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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES W. NEAL,

Defendant and Appellant.

B277413

(Los Angeles County
Super. Ct. No. BA441433)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard S. Kemalyan, Judge. Affirmed.

Andrea Keith, 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 Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Defendant James W. Neal appeals from the judgment entered following trial at which the jury found him guilty of sale of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). The trial court suspended imposition of sentence and placed him on probation for a five-year period on certain terms and conditions.

Defendant contends the judgment must be reversed, because the trial court denied his motion for a mistrial based on references during trial to the absence of audio on the videotape of the drug transaction and his later mistrial motion based on a brief and somewhat vague reference to gangs. Further, he contends cumulative errors also mandate reversal of the judgment.

We affirm the judgment. The trial court did not abuse its discretion in denying both motions for mistrial. The court admonished the jury pursuant to the instruction crafted by both parties not to consider the absence of audio or references to the absence of audio on the videotape, which instruction the jury is presumed to have understood and followed. The fleeting reference to gang members was inconsequential to the issues in the case and did not give rise to an inference that defendant was associated with any gang.

BACKGROUND

On November 11, 2015, about 3:00 or 4:00 p.m., the Los Angeles Police Department (LAPD) conducted a controlled drug buy. The LAPD equipped the informant with a video and audio recording device, a radio transmitter, and pre-recorded bills. After the informant contacted a “hook,” someone who takes the buyer to a location where drugs are sold, the hook led him to a trailer near Crenshaw Boulevard and 71st Street. Once there, the informant gave the hook a pre-recorded \$20 bill. The hook gave the bill to defendant through a trailer window, and defendant gave the hook 0.38 grams of rock cocaine, which was consistent with a “street-level purchase for

\$20.” The hook gave the cocaine to the informant, who then gave the hook \$5 dollars. Following defendant’s arrest, the police recovered the pre-recorded \$20 bill from a stack of money on defendant’s person. The informant identified defendant at a field showup and from his photograph at trial.

In sum, there was overwhelming evidence of defendant’s guilt of the charged crime.

DISCUSSION

1. Denial of Mistrial Motion Based on Absence of Audio Not Abuse of Discretion

Defendant contends the trial court abused its discretion in denying his initial mistrial motion, because the informant’s references to the absence of audio on the videotape were prejudicial. We find no abuse of discretion.

a. Applicable legal principles

“[T]he trial court is vested with considerable discretion in ruling on mistrial motions.” (*People v. Wharton* (1991) 53 Cal.3d 522, 565.) We review the court’s denial of a mistrial under the deferential abuse of discretion standard. (*People v. Bolden* (2002) 29 Cal.4th 515, 555.) “A trial court should grant a mistrial only when a party’s chances of receiving a fair trial have been irreparably damaged.” (*Ibid.*) In other words, “[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[.]’ ” (*Wharton*, at p. 565.)

b. References to absence of audio

The drug transaction was caught on videotape except for the exchange of the drugs for money, i.e., “a hand reaching out and a hand coming in.” At a pretrial hearing, the trial court granted the defense

motion to exclude the audio portion of the tape, ruling: “The court has listened to the arguments concerning the video and audio associated with that and having heard the arguments and considered the matter, it is my order that the audio connected with the video will not be admissible.”

While the video was played to the jury, the prosecutor asked, “So did you see the car right there?” The informant replied, “Yeah,” and spontaneously asked, “[C]an we get some audio on there. That tells the whole story.”

The court instructed the jury, “I think it’s appropriate . . . that I advise the jury that they’re not going to hear . . . the audio on the video. [¶] I want you to be aware of why that is at least to the extent I can. Portions of things that are said in this audio have evidentiary objections that the court has heard and spoken to the lawyers about and I’ve sustained some of those objections, so as a result, you’re not hearing the audio at this time. There are evidentiary reasons that prevent you from hearing it.”

The court advised the informant although he would “like to refer to the audio, . . . it’s not going to be played so that’s why counsel is asking you questions and both lawyers will ask . . . questions about what happened next.” He responded, “Yeah.” The court then admonished “you should avoid indicating at any time what someone said to you, but you could certainly say what’s happening and what [he] said to people.”

Subsequently, defense counsel asked, “And portions of the video were played here in court today?” The informant replied, “At the point you should have heard the audio.” Noting the witness was answering the question posed by defense counsel, the trial court overruled the defense objection under Evidence Code section 356.

Defense counsel later moved for a mistrial “based upon the highly prejudicial comments continuously stated by [the informant] in regards to his statements about the audio not being played, in essence, . . . to insinuate or wonder why this audio is not being played.” In denying the motion, the trial court noted the court already advised the jury regarding the reason why it would not be hearing the audio and stated “the jury probably understood when I told [the informant], you can tell us what you said, but not what anyone else said to you, that there was an objectionable evidentiary issue.” The court invited counsel for both parties to draft an instruction to the effect that the jury “did not hear the audio because of evidentiary issues and [the jury] was to decide the case without any reference to the audio [or to] what any witness may have stated was presented on the audio.” The court indicated such an instruction “will reinforce what the court told the jury today. On that basis, I would deny the motion.”

The court gave the agreed upon instruction: “Evidence . . . of a video was introduced at trial. [¶] The court ruled that the audio of the video was inadmissible. [¶] You are not to consider the fact that audio exists for any purpose. [¶] You must not speculate or consider why the court excluded the audio. [¶] Any witness’ comments on the existence of audio must be completely disregarded and must play no part in your deliberation process.”

c. No prejudice flowing from references to audio absence

We are not persuaded it is likely that the jury would infer from the two statements of the informant quoted above that the audio contained matter adverse to the defendant and that the defense tactic was to foreclose the jury from hearing the audio portion of the videotape. Immediately after the first comment, the trial court

specifically admonished the jury that the jury would not be hearing the audio because of the court's evidentiary rulings sustaining objections to some of the audio. With regard to the second reference to the absent audio, the court requested and gave the curative instruction drafted jointly by counsel for both parties. This instruction expressly admonished the jury "not [to] speculate or consider why" the audio was excluded and to disregard completely during its deliberations "[a]ny witness' comments on the existence of audio[.]" The jury is presumed to have understood and followed these instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) No prejudice therefore flowed from the two comments regarding the absent audio portion of the videotape. Even without the court's admonitions, we think it unlikely the jury would have been inclined to give any weight to the references to the absence of audio, since there was overwhelming proof of the charged crime, including the video, the informant's eyewitness identification at the field showup and at trial, and the pre-recorded \$20 bill in defendant's possession when he was arrested.

2. Denial of Mistrial Motion Based on Gang Reference Not Abuse of Discretion

Defendant contends the trial court abused its discretion in denying the motion for mistrial based on the reference to gang "affiliation," which he claims was prejudicial. Denial of the mistrial motion was not an abuse of discretion. When viewed in context, the reference to a "gang" was inconsequential.

a. Context of gang reference

Detective Currie testified on cross-examination that during the search of the trailer, the police found a "notebook and a stack of papers." On redirect examination, the prosecutor noted defense counsel had "mentioned some notebooks" and asked what Detective

Currie saw when he looked inside. Detective Currie responded, “They were religious writings, talking about how to recruit gang members, poor people for religious cause.” In overruling a defense relevance objection, the court stated the prosecutor “is entitled to follow up to the extent the defense raised it.”

Subsequently, defense counsel moved for a mistrial “based on the testimony elicited from Detective Currie,” specifically “where [he] testified about what he characterized as writings contained within the [trailer], recruiting gang members for religious movements.” He argued “[t]hose materials and that testimony is highly irrelevant to the charge of cocaine base as it’s brought here. . . . [I]t’s highly inflammatory and the prejudicial effect of that irrelevant, prejudicial testimony . . . would [render] the jury . . . unable to fairly examine the evidence against [defendant].”

The prosecutor pointed out the “defense opened the door for the admission of what was in the notebooks.” He denied any intent to elicit “that information until [the] defense [asked] Detective Currie about the absence of pay-owe sheets and the nature of what was in the notebooks.”

The trial court denied the mistrial motion, finding the defense “opened the door” as to “what actually was in those documents.” The court further ruled that there was no “undue prejudice from this evidence coming in,” because “it’s very clear that this case had to do with drug sales[.]”

b. Reference to gang innocuous

No potential prejudice to defendant could flow from the reference to gang members in this context. As he himself points out, such reference is irrelevant to the cocaine charge in this case. Again, defendant fails to articulate a cogent theory of prejudice. Defendant was not charged with any gang enhancement, and the reason why

defendant sold drugs was irrelevant to any charged offense. To be harmful to the defense, there must be a negative connection to defendant, e.g., he is a gang member or, at a minimum, associated with a criminal gang. When viewed in context, no such inference could be drawn, because the subject of the notebooks pertained not only to “recruit[ing] gang members [but also] poor people for religious cause.” Nothing was said by Detective Currie that could be interpreted as linking defendant to “gang members” or “poor people.”

3. Reversal Unwarranted in Absence of Error

Defendant contends the cumulative errors necessitate reversal of the judgment. Having found no error, we conclude there was no cumulative error. (*People v. Bennett* (2009) 45 Cal.4th 577, 598; *People v. Samayoa* (1997) 15 Cal.4th 795, 849.)

DISPOSITION

The judgment is affirmed.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

FLIER, J.