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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN KEITH MCNUTT,

Defendant and Appellant.

H037067

(Santa Clara County

Super. Ct. No. F1036425)

A jury convicted defendant Brian Keith McNutt of two counts of first degree burglary (Pen. Code, §§ 459, 460, subd. (a)),¹ receiving stolen property (§ 496, subd. (a)), misdemeanor resisting, delaying or obstructing an officer (§ 148, subd. (a)(1)), and misdemeanor vandalism (§ 594, subds. (a), (b)(2)(A)). After defendant waived his right to a jury trial on three prior conviction allegations and one prison prior allegation (§§ 667, subds. (a), (b)-(i), 1170.12, 667.5, subd. (b)), the court found those allegations true. The court sentenced defendant to 15 years and eight months in prison.

On appeal, defendant claims he was incurably prejudiced when the jury learned, by volunteered testimony that was immediately stricken by the court, “that [he] had a criminal record, preferred to be in jail, and had multiple drug addictions.” Defendant

¹ Subsequent statutory references are to the Penal Code unless otherwise noted.

contends that the judgment must be reversed and the case remanded for a hearing on whether the state and federal double jeopardy clauses bar his retrial. We affirm.²

I. Factual Background

After a Thanksgiving dinner with his extended family, Jason Carmona Ruiz returned around 7:30 p.m. to the home he shared with his parents and sister. He was walking down the hallway when “all of a sudden” the door to his sister’s room “just slammed shut.” Before it closed, Ruiz saw the shadow of a head that was bald or had “like a fade [haircut].” Startled, he tried to open the door, but it was locked. Ruiz heard “all this movement” in his sister’s room, and an unfamiliar voice inside said, “‘It’s me, bro. You know me. You know me.’”

Hearing a window screen fall to the ground, Ruiz rushed to open the back door, but it jammed, so he “ran” out the front door. He saw defendant “hiding” crouched down between a truck and the next-door neighbor’s house. Ruiz saw no one else in the area. Defendant started “yelling,” and Ruiz recognized his voice as the voice he had heard coming from his sister’s room.

Seeing Ruiz, defendant fled, and Ruiz pursued him. Defendant broke down the fence of a house two doors down and ran into the backyard, where Ruiz grabbed him as he tried to jump the back fence. The two struggled, with defendant “yelling” to Ruiz “about his friends, that he had to help out his homeboy and about his family.” Ruiz once again recognized defendant’s voice as the voice he had heard coming from his sister’s room.

Ruiz’s neighbors, the Aveys, came outside to investigate the commotion in their backyard. Telling them, “Call the police, this person has tried to rob my house,” Ruiz held defendant until officers arrived.

² Accordingly, we need not address defendant’s double jeopardy contentions.

Dispatched to the Avey's backyard, Gilroy Police Officer Bill Richmond and two other officers found defendant "crunched up against the fence . . . kicking and screaming," with Ruiz standing over him, "attempting to just not let him get away." Defendant told the officers to "'fuck off'" and claimed he "'didn't fuckin' do anything.'" The officers "were attempting to get him to calm down," but that "took a bit of time. He wouldn't." Defendant kicked at the officers when they approached him and went limp when two of them each took one of his arms. He "was just being physically difficult." The officers "had to pull him from that fence" and maneuver him into a prone position on his stomach. Even then, Richmond recalled, "it was just too much of a volatile situation, so we placed handcuffs on him so we [could] control the whole situation." Defendant refused to identify himself, but Richmond found a wallet containing his identification on the ground.

Richmond arrested defendant and "walked him out" to his patrol car. Defendant "was calm on the way out of the backyard," but when he realized he was going to be placed in the back of the vehicle, "he resisted at that point," pulling away from the officers and struggling. Richmond and another officer "had to physically take control of him again and tell him you are under arrest and you are going down to booking; and at that point, he complied."

Richmond transported defendant to the jail. On the way, defendant remarked, "Every time I start getting my life together I do something to self-destruct." "I need to be in jail; it's the best place for me to be," he volunteered, and he also "made numerous comments about his drug addictions."

Officer Randy Bentson was one of the officers who responded to the Aveys' backyard. While Richmond dealt with defendant, Bentson retraced Ruiz's steps with him, looking for evidence. They found a wallet containing a locket on the ground beneath Ruiz's sister's window, but Ruiz did not recognize either item.

Bentson noticed a screen missing from a window, which was open. Looking inside, he saw a shoe rack propped against the door “like it was trying to block the door from opening.” Ruiz climbed through the window and opened the front door, and he and Bentson “went to every room.” The shoe rack in Ruiz’s sister’s room had been moved, and there were shoes “scattered about the floor,” but the house did not appear to have been ransacked, and Ruiz could not tell if anything was missing. Bentson told Ruiz to call him if family members discovered anything missing. No one called him.

Officers were still dealing with the Ruiz burglary when they received a report of another burglary at an apartment a few doors away. Officer Hugo Del Moral went to the apartment and met with its resident, Les Walker. Del Moral noticed that the screens had been removed from Walker’s front windows. Inside, it appeared as if someone had been “looking through things.”

Walker was “agitated” and “seemed disturbed by the whole incident.” He had come home from a Thanksgiving dinner around 7:00 or 7:30 p.m. to find the screens removed from his front windows and the windows wide open. When he entered, a voice from his kitchen called out, “Hello, Les.” Startled, Walker ran into a bedroom to turn on some lights, and the same voice said, “I’m already outside.” Walker turned on all the lights and searched his nightstand and dresser drawers for a bracelet his late father had given him. Unable to find it, he telephoned his housekeeper and asked her to call the police.

While Moral was at Walker’s apartment, Bentson arrived with the wallet and locket that he and Ruiz had found. Walker identified both items as his.

II. Procedural Background

During motions in limine, the People advised the court that they planned to introduce the statements defendant had made on the way to the jail. After an Evidence Code section 402 hearing, the court ruled that defendant’s statement about “self-

destruct[ing]” every time he started getting his life together was admissible as a spontaneous statement tending to support a consciousness-of-guilt argument. Defendant’s other statements, about “need[ing] to be in jail” and having “slamm[ed] meth two days ago,” were excluded after the court found that they “d[id] not relate either to consciousness of guilt or motive; certainly to bring extraneous matters under 352 into the picture they will be excluded.”

Laurie Avey testified at trial about the ruckus in her backyard. Asked if she had observed how defendant dealt with the police that night, she responded, “Very vocal and as far as saying *he had a police record* and he didn’t want, you know -- he was hurting. He didn’t say they were hurting him but he was saying I’m hurt. And he -- I’m sorry, may I have you repeat that question?” (Italics added.)

Defendant’s trial counsel objected at an unreported bench conference, after which the court told the jury, “My understanding is the witness is requesting the question to be reasked. So the last answer and question will be stricken in their entirety. [¶] And, Ladies and Gentlemen, as I advised you earlier, you are to strike that portion of the testimony from your memory. [¶] Go ahead and reask or rephrase your question.” Avey was then asked whether defendant had been “cooperative with the police as far as [she] could see” and whether he was “resisting while they were dealing with him.” The trial continued with no further references to defendant’s criminal record.

After Richmond testified that he had transported defendant to jail, he was asked if defendant had made “any spontaneous comments or statements” during the drive. He responded affirmatively, and the questioning continued as follows.

“Q: And you were -- these were not -- his responses were not to questions that you were asking; is that correct?

“A: That’s correct. Let me be clear. I did not ask any questions.

“Q: And what did he say?

“A: May I refer to my report?

“Q: Did you write down what he said to you?

“A: Yes, Sir.

“Q: You can review your report to get that down. And if it’s going to be verbatim, assuming that, if you can read what he said if you need that for the verbatim.

“A: Thank you. I think I will do that if that’s okay with counsel.

“[Defendant’s trial counsel]: Your witness.

“The Court: Go ahead.

“The Witness: Thank you, Your Honor. [¶] While in the back of my vehicle [defendant] said, ‘Every time I start getting my’ -- quote: ‘Every time I start getting my life together I do something to self-destruct.’ *And then he separately said, ‘I need to be in jail; it’s the best place for me to be.’ He made numerous comments about his drug addictions. And I don’t have the specific -- I don’t have a specific quote about what type of drugs, but I do have a quote in that he said --*” (Italics added.)

Defendant’s trial counsel interrupted, and after an unreported bench conference, the trial court admonished the jury that “[t]he last portion of the witness’s answer will be stricken and is to be disregarded.” The district attorney immediately moved on to another subject.

Walker testified that he had gone to a nearby Starbucks around 1:00 or 2:00 p.m. on Thanksgiving. Defendant, whom Walker had never met, was there, and Walker introduced himself, as was his custom. Walker was surprised when defendant said he knew who he was and where he lived. Defendant explained that Dan Morse had told him who Walker was. Walker testified that defendant also told him “something like, ‘yeah, we’re going to rob somebody tonight’ or something. Something like that.” Walker learned defendant’s name because “[h]is wallet was out and his identification was showing and it said Brian Keith McNutt.” The two spoke for about 10 minutes.

Walker acknowledged telling police that the voice he heard in his kitchen sounded like Morse’s. “I thought it was Dan Morse. I didn’t know for sure. It sounded like him.”

Walker later learned (and the parties stipulated) that Morse had been in jail between August 24, 2010 and December 2, 2010.³

Walker acknowledged that a two-story fall from a scaffold in 1989 had left him with some memory problems and that he also has “a hard time hearing.”

The defense called Ruiz’s mother and sister as witnesses. Ruiz’s mother testified that cash and jewelry were missing from her bedroom after the burglary. She asked her daughter to report the loss to the police, but was unsure whether her daughter had done so, “because she said that they wouldn’t answer and they wouldn’t answer.” Ruiz’s mother had not recovered any of her missing property.

Ruiz’s sister testified that she came home to find “shoes all over the floor” of her room. Her bed was “a mess,” her window blinds were broken, the window was open, her jewelry box had been moved, and a bracelet and about \$40 were missing. She tried calling Bentson that evening but was unable to reach him until a week later, when she reported what she and her mother had discovered missing. Ruiz’s sister had not recovered any of her missing property.

After deliberating just over four and a half hours, the jury returned guilty verdicts on all counts. Defendant waived his right to a jury trial on the enhancement allegations, which the court found true. Defendant was sentenced to 15 years and eight months in prison. He filed a timely notice of appeal.

³ Walker and Morse were not friends. Walker testified that Morse “disliked” him, apparently because Walker “used to see” Morse’s mother. Walker claimed Morse had confronted him at Safeway a few days before Thanksgiving and warned him to stay away from Morse’s mother. The next morning, Walker found “stay away from my mom” written in ketchup on his kitchen window. Although he was not scared of Morse, Walker “stay[ed] away from the guy.” It concerned Walker to hear that Morse might be involved in robberies that night, because he “didn’t know . . . what [Morse] was capable of.”

III. Discussion

Defendant claims he was incurably prejudiced when the jury learned, by volunteered testimony immediately stricken by the court, “that [he] had a criminal record, preferred to be in jail, and had multiple drug addictions.” The Attorney General counters that defendant forfeited his claim by failing to move for a mistrial below, and in any event, the claim lacks merit.

In *People v. Hill* (1992) 3 Cal.4th 959 (*Hill*), overruled on another ground in *People v. Price* (2001) 25 Cal.4th 1046, 1069, footnote 13, the California Supreme Court held that the defendant’s “failure to request appropriate ameliorative action waived his appellate challenge” to remarks made by spectators during his capital murder trial. (*Hill*, at p. 1000.) The defendant had “neither objected to any of the three instances of spectator remarks nor requested the trial court to admonish the jury to disregard the remarks. *He also failed to move for a mistrial after any of the remarks.*” (*Ibid.*, italics added.) In any event, he had not been prejudiced by a “brief” comment, a “momentary two-word utterance,” and an “abbreviated” outburst, because the jury had been admonished to disregard each interruption. (*Id.* at pp. 1000-1003.)

In *People v. Moore* (1956) 143 Cal.App.2d 333 (*Moore*), the trial court sustained a somewhat belated objection to the prosecutor’s cross-examination of one of the defendants about his nonfelony prior arrests and, at defense counsel’s request, admonished the jury to disregard the testimony. (*Id.* at p. 338.) The Court of Appeal held that the defendants’ claim of prosecutorial misconduct had been forfeited, noting, “It was not contended that the admonition could not cure the error. *No mistrial was asked. Appellants got all they asked for.*” (*Ibid.*; accord, *Jonte v. Key System* (1949) 89 Cal.App.2d 654, 659 [“[C]ounsel . . . at no time asked for a mistrial—all he asked for was that the jury be instructed to disregard the passages objected to.”]; *Ades v. Brush* (1944) 66 Cal.App.2d 436, 445 [“[W]hen this alleged [attorney misconduct] occurred, counsel for appellants did not then ask for a mistrial—all he asked for was that the jury be

instructed to disregard it. This, the trial court did, not once, but twice. Appellants got all they asked for.”].)

Here, the trial court sustained defendant’s objections to each volunteered statement and promptly admonished the jury to disregard the testimony. Absent evidence to the contrary, we presume that jurors will understand and follow a trial court’s admonition to ignore testimony that the court has stricken. (*People v. Avila* (2006) 38 Cal.4th 491, 574 (*Avila*); *People v. Burgener* (2003) 29 Cal.4th 833, 874-876 (*Burgener*).)

If defendant felt that the admonitions were “ambiguous” or confusing, as he now argues, we think it was incumbent on him to so inform the court to give it an opportunity to strengthen them.⁴ If defendant was convinced that the challenged testimony was “just too compelling for a jury to put aside,” as he now argues, he should have moved for a mistrial. He should, moreover, have done so *on the record*. (*People v. Romo* (1975) 14 Cal.3d 189, 195 [since the defendant was claiming error, “it was his duty to point out the error by an adequate record”]; *People v. Morrison* (2004) 34 Cal.4th 698, 710 [“the voicing of objections and disagreement is critical for development of an adequate record on appeal . . .”].) Defendant implicitly accepted the admonitions as sufficient to cure any prejudice. He cannot now complain that they were insufficient. (*Hill, supra*, 3 Cal.4th at p. 1000; *Moore, supra*, 143 Cal.App.2d at p. 338.)

⁴ Defendant claims the court’s admonition that “[t]he last portion of [Richmond’s] testimony will be stricken and is to be disregarded,” was “ambiguous” and “[did] not plainly reach the most prejudicial portion of the answer.” The record reflects no such objection below. Even if we assume the objection was preserved, we disagree that the admonition failed to reach defendant’s “I need to be in jail” comment. We do not interpret the admonition as narrowly as defendant does. In our view, it was broad enough to encompass not only the inadmissible “I need to be in jail” statement but also the admissible “self-destruct” statement.

We would reject defendant’s claims even if he had preserved them, because any conceivable prejudice was cured by the trial court’s admonitions.⁵

“A witness’s volunteered statement can, under some circumstances, provide the basis for a finding of incurable prejudice.” (*People v. Ledesma* (2006) 39 Cal.4th 641, 683.) “[E]xposing a jury to a defendant’s prior criminality presents the *possibility* of prejudicing a defendant’s case and rendering suspect the outcome of the trial.” (*People v. Harris* (1994) 22 Cal.App.4th 1575, 1580 (*Harris*), italics added.) But “[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. Allen* (1978) 77 Cal.App.3d 924, 935 (*Allen*)). “The finding of exceptional circumstances depends upon the facts of each case.” (*Ibid.*) “[W]hether the error can be cured by striking the testimony and admonishing the jury rests in the sound discretion of the trial court.” (*Harris*, at p. 1581.)

We begin with Avey’s nonresponsive reference to defendant’s “police record” and Richmond’s passing reference to defendant’s “need to be in jail” remark, neither of which

⁵ We note at the outset that the prejudice defendant claims occurred here was not caused by prosecutorial misconduct or trial court error. The district attorney did not improperly elicit the challenged testimony. He asked Avey a yes-or-no question, and she blurted out a nonresponsive answer about defendant’s “police record.” The jury heard about defendant’s “I need to be in jail” remark and learned that he had mentioned his “drug addictions” because Richmond gave an unexpectedly expansive answer to a legitimate question that seems to have been designed to elicit evidence the court had expressly ruled admissible—i.e., defendant’s statement about “self-destruct[ing]” every time he started getting his life together. Reading from his police report, Richmond provided the expected answer but then unexpectedly continued reading until he was interrupted by defense counsel’s objection.

The record reveals no trial court error either. To the extent defendant’s mention of “the rules of evidence” and citation of Evidence Code section 1101, subdivision (a) can be read to argue that the court improperly admitted evidence of defendant’s “bad character,” we reject it. The court, which had previously ruled the challenged statements inadmissible, sustained defense counsel’s objections to Avey’s and Richmond’s testimony and immediately admonished the jury to disregard it. We presume the jury understood and followed those admonitions. (*Avila, supra*, 38 Cal.4th at p. 574; *Burgener, supra*, 29 Cal.4th at p. 874.)

made this an “exceptional case” in which any prejudicial effect of the volunteered statements could not be cured by admonishing the jury. (*Allen, supra*, 77 Cal.App.3d at p. 935.) Far more specific references to a defendant’s criminal record have been held not prejudicial, particularly where, as here, the evidence against the defendant was strong.⁶ In *People v. Collins* (2010) 49 Cal.4th 175 (*Collins*), the trial court excluded reference to the defendant’s recent incarceration. On redirect, the defendant’s girlfriend “nonresponsively volunteered” that she had accumulated a \$1,200 phone bill because he “would call every night collect *and he was in Susanville.*” “This was when *he was still in Susanville before he got out* in December.” (*Collins*, at pp. 185, 196-198, italics added.) The California Supreme Court upheld the trial court’s denial of the defendant’s mistrial motion, holding that the remarks were “brief and ambiguous,” and any prejudicial effect could be cured by an admonition. (*Collins*, at pp. 198-199.)

In *People v. Valdez* (2004) 32 Cal.4th 73, a detective testifying about a witness’s positive identification of the defendant was asked how he had “‘managed’” to include the defendant’s photograph in the photo lineup. (*Id.* at p. 123.) The detective explained that the witness had told police the murder victim and the defendant knew each other, “[s]o at that time we felt we had a possible suspect and we then *went to the jail* and found a

⁶ We cannot agree with defendant’s assertion that this was “a close case.” Although he was not found in possession of any stolen property, the circumstantial evidence against him was compelling, and there was no alibi or other exculpatory evidence to contradict it. Ruiz returned home to find someone in his sister’s room. He did not get a good look at the burglar, but he heard his voice, which was the same as defendant’s. When Ruiz “ran” outside after hearing the window screen fall to the ground, he saw defendant “hiding” between a truck and the next-door neighbor’s house. No one else was in the area, and defendant fled when he saw Ruiz. Defendant’s flight under these circumstances and his later statement to police that “[e]very time I start getting my life together I do something to self-destruct” made an inference of consciousness of guilt unavoidable. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1055.) The fact that property stolen from Walker was found outside Ruiz’s sister’s window shortly after Walker reported finding someone inside his apartment just as obviously supported an inference that defendant had committed both burglaries.

mug photo and put it in this mug photo lineup.’” (*Ibid.*) The California Supreme Court concluded that the “fleeting reference to ‘jail’ was not ‘so outrageous or inherently prejudicial that an admonition could not have cured it.’” (*Id.* at p. 123; accord, *Avila, supra*, 38 Cal.4th at pp. 572-574 [codefendant’s volunteered remark that the defendant had “barely got[ten] out of prison” when the crimes occurred did not result in incurable prejudice]; *People v. Bolden* (2002) 29 Cal.4th 515, 554-555 [arresting officer’s “very brief” and nonresponsive testimony about having obtained the defendant’s address from the parole office did not irreparably damage the defendant’s chance of receiving a fair trial]; *Harris, supra*, 22 Cal.App.4th at p. 1581 [witness’s “incidental remark” about the defendant’s parole status caused no prejudice].)

As in the above cited cases, the two-word reference here to defendant’s “police record” and the one-sentence reference to his “need to be in jail” remark were very brief. The trial court promptly struck the testimony and immediately admonished the jury not to consider it, and nothing more was said on either subject during two days of testimony from five additional witnesses. The volunteered statements did not prejudice defendant in any way.

By a similar analysis, Richmond’s nonspecific statement that defendant “made numerous comments about his drug addictions” did not make this an “exceptional case” in which the prejudicial effect of the surprise testimony could not be cured by an admonition. (*Allen, supra*, 77 Cal.App.3d at p. 935.) The fleeting reference was an isolated one.

Defendant insists, however, that exposing the jury “unnecessarily to evidence of [his] multiple drug addictions” was “extremely” prejudicial. He quotes a passage from *People v. Cardenas* (1982) 31 Cal.3d 897 (*Cardenas*) to support his argument, but his reliance on that case is misplaced.

In *Cardenas*, the defendant challenged his convictions for attempted murder and attempted robbery, arguing that the trial court had improperly admitted evidence of his

heroin addiction to establish a financial motive for the attempted robbery. The California Supreme Court agreed that the trial court should have excluded the evidence as more prejudicial than probative under Evidence Code section 352. (*Cardenas, supra*, 31 Cal.3d at p. 907.) Since the testimony “tended ‘only remotely’ to prove that [the defendant] had committed the attempted robbery,” its probative value was substantially outweighed by its “inflammatory effect” on the jury. (*Ibid.*) The prejudicial effect of this evidence, when cumulated with the effect of gang evidence that the trial court had also improperly admitted, required reversal. (*Id.* at p. 910.)

Cardenas is inapposite. In that case, the trial court permitted multiple witnesses to testify “at great length” about the defendant’s physical condition, which they suggested “showed” that he had been addicted to heroin “over a long period of time.” (*Cardenas, supra*, 31 Cal.3d at pp. 903, 907.) These witnesses described the defendant’s attempts at treatment and his 10 to 20 contacts with police in the previous five to six years. (*Id.* at p. 903.) They also estimated “the alleged size and value of [his] heroin habit.” (*Id.* at p. 907.) Here, by contrast, the jury heard an isolated sentence that told them no more than that defendant had “made numerous [unspecified] comments about his drug addictions.” The trial court immediately struck the testimony and admonished the jury not to consider it. The reference did not prejudice defendant.

Relying on *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 (*McKinney*), defendant asserts that the jury’s “exposure . . . to this . . . improper character evidence” violated his Fourteenth Amendment right to a fair trial, which requires application of the *Chapman* standard. (*Chapman v. California* (1967) 386 U.S. 18.) We reject his contentions.

In *McKinney*, the Ninth Circuit held that extensive testimony about the defendant’s fascination with knives should not have been admitted at his trial for killing his mother with a knife. (*McKinney, supra*, 993 F.2d at p. 1385.) Because this irrelevant and inadmissible propensity evidence was “emotionally charged,” the court held that its

admission rendered the defendant's trial fundamentally unfair in violation of his federal constitutional right to a fair trial. (*Ibid.*) The testimony itself consumed over 60 pages in the record, and the prosecutor summarized and emphasized it in his closing argument, reiterating that the defendant's ownership of knives was "one of two or three crucial issues in the case." (*Id.* at p. 1386 & fn. 10.)

McKinney is easily distinguished. In that case, the trial court admitted a significant quantum of highly prejudicial character evidence. The prosecutor relied on it. No curative admonition was given. Here, by contrast, the brief and nonspecific remarks that Avey and Richmond volunteered were immediately stricken by the trial court, and the jury was admonished not to consider them. The circumstances that defendant complains of here bear no resemblance to the fundamental unfairness that the Ninth Circuit held infected the trial in *McKinney*. Defendant's federal constitutional right to a fair trial was not violated.

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.