Filed 12/03/18 P. v. Ochoa-Lopez CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ALEXIS OCHOA-LOPEZ, Defendant and Appellant.	B288175 (Los Angeles County Super. Ct. No. PA087155)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky, Judge. Affirmed.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

On September 21, 2017, appellant was charged with murder (Pen. Code, § 187, subd. (a).)[1] It was also alleged that appellant used a deadly weapon (§ 12022, subd. (b)(1)) and acted for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(c)).

A jury found appellant guilty of first-degree murder, and found true the deadly weapon and gang enhancement allegations. The court sentenced appellant to a term of 25 years to life with the possibility of parole, and an additional one-year term for the deadly weapon enhancement, for a total term of 26 years to life.

Appellant timely appealed. He contends that in rebuttal argument, the prosecutor committed misconduct by misstating the law regarding imperfect self-defense. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Prosecution Evidence*

1. *Najera's Death*

Gloria Watkins lived in an apartment on Roscoe Boulevard, in the city of Northridge. Watkins lived on a block populated by many members of the Brown Pride Surenos (BPS) gang. She served as a "hood mom" and would often house BPS members at her house, making sure they had food and a place to sleep. Adrian Ortiz Najera, known as "Chino" within BPS, was a friend of Watkins' who had stayed at her apartment. Appellant had recently met Watkins and also stayed at her apartment for two weeks in September 2016. While Watkins was briefly in the hospital, $2,000 disappeared from her safe. Watkins reported this to Edwin Aponte, or "Crooks," the shot caller for BPS.

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

On September 7, 2016, a meeting was held at Watkins's house. Appellant, Najera, Crooks, and other BPS members were there. During the meeting, appellant punched Najera in front of the other gang members, and Najera did little to defend himself. Appellant knew that punching a fellow member who is more established in the gang is considered disrespectful, and that he might be subject to retaliatory action. He later explained that he punched Najera because he felt he was being blamed for the missing money, but believed Najera had taken the money and was not being truthful about it.

After the meeting, appellant, Najera and Watkins stayed behind, smoked meth together, and drove around town to pick up more drugs. Appellant drove his car, and they stayed out until the early morning. Watkins testified that nothing seemed out of the ordinary with appellant and Najera that night. They dropped her off at her apartment and left again. In the morning, they picked up Watkins and gave her a ride to her car before driving off. They appeared to be getting along, and were not fighting, afraid or quiet. Watkins did not consider Najera to be a violent person, though she had heard that he once beat up a "wannabee" BPS member, Johnny Hernandez, and left a boot print on his head. Najera had told Watkins he wanted to get out of the gang, and he tried not to participate in BPS activities.

When Watkins returned to her apartment, the door was locked and she had to break through it. She saw appellant vacuuming, wearing her shawl but otherwise naked. There was broken glass and blood everywhere. She asked where Najera was, and appellant pointed to the bathroom. There, she found Najera dead in the bathtub, covered under blankets. Watkins ran out of

the apartment and drove to tell Crooks, then dialed 911. She described appellant as being scared and crying.

Los Angeles Police Department (LAPD) officers responded to the scene. An officer encountered appellant in the laundry room of the building, bleeding, with fresh scratches on his face. His skin was sweaty, clammy and cold. The officer asked him if he was okay, and appellant replied, "No. I was attacked. What was I supposed to do at that time?" No blood was observed on appellant's clothes or anywhere else on his body. The police detained Watkins, appellant, and Hernandez, who had arrived at the apartment after Najera's death and helped appellant clean up the crime scene.

A police search of the apartment revealed the presence of blood in various places, including the vacuum cleaner, the couch in the living room, a wall above the couch, a pillow inside the hallway closet, clothes on the bathroom floor, the bathroom sink, the wood floor and carpet, the kitchenette table and cabinet, a towel in the bedroom, and on shards of glass. Inside the bedroom closet, police recovered a knife inside a pair of shorts, a wallet with appellant's driver's license, and appellant's cell phone and credit cards.

2. *Appellant's Confession*

Two LAPD officers interviewed appellant while in custody that evening. The videotaped recording of the interview was played for the jury. Appellant admitted he killed Najera that morning, and said he was "defending [his] life." It was sometime in the early morning when appellant and Najera were in Watkins's living room trying to go to sleep. Appellant believed Najera was only pretending to sleep, and appellant had been feeling tension building between them since the previous night,

as if something was going to happen. A voice could be heard saying "You better watch out," "Come on, just do it!" and "He's gonna get you!"[2]

Appellant grabbed Najera, who was lying on the floor, and started choking him. Appellant then took out a knife from his pocket, but decided not to use it and set it down. He jumped on Najera's back and continued trying to choke him. Najera pleaded with appellant to stop and struggled unsuccessfully to get up. Appellant grabbed the knife again, back-mounted Najera with his legs straddling him on the sides, and started stabbing him. Appellant first tried slitting Najera's throat, but the knife was too dull. Najera pleaded with him, "Please, I got a little sister," but appellant was determined to kill him. At some point, appellant tried to smother Najera with a pillow. Appellant stabbed Najera in the neck, stomach and torso. Though no longer resisting, Najera was still breathing and "wouldn't die." Wanting "everything to be over," appellant stabbed him again and completed the killing in the bathtub. Najera was still alive but weak when appellant dragged him to the bathtub and filled it with water. He then held Najera's head under water until he stopped moving.[3]

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[2] It was well known in the apartment building that a resident living above Watkins would scream when he was off his medication.

[3] Although Najera had been stabbed multiple times, the autopsy report determined that the primary cause of death was drowning. The medical coroner explained at trial that none of the stab wounds were immediately fatal because they did not injure any major vascular structures or vital organs. Only three stab wounds hit vital areas in the chest. The combination of

Appellant covered Najera's body with blankets, and cleaned up. He overflowed the bathroom sink to wash the floor, and drained and refilled the bathtub because the water was so red. He took his bloody clothes off and showered. He then cleaned up the apartment, vacuuming the broken glass and wiping up blood.

Appellant characterized what he did as "pretty gross" and "pretty messed up," but explained "it was gonna be either one of us." He didn't think he would ever do what he did, but "[he] just had to" because "it was either [he] or [Najera] [that would die]." Appellant had cut his thumb during the attack, perhaps from the knife or from a glass table that shattered. He also had minor abrasions and bruising on his face, neck, shoulder, arm, ribs, and back. Although Najera never got on top of appellant to gain an advantage, at one point appellant thought Najera "almost had [him]," and "that's what [he] was trying to avoid." However, during the same interview, appellant also said that Najera wasn't "kicking [appellant's] ass at all." When asked what he thought the consequences of killing somebody were, appellant said, "they just make you part of their gang."

While being transported by a different LAPD officer to the hospital after the interview, appellant disclosed that he had been a member of BPS for three months. When asked if he had put in any "work" to earn the gang's acceptance, appellant replied, "I have now," and expressed his hope that what he did would improve his standing with Crooks and within the gang.

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these wounds might have caused death in half an hour to an hour. The wounds might have been survivable if medical aid had been available within a reasonable period of time.

3. *Gang Evidence*

The prosecution's gang expert opined that appellant was a member of BPS because he had been associating with them on a regular basis, was familiar with the political hierarchy within the gang, and described "doing work" or "going on missions" for the gang. Presented with a hypothetical based on the facts of Najera's killing, the expert further opined that such a killing would elevate appellant's status and benefit the gang, because it would hold someone accountable for the missing money, and breed intimidation and fear within the community.

B. *Defense Evidence*

The defense's only witness, a gang expert, opined that appellant was not a BPS member, but a "wannabee." He explained that it is not uncommon to find a blending of both gang and nongang members in an environment with heavy drug use. There was no evidence that appellant had been "jumped in" or vetted into the gang. Presented with a hypothetical based on Najera's killing, the expert opined that unless the killing was sanctioned by the gang, it would not benefit the gang.

C. *Jury Instructions and Closing Arguments*

Before closing arguments, the trial court instructed the jury on the elements of murder and imperfect self-defense.[4] It

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[4] "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed a person because he acted in imperfect self-defense. The defendant acted in imperfect self-defense if: The defendant actually believed that he was in imminent danger of being killed or suffering great bodily injury; AND The defendant actually believed that the immediate use of deadly force was necessary to defend against the danger; BUT At least one of those beliefs was unreasonable." (See CALCRIM No. 571.)

further instructed the jury: "If you believe that the attorneys' comments on the law conflict[] with my instructions, you must follow my instructions." (See CALCRIM No. 200.)

During her closing argument, the prosecutor explained the elements of imperfect self-defense and why appellant was unable to meet them. She emphasized that imperfect self-defense "does not apply when the defendant, through his own wrongful conduct, has created the circumstances that justify his adversary's use of force." She further explained that "[b]elief in future harm is not sufficient, no matter how great or how likely the harm is believed to be." "A danger is imminent if, when the fatal wound occurred, the danger actually existed, or the defendant believed it existed. . . . [T]he danger must seem immediate and present, so that it must be instantly dealt with."

In his closing argument, defense counsel also explained imperfect self-defense, arguing that appellant's conduct satisfied the elements of the defense. According to counsel, appellant was not thinking clearly that night, due to a lack of sleep and the use of drugs, which fueled his fear and paranoia about what Najera would do to him in retaliation.

In rebuttal, the prosecutor made the following argument:

> "The defense argument all along has been fear and paranoia. Fear and paranoia means that the defendant had the legal right to kill [Najera] because he was afraid, because he was paranoid about what might happen.
>
> "But unfortunately, that's just not a legal defense. It isn't.

> "Self-defense is really specific. Your fear and paranoia does not give you the right to go around killing people. It does not. In order to use self-defense, you have to be in imminent danger of being killed."

Defense counsel requested a sidebar, and the trial court overruled the request, stating "[w]e will talk about it later."

In the remainder of her argument, the prosecutor acknowledged that "[i]t was fear and paranoia that drove [the defendant] to think the things that he thought, but he was never in . . . actual fear of imminent danger . . . ." Again, she said, "[t]here's fear and paranoia, but there's not fear for your life such that it's a legal defense." The prosecutor distinguished between the fear that appellant felt regarding the unresolved money issue, and the fear for one's life required for imperfect self-defense.

D. *Motion for Mistrial and Motion for New Trial*

At the end of the prosecution's rebuttal, the trial court reiterated its earlier instruction to the jury: "If you believe that the attorneys' comments on the law conflict[] with my instructions, you must follow my instructions." After the trial court dismissed the jury for deliberations, the following colloquy ensued:

> "THE COURT: In addition, during the People's closing argument – I'm sorry – rebuttal argument, [defense counsel] objected – asked for a sidebar. I actually flagged it. I didn't want to break up the argument and have a sidebar, but I believe you wanted one because you felt, perhaps, [the prosecutor] was misstating the law. Is that accurate?
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> "[DEFENSE COUNSEL]: Yes.

"THE COURT: I suspected that's why you asked.

"[DEFENSE COUNSEL]: She was going into complete self-defense. I never made a self-defense argument. And I think that confused the jury. So for those grounds, I am going to ask for a mistrial.

"THE COURT: Okay. Mistrial is denied. That's why I re-read that last instruction, by the way. I said . . . [if] the attorneys' comments on the law conflict[] with my instructions, you must follow my instructions. And the jury, of course, is presumed to do so."

After the jury returned its verdict, defense counsel filed a motion for new trial on the ground that improperly admitted gang evidence was inflammatory. At argument, defense counsel added that the prosecutor confused the jury by alternately using the terms "self-defense," "imperfect self-defense" and "perfect self-defense" during her closing argument.[5] The prosecutor responded that any misstatement was inadvertent. The trial court denied the motion, finding that the prosecutor had used the term "perfect self-defense" when she really meant "imperfect self-defense," but regardless, the error was not "fatal" and did not undermine confidence in the verdict.

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[5] During her closing, the prosecutor said: "I have to prove that the defendant unlawfully killed – and we put that in highlights because we are going to talk about voluntary manslaughter and perfect self-defense – unlawfully killed [Najera]."

DISCUSSION

A. *Appellant Did Not Forfeit His Claim of Prosecutorial Misconduct.*

Appellant contends the prosecutor committed prosecutorial misconduct – or, more aptly, prosecutorial error – by misstating the law on imperfect self-defense.[6] Respondent argues that appellant forfeited his claim of prosecutorial misconduct by failing to object on that ground and request a curative admonition.

Generally, "'"[a] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion, and on the same ground, the defendant objected to the action and also requested that the jury be admonished to disregard the perceived impropriety.'" [Citations.] The defendant's failure to object will be excused if an objection would have been futile or if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*Centeno, supra,* 60 Cal.4th at p. 674.) "A prosecutor's misstatements of law are generally curable by an admonition from the court," unless the prosecutor's argument is "so extreme or pervasive" that a prompt objection and admonition will not be curative. (*Ibid.*)

Here, defense counsel failed to object on the ground of prosecutorial misconduct and ask for a curative admonition at the time of the alleged misstatement of law. Instead, defense counsel requested a sidebar, which the trial court overruled. The

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[6] "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 666-667 (*Centeno*).)

trial court's explanation that it did not want to "break up the [prosecution's closing] argument and have a sidebar" does not necessarily establish that appellant's objection on the record would have been futile. However, the trial court's own comments make clear that it recognized the basis for the requested sidebar, and found it sufficient to address the issue by reiterating CALCRIM No. 200, which did not specifically address the prosecutor's misstatement. At the earliest opportunity to address the court, defense counsel presented his objection to the prosecutor's statements. On this record, we conclude appellant's claim of prosecutorial error was not forfeited.

B. *The Prosecutor Did Not Commit Misconduct.*

"A prosecutor's conduct violates the Fourteenth Amendment of the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) To establish prosecutorial misconduct during comments made to the jury, appellant must show that "'[i]n the context of the whole argument and the instructions' [citation], there was 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] 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. [Citation.]' [Citation.]" (*Centeno, supra,* 60 Cal.4th at p. 667.)

We find no prosecutorial misconduct because, in the context of the entire argument and instructions given, it was not reasonably likely that the jury improperly applied the prosecutor's statements in an erroneous manner. The jury was instructed multiple times on imperfect self-defense, and also instructed per CALCRIM No. 200 to follow the court's instructions if the attorneys' comments were in conflict. After both sides rested, the trial court instructed the jury on the elements of murder and imperfect self-defense. The prosecutor then addressed each element of imperfect self-defense in her closing argument, summarizing the evidence that disproved its application. She explained, in accordance with CALCRIM No. 571, that belief in some future harm is not sufficient, and that the defendant must "actually believe" that an imminent danger exists. Appellant did not, she argued, believe he was in "imminent danger" when he killed Najera by drowning him; by appellant's own admission, he was tired of waiting for Najera to die. And appellant himself initiated the attack, taking a knife to Najera as the latter tried to sleep. Nor, the prosecutor argued, did appellant actually believe "the immediate use of deadly force was necessary"; had he done so, he would not have abandoned the knife in favor of the less immediate method of choking his victim. Appellant's minor injuries following the incident were disproportionate to the harm inflicted on Najera, and suggested appellant clearly overpowered him. When appellant inflicted the "fatal wound" by drowning, Najera was incapacitated by the stabbings and no longer posed a threat to appellant, who had to drag his body to the bathtub. Defense counsel also discussed imperfect self-defense during his closing argument, using an illustration and explaining that "[i]t's imperfect [self-defense] as

long as you believe that other person believed that he needed to commit this crime."

The prosecutor's rebuttal statements are not inaccurate statements of law. It is correct that fear and paranoia are "not a legal defense" to a charge of murder, and the prosecutor later distinguished between the fear and paranoia that appellant felt, and the actual belief that one is in "imminent danger" required for imperfect self-defense.[7] Her statement that "[i]n order to use self-defense, you have to be in imminent danger of being killed" was, to the extent it referred to perfect self-defense, admittedly irrelevant. But in the context of her entire argument and the court's instructions, it is not reasonably likely that jurors were confused or misled. The trial court instructed the jury on the elements of imperfect self-defense, and the prosecutor summarized the evidence that appellant committed a first-degree murder. The prosecutor correctly informed the jury that appellant's defense was one of imperfect self-defense, and completed her explanation of imperfect self-defense during the rest of her argument. There was no evidence that appellant was afraid of Najera, and appellant later told police that killing Najera was his way of putting in work for the gang.

The prosecutor further explained that while appellant may have felt fear and paranoia about the missing money and the

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[7] The prosecutor argued: "And fear like this is just not enough. To find imperfect self-defense, it's not enough to be afraid and to be paranoid, even if there's some basis for your fear and paranoia. . . . You have to be afraid of the person who is attacking you. . . . And to find it in this case, what you need to have is an actual belief. The defendant had to have an actual belief that he was in imminent danger of being killed in that room alone with [Najera]."

repercussions of punching Najera at the meeting, he did not harbor an "actual belief" that his life was in imminent danger at the time he killed Najera. The evidence indicated that appellant attacked Najera when he perceived him to be lying down and trying to sleep. Appellant laid aside his knife before attempting to choke Najera, clearly gained an "advantage" over Najera as he stabbed him multiple times, and dragged Najera's incapacitated body to the bathtub with the express purpose of drowning him. Such behavior was inconsistent with an actual but unreasonable belief that appellant was in imminent danger of being killed. After both sides rested, the trial court reiterated that jurors should defer to the court's instructions if they perceived any conflicts based on the attorneys' arguments. In the context of the entire argument and the court's curative instructions, it is not reasonably likely that jurors misunderstood or misapplied the prosecutor's statements.[8]

Even had we found error, we would deem it harmless. Generally, any potential harm resulting from prosecutorial error may be cured by proper jury instructions, and jurors are presumed to understand and follow the court's instructions. (See *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083 [prosecutor's misstatement of law was harmless in light of court's correct legal instruction and corrective CALCRIM No. 200 instruction that jurors disregard attorney arguments conflicting with the court's instructions]; *People v. Osband* (1996) 13 Cal.4th 622, 717 ["When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the

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[8] The jury's swift verdict – after deliberating less than five hours — also supports this position.

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.' [Citation.]"]; *People v. Sanchez* (2001) 26 Cal.4th 834, 852 [in the absence of any evidence to the contrary, "[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions"].) Before closing arguments, the trial court specifically instructed the jury on the elements of imperfect self-defense. The jurors were also instructed that arguments of counsel are not evidence, and that the jury must defer to the court's instructions when an attorney's statements of law conflict with those instructions. Furthermore, as explained above, evidence supporting appellant's imperfect self-defense theory was weak, rendering harmless any prosecutorial misstatement.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

WILLHITE, J. COLLINS, J.