Filed 1/18/18 P. v. McBride AC2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ANA MCBRIDE, Defendant and Appellant.	B271640 (Los Angeles County Super. Ct. No. BA436038)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Willcox Clarke, Jr., Judge. Affirmed.

Thomas Owen, 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, Steven D. Matthews and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Ana McBride appeals from her conviction for attempted murder and arson, contending that instructional error and a misstatement of law by the prosecutor during closing argument deprived her of a fair trial.

We reject both contentions, and affirm.

BACKGROUND

Beginning in 2004, McBride resided in a single-family home belonging to Brenda Pillors. After Pillors died in 2005, McBride, refused to leave. Marc Duvernay, a probate attorney representing the estate's administrator, instituted eviction proceedings against her, and in January 2012, the Los Angeles County Sheriff's Department carried out the eviction, after which Duvernay changed the house locks.

By 2014, McBride had returned to the residence and changed the locks again. Duvernay summoned police, who again ejected her.

On April 25, 2015, Duvernay allowed McBride to enter the residence and its detached garage to retrieve her belongings, while he waited outside. Inside the house, McBride used gasoline and a barbeque lighter to set fires in four locations. When the conflagration got away from her, she ran out of the house with her wig on fire, threw off the wig, got into her car and drove away. Within a minute, McBride returned with a bottle of lighter fluid and a cigarette lighter. She approached Duvernay, who was closing the garage door while neighbors attempted to help with the house fire, and doused him with lighter fluid. She then went into the garage and set fire to it as well. When McBride exited the garage she used the cigarette lighter to try to set fire to Duvernay, who ran away. McBride then sat on the hood of her

car and watched the house burn, telling neighbors that if she could not have it, it would burn.

Paramedics treated McBride at the scene. She told them Duvernay had hit her over the head with something and knocked her out.

McBride was charged with arson and attempted murder. (Pen. Code, §§ 664/187, subd. (a), 451, subd. (c).)[1] At trial, she testified that when she entered the Pillors residence the kitchen floor had already been doused with an accelerant, and the fire started accidentally when an ash from her cigarette dropped onto the floor. When she ran outside, Duvernay closed the garage door on her head, rendering her unconscious. She never tried to set fire to Duvernay or any structure.

A jury found McBride guilty of attempted murder and two counts of arson and the trial court sentenced her to eight years and four months in prison.

She timely appealed.

DISCUSSION

McBride contends the trial court gave improper instructions on flight and prevarication as they relate to awareness of guilt. She also contends the prosecutor made a misstatement of law that prejudiced the trial.

I. Flight and Prevarication Instructions were Proper

McBride contends the trial court erred in instructing the jury that it could infer from her fleeing the crime scene that she was aware of her guilt, and further erred in instructing that the jury could infer awareness of guilt from her making a false

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

statement to paramedics about having been struck on the head. We discern no error.

The trial court instructed the jury pursuant to CALCRIM No. 372 as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that she was aware of her guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

The court also instructed the jury pursuant to CALCRIM No. 362, as follows: "If the defendant made a false or misleading statement before this trial relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show she was aware of her guilt of the crime and you may consider it in determining her guilt. If you conclude the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

CALCRIM Nos. 372 and 362 are the successors of CALJIC Nos. 2.52 and 2.03, respectively, which contained nearly identical language except where the successor instructions use the phrase "aware of guilt," CALJIC No. 2.03 used the phrase "consciousness of guilt." CALJIC No. 2.53 used neither phrase but has been construed as permitting an inference of consciousness of guilt.

The due process clauses of the federal Constitution protect an accused " 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' " (*Francis v. Franklin* (1985) 471 U.S. 307, 313.) "This 'bedrock, "axiomatic and elementary" [constitutional] principle' [citation], prohibits the State from

using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." (*Id.* at p. 313.)

Neither evidence that a defendant fled from a crime scene nor that she made a false statement in relation to the crime is proof of guilt beyond a reasonable doubt. But common sense and experience tell us that sometimes the guilty flee to evade capture, and sometimes prevaricate to avoid detection. Therefore, "[f]or centuries courts have instructed juries that an inference of guilty knowledge may be drawn from" other facts. (*Barnes v. United States* (1973) 412 U.S. 837, 843.) As pertinent here, it is well established that in appropriate circumstances a jury may infer that a defendant who fled from or prevaricated about a crime did so due to consciousness of guilt. (*People v. Mendoza* (2000) 24 Cal.4th 130, 180 [approving CALJIC No. 2.53, the former flight instruction]; *People v. Crandell* (1988) 46 Cal.3d 833, 871 [approving CALJIC No. 2.03, the former prevarication instruction].) Such an inference is grounded in reason and experience, and instructions permitting the inference leave it to the jury "to determine what significance, if any, should be given to evidence of consciousness of guilt, and caution that such evidence is not sufficient to establish guilt, thereby clearly implying that the evidence is not the equivalent of a confession and is to be evaluated with reason and common sense." (*People v. Crandell*, at p. 871.)

McBride does not quarrel with these principles. Instead, she argues that "consciousness" of guilt is different from "awareness," and the longstanding approval of instructions regarding consciousness should not carry over to instructions on

awareness. This is so, she argues, because consciousness of guilt is merely generalized shame, unbound to any specific matter, while awareness of guilt is a particularized self-acknowledgement that one has committed a crime. Therefore, McBride argues, an instruction that permits the jury to infer awareness of guilt impermissibly allows an inference of guilt itself.

Our colleagues in the Fifth District rejected this very argument (*People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1159), and so do we. "[C]ommon sense and experience tell us that" a defendant who fled from a crime scene or prevaricated about a crime "may have known or been aware of" inculpatory facts. (*Barnes v. United States* (1973) 412 U.S. 837, 845.) The jury is permitted to infer at least that the defendant knew of these facts, although she must be afforded an opportunity to offer a "plausible explanation for such [conduct] consistent with" lack of such knowledge. (*Id.* at p. 845.) Because both "consciousness" and "awareness" of guilt in this context amount to nothing more than knowledge of inculpatory facts, any introspective distinction between them is immaterial for purposes of jury instructions. Therefore, our Supreme Court's approval of instructions regarding consciousness of guilt apply also to instructions on awareness of guilt.

II. Any Prosecutorial Error was Harmless

McBride contends that during closing argument the prosecutor misstated the law regarding heat of passion, which prejudiced the trial. We disagree.

During her argument the prosecutor discussed whether Duvernay striking McBride on the head—assuming that occurred—would be sufficient provocation to support a conviction for the lesser included offense of attempted voluntary

manslaughter. The prosecutor stated that to find sufficient provocation the jury would have to believe that being hit on the head "would cause a person of average disposition, a normal everyday person to act rashly and without due deliberation, from passion rather than judgment." The prosecutor then stated, "Someone hits you. Do you get to [try] to kill them? The answer is no. Just because someone hits you, . . . you don't get to try and kill them. A reasonable person would not have that reaction."

McBride's counsel objected to the argument, and the trial court stated that it amounted to a "misstatement of law." The court clarified that "what is measured is whether whatever action was taken was done rashly and without due deliberation," not whether a reasonable person under such provocation would have undertaken to kill.

The jury later requested clarification as to the heat of passion theory of attempted voluntary manslaughter, but returned its verdict before receiving the court's answer.

A prosecutor's misconduct violates due process if it infects a trial with unfairness. (*People v. Harrison* (2005) 35 Cal.4th 208, 242.) Less egregious conduct may nonetheless constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*Id.* at p. 242.) If a prosecutorial misconduct claim is based on the prosecutor's arguments to the jury, we consider how the statement would, or could, have been understood by a reasonable juror in the context of the entire argument and determine whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) A prosecutor may fairly comment on and argue any reasonable

inferences from the evidence. (*People v. Samayoa* (1997) 15 Cal.4th 795, 837.) But a prosecutor may not misstate the law. (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.)

Voluntary manslaughter is an unlawful killing "upon a sudden quarrel or heat of passion." (§ 192, subd. (a).) "The heat of passion requirement for manslaughter has both an objective and a subjective component." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) The circumstances giving rise to the heat of passion must be "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection" (*People v. Manriquez* (2005) 37 Cal.4th 547, 583-584), and the defendant "must actually, subjectively, kill under the heat of passion" (*People v. Steele*, at p. 1252). The objective component is defined by whether the provocation would cause a reasonable person to react rashly and without reflection, not whether it would cause a reasonable person to kill.

Although the prosecutor's remarks concerning heat of passion amounted to a misstatement of the law, the error was harmless. The trial court fully and correctly instructed the jury on the elements of heat of passion, stating that "what is measured is whether whatever action was taken was done rashly and without due deliberation," not whether a reasonable person under such provocation would have undertaken to kill. The court also admonished the jury to abide by its written instructions, which McBride concedes were correct. "In the absence of any evidence of confusion on the part of the jury, '[j]urors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions.' " (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1083.)

McBride argues the trial court did not actually sustain her objection. The argument is without merit, as the court expressly commented that the prosecutor had misstated the law, then correctly explained the law, thus implicitly sustaining the objection and remedying the claimed error.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.