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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.

HECTOR ALEJANDRO RODRIGUEZ,

Defendant and Appellant.

G052112

(Super. Ct. No. RIF151329)

O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Affirmed.

Torres & Torres and Tonja R. Torres, 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, Eric A. Swenson, Kristine A. Gutierrez, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

The People charged defendant Hector Alejandro Rodriguez with premeditated murder (Pen. Code, §§ 187, subd. (a), 189) and alleged he personally used a deadly weapon, i.e., a motor vehicle (Pen. Code, §§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)). The jury convicted him of second degree murder (Pen. Code, §§ 187, subd. (a), 189) and found true the weapon use enhancement. The court imposed a total prison sentence of 16 years to life.

On appeal defendant contends the court improperly admitted evidence of his prior misdemeanor “hit and run” conviction to impeach him. Although defendant concedes, at least for purposes of his argument on appeal, that misdemeanor hit and run is a crime of moral turpitude, he nevertheless asserts the court failed to weigh the probative value of the evidence against its prejudicial impact under Evidence Code section 352. He further contends the prosecutor committed misconduct by suggesting during closing argument that the presumption of innocence ends when the jury begins to deliberate. We disagree with defendant’s arguments and affirm the judgment.

FACTS

On the morning of July 11, 2009, the victim Hector Angel (then around 38 years old), his two sons, and his two friends Juan C. Jr., and Juan C., Sr., went to a baseball game in Anaheim. After the game, they went to the Riverside home of Angel’s brother.

That night, the group, including Angel’s brother, decided to go to the home of the friends’ family member. Not wanting to go empty handed, they stopped at a nearby liquor store to buy some beer. Angel’s older son, who was driving Angel’s truck, parked in the shopping center, located at the intersection of Tyler Street and Wells Avenue in Riverside, at around 9:00 p.m. Angel’s brother and Juan C., Sr., went into the liquor store while the others waited in the truck.

At about the same time, defendant parked a Chevy Silverado truck (which belonged to his friend) somewhere behind Angel's truck. Defendant's passengers were his seven-year-old son and a man named Jason Tapia.

Defendant got out of the Silverado and walked toward the liquor store. As he passed Angel's truck, he gave its occupants a hard, angry, "mad-dogging" stare. Minutes later, he came out of the store with a bag of ice, walked by Angel's truck again, and gave its occupants a more intense stare. Angel's older son stared back at defendant.

When defendant reached the Silverado, he urinated into a nearby planter, then got in the Silverado's driver's seat. As the Silverado headed toward Wells Avenue, Angel's older son said in Spanish to defendant's passenger Tapia, "What are you looking at?" Tapia raised his arms and said in Spanish, "What's up?" The older son responded, "What's up?"

Defendant turned onto Wells Avenue, made a U-turn, and drove back into the parking lot. Angel and two others got out of the truck, believing defendant and Tapia were returning to fight. Angel made it past the back of his truck.

The Silverado's tires screeched as defendant accelerated to high speed, struck Angel, and drove over him. Defendant then sped toward the Tyler Street exit.

A responding police officer found a puddle of urine in the parking lot, where witnesses said the suspect had urinated. Paramedics transported Angel to the hospital where he was pronounced dead.

The subsequent police investigation resulted in the identification of defendant as the driver of the Silverado. But defendant had fled to Mexico. An arrest warrant was issued for defendant as a murder suspect. Over two and one-half years later, on February 9, 2012, Mexico extradited defendant to the United States.

DISCUSSION

The Court Properly Admitted Evidence of Defendant's Prior Misdemeanor Conviction

Defendant contends the court failed to exercise its discretion under Evidence Code section 352 in determining the admissibility of his prior misdemeanor “hit and run” conviction.¹

1. *Background*

The People filed a written motion (the motion) to impeach defendant, should he choose to testify, with two misdemeanor convictions. The first conviction was for driving under the influence of alcohol (Veh. Code, § 23152, subds. (a), (b))² in 2008. The second was for “hit and run” under section 20002 (accident involving property damage) in 2006. The motion stated defendant also suffered a 2009 felony conviction for possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)), but that the People did *not* seek to impeach defendant with that conviction, since the crime did not reflect moral turpitude.

The motion discussed at length the law on impeachment with misdemeanor convictions. It stated that, in order for a prior misdemeanor conviction to be admissible for impeachment purposes, the court must find the offense involved moral turpitude and that its admission would *not* violate Evidence Code section 352. Two and a half pages of

¹ We address this issue on the merits despite defense counsel’s failure to object below, since, as we shall discuss, the “probative value of the prior[] outweigh[ed] its] prejudicial effect and . . . the trial court would have likely overruled the trial counsel’s objection under Evidence Code section 352.” (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 927-928 (*Mendoza*).

² All statutory references are to the Vehicle Code unless otherwise stated.

the motion were devoted to Evidence Code section 352 and the factors to be considered by a court in exercising its discretion thereunder.

The court stated it had read the People's "brief" on the motion, reviewed the case law, and had done its own research on the issue. The court's tentative decision was that (1) defendant's driving under the influence offense was not a crime of moral turpitude, but (2) his failure to stop and report an incident involving property damage involved willful conduct to escape responsibility, which is conduct that goes to veracity and is therefore a crime of moral turpitude. The court stated it had read *People v. Forster* (1994) 29 Cal.App.4th 1746 and *People v. Bautista* (1990) 217 Cal.App.3d 1, and invited further discussion: "And if either side wishes to further this discussion, I'm happy and pleased to look at any additional case law and consider any other arguments." The record does not reflect defense counsel ever formally objected to or sought further discussion of the court's tentative ruling.

Defendant subsequently testified on his own behalf. Toward the outset of defense counsel's direct examination of defendant, the attorney elicited defendant's testimony that in 2006, he was involved in a car accident and left the scene without talking to the police or the other parties and, "because of that, [was] convicted of misdemeanor hit and run."

2. *Relevant Law*

Evidence Code section 352 affords a trial court the discretion to "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." "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the

defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual[,] which has very little effect on the issues"" (*People v. Karis* (1988) 46 Cal.3d 612, 638), and which "tends to cause the trier of fact to decide the case on an improper basis" (*People v. Walker* (2006) 139 Cal.App.4th 782, 806).

In *People v. Castro* (1985) 38 Cal.3d 301 (*Castro*), our Supreme Court held that — subject to Evidence Code section 352 — "any felony conviction which necessarily involves moral turpitude, even if the immoral trait is one other than dishonesty," may be used to impeach a witness. (*Id.* at p. 306.) Subsequently, our Supreme Court broadened this rule to cover prior misdemeanor misconduct as well: "[I]f past criminal conduct amounting to a misdemeanor has some logical bearing upon the veracity of a witness in a criminal proceeding, that conduct is admissible, subject to trial court discretion" (*People v. Wheeler* (1992) 4 Cal.4th 284, 295, superseded by statute on another issue as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1460.) "Misconduct involving moral turpitude may suggest a willingness to lie" and is therefore relevant to a witness's credibility. (*Wheeler*, at p. 295.) Accordingly, a "witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352." (*People v. Clark* (2011) 52 Cal.4th 856, 931.)

In general, however, a misdemeanor "is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present. Hence, courts may and should consider with particular care whether the admission of such evidence might involve undue time, confusion, or prejudice which outweighs its probative value." (*People v. Wheeler, supra*, 4 Cal.4th at pp. 296-297.)

A trial court — in exercising its discretion on whether to admit evidence of prior misconduct — “must consider four factors identified by our Supreme Court in *People v. Beagle* (1972) 6 Cal.3d 441, 453.” (*Mendoza, supra*, 78 Cal.App.4th at p. 925.) One such factor is “whether the prior conviction is for the same or substantially similar conduct to the charged offense.” (*Ibid.*) But “[t]hese factors need not be rigidly followed.” (*Ibid.*)³

“A trial court’s decision to admit or exclude impeachment evidence under Evidence Code section 352 is reviewed for an abuse of discretion.” (*People v. Johnson* (2015) 61 Cal.4th 734, 766.)

3. *The Court Properly Exercised Its Discretion Under Evidence Code Section 352 to Admit Evidence of Defendant’s Prior Conviction*

Defendant notes that *People v. Bautista, supra*, 217 Cal.App.3d 1, “held that felony hit and run was a crime involving moral turpitude, but did not reach the question regarding misdemeanor conduct.” (*Id.* at pp. 5-7.) But defendant does not challenge the court’s ruling that the offense of hit and run — regardless of whether it involves personal injury or solely property damage — is a crime of moral turpitude. Instead, defendant assumes for purposes of argument that misdemeanor hit and run is a crime of moral turpitude, but the court failed to exercise its discretion to exclude the evidence under Evidence Code section 352, and that had it done so, the evidence should have been excluded.

³ *People v. Beagle, supra*, 6 Cal.3d 441 (*Beagle*) predates *Castro* and Proposition 8 (enacted in 1982 as part of the Victims’ Bill of Rights — art. I, § 28, subd. (f) of the Cal. Const. [*Castro, supra*, 38 Cal.3d at p. 305]). One of *Beagle*’s four factors to be considered by a trial court is “whether the prior conviction reflects adversely on an individual’s honesty or veracity.” (*People v. Mendoza, supra*, 78 Cal.App.4th at p. 925.) In the aftermath of *Castro*, a prior conviction reflects adversely on an individual’s honesty or veracity if the conviction is for a crime of moral turpitude — “that is, a “general readiness to do evil.”” (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 645.)

Section 20001 (at issue in *People v. Bautista, supra*, 217 Cal.App.3d 1) concerns accidents resulting in injury to, or death of, a person. (§ 20001, subd. (a).) In contrast, section 20002 (under which defendant suffered the misdemeanor conviction at issue here) concerns accidents “resulting only in damage to any property.” (*Id.*, subd. (a).) The mandates of both statutes are similar, however. Both require the driver to immediately stop (§§ 20001, subd. (a), 20002, subd. (a)) and provide his or her name and address, and present his or her driver’s license and vehicle registration, to persons specified in the respective statute (§§ 20002, subd. (a)(1) & (2), 20003, subds. (a) & (b)).⁴ Both sections 20001 and 20002 aim to prevent drivers from escaping liability for damage or injury they have caused, whether it be property damage or personal injury. A driver who flees the scene of an accident in violation of either statute exhibits an intent and purpose to conceal his or her identity and involvement. A person who violates section 20002 may seek to evade significant financial responsibility for property damage he or she has caused. One “can certainly infer that such a mental state indicates a ‘general readiness to do evil’ or moral turpitude.” (*Bautista, supra*, 217 Cal.App.3d at p. 7.)

But defendant contends the court focused only on whether misdemeanor hit and run is a crime of moral turpitude and failed to evaluate whether the evidence was unduly prejudicial under Evidence Code section 352. He asserts the court lacked “information concerning the circumstances underlying the incident itself” and should have elicited an offer of proof from the prosecution. He also asserts the jury “never learned what damage resulted from the accident, and [the jury] was never told misdemeanor hit and run charges apply solely to accidents involving property damage. Thus, the jury was free to conclude [he] caused personal injury in the past while driving and left the scene, and as a result he had a propensity for engaging in hit and run conduct

⁴ Some of these requirements are subject to a request being made. (§§ 20002, subd. (a)(1), 20003, subd. (b).)

that resulted in personal injury or death.” In his reply brief, defendant relies on *Mendoza, supra*, 78 Cal.App.4th 918 and *People v. Muldrow, supra*, 202 Cal.App.3d 636, to argue that evidence of his prior misdemeanor conviction was unduly prejudicial because the crime, as presented to the jury, was too similar to the charged offense.

A “court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its balancing functions under Evidence Code section 352.” (*People v. Taylor* (2001) 26 Cal.4th 1155, 1169.) “Our independent review of the record in the present case shows that the court was well aware of its responsibilities under Evidence Code section 352. The court held [a] hearing outside the jury’s presence to determine whether to admit [defendant’s two prior misdemeanor convictions], and ultimately excluded” one of them. (*Ibid.*) The court stated it had read the motion. The motion was devoted substantially to a discussion of Evidence Code section 352, and clearly articulated the two requirements for admission of a prior misdemeanor conviction for impeachment purposes, i.e., that the court must find the offense involved moral turpitude *and* that the evidence is admissible under Evidence Code section 352. Indeed, the court’s careful attention to the motion is evidenced by its mentioning of a typographical error in the document, i.e., that the People referred to Vehicle Code section 2002, instead of Vehicle Code section 20002. Under these circumstances, the record adequately reflects the court was aware of and exercised its Evidence Code section 352 discretion.

The court did not abuse its discretion by admitting evidence of defendant's prior misdemeanor conviction. The ""identity or similarity of current and impeaching offenses is just one factor to be considered by the trial court in exercising its discretion."" (Mendoza, supra, 78 Cal.App.4th at p. 926.) The greater the similarity between the defendant's offenses, the more relevant and probative the prior conviction may be. A court's ultimate task under Evidence Code section 352 in this context is to balance whether the evidence's probative value in assessing the witness's credibility is substantially outweighed by the risk of undue prejudice to the defendant. (Evid. Code, § 352; People v. Muldrow, supra, 202 Cal.App.3d at p. 644.)

Defendant overstates the similarity between his prior misdemeanor hit and run conviction and the charged offense of murder. Obviously, misdemeanor hit and run, even without an explanation of the elements of the crime, connotes conduct far less culpable than murder. "Although the record does not contain any details of defendant's prior conviction[], there is absolutely no evidence that" it involved the death of a person. (Mendoza, supra, 78 Cal.App.4th at p. 926.) The only evidence the jury heard about defendant's prior conviction was that his misdemeanor hit and run misconduct involved leaving the scene of a car accident "before talking to the police or the other parties."⁵

In sum, the court did not abuse its discretion by admitting evidence of defendant's prior misdemeanor hit and run conviction. "No witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity." (People v. Muldrow, supra, 202 Cal.App.3d at p. 646.)

⁵

Although defendant contends the jury was not informed whether the prior accident involved only property damage and how serious the damage was, defense counsel obviously chose not to elicit this testimony from defendant. Defense counsel may have had a sound tactical reason for making that choice. ""Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel *only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.*"" (Mendoza, supra, 78 Cal.App.4th at p. 924.)

The Prosecutor Did Not Commit Misconduct

Defendant contends the prosecutor committed misconduct by arguing in her rebuttal closing argument: “[D]on’t let [defense counsel] guilt you into doing anything. The way you do your job, the way you want to do your job, you do it. If you go back there, this whole time, the law protects the defendant, it protects every criminal defendant. He’s presumed to be innocent. You’ve all paid attention. I’ve watched you all. You have been paying attention throughout this trial. [¶] If you get back there and you start talking, that presumption is gone. That law that protected him, it’s down. Now is the time for the common sense. And if your common sense tells you when a man is arrested in Mexico and extradited to the United States, the gig of, ‘I’m afraid because I didn’t want to get arrested,’ it’s over. You’re already arrested, buddy, so now talk.”

Defendant contends the prosecutor, with these words, implied that the presumption of innocence was over, and that common sense trumped the presumption of innocence, as soon as the jury retired to deliberate, before it even considered the evidence.⁶

Prosecutorial misconduct violates the federal Constitution if it “infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) “Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it

⁶ Defendant argues that if this court concludes his argument on appeal is forfeited by his counsel’s failure to object below, then his counsel provided him with ineffective assistance of counsel. We disagree. “Even if one or more of the statements were improper, none of them took up more than a few lines of the prosecutor’s lengthy closing argument. Defense counsel would therefore have been well within the bounds of reasonable competence had he chosen to ignore the statements rather than draw attention to them with an objection.” (*People v. Milner* (1988) 45 Cal.3d 227, 245.) An “attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.” (*People v. Avena* (1996) 13 Cal.4th 394, 421.) In any case, we address defendant’s contention on the merits and find no prosecutorial misconduct.

involves ““the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.”””” (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

A prosecutor’s improper comments during closing argument can constitute misconduct. A prosecutor is subject to limitations on the scope of closing argument and the method of presenting it. (5 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 758, pp. 1177-1178.) Nonetheless, ““a prosecutor is given wide latitude during argument,”” may ““vigorously argue his case,”” and may make fair comment on the evidence and draw reasonable inferences from it. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) During rebuttal, a prosecutor’s arguments “that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) For example, a prosecutor may comment on whether defense counsel’s closing argument is persuasive. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1155, disapproved on a different point by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.)

In determining whether a prosecutor’s comments to the jury constituted misconduct, we consider whether a reasonable likelihood exists that the jury misconstrued or misapplied the prosecutor’s remarks (*People v. Ayala* (2000) 23 Cal.4th 225, 284) in a way harmful to the defendant, regardless of whether the prosecutor acted in good or bad faith (*People v. Benson* (1990) 52 Cal.3d 754, 793). “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.” (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another point in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) In addition, the prosecutor’s statements must be viewed “in the context of the argument as a whole.” (*People v. Dennis* (1998) 17 Cal.4th 468, 522; *Boyd v. California* (1990) 494 U.S. 370, 385.)

In *People v. Goldberg* (1984) 161 Cal.App.3d 170, 189, the defendant contended “the prosecutor committed reversible misconduct during closing argument by . . . stating that the presumption of innocence no longer applied,” as follows: ““And before this trial started, you were told there is a presumption of innocence, and that is true, but once the evidence is complete, once you’ve heard this case, once the case has been proven to you — and that’s the stage we’re at now — the case has been proved to you beyond any reasonable doubt. I mean, it’s overwhelming. *There is no more presumption of innocence.* Defendant Goldberg has been proven guilty by the evidence. Thank you.”” (*Ibid.*) The Court of Appeal concluded “the complained-of remarks were not misconduct.” (*Ibid.*) The “prosecutor essentially restated, albeit in a rhetorical manner, the law as reflected in Penal Code section 1096 and CALJIC [No.] 2.90 that a ‘defendant in a criminal action is presumed to be innocent until the contrary is proved. . . .’” (*Ibid.*) “Once an otherwise properly-instructed jury is told that the presumption of innocence obtains until guilt is proven, it is obvious that the jury cannot find the defendant guilty until and unless *they*, as the fact-finding body, conclude guilt was proven beyond a reasonable doubt.” (*Id.* at pp. 189-190.)

Here, the prosecutor’s statement to the jury was inartful — she would do well to carefully study the *Goldberg* case if she intends to use this argument again. The prosecutor in *Goldberg* argued the presumption had been overcome by overwhelming proof of guilt, not that the presumption vanished the moment deliberations began.

But viewed in context, and given the entirety of her argument, the comments were a fair rebuttal to the doubts that defense counsel had tried to cast on the evidence. For example, in defense counsel’s closing argument, he recounted the details of defendant’s story, i.e., that defendant saw people arguing with Tapia and saw one person get a screwdriver; that defendant told them to calm down because his son was in the truck; that he drove out towards Wells Street but due to traffic and Tapia’s warning that the people were coming, he drove back through the parking lot; and that he thought

the victim was holding a gun so he accelerated thinking the man would get out of the truck's way. Defense counsel argued to the jurors that, upon retiring for deliberations, they had to ask themselves: "Has it been proven beyond any reasonable doubt that that whole story never happened?"

The prosecutor's comments suggested that the evidence proved beyond a reasonable doubt that defendant was guilty. Shortly after the complained-of remarks, she elaborated upon defendant's failure to claim self-defense in his police interview: "[H]e went with, 'I thought it was a planter. And I just woke up in Mexico.' Hour and a half of interrogation by two detectives. [¶] And if . . . that fact alone, you go back there, when you can bring down this presumption of innocence and you say, you know what, I cannot get past that."

The prosecutor's comments were consistent with Penal Code section 1096, which provides that a criminal defendant "is presumed to be innocent until the contrary is proved" (*Ibid.*) The court instructed the jury with the correlative instruction, CALCRIM No. 220, which states that a criminal defendant is presumed to be innocent and that this presumption requires the People to prove a defendant guilty beyond a reasonable doubt; that proof beyond a reasonable doubt does *not* require the evidence to "eliminate all possible doubt because everything in life is open to some possible or imaginary doubt"; and that unless the evidence proves the defendant guilty beyond a reasonable doubt, the jury must find the defendant not guilty. The jury also knew the court's instructions overrode any conflicting comments on the law made by an attorney, since the court instructed them with CALCRIM No. 200. As in *People v. Goldberg*, *supra*, 161 Cal.App.3d 170 the jury was well informed they could not find defendant guilty unless the evidence proved him to be guilty beyond a reasonable doubt.

The prosecutor did not commit misconduct.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.