure to request a further admonition or curative instruction.

VI.

NO CUMULATIVE ERROR

For the reasons we have explained, *ante*, we conclude that none of Haggard's contentions of prosecutorial misconduct constituted prejudicial error. We also reject his further claim that the cumulative impact of the alleged misconduct resulted in prejudice under any standard. (*People v. Collins* (2010) 49 Cal.4th 175, 208.) As was true in *People v. Cole* (2004) 33 Cal.4th 1158, 1204, here, "[i]n summary, the prosecutor's conduct during closing and rebuttal arguments did not infect the trial 'with such unfairness as to make the conviction a denial of due process' [citation] or involve 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' [citations]. We presume the jurors treated 'the prosecutor's comments as words spoken by an advocate in an attempt to persuade' [citation], and we find nothing in the record that would suggest otherwise."

DISPOSITION

The judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.