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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD LAMAR JACKSON,

Defendant and Appellant.

H036769

(Monterey County

Super. Ct. No. SS042117)

A jury convicted defendant Clifford Lamar Jackson of two counts of attempted criminal threat and the trial court found true three prior convictions for purposes of the Three Strikes law. On appeal, defendant contends that he received ineffective assistance of counsel because his trial counsel failed to object to prosecutorial misconduct during argument that shifted the burden of proof. We affirm the judgment.

BACKGROUND

In *People v. Jackson* (2009) 178 Cal.App.4th 590, we reversed defendant's convictions of two counts of attempted criminal threat because we concluded that attempted criminal threat includes a reasonableness element and the jury at defendant's trial was not instructed to consider whether the intended threat reasonably could have caused sustained fear under the circumstances. We held: "[I]n order to support a conviction for attempted criminal threat the jury must find that the defendant specifically intended to threaten to commit a crime resulting in death or great bodily injury with the further intent that the threat be taken as a threat, under circumstances sufficient to convey

to the person threatened a gravity of purpose and an immediate prospect of execution so as to reasonably cause the person to be in sustained fear for his or her own safety or for his or her family's safety.” (*Id.* at p. 598.)

At defendant's retrial, the trial court instructed the jury consistent with our opinion as follows: “The defendant is charged in Counts One and Two with attempted threats of violence. To prove that the defendant is guilty of this crime, the People must prove that, one, the defendant took a direct but ineffective step towards committing threats of violence. Two, the defendant specifically intended to threaten a crime resulting in death or great bodily injury. Three, with a further intent that the threat be taken as a threat; four, under circumstances sufficient to convey to the person threatened a gravity of purpose and an immediate prospect of execution; and, five, so as to cause a reasonable person to be in sustained fear for his or her safety, or for his or her family safety.”

Thereafter, the People argued the following points to the jury.

“Now, when we're talking about an attempt to threaten someone, the Judge read the law to you, and I want to go over it in a little more detail because it has a lot of language in it. Basically what it says is when someone attempts to threaten--attempts to threaten someone with violence, we have to prove the defendant took a direct but ineffectual step towards committing threats of violence.”

“And finally, could that kind of threat have caused a reasonable person to be in sustained fear for himself or his wife, and under these circumstances, her husband.”

Defendant then offered the following in his argument.

“So we look at the instruction, and we see that the People have t[he] burden of proof. They have the burden of proof to prove a defendant guilty beyond a reasonable doubt. They have the burden to prove every element. [¶] Now, you know, it's easy to say, well, you know, we--there's five or six things and there's no question that these three or four things are proven, and that's it, and your job is done, and let's go home. No. You have to look at all of the parts of the instructions, all of the elements, and so on.”

“So going again through the applicable law. We have talked about whether it’s proven beyond a reasonable doubt, lapse of time is not an excuse for the People not to meet that burden, witnesses.”

In rebuttal, the People urged the following.

“Now, if these witnesses came in here seven years later and had perfect recall of what happened and remembered every detail exactly right, it would mean that they were lying, because no one can remember anything from seven years ago, every detail. Defense attorney says that just because it’s been seven years, does not reduce the burden of proof, and it doesn’t. You don’t believe beyond a reasonable doubt that those defendants said those words, then you must acquit him.”

“But the bottom line here is there is no element that Mr. and Mrs. Rogers were in fear. That is not an element of this crime. We always go back to the elements of the crime, because we try to break the crime down into simple pieces so the jury can follow it. Not everyone is very well versed in the law to follow it as easily as we can, so the Judge--a very good Judge--reads the instructions to you: one, two, three, four, five. Do you find all five of those true? And then it is a crime that was committed. And if you find them beyond a reasonable doubt, then he’s guilty. And what the elements are is that a reasonable person under those circumstances could be in sustained fear of that threat. So basically what you’re saying is if that element is not met, that what you’re saying is *it would be unreasonable for someone to be in sustained fear* when being told they’re going to be killed. If someone comes into my office and tells me ‘I’m going to go get my AK-47 and come back here and kill you,’ *would it be unreasonable of me to be in fear*, in sustained fear, and to be in real fear, no a momentary or fleeting fear? That’s what the language is. Sustained fear means a period of time that is more than momentary fleeting or transitory. I would argue to you that the Rogers are probably still in fear today of that happening. But that’s not an element of the crime. We are not talking about that. We are talking about what a reasonable person--any reasonable person having this man under

those circumstances say what he say would they feel fear. I don't believe there is a reasonable doubt as to that." (Italics added.)

DISCUSSION

Defendant objects to the italicized words of the People's argument. According to defendant, "The prosecution insisted that in order for the jury to find for [defendant] on [the reasonableness element], the jury would have to find that 'it would be unreasonable for someone to be in sustained fear. . . .' This shifted the burden of proof." Defendant clarifies: "[T]he prosecution insisted an acquittal required the jury finding it would be 'unreasonable' for 'someone' to have sustained fear rather than the prosecution having to prove the opposite for a reasonable person."

Misconduct involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. (*People v. Haskett* (1982) 30 Cal.3d 841, 866.) And, of course, "It is improper for the prosecutor to misstate the law generally, and in particular, to attempt to lower the burden of proof." (*People v. Williams* (2009) 170 Cal.App.4th 587, 635, citing *People v. Hill* (1998) 17 Cal.4th 800, 829.) "[A] prosecutor may not suggest that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.'" (*People v. Woods* (2006) 146 Cal.App.4th 106, 112, quoting *People v. Bradford* (1997) 15 Cal.4th 1229, 1340.)

"When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise no claim is preserved for appeal." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44.)

Defendant concedes that he did not object to the People's supposed burden-shifting argument. He contends that trial counsel was constitutionally ineffective because he failed to object. (See *People v. Pitts* (1990) 223 Cal.App.3d 606, 693.)

"To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance

prejudiced the defense. [Citations.] Counsel’s performance was deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms. [Citation.] Prejudice exists where there is a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” (*People v. Benavides* (2005) 35 Cal.4th 69, 92-93.)

When the claim of misconduct is based on arguments or comments the prosecutor made before a 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.’ ” (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) If the challenged statement or argument was not misconduct then, of course, it would not be outside the range of competence for counsel to fail to object. Even where the prosecutor may have engaged in objectionable conduct, mere failure to object does not establish incompetence. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) Defendant must show that counsel’s omission involved a critical issue, and that the failure to object could not be explained as a reasonable trial tactic. (*People v. Lanphear* (1980) 26 Cal.3d 814, 828-829, reiterated at *People v. Lanphear* (1980) 28 Cal.3d 463; *People v. Jenkins* (1975) 13 Cal.3d 749, 753.) A failure to object to closing argument can often be explained by an attorney’s tactical determination that: (1) the objectionable statement is not sufficiently damaging to warrant objection; or (2) an objection would highlight the objectionable statement (or inference to be drawn from that statement), causing more prejudice than the objectionable statement alone. Given these considerations, and the split-second decision required to lodge a timely objection during an opponent’s closing argument, courts routinely have recognized that “the decision facing counsel in the midst of trial over whether to object to comments made by the prosecutor in closing argument is a highly tactical one” (*People v. Padilla* (1995) 11 Cal.4th 891, 942, overruled on other grounds in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1), and that “a mere failure to object to . . . argument seldom establishes counsel’s incompetence.” (*People v. Ghent* (1987) 43 Cal.3d 739, 772.)

In examining whether there is a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner, “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 ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421.) “Juries are warned in advance that counsel’s remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel’s assertions are the ‘statements of advocates.’ Thus, argument should ‘not be judged as having the same force as an instruction from the court.’ ” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21; *Boyd v. California* (1990) 494 U.S. 370, 384-385.) “This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made.” (*Boyd v. California, supra*, at pp. 384-385.) “[W]e cannot focus exclusively on a few erroneous words . . . and then reverse the conviction unless it is ‘reasonably likely’ that the jury applied the erroneous standard described or implied by those few words. We must examine the overall charge that the jury heard for a better view of the standard the jury took into its deliberations and applied.” (*Chalmers v. Mitchell* (2nd Cir. 1996) 73 F.3d 1262, 1267; *United States v. Park* (1975) 421 U.S. 658, 674-675.) The instructions are particularly significant because “ ‘[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.’ ” (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) Thus, “[w]e presume that jurors treat the court’s instructions as a statement of the law by a judge, and the prosecutor’s comments as words spoken by an advocate in an attempt to persuade.” (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8; see also *People v. Smith* (2005) 35 Cal.4th 334, 372.)

Here, in the objected-to snippets of the People's argument, the prosecutor did not insist that an acquittal required the jury to find that it would be unreasonable for someone to have sustained fear. The remarks can be interpreted as urging that an acquittal would equate to a conclusion that, under the circumstances, it would be unreasonable for a person to be in sustained fear after being told he or she was going to be killed. The comments directly follow the prosecutor's reminder that "the elements are is that a reasonable person under those circumstances could be in sustained fear of that threat." Thus, in context, the objected-to remarks could be construed as an explanation of what would be the effect of a negative answer to the reasonableness element rather than a misstatement of the reasonableness element. In any event, it is impossible to overlook that the objected-to remarks immediately followed the trial court's instruction telling the jury that it must find beyond a reasonable doubt that the reasonableness element of attempted criminal threat requires that the intended threat must reasonably cause sustained fear. It is also impossible to overlook that the objected-to remarks immediately followed other parts of the People's opening argument to the effect that the People have to prove that the threat caused a reasonable person to be in sustained fear. Moreover, defendant himself told the jury that the People have the burden to prove a defendant guilty beyond a reasonable doubt by proving every element. And, again, the prosecutor prefaced the objected-to remarks in the rebuttal by correctly telling the jury that it must find beyond a reasonable doubt that a reasonable person under the circumstances could be in sustained fear of the threat.

In light of the context and the instructions and arguments that accurately described and placed the burden of proving the reasonableness element on the People, trial counsel may very well have refrained from objecting to the italicized remarks because he concluded that there was no reasonable likelihood that the jury would construe or apply the remarks to absolve the People of proving the reasonableness element. Or, if he believed the remarks to have been misconduct, he may have refrained from objecting

because he concluded that the remarks were not sufficiently damaging to warrant an objection given the context, the trial court's instructions, and the parties' arguments as a whole. Indeed, the circumstances convince us that trial counsel's failure to object was because the supposed misconduct and any potential prejudice are more apparent than real, more arguable on appeal than actual at trial.

In a related argument, defendant contends that he received ineffective assistance of counsel because trial counsel's argument was deficient. According to defendant, "trial counsel never argued the issue as to whether [defendant's] actions 'caused a reasonable person to be in sustained fear.'" Defendant, however, fails to address the prejudice prong of an ineffective assistance of counsel claim.

" '[P]rejudice must be affirmatively proved; the record must "demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" ' ' ' (*People v. Catlin* (2001) 26 Cal.4th 81, 163.)

Even accepting defendant's premise that trial counsel was deficient for failing to argue the reasonableness element, defendant offers no discussion to the effect that, had counsel made the reasonableness argument, the result of the proceeding would have been different. His contention therefore fails.

DISPOSITION

The judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.