

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DWIGHT RAY THOMAS,

Defendant and Appellant.

2d Crim. No. B234358
(Super. Ct. No. 1351386)
(Santa Barbara County)

Dwight Ray Thomas appeals from a judgment following conviction by jury of first degree residential burglary and receipt of stolen property. (Pen. Code, §§ 459, 496, subd. (a).)¹ In a bifurcated proceeding, he admitted that he had served two prior prison terms. (§ 667.5, subd. (b).) The court sentenced him to eight years in state prison, consisting of the upper term for burglary, plus one year for each prior prison term. The court imposed and stayed a two-year prison term for receiving stolen property. (§ 654.)

Thomas contends the trial court erred when it denied his motion for mistrial because he suffered incurable prejudice when a prosecution witness mentioned his release from "the penitentiary." We affirm.

¹ All statutory references are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

At 9:15 on a November morning, John Villa took his son to a motel to visit a prostitute, Leslie Munoz. While he was away, someone smashed the sliding doors of his mobile home and took guns, cash, and a Vizio 32-inch flatscreen television. Between 9:30 a.m. and 10:00 a.m., a witness saw two black men speed away from Villa's home in a dark four door Saturn

Munoz, had been to Villa's home before. She was close friends with Thomas. Her motel room was registered in Thomas' name. She took a photo of Thomas in her motel room at 8:19 a.m., just before Villa's son came to visit her. At 10:12 a.m., Munoz sent a text message to Thomas that said, "He going from here now, K."

Villa and his son returned home at about 10:12 a.m. Villa called the Sheriff's Department. Deputy Jonathan Fleming arrived sometime around 10:30 a.m. At about 11:00 a.m., Villa drove back to Munoz' motel room. He saw a black Saturn parked in front and he wrote down the license plate number. When Villa knocked on the motel room door, Thomas answered. Villa told Thomas and Munoz that he had been robbed and he would be back with the sheriff.

The Saturn was registered to the mother of Thomas' children, Sandra Castillo. On the afternoon of the burglary, deputy sheriffs searched the home that they shared. The deputies found a Vizio 32-inch flatscreen television on the floor between the bed and the wall. It had blood on it and it was unplugged. Villa later identified the television.

Castillo told a deputy sheriff that a friend gave her the television two or three days earlier. She said Thomas had been home with her all morning, from the time he took their daughter to school at about 6:00 a.m. until 1:15 p.m. when she and Thomas went to a thrift store and then to Munoz' "house." Deputies later discovered that Castillo had sent a text message to Thomas at 11:07 a.m. with a photograph of the television.

Detective Fleming interviewed Thomas the next day. He said Thomas and Munoz were friends and he met her when he got out of the "penitentiary." Thomas said he had not been to Munoz' motel on the day of the burglary, except to drive by it in the afternoon. He said he had been home all morning after he took his daughter to school until about 12:30 p.m. He said he "never" went anywhere else that day.

Thomas said that two Hispanic men brought a television to his house around noon so he could sell it. He could not name them. He told Deputy Fleming, "[A]t the time I know it was stolen." He then said, "At the time I didn't know it was stolen . . . [,] but . . . I know it has something faulty to do with it."

Thomas told Deputy Fleming, "I know what happened now. And I know how-how-how serious it really is. It was some-some guns involved. . . ." Deputy Fleming had not mentioned guns. According to Deputy Fleming's testimony, Thomas said several times that he could get the guns back if they gave him 48 hours. According to the interview transcript, Thomas said, "I can get you every single one of those (unintelligible) bad men . . . ," and then Fleming and Thomas spoke over and interrupted each other.

Deputy Fleming photographed messages from Thomas' cell phone. On the day of the burglary, Thomas and Munoz exchanged messages starting at about 4:00 a.m. At about 6:00 a.m., Thomas exchanged messages with "Sonny." Thomas wrote to Sonny, "Handle your biz. I just got off the phone with [Munoz]. She's going to make that call around 7:15 . . . 7:30. Handle it Little Bro. Time to go to work." At 6:20 a.m., Sonny wrote, "The old lady is tripping so I'm not going to make it, Bro. . . . She did not have to work today." At 7:01 a.m., Thomas wrote to Munoz, "Call . . . back ASAP." At about noon, Thomas wrote to Sonny, "I got them things, though, all long." The stolen guns were all long barreled.

Munoz and Thomas were arrested and charged with residential burglary. Thomas sent Munoz a letter in jail. He wrote, "let's just get the facts straight. I came down to--I came down the morning to take you to your storage, kicked it for a minute and took my ass back home. The only other time that you saw me was when I came

back to the room to ask you where Rocky got the T.V. from." Thomas supplied explanations for the text messages. He wrote to Munoz that the "10:12" text message ("He going from here now, K"), "was the manager You know, he's always coming around and always to see if you was doing -- if you was gonna pay for another night" Thomas wrote that the "6:12" message to Sonny, ("Handle your biz. . . . Time to go to work"), "was [about Munoz] making that phone call to see if me and Little Brother could do some work for one of your folks. . . . You pick who . . . seeing you know just about everybody in every business, I'm thinking the landscaping/maintenance business." Thomas wrote that Munoz should "put a straight 10 on it" when she testified. He wrote, "I want you looking extra pretty, China, as it's going down. . . . They will not break us."

Munoz entered into a plea agreement. Under the terms of the agreement, she pled guilty to residential burglary but would be permitted to withdraw that plea after she cooperated with the prosecution and testified. She would then receive probation in exchange for pleading guilty to grand theft.

At trial, Munoz testified that Thomas planned the burglary. Her role was to keep Villa's son at the motel room as long as she could, "so that his house could get robbed," and to let Thomas know "when the victim left." She showed Thomas where Villa's house was. Thomas was present when she spoke to Villa's son on the telephone to arrange his visit. Also present were "Rocky" and "Sonny." When she hung up, Thomas asked her if that was the person "with the guns."

During trial, the jury saw a videotape of Deputy Fleming's interview with Thomas and received the transcript. By agreement, counsel excised the reference to "the penitentiary." The prosecutor did not admonish Deputy Fleming to avoid reference to "the penitentiary." Defense counsel did not move to exclude reference to the "penitentiary," or otherwise move to exclude evidence of Thomas' prior criminality.

During the redirect examination of Deputy Fleming, the prosecutor asked him about his interview with Thomas. She said, "Did you ask him how he -- if he knew Leslie Munoz?" Deputy Fleming answered, "He said that he had known her since

around 2002, and that he had met her when he had gotten out of the penitentiary." Defense counsel objected.

The court excused the jury and defense counsel moved for a mistrial. The prosecutor said she did not intend to elicit the statement. The trial court found this to be true. It also found that Deputy Fleming's statement was non-responsive. Deputy Fleming told the court that the prosecutor did not have "any conversation" with him before trial "about not mentioning the penitentiary." The court initially indicated that it was inclined to grant the motion. But, after inviting and reviewing authorities and considering lengthy argument, the court denied the motion on the following morning. It concluded that the reference was not unduly inflammatory given the nature of the case as a whole.

The court struck that portion of Deputy Fleming's response that referred to the penitentiary, and admonished the jury as follows: "We ended the day yesterday so far as you were concerned with a question asked and a nonresponsive answer given by the officer. That question asked when the defendant indicated he had met Leslie Munoz. The answer was nonresponsive. Nothing in the answer was helpful, or will be helpful, to you in trying to decide whether he defendant is guilty or anything. I have stricken that answer and you are to disregard it. Again, it has nothing to do with issues that you have to decide in this case."

Thomas testified that he did not burglarize Villa's home, he had never been near it, and he did not ask anyone else to burglarize it for him. He said he received the television from "Rocky," but he did not know it was stolen.

Thomas testified that he left his house several times on the morning of the burglary. He said he took his daughter to school at about 6:45 a.m., went home, and then "went back to town," "to [Munoz']" room." He was with Munoz about 20 minutes, "[j]ust long enough to take her to storage, you know, back, smoke a cigarette." Then he went home. While he was home, "Rocky" called to ask if Thomas wanted to make some money. Thomas said, "Yes." Rocky came to the house with a television. Thomas did not know where it came from and he did not ask.

Thomas testified that after Rocky left, he went back to Munoz' motel. He was in her room for about two or three minutes when Villa knocked on the door. Villa said his house had been burglarized. Thomas went back home again. Later that afternoon, Thomas and Castillo went back downtown together and drove by Munoz' motel but did not stop.

Thomas explained some of the text messages. He said Munoz must have been referring to the motel manager when she wrote, "He going from here now, K." He did not ask Munoz to tell him when the Villas left her place. He said he sent the message to Sonny about going to work, because Sonny was going "to do some temporary work possibly for [Munoz]. I mean, not for [Munoz], but for one of [Munoz'] clients, temporary work whatever." He said Castillo sent him a photograph of the television so he "could sell the T.V. to people."

Thomas acknowledged his letter to Munoz. He said he was not trying to make her testify in any particular way. The prosecutor did not confront Thomas with his criminal history.

Castillo testified that "a Mexican fellow" brought a television into their bedroom at about 9:30 or 10:00 on the morning of the burglary. She asked Thomas if they could keep it, and he said they were "going to make some money off it." Thomas left at about 11:00 a.m. to take Munoz to a storage unit. Thomas called and asked her to describe the television. She "texted" him a photograph of it. Castillo acknowledged her felony criminal record.

The jury deliberated for one day and asked several questions before reaching its verdict. In the morning of deliberations, they requested a DVD player, speakers, a transcript of Castillo's testimony, Munoz' testimony, Thomas' "testimony of timeline," and transcripts of "the DVD."

Before returning a verdict in the afternoon, the jurors sent two notes to the court. The first, sent at 2:35 p.m., stated, "We did not all agree on 1 verdict. We read and re[-]read the instructions." The jury foreman explained that they were divided 10-2

on both counts and could not reach agreement. The court asked the jurors to deliberate for another forty minutes and report back.

Twenty-five minutes later, the jurors sent another note: "We decided we need direction." The foreman said that they had a "little bit of a breakthrough" after they sent that note, but they needed more "direction" concerning "circumstantial as opposed to actual physical evidence." He said, "It seems to be a point that is sticking with one of the jurors," who seems to think "that there's too many areas that gee, he could have done it or he couldn't have done it. It doesn't look like maybe he was there, maybe he wasn't there. So, that gives him the reasonable doubt." The court re-instructed the jury on circumstantial and direct evidence and reminded them that, if they could draw two reasonable conclusions from the evidence, they must accept the conclusion pointing to innocence. The jury returned to the jury room and reached a unanimous guilty verdict on both counts within twenty minutes.

DISCUSSION

A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been "irreparably damaged." (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) We use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial. (*Ibid.*) "A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) 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. (*People v. Wharton* (1991) 53 Cal.3d 522, 565.)

The absence of prosecutorial misconduct does not preclude a finding of incurable prejudice. "Although most cases involve prosecutorial or juror misconduct as the basis for the motion, a witness's volunteered statement can also provide the basis for a finding of incurable prejudice." (*People v. Wharton, supra*, 53 Cal.3d at p. 565.) A "jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith." [Citations.] "It 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, 934-935, quoting *People v. Seiterle* (1963) 59 Cal.2d 703, 710.)

Exposing 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; *People v. Allen, supra*, 77 Cal.App.3d at pp. 934-935 [statement that defendant was "on parole" incurable by admonition when evidence was "extremely close"]; *People v. Roof* (1963) 216 Cal.App.2d 222, 225, 227 [statement that defendant had previously been "charged with contributing to delinquency of a minor" incurable by admonition when criminal intent was a "close question"]; *People v. Ozuna* (1963) 213 Cal.App.2d 338, 339, 341-342 [statement that defendant was an "ex-convict" incurable by admonition when it resulted from "calculated" misconduct and close evidence resulted in hung jury in first trial].)

But here, any prejudice was curable by admonition because Deputy Fleming's reference to the "penitentiary" was fleeting and insignificant in the context of overwhelming circumstantial evidence that Thomas coordinated the burglary. In *People v. Bolden, supra*, 29 Cal.4th at p. 555, the trial court properly denied a motion for mistrial after a police officer testified, "It was at the Department of Corrections parole office located at--," (*id.* at p. 554) when the prosecutor asked him for defendant's address. The prosecutor had warned the witness three times not to refer to the parole office, and interrupted the witness as soon as he did so. The Court concluded that it was, "doubtful that any reasonable juror would infer from the fleeting reference to a parole office that defendant had served a prison term for a prior felony conviction. The incident was not significant in the context of the entire guilt trial" (*Id.* at p. 555.)

Here, the prosecutor did not warn Fleming not to mention the penitentiary. But the evidence of guilt was overwhelming. In *People v. Harris, supra*, 22 Cal.App.4th 1575, the trial court properly denied a motion for mistrial after a prosecution witness indirectly referred to the defendants' parole status after defense counsel asked how often she had discussed the case with the victim. She said, "I don't

know. [¶] The first two weeks it was just like . . . we talked about it and stuff, because their parole officers were calling and everything and I was just nerved up--." (*Id.* at p. 1580.) The trial court struck the statement and admonished the jury to disregard it. (*Id.* at p. 1581.) The court of appeal concluded that, whether or not the court's order denying mistrial was an abuse of discretion, it was harmless. (*Ibid.*) The evidence of guilt was "overwhelming and undisputed," including "virtually identical" eyewitness and victim accounts of the robbery, the defendant's immediate apprehension and identification, and his possession of the stolen property. (*Ibid.*)

Here, no eyewitness saw Thomas enter Villa's house, but his own cell phone messages, his incriminating statements, his letter to Munoz in jail, and the well-corroborated testimony of Munoz supplied overwhelming evidence that Thomas organized the burglary. His inconsistent timelines for the morning of the burglary further discredited his testimony. This was not an exceptionally close case.

Thomas argues that no forensic evidence linked him to the burglary, but none was necessary. He told Deputy Fleming that his fingerprints would be on the stolen television and the television was in his bedroom. His text messages documented his involvement in the crime.

That the jurors requested direction does not indicate that the evidence was close. They deliberated for less than a day. They indicated that one juror did not understand that circumstantial evidence may dispel reasonable doubt. When the court clarified that it may, the jury reached a verdict within twenty minutes.

Thomas argues that the prosecutor is "to blame" because she should have warned Fleming not to mention the "penitentiary." (*People v. Bentley* (1955) 131 Cal.App.2d 687, 690, disapproved on another grounds in *People v. White* (1958) 50 Cal.2d 428, 431.) A prosecutor "has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial." (*Bentley*, at p. 690.) But this case does not involve highly prejudicial evidence of the kind that a witness deliberately volunteered in *Bentley*. There, a "police officer deliberately made [a] statement about defendant being

a suspect in another [child molestation] case in 1942 with the idea in mind of prejudicing defendant." (*Ibid.*) The passing reference to incarceration here was inadvertent and the trial court did not abuse its discretion when it determined that any prejudice was curable by admonition.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Roger Randall, Judge
Superior Court County of Santa Barbara

John Derrick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, Russell A. Lehman, Deputy Attorney General, for Plaintiff and Respondent.