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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. TYRELL TATUM, Defendant and Appellant.	B268692 (Los Angeles County Super. Ct. No. LA081378)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael V. Jesic, Judge. Judgment affirmed.

Randall Conner, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Tita Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

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In this appeal, we affirm defendant Tyrell Tatum's judgment of conviction. After review, we reject defendant's challenges based on alleged prosecutorial misconduct and alleged ineffective assistance of counsel.

BACKGROUND

On July 13, 2015, defendant was involved in a motor vehicle collision on Ventura Boulevard. Defendant was charged with driving under the influence of alcohol with three prior similar offenses, refusal to take a chemical test, and misdemeanor vandalism of a jail door. A prior serious and/or violent felony and two prior prison terms also were alleged. The hotly contested issue during the jury trial was whether defendant was under the influence of alcohol at the time of the collision.

During trial, defendant's theory was that the police officer who administered field sobriety tests was inexperienced, and therefore the officer's conclusion that defendant was intoxicated should not be credited. On appeal, defendant argues that the prosecutor committed misconduct and that his counsel was ineffective for failing to object to the misconduct or request an admonition.

1. Opening Statements

In her opening statement, the prosecutor stated that it was a "miracle" no one was injured in the motor vehicle collision caused by defendant. The prosecutor stated: "[W]hat could have been a tragedy turned out to be a miracle. And that miracle meaning that nobody was killed." "[T]he other miracle" was that one of the cars, which was hit, crashed into a store that was closed rather than "into the coffee shop filled with people." "[A]nother miracle" was that no person involved in the collision was hurt. The prosecutor

stated: "It's a miracle that the defendant is alive and that all of the people on Ventura Boulevard is [*sic*] alive."

Defense counsel did not object to the prosecutor's opening statement describing the "miracles." The court overruled defense counsel's objection to the display of a photograph of the coffee shop near the collision. The photograph showed people sitting outside the coffee shop, located on Ventura Boulevard. However, the court later sustained an objection and excluded the photograph from evidence.

In her opening statement, defense counsel countered the prosecutor's "miracle" theory, stating: "This is not a case about a miracle. This is not a case about avoiding death. That's lots of drama. This case is about whether or not someone was under the influence." Defense counsel told jurors: "[B]e sure as you listen to every part of the evidence to remind yourself what you're here to decide, not about a miracle. You're here to decide if someone was under the influence and to decide if the People in this case . . . have given you enough evidence to determine beyond a reasonable doubt that that is true."

Defense counsel further presented her theory: "The evidence will show that everything you get is in the form of what's called the FST's, field sobriety tests. Those are subjective. Those are 1 person, in this case an officer, giving tests and determining what that officer thinks about a level of impairment." "When you listen to the evidence put forth by the People, ask yourselves if these are objective factors to determine if someone is under the influence. You will find that they are not."

2. Prosecution Evidence

It was undisputed that defendant caused a motor vehicle accident on July 13, 2015. Christine Naegle, a passenger in a

vehicle struck by defendant, noticed that defendant smelled of alcohol. She observed defendant try to leave the scene, but he was unable to flee because his car was inoperable. Naegle concluded that defendant was trying to flee because he pressed on the gas and turned the steering wheel. When Naegle started to call 911, defendant asked her to stop. Naegle described defendant as "belligerent and obnoxious" towards the police officers who arrived at the scene. Specifically, defendant told an officer, "That badge doesn't fucking scare me. I have friends."

Vincent DiPersio also was involved in the collision. After being hit by defendant, DiPersio's car ended up inside a store, next to a populated coffee shop (the one in the picture shown to jurors). DiPersio testified that patrons of the coffee shop "came to [his] rescue." The court sustained an objection when the prosecutor asked DiPersio if he was lucky to be alive. As noted, at the request of defense counsel, the court also excluded the picture of the coffee shop.

Alonzo Campos was riding his motorcycle when he saw defendant, who was speeding, pass him. Campos estimated that defendant was driving about 75 miles per hour just before the collision.

Scott Eyer, a firefighter paramedic who responded to the scene after the collision, testified that defendant appeared to be under the influence of alcohol. Defendant's eyes were bloodshot, and he was acting irrationally.

Defendant completed field sobriety tests administered by Officer Trevor Sankey. Sankey had not previously administered such tests but had been trained to administer them. Based on defendant's performance on these tests, Sankey opined that defendant was under the influence of alcohol.

Sankey's opinion that defendant performed poorly was based on the following. On the horizontal gaze nystagmus test, which requires the subject observe a pen and tests involuntary eye jerking, Sankey observed defendant twitching his eyes.[1] The eye twitching was a sign of impairment resulting from alcohol. When he administered the Rhomberg balance test, Sankey observed defendant sway. Nevertheless, Sankey concluded he performed "okay" on that test. Defendant fell off a line when he was asked to take nine steps on a line. Defendant was not able to stand on one foot, but started to sway and hop. When asked to touch his nose with his finger, defendant was able to do so three out of six times. Sankey also observed that defendant's eyes were bloodshot and watery.

Defendant refused to submit to a blood or breath test. He said: "I refuse. Fuck you. I refuse. I'm a real fucking criminal." Defendant was read an admonition that his refusal could be used against him.[2]

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[1] " 'Nystagmus is an involuntary rapid movement of the eyeball, which may be horizontal, vertical, or rotatory. [Citation.] An inability of the eyes to maintain visual fixation as they are turned from side to side (in other words jerking or bouncing) is known as horizontal gaze nystagmus, or HGN. [Citation.]' [Citation.] The theory supporting HGN testing is that intoxicated persons exhibit HGN and that a field test conducted by a police officer can identify the condition." (*People v. Joehnk* (1995) 35 Cal.App.4th 1488, 1493.)

[2] The admonition provided: "You are required by state law to submit to a chemical test to determine the alcohol content of your blood. Number 2, you have the choice of taking a blood or breath test when applicable. Since you need medical treatment your choice is limited to the test, which is a breath test or blood test. These tests are available at Van Nuys station. If you take a breath test a

During cross-examination, Officer Sankey acknowledged that the result of field sobriety tests was subjective. He testified that fatigue and stress can affect a person's performance. He also acknowledged that he did not recall the specific parameters for the distance of the pen from the subject's face and may not have correctly positioned the pen when administering the horizontal gaze nystagmus test. Sankey did not recall reviewing standards issued by the National Highway Traffic Safety Administration for all of the tests, but did for at least one of them. Sankey did not recall if there was a baseline for the Rhomberg balance test. Sankey was not aware of a standard of deviation for the test that required defendant to walk in a line.

3. Defense Evidence

When defendant's fiancée arrived at the scene shortly after the collision, she did not smell alcohol on defendant's breath. The passenger in defendant's vehicle also did not smell alcohol on defendant. Neither saw defendant stumble or slur his speech.

Defendant did not testify. He did not claim that he was unconscious at the time of the accident (as he states on appeal).

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sample will not be saved and you . . . or your attorney will not have a breath sample to test for blood alcohol content. If you want any remaining sample saved for your use you must choose to take a blood test, which will be saved at no cost to you and may be tested by any party in any criminal prosecution. If you refuse to submit to or fail to complete a test your driving privilege will be suspended for 1 year or revoked for 2 or 3 years. . . . Refusal or failure to complete a test may be used against you in court. In addition, if you refuse to submit to a test or fail to complete a test and you are convicted of driving under the influence of any alcoholic beverage or drugs or any combination of these your refusal will result in a fine and mandatory imprisonment."

4. Vandalism

Defendant damaged the door of the jail where he was held after having been arrested. He damaged it by kicking it multiple times.

5. Instructions

Jury instructions included the following: "A person is under the influence if as a result of drinking or consuming an alcoholic beverage his or her mental or physical abilities are so impaired that he or she is no longer able to drive a vehicle with the caution of a sober person using ordinary care under similar circumstances. The manner in which the person drives is not enough by itself to establish whether the person is or is not under the influence of an alcoholic beverage. However, it is a factor to be considered in light of all the surrounding circumstances in deciding whether the person was under the influence."

"If the defendant refused to submit to [a chemical] test after a peace officer asked him to do so and explain[ed] the test's nature to the defendant then the defendant's conduct may show that he was aware of his guilt. . . . However, evidence that the defendant refused to submit to such a test cannot prove guilt by itself."

"Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. Nothing that the attorneys say is evidence. In their opening statements and closing arguments the attorneys discussed the case, but their remarks are not evidence. Their questions are not evidence. Only the witnesses' answers are evidence."

The court instructed jurors: "Do not let bias, sympathy, prejudice, or public opinion influence your decision." The court further instructed: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show

that he was aware of his guilt. If you conclude that the defendant fled or tried to flee it is up to you to decide the meaning and importance of that conduct."

6. Closing Argument

Prior to closing argument, the court warned counsel that neither was permitted to appeal to the passions of jurors. The court stated that referencing "victims on the side of the street is strictly [appealing] to the passions of the jury that all these people could have been killed that day." The prosecutor did not mention her "miracle" theory during closing argument. She emphasized the testimony of defendant's poor driving, his poor performance on the field sobriety tests, the smell of alcohol, his attempt to escape, and his refusal to submit to a chemical test.

Defense counsel emphasized Officer's Sankey's lack of experience in administering field sobriety tests. Defense counsel also argued that both defense witnesses testified that defendant was upset but was not drunk.

7. Verdict and Sentence

Defendant was convicted as charged. The priors were found true following a court trial. The trial court denied defendant's motion for a new trial based on prosecutorial misconduct relating to the "miracle" theory. The court found: "The objections were made during the trial, not during opening statements, but when the evidence portion came on. The defense did make objections and I ruled on the objections. And I did find it to be irrelevant. And I admonished the jury to disregard. And they are presumed to follow my instructions. And I believe they did follow my instructions in this case. And so the motion for new trial is denied based on that."

Defendant was sentenced to five years for driving under the influence and a concurrent one-year sentence for the vandalism.

DISCUSSION

Defendant argues that the trial court erred in denying his motion for a new trial based on prosecutorial misconduct. He also argues that he received the ineffective assistance of counsel. As we shall explain, defendant fails to show that reversal of his conviction is warranted.

1. Defendant Forfeited His Claim of Prosecutorial Misconduct by Not Objecting or Requesting an Admonition

Under state law, prosecutorial misconduct includes " ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Earp* (1999) 20 Cal.4th 826, 858.) A defendant's federal due process rights are violated when a prosecutor's improper remarks " ' " ' "so infect[] the trial with unfairness as to make the resulting conviction a denial of due process." ' " ' " (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) An appeal to the passions of the jurors or for sympathy of the victim is improper. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342, 1344.) However, " '[t]o preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition . . . .' " (*People v. Earp, supra*, at p. 858.) Only, if an objection would have been futile, defendant is excused from objecting. (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

Here defendant's claim of prosecutorial misconduct was forfeited. The record demonstrates that an objection to the prosecutor's "miracle" theory would *not* have been futile. The court sustained defense counsel's objections, found the prosecutor's proposed evidence that people seated at the nearby coffee shop were not injured was irrelevant, and instructed the prosecutor to refrain from repeating her "miracle" theory or suggesting bystanders could

have been killed during closing argument. Moreover, in rejecting defendant's motion for a new trial on the ground of prosecutorial misconduct, the court made clear that "[t]he objections were made during the trial, not during the opening statements . . . . The defense did make objections and I ruled on the objections. And I did find it to be irrelevant." There is no merit to defendant's claim that an objection would have been futile.

Defendant's purported analogy to *People v. Bandhauer* (1967) 66 Cal.2d 524, 530, is inapt. ". . . *Brandhauer's* rationale is that, due to the incremental nature of the improper argument, by the time the basis of an objection was apparent it would have been ineffective to counteract the prejudice flowing from the misconduct. In other words, an objection would have been futile . . . ." (*People v. Seumanu, supra*, 61 Cal.4th 1293, 1341.) Here, the prosecutor started her opening statement by claiming that "what could have been a tragedy turned out to be a miracle. And that miracle meaning that nobody was killed." Her argument was not incremental in nature; the basis for an objection was clear from the outset.

Finally, raising a claim of prosecutorial misconduct in a motion for new trial is insufficient to preserve the issue because it does not afford the trial court the opportunity to admonish the jury and mitigate any prejudice. (*People v. Williams* (1997) 16 Cal.4th 153, 191.) In short, defendant fails to show he preserved his claim of prosecutorial misconduct.

2. Defendant's Ineffective Assistance of Counsel Claim Lacks Merit

Based on his counsel's failure to object to the alleged prosecutorial misconduct, defendant argues that he received the ineffective assistance of counsel. As defendant recognizes, he bears

the burden to show that (1) his counsel's performance was deficient because it fell below an objective standard of reasonableness and that (2) counsel's deficiencies resulted in prejudice. (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) " 'The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.' " (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

With respect to the "miracle" theory repeated in the prosecutor's opening statement, jurors were instructed that the opening statement was not evidence. They were instructed that "[u]nless the evidence proves the defendant guilty beyond a reasonable doubt . . . he is entitled to an acquittal and you must find him not guilty." Thus jurors were instructed that they could not rely on the prosecutor's opening statement to convict defendant. Defendant therefore cannot show a reasonable probability that absent the claimed prosecutorial misconduct during opening statement he would have received a more favorable verdict.

The only challenged evidence was DiPersio's testimony that his car ended up next to a coffee shop with a bunch of people sitting outside. A picture was shown to jurors but not admitted into evidence. DiPersio testified that persons at the coffee shop came to his rescue. Evidence of a crowded coffee shop next to the collision is not inflammatory and is not probative of whether defendant was intoxicated at the time of the collision. Even if the evidence was irrelevant, it was not prejudicial to defendant.

Although defendant emphasizes the weaknesses in Officer Sankey's testimony regarding the field sobriety tests—defendant's intoxication was supported by other evidence. There was evidence defendant had bloodshot eyes and acted belligerently. He tried to

flee the scene and refused to submit to a breath or blood test. Not only did the victim Naegle smell alcohol but the trained firefighter concluded that defendant was under the influence of alcohol. In light of this evidence, there was no reasonable probability that the brief introduction of evidence that a nearby coffee shop was populated and that other bystanders could have been injured affected the verdict. Although defendant argues that none of this evidence conclusively shows that his blood alcohol was 0.08 percent or higher, the evidence including defendant's refusal to submit to a test to measure his blood alcohol supported that inference.

Defendant also emphasizes that the court sustained an objection to the prosecutor's questions to DiPersio regarding whether he was lucky to be alive and to Campos regarding why he held on to the handlebars on his motorcycle. No evidence was elicited in response to these questions and defendant was not prejudiced by them. Moreover, to the extent that the prosecutor was attempting to imply that DiPersio and Campos could have been injured, that inference is not prejudicial. Almost any motor vehicle collision can result in injury regardless of whether a driver is intoxicated at the time of the collision.[3] The challenged evidence

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[3] Defendant's reliance on *People v. Centeno, supra*, 60 Cal.4th 659 is misplaced. In *Centeno*, the court held that a diagram showing the boundaries of California to explain reasonable doubt was prejudicial. The court further found that the prosecutor's argument served to lower the prosecution's burden of proof. (*Id.* at p. 673.) Here, in contrast, the challenged opening argument and evidence did not serve to lower the prosecutor's burden of proof. In contrast to *Centeno*, here no claim could be made that the prosecutor "misled the jury about the applicable standard of proof and how the jury should approach its task." (*Id.* at p. 674.)

did not bear on the credibility of any key witness or undermine defendant's principal argument that Sankey was inexperienced.

Notwithstanding the prosecutor's opening statement and the evidence of persons at the coffee shop, during their closing arguments, the parties focused on the key issue—whether defendant was under the influence at the time of the collision. Jurors were instructed to rely only on the evidence in reaching the verdict, and nothing in the record suggests that they failed to follow this instruction. Defendant has not met his burden of demonstrating that absent the alleged ineffective assistance, a reasonable probability of a more favorable outcome. Therefore, he cannot show he received the ineffective assistance of counsel. (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1008 ["It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a 'reasonable probability' that absent the errors the result would have been different."].)

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J. SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.