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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JARAY WASHINGTON,

Defendant and Appellant.

H036495

(Santa Clara County

Super. Ct. No. CC823875)

Defendant Jaray Washington appeals from a judgment of conviction entered after a jury found him guilty of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)) and reckless driving (Veh. Code, § 2800.2, subd. (a)). The jury also found true the allegations that a principal in the robbery personally used a firearm (Pen. Code, § 12022.53, subs. (b), (e)(1)) and that defendant was armed with an assault weapon (Pen. Code, § 12022, subd. (a)(2)). In a bifurcated proceeding, defendant admitted the allegations that he had served three prior prison terms. The trial court imposed a total term of nine years and eight months in prison. On appeal, defendant contends that he was deprived of due process when the prosecution's investigator improperly informed the jury that he was on parole. We find no error and affirm.

I. Statement of Facts

At approximately 3:10 p.m. on October 7, 2008, there was a robbery at Clyde's Liquors in San Jose. A surveillance video shows two men entering the store. One of the men was wearing a jacket with Lowe's written on it and the other was wearing sunglasses and a black sweatshirt or jacket with an orange emblem on the back. The man with the sunglasses was holding a gun, which appeared to be a .22 caliber Intratec semi-automatic firearm. The clerk gave them cash from the cash drawer. One of the men also took a bottle of Grey Goose vodka and a box of cigars.

Clyde's Liquors had placed a tracking device that was included in the stolen property. The tracking device enabled the police to determine that the robbers were in a Dodge van going northbound on Highway 101. San Jose Police Sergeant Domingo Sanchez heard the dispatch and positioned himself on a possible escape route. When he saw the van, he requested assistance.

There were a number of police cars in pursuit. The officers activated their lights and sirens, and the van eventually stopped due to traffic congestion. The officers conducted a felony car stop in which the officers drew their firearms and announced over a loudspeaker that the occupants should exit the van. Adriana Valencia, who had been driving, exited the van and was arrested. A man, who was described as either African American or Hispanic with short hair and in his 20's, got into the driver's seat and another individual jumped into the passenger seat. The men drove away in the van. During the ensuing chase, someone threw shoes and a jacket with Lowe's written on it from the van.

East Palo Alto Police Officer Rami Khoury saw the van exit the freeway at a high rate of speed. Officer Khoury recognized defendant as the driver of the van. He had spoken with defendant, who lived in East Palo Alto, "probably four times" for 10 to 20 minutes and had seen him on several other occasions. Defendant was wearing a dark baseball cap and Officer Khoury could not see how long his hair was. Though Officer Khoury tried to make a car stop, defendant ran a red light and eventually hit two parked

cars. When Officer Khoury reached the van, there was no one in it. Officer Khoury told San Jose Police Detective John McElvy at the scene that defendant was the driver. Officer Khoury later obtained a surveillance video from a nearby market that showed defendant walking away from the scene of the crash.

The police searched the van and found a loaded Intratec .22 caliber semi-automatic firearm and a cigar box between the two front seats of the van. They also found a pair of gold-rimmed sunglasses, a black jacket with an orange-colored insignia, a bottle of Grey Goose vodka, a box of powder-free gloves behind the front seats, and a bag of clothing that included a multi-colored shirt. Defendant's fingerprints were found on the sliding door of the van, the cigar box, and a discount card found in the van. Andre Jacks's fingerprints were also found on the cigar box.

The police searched the home of Teresa Gutierrez, Valencia's mother. They found several items belonging to defendant and Valencia in one room. Defendant is the father of Valencia's daughter. Gutierrez owned the van and had loaned it to Valencia on October 7, 2008.

Shanaye Sayers testified that she had dated defendant off and on between 2000 and 2008. Defendant periodically borrowed her car in late September and early October 2008. She identified the shirt recovered by the police from the van as having been worn by defendant. Defendant told her that Jacks was his cousin. She also recognized Warren Jordan, because she had met him through defendant.

There was television coverage of the robbery on October 7, 2008. That evening, warrants were issued for the arrest of defendant and Jordan. A warrant was later issued for the arrest of Jacks.

East Palo Alto Police Detective Ed Soares testified that he had always known Jordan to have "twisties" with black and red color in his hair. Detective Soares had last seen Jordan with this hairstyle two to three months before the robbery.

The police were unable to locate defendant at his known residences. On October 21, 2008, the police arrested Jacks. They found Greyhound tickets from Georgia and Alabama in his bedroom. On December 19, 2008, defendant and Jordan were arrested in Alabama.

Deputy Jessica Parrish of the Santa Clara County Sheriff's Department testified that she was working as a bailiff in the courtroom on April 7, 2010, when Valencia was on the witness stand. During the questioning of Valencia, Deputy Parrish saw defendant move his right index finger in front of his lips on two occasions. Valencia then refused to answer further questions.

Valencia was called as a witness, but refused to answer questions.

II. Defense Case

San Jose Police Officer Phillip White testified that when the van pulled over, he was approximately 17 feet from the driver's side of the van. After the woman exited the van, he saw a black male get into the driver's seat and a black male in the passenger seat. He saw the driver for "a few seconds," and described him as in his "20's, maybe light-medium skin, . . . a dreadlock hairstyle, the reddish gold tinted hairstyle." He could not identify the driver.

Craig Lee, a criminalist with the Santa Clara County District Attorney Crime Laboratory, testified as an expert in the analysis of DNA evidence. He testified that Jacks was the source of the DNA on the Lowe's jacket. Regarding the other jacket, the results were mixed. Valencia and Jordan were possible contributors of the DNA, defendant could neither be included nor excluded as a possible contributor, and Jacks was excluded. The DNA on steering wheel also contained mixed DNA. Valencia and Jordan were possible contributors, defendant could neither be included nor excluded as a contributor, and Jacks was excluded as a contributor.

III. Discussion

Defendant contends that he was denied due process when the prosecution's investigator improperly informed the jury that he was on parole.

Detective McElvy testified that he arrived at the crash site in East Palo Alto shortly after the crash. He further testified that Officer Khoury told him that defendant was the driver of the van and this information was entered on the incident log at 3:45 p.m. On cross-examination, the following colloquy occurred: "Q. [DEFENSE COUNSEL]: Whose responsibility was it, if you know, to do something with the information that Officer [Khoury] testified to that he knew who the driver of the minivan was? [¶] A. [DETECTIVE MCELVY] At an incident command post, the command officer's in charge. So I passed that information on to him. Tactically there [were] things happening right away. You only have a name. So we have to research and find a date of birth. We have to find out where he lives. We have to contact his parole officer. There is so much at once that transpires. But broadcasting his name over the radio as soon as I got it, when I passed that [] along, I didn't do it personally right away but somebody else may have."

On redirect examination by the prosecutor, there was the following exchange: "Q. [PROSECUTOR] Do you have a printout of any summaries of radio traffic and other police actions from the East Palo Alto police department? [¶] A. No. [¶] Q. What about any other police agencies besides San Jose? [¶] A. I do not. [¶] Q. How many other agencies assisted you besides East Palo Alto and then the San Jose Police Department? [¶] A. Menlo Park Police Department; San Mateo Sheriff's Department; Sunnyvale DPS. We had several task force. Parole office."

Outside the presence of the jury, defense counsel made a motion for a mistrial, stating that the references to parole were inadmissible evidence from which the jury "could draw a conclusion . . . that . . . there is a criminal history that they're not . . . privy to." The prosecutor argued that the references were isolated and not specific to

defendant, and that the trial court could strike the references. The prosecutor also acknowledged that defense counsel could have tactical reasons for not requesting that the references be stricken. The trial court stated: “Well, here’s my vision on it. Number one, I heard it when it happened. I believe there was a second reference later in his testimony. The first reference was arguably more aggressive than the second reference. It was never phrased in the context of contacting Mr. Washington’s parole officer. It was phrased in the context of steps that he took which included contacting various police agencies, parole. I mean he listed a myriad of contacts that were made. It neither highlighted the fact that Mr. Washington was on parole. It was presented in the course of steps ordinarily taken. Would I have preferred it hadn’t been done? Absolutely. Am I surprised you didn’t stand up and object? Absolutely not. It only would have highlighted it and focus[ed] on it. I don’t think it carried the inference that you believe it did in good faith belief that it somehow referenced Mr. Washington is on parole. The comment was unfortunate but I don’t think it rises to the level that a mistrial is warranted. The motion for mistrial is denied.” The trial court also noted that the reference was brought out on cross-examination and “was arguably responsive to the question but it arguably went beyond where it should have.”

Evidence Code section 1101, subdivision (a) prohibits evidence of other crimes to show a defendant’s bad character or propensity to commit crimes. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 203.)

“‘A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]’ (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) A motion for a mistrial should be granted when “‘a [defendant’s] chances of receiving a fair trial have been irreparably damaged.’” (*People*

v. Ayala (2000) 23 Cal.4th 225, 282.)” (*People v. Collins* (2010) 49 Cal.4th 175, 198-199.)

Here, the trial court did not abuse its discretion in denying the motion for mistrial. Detective McElvy was asked whose responsibility it was “to do something with the information” identifying defendant as the driver. He responded that the command officer was in charge, so he gave him the information. He then explained that the name of a suspect triggers further investigation, including obtaining his date of birth, finding his residence, and contacting his parole officer. He further noted that “[t]here is so much at once that transpires.” His first reference to parole was ambiguous, that is, jurors might have understood that defendant was on parole and thus had previously been convicted of a crime, or they might have understood that no one officer is responsible for obtaining additional information on the suspect in this type of situation. The second reference was even more ambiguous. In response to questions as to the agencies involved in the investigation, Detective McElvy listed several, including the parole office. Given that there were additional suspects, the reference to parole did not directly suggest that defendant was on parole. Since Detective McElvy’s comments were brief and ambiguous, any prejudicial effect could have been cured by admonition.

The cases upon which defendant relies are distinguishable. In *People v. Allen* (1978) 77 Cal.App.3d 924, the defendant was charged with committing a robbery with a minor. (*Id.* at p. 928.) The minor testified for the prosecution that the robbery was the defendant’s idea, that he had a gun, and that he had participated in the robbery. (*Id.* at p. 929.) To show that the minor had a motive for untruthful testimony, defense counsel was permitted to elicit testimony from the minor that his juvenile case arising from the robbery was pending. (*Ibid.*) However, the trial court did not allow defense counsel to cross-examine both the minor and his mother as to their expectations of leniency in connection with the minor’s two other pending robbery cases. (*Ibid.*) The minor’s mother also unexpectedly testified that the defendant’s sister told her he was “on

parole.’” (*Ibid.*) *Allen* held that the trial court erred in refusing to allow the cross-examination of the minor and his mother regarding the other two robbery charges and in refusing to grant a mistrial after the minor’s mother testified that the defendant was on parole. (*Id.* at p. 938.) *Allen* was “a close case in which the credibility of the prosecution’s witnesses and the credibility of [each side’s] . . . witnesses were the key factors. The [defendant] was not arrested at the scene of the crime, no stolen goods were found in his possession, the gun was not found and the identification evidence by the victim and her husband was not convincing.” (*Ibid.*) Thus, *Allen* concluded that “[h]ad the [defendant] been able to present evidence as to the motive of fabrication and the jury not heard the damaging evidence about [the defendant’s] parole status, it is reasonably probable that a result more favorable to the [defendant] would have been reached,” and reversed the judgment. (*Id.* at p. 939.)

In contrast to *Allen*, here, the references to parole were ambiguous and the defense was not prevented from presenting evidence of two key prosecution witnesses’ motives to fabricate. Moreover, this was not a close case. Even if the jury credited Officer White’s description of the driver, which did not match defendant’s description, there was very strong circumstantial evidence of defendant’s guilt. Defendant is Jacks’s cousin and Jordan’s friend, and he went to Alabama with Jordan after the robbery. Defendant’s fingerprints were found on the cigar box and the van, and defendant could not be excluded as a contributor to the DNA retrieved from the steering wheel of the van. Defendant was also seen in a surveillance video walking away from the crash scene. Moreover, defendant’s girlfriend was driving the van after it left Clyde’s Liquors, and while she was on the stand, she refused to testify after defendant gestured for her not to do so. Defendant argues, however, that there was no evidence of words or conduct that he aided or encouraged the commission of the robbery. We disagree. Since defendant remained in the van after the felony car stop, the jury could reasonably infer that

defendant continued to encourage Jordan and Jacks in the commission of the charged offenses.

People v. Coleman (1985) 38 Cal.3d 69 also does not assist defendant. In *Coleman*, the defendant was charged with murdering his wife, son, and niece, and assaulting his daughter with the intent to commit murder. (*Id.* at p. 73.) *Coleman* held that the admission of three letters by the defendant's wife in which she stated that he had threatened on several occasions to kill his family was prejudicial error. (*Id.* at p. 74.) Though the trial court had given a limiting instruction that the letters could only be used to impeach the defendant's credibility and to challenge and explain the basis for the experts' opinions, *Coleman* concluded that such an instruction could not insure that the jury would not consider the letters as proof of the wife's accusations. (*Id.* at p. 81.) There is simply no comparison between the prejudicial nature of a murder victim's statements that the defendant had threatened to kill his family and the ambiguous references to parole in the present case.

Defendant also argues that the admission of "a prior conviction that is not relevant to the issues in the case" violated his right to due process. We find no merit in this argument. The erroneous admission of other crimes evidence "results in a due process violation only if it makes the trial *fundamentally unfair*." (*People v. Partida* (2005) 37 Cal.4th 428, 439.) Here, the officer's fleeting references to parole in describing police investigative procedures did not rise to the level of other crimes evidence. Accordingly, there was no due process violation.

Defendant also contends that his case should be remanded for a hearing on whether the state and federal double jeopardy clauses bar retrial. He claims that "the prosecution has engaged in misconduct for the purpose of causing a mistrial or to avoid a likely acquittal." However, since we have concluded that the trial court did not abuse its discretion in denying the motion for mistrial, we need not consider whether the prosecutor sought to obtain a mistrial rather than an acquittal.

IV. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.