Filed 6/25/19 P. v. Diaz CA4/3

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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. RICHARD DIAZ, Defendant and Appellant.	G055781 (Super. Ct. No. 14CF3984) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Julian W. Bailey, Judge. Affirmed.

Jason L. Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Melissa Mandel, Meredith White, and Genevieve Herbert, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Richard Diaz of attempted murder, assault with a deadly weapon, battery with serious bodily injury, and active participation in a criminal street gang. Diaz contends his due process rights were denied by the trial court's admission of pretrial identification evidence of his vehicle because it was the result of unduly suggestive police procedure. He further asserts his trial counsel rendered ineffective assistance of counsel for failing to move to suppress the vehicle identification evidence and for failing to object to some of the prosecutor's remarks during closing argument. Diaz's arguments lack merit and we affirm the judgment.

FACTS

On September 30, 2014, at about 4:15 p.m., M.V. (witness 1) was driving in Santa Ana. A gold four-door car directly in front of her stopped.

The occupants of the car began flashing hand signs at a man riding a bicycle on the sidewalk. The man on the bicycle (the victim) made hand signs back. At least two Hispanic males emerged from the passenger side and rear of the car and approached the victim. The victim yelled "Lopers[1]" as the men approached.

When witness 1 got out of her car, she saw the two men beating the victim from across the street. Witness 1's nephew, R.S. (witness 2), and his friend C.L. (witness 3), joined her in her front yard, which was about 35 feet from the assault.

The assailants beat the victim unconscious. They positioned the victim's body and then backed over him with the car. They jumped on his head and kicked and stomped on him. The assailants then got into the car and drove forward over the victim as they drove away.

Police responded to the scene. The victim was transported to the hospital. Officer Joe Manuel Chavez interviewed witness 1. She told Chavez that the assailants

[1] Lopers is a criminal street gang based in Santa Ana.

drove a gold "newer, clean Honda." Chavez said she could not describe the driver or say whether the driver was male or female.

Police dispatch broadcasted a description of the suspect vehicle, and based on police information ran a records check on Diaz's vehicle. Diaz was the vehicle's registered owner. Based on this information, officer Michael Gibbons went to Diaz's residence, about one block from the crime scene, around 4:45 p.m. to search for his vehicle.

Shortly before 6:00 p.m., officer Brett Nelson noticed a vehicle containing a female driver and male passenger exit Diaz's parking structure. Upon seeing Nelson, the female driver appeared shocked. The officer searched the parking structure and noticed an unoccupied gold Toyota Camry, which matched the description of the vehicle broadcasted by dispatch. The hood was warm to the touch. Diaz was not at home. Police impounded the vehicle. Diaz's wallet, which contained his identification and credit cards, a black baseball hat, and a brown bandana were inside the vehicle.

The victim survived the assault but suffered significant injuries requiring care at a nursing home. Due to his injuries, he did not remember the assault. He acknowledged being a former member of the Lopers gang.

Over two weeks after the assault, police showed witness 1 three sets of photographs by police. Initially, she could not select anyone from the three sets of photographs. When police informed her they had no other sets, she asked to look again. She then tentatively identified a photograph of one of the other assailants, but was not sure about the identification. Although Diaz's photograph was included in the second set of photographs given to witness 1, she did not select him.

While witness 1 was at the station, an officer took her to view "a particular car that might have been involved," referring to Diaz's car, which they had seized earlier. She identified it as the suspect vehicle, recognizing it by the color. Police later showed

witness 2 a photograph of Diaz's car. Witness 2 also identified Diaz's vehicle as the same golden-brown one he had observed at the scene.

The prosecution filed an information charging Diaz with attempted murder (Pen. Code[2] §§ 664, subd. (a), 187, subd. (a); count 1); assault with a deadly weapon, a vehicle (§ 245, subd. (a)(1); count 2); assault with force likely to cause great bodily injury (§ 245, subd. (a)(4); count 3); battery with serious bodily injury (§ 243, subd. (d); count 4); and active participation in a criminal street gang (§186.22, subd. (a); count 5). The information alleged count 1 was done willfully, deliberately, and with premeditation within the meaning of section 664, subdivision (a); counts 1 through 4 were committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1); and Diaz personally inflicted great bodily injury causing brain injury and paralysis during the commission of the offense within the meaning of section 12022.7, subdivision (b), as to counts 1 through 3. Upon motion by the prosecution, the court dismissed count 3 and its enhancements.

At trial, witnesses 1 and 2 affirmed their pretrial identifications of Diaz's vehicle. When shown a photograph of the vehicle, witness 1 testified "it really looks very much like the car involved." She denied ever describing the car as a Honda. During his testimony, witness 2 was also shown a photograph of Diaz's vehicle, and he stated that it "looked exactly like the car that I've seen." The jury also viewed surveillance footage from a business approximately one block from the assault. The video showed the victim riding by on a bicycle. Afterwards, a gold sedan drove by. Officer Eddie Nunez testified that, "[h]aving reviewed the video and looking at the car in the parking garage" the vehicles were "consistent."

Also at trial, the witnesses described the attackers as young Hispanic males. Witness 1 stated she was scared to testify because the crime was gang related. Witnesses

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[2] All further statutory references are to the Penal Code.

described the front passenger as a light-skinned, skinny, Hispanic male who wore a hat. Witnesses described the rear passenger as a tall, dark-skinned man and the driver as a man heavier than the others. The witnesses described the suspect vehicle as a gold, golden-brown, beige, or brown four-door vehicle.

During closing argument, the prosecutor stated: "And really, to find the defendant not guilty, this is my argument to you: number one, you've got to ignore all the evidence, and number two, you have to believe the defendant. You have to believe him when he says, 'I wasn't there. I was at my sister-in-law's house.' [¶] He's the only one that says that. That's where he says he was, and you'd have to believe that, and the same time thinking he's credible, reject all the lies that you know he told. [¶] I enjoyed this part of the interview. [The police detective] says, 'and right there we know that's a lie, [Diaz]. I mean, that's a straightup lie,' if you can see that. [¶] 'How is it a lie if it's coming out of my mouth?' 'Well, because everything that's coming out of your mouth is a lie, everything that's coming out of your mouth is almost a lie in that entire interview.' [¶] 'I'm telling you I wasn't there.' [¶] You have to believe that. You have to believe him when he says, 'I'm telling you that I wasn't there,' knowing the fact that he's a liar about everything else that links him to the crime."

During his closing argument, defense counsel challenged the witnesses' identification of Diaz's vehicle as the suspect car. He also argued that no evidence connected Diaz's vehicle to the scene. In rebuttal argument, the prosecutor stated: "I think it's silly to try to say that [Diaz's] car wasn't identified and that wasn't the car. It was identified. . . . [witness 2] doesn't have to say, yes, that's the car. He can say no. He said no to other things. [¶] I think it is silly that that's not the car. We've got a bandana in the front representing Logan Street. We've got a black hat on the front seat which [witness 1] said the front passenger had on. . . . That fits. [¶] And how do you think the police just ended up at his house? Do you think they just picked a house in the middle of Santa Ana and just showed up and sat on the house and got lucky?"

A jury found Diaz guilty as charged. The trial court sentenced Diaz to an indeterminate term of 15 years to life for count 1 consecutive to a determinate term of five years for the great bodily injury enhancement. The court imposed and stayed punishment on the remaining counts pursuant to section 654.

DISCUSSION

I. *Applicable Law Regarding Ineffective Assistance of Counsel*

A criminal defendant has the right to assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15.) This constitutional right to counsel entitles a defendant not to '"some bare assistance but rather to *effective* assistance.' [Citation.]" (*People v. Jones* (1991) 53 Cal.3d 1115, 1134.) "In order to demonstrate that the alleged incompetency of [] trial counsel in not objecting to the identification evidence denied [a defendant] a potentially meritorious defense, the defendant must present a convincing argument that the pretrial identification procedure 'resulted in such unfairness that it infringed his right to due process of law.' [Citations.]" (*People v. Nation* (1980) 26 Cal.3d 169, 179.) This requires a review of "the facts and circumstances of the identifications to determine whether they were 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Citations.]" (*Ibid*.)

On appeal, an ineffective assistance of counsel claim requires reversal only if appellant demonstrates both (1) that counsel's performance was deficient, and (2) that this deficient performance prejudiced the defense. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*.)) A """reasonable probability is defined as one that undermines confidence in the verdict." [Citation.]' [Citation.]" (*In re Hardy* (calcri7) 41 Cal.4th 977, 1032.) The prejudice prong is met where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland*, *supra*, 466 U.S. at p. 694.) A reviewing court need not and should not attempt to determine whether counsel's performance was

deficient if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice. (*Id*. at p. 697.)

Reviewing courts show great deference to defense counsel's tactical decisions during trial in order to avoid '"chilling vigorous advocacy."' (*In re Fields* (1990) 51 Cal.3d 1063, 1069.) "[C]ourts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight. [Citation.]" (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

II. *Pretrial Identification of Vehicle*

Diaz contends trial counsel rendered ineffective assistance of counsel because he failed to move to suppress the pretrial identification evidence of his vehicle based on due process grounds.[3] We disagree because trial counsel was not required to make a futile objection.

"The proper standard for judging attorney performance is that of reasonably effective assistance, considering all the circumstances. When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. Judicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, *supra*, 466 U.S. at pp. 668, 669.)

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[3] Diaz contends the court erred by admitting evidence relating to the pretrial identifications of the vehicle. Because Diaz concedes this issue was not raised below, we consider the merits of the claim only as part of his ineffective assistance of counsel argument.

Bearing this standard in mind, trial counsel's decision not to object to the pretrial identification of the vehicle was objectively reasonable. Neither the United States Supreme Court nor the California Supreme Court recognize a due process right to suppress the identification of inanimate objects based upon suggestive police procedure. (*People v. Lucas* (2014) 60 Cal.4th 153, 238 (*Lucas*).) The California Supreme Court in *Lucas* court noted, "nearly every jurisdiction that has addressed the issue, however, has concluded that 'any suggestiveness in the identification of inanimate objects is relevant to the weight, not the admissibility, of the evidence.' [Citations.]" (*Ibid*.)

Given the lack of case law demonstrating suppression of a vehicle identification is proper based on due process grounds, if trial counsel had objected, any such objection would have been overruled. Because trial counsel was not required to make futile objections, we find no error. (See *People v. Price* (1991) 1 Cal.4th 324, 387 [counsel does not render ineffective assistance by failing to make futile motions or requests].)

III. *Prosecutor's Remarks During Closing Argument*

Diaz contends the prosecutor unconstitutionally shifted the burden of proof when he told the jury it had to believe Diaz's alibi to find him not guilty, and he improperly bolstered the prosecution's evidence by referring to facts not in evidence.[4] Diaz asserts his trial counsel was ineffective for failing to object to these errors during closing arguments. We are not persuaded the prosecutor's remarks constituted misconduct, but even if the comments could be deemed misconduct we find no prejudice.

"A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the

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[4] Diaz contends the prosecutor's statements, "And how do you think the police just ended up at his house? Do you think they just picked a house in the middle of Santa Ana and just showed up and sat on the house and got lucky?," assumed the police had other reasons to suspect Diaz beyond the evidence presented at trial.

conviction a denial of due process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct 'that does not render a criminal trial fundamentally unfair' violates California law 'only if it involves "'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'"' [Citations.]" (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) An improper brief and mild comment by the prosecutor in closing argument is harmless error. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

"In evaluating a claim of prejudicial misconduct based upon a prosecutor's comments to the jury, we decide whether there is a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) A judgment of conviction will be reversed based on prosecutorial misconduct "only when, after reviewing the totality of the evidence, we can determine it is reasonably probable that a result more favorable to defendant would have occurred absent the misconduct." (*People v. Castillo* (2008) 168 Cal.App.4th 364, 386.) "Arguments by counsel 'generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, [citation], and are likely viewed as the statements of advocates; the latter . . . are viewed as definitive and binding statements of the law.'" (*People v. McDowell* (2012) 54 Cal.4th 395, 438.)

Here, the jury was instructed with CALCRIM No. 200. It states, in part, "If you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (CALCRIM No. 200.) "A jury will generally be presumed to have followed an admonition to disregard improper evidence or comments, as '[i]t is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions."'" (*People v. Pitts* (1990) 223

Cal.App.3d 606, 692.) This instruction reduced any chance that the jury would have relied on the prosecutor's comments.

Even assuming the prosecutor's comments were improper, however, we cannot say the failure to object prejudiced the defense. There is no indication the comments infected the trial with such unfairness as to deny Diaz due process. Accordingly, Diaz's claim of ineffective assistance of counsel fails.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.