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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. ANTHONY MICHAEL LEWIS, Defendant and Appellant.	B232848 (Los Angeles County Super. Ct. No. YA077908)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan B. Honeycutt, Judge. Affirmed.

Alex Coolman, 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, Assistant Attorney General, Scott A. Taryle and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Anthony Michael Lewis appeals from a judgment of five years in state prison, following convictions on two counts of second degree robbery. He contends (1) the trial court erred in admitting statements he made to a police officer after he had been threatened by other police officers, (2) the court erred in precluding his trial counsel from questioning the officer about the impact of coercion on the reliability of a confession, and (3) the prosecutor committed multiple acts of misconduct. Finding no reversible error, we affirm.

STATEMENT OF THE CASE

In a four-count information, the Los Angeles District Attorney charged appellant and codefendant Daniel Guarisco with second degree robbery of, respectively, victims Gabriela Cabrera (count 2), Raissa Silva (count 3), Hung Soo Park (count 4), and John Hong (count 5) in violation of Penal Code section 211.[1]

Appellant pled not guilty. A jury found appellant guilty as charged on counts 4 and 5, but acquitted him on counts 2 and 3.[2]

The trial court denied probation, and sentenced appellant to state prison for a term of five years (the upper term) on count 4. A concurrent five-year term was imposed on count 5. Appellant filed a timely notice of appeal.

STATEMENT OF THE FACTS

A. *The Robberies*

On March 21, 2010, at approximately 4:50 p.m., Gabriela Cabrera and Raissa Silva were robbed at gunpoint in Hermosa Beach. Cabrera testified that Guarisco had approached Silva and her after coming out from an alley, and that he

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[1] All further statutory citations are to the Penal Code.

[2] Just after the jury began deliberating, Guarisco pled no contest to count 2, in exchange for the prosecutor's agreeing to dismiss counts 3, 4 and 5.

had left by running back toward the alley. Cabrera testified that she noticed a blue pickup truck, later identified as appellant's truck, parked in the alley. Cabrera also noticed that someone was sitting in the driver's seat of the truck, but she could not identify the driver. Guarisco robbed the women of their purses. Cabrera testified that her purse contained, inter alia, American and Argentinean money.[3] After Guarisco ran away, the two women ran in the opposite direction. They found a man who called 911 on a cell phone and then handed it to Cabrera. Cabrera told the 911 operator about the robbery. At trial, both Cabrera and Silva identified Guarisco. They also testified that the gun depicted in People's exhibit No. 4 was similar to the gun used by Guarisco in the robbery. On cross-examination, Cabrera stated that she never saw appellant "in or about that location" where she was robbed.

That same evening, Hung Soo Park was working at his store in Los Angeles. Park testified that at about 7:27 p.m., appellant, wearing black clothing, entered the store and asked for a Swisher Sweet cigar. As Park turned around to get the cigar, appellant said that instead of the cigar, he wanted to buy some "scratcher" lottery tickets. Park retrieved some scratcher lottery tickets and put them on the counter. When Park looked up, he saw that Guarisco, wearing a white sweatshirt, was also standing at the counter. Guarisco pulled out a gun and pointed it at appellant. Park testified that appellant did not appear to be scared. Guarisco then pointed the gun at Park, and told him to hand over money. Park was very scared. He gave Guarisco all the money in the cash register and on his person, about $1,500. During this time, appellant took the scratcher lottery tickets and walked toward the

[3] Cabrera testified she had arrived in the United States from Argentina two weeks before the robbery.

exit, where he stood, just inside the store, looking outside. After Guarisco took the money, both men ran out of the store.

At trial, Park identified the gun shown in People's exhibit No. 4 as being similar to the gun used by Guarisco. Park also identified appellant and Guarisco. Park testified he had previously identified the two men at a preliminary hearing in July 2010. The robbery was captured on the store's video surveillance camera. The video of the incident was played for the jury. On cross-examination, Park agreed that appellant left cash on the counter before taking the lottery tickets. Guarisco took this money during the robbery.

John Hong also was working at his store in Los Angeles that evening. Hong testified that at about 7:40 p.m., appellant, wearing black clothing, entered the store and asked him for a Swisher Sweet cigar. Guarisco, wearing a white jacket, a beanie and black sunglasses, was standing just behind appellant. Hong retrieved the cigar and handed it to appellant. Appellant put money on the counter and started to leave. Hong called appellant back to give him his change. After appellant got his change, and began to leave, Guarisco pulled out a gun and pointed it at appellant. Hong testified that appellant did not appear to be scared. Guarisco then pointed the gun at Hong. Hong could not recall whether Guarisco initially demanded money because he was "so scared." Hong removed all the money in the cash register, about $250 or $300, and gave it to Guarisco. Guarisco told Hong to put the money in a bag, and Hong did so. Hong testified that during this time, appellant was "just standing next to us." After Hong put the money in the bag, appellant left the store. After Guarisco left, Hong called 911. An audio recording of Hong's 911 call was played for the jury.

Hong identified appellant and Guarisco at trial. He also testified that the gun depicted in People's exhibit No. 4 was similar to the gun used by Guarisco during

the burglary. The robbery was captured on the store's video surveillance camera. The video of the incident was played for the jury. On cross-examination, Hong testified he had previously identified appellant when he was "show[n] [some] pictures."

B. *The Police Investigation*

On April 26, 2010, Hermosa Beach Police Detective Jonathan Sibbald showed Silva a six-pack photographic array of potential suspects. Silva "immediately" identified Guarisco as the man who robbed her and Cabrera.

The next morning, at around 9:15 a.m., Detective Sibbald, Detective Eric Cahalan, and other detectives went to Guarisco's house. After obtaining consent, Detectives Cahalan and Sibbald searched Guarisco's room. The officers found some Argentinean money under the mattress on Guarisco's bed.

An hour later, the detectives went to appellant's house, which was two blocks from Guarisco's on the same street. A blue pickup truck was parked in the driveway. Appellant was home. After obtaining permission from appellant's grandmother to search the house, Detective Cahalan searched appellant's room. The gun depicted in People's exhibit No. 4 was found in a backpack in appellant's room.

Detective Sibbald advised appellant of his *Miranda* rights,[4] and appellant confirmed his understanding of them. Detective Sibbald, with assistance from several other detectives, conducted an audio-recorded interview of appellant. Portions of the audio recording of Detective Sibbald's interview were played for the jury. During the interview, appellant said he bought lottery tickets at one of the stores in Los Angeles. Appellant also admitted owning a gun similar in kind to the gun depicted in People's exhibit No. 4.

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

Hermosa Beach Police Sergeant Raul Saldana transported appellant from his home to the Hermosa Beach Police Department. During the drive, appellant engaged in an audio-recorded conversation with Sergeant Saldana. Appellant initiated the conversation by asking for a tissue. He and Sergeant Saldana then engaged in "small talk." Sergeant Saldana advised appellant that "he was a young man" and "probably needed to use" the situation as a learning experience, and that he did not "necessarily have to continue in this type of activity." At one point, Sergeant Saldana told appellant that the police would disseminate information about the robbery of the two women and of the liquor stores in Los Angeles, and asked appellant if any other crime victims would come forward. Appellant said, "Just a one-day spree." Sergeant Saldana asked, "What's that?" and appellant said, "That's all." Appellant also said he could "guarantee" that no other victims would come forward.

Portions of the audio-recording of appellant's conversation with Sergeant Saldana in the police car were played for the jury. The prosecution began by playing a portion of People's exhibit No. 24 (a CD with an audio recording of the Saldana/Lewis conversation that was "redacted and clarified"), continued by playing from People's exhibit No. 16 (a CD with the original audio recording of the conversation), and finally went back to People's exhibit No. 24 "to play the balance of the interview."

C. *Defense Case*

Appellant did not testify. Appellant's grandmother testified that when police officers came to her house, she opened the door for them. The officers scared her by entering her home, "hollering, demanding, pointing the gun." She also observed that appellant began to cry when he was talking to the officers.

DISCUSSION

Appellant contends his convictions should be reversed because (1) the trial court erred in admitting the conversation between appellant and Sergeant Saldana in the patrol vehicle; (2) the court erred in precluding his trial counsel from cross-examining Sergeant Saldana about the impact of coercion on the reliability of admissions; and (3) the prosecutor committed multiple acts of misconduct. We address each issue in turn.

A. *Statements to Sergeant Saldana*

Appellant first contends the trial court erred in allowing the prosecution to use appellant's comments to Sergeant Saldana. We conclude there was no error, and that in any event, any error was harmless.

1. Relevant Background

Prior to trial, the court determined that Detectives Sibbald and Cahalan had threatened appellant during the interrogation at appellant's home. Specifically, the court determined that the detectives had threatened to take appellant's truck if he did not cooperate, and thus, his grandmother would not have a method of transportation to see her doctor. The court suppressed the roughly 15 minutes of interrogation that followed this threat, concluding that appellant's statements during that time period were coerced.

The court declined, however, to suppress the conversation between Sergeant Saldana and appellant during the drive to the police station. The court found that the impact of the threat had been attenuated for the following reasons: (1) the threat to take appellant's truck was no longer a threat because when Sergeant Saldana and appellant left, the truck remained at the house; (2) appellant initiated the conversation; and (3) the tone and tenor of the conversation was not coercive. The court also noted that the conversation occurred 15 minutes after the

interrogation at the house, and that Sergeant Saldana did not make the threat to take the truck.

Just before Sergeant Saldana testified at trial, appellant's counsel again asked that evidence of appellant's statements to Sergeant Saldana in the police car be excluded. Counsel noted that Sergeant Saldana was present during the police interrogation. The court reaffirmed its prior ruling. Although the prior ruling had been based upon a mistaken impression that Sergeant Saldana was not present during the initial interrogation, the court stated it would reaffirm its prior ruling because Sergeant Saldana did not participate or interact with appellant in any manner other than to ask one question about the grandmother at the beginning of the interrogation, before the threat to take appellant's truck was made.

2. Coerced Statements and Attenuation

In *People v. McWhorter* (2009) 47 Cal.4th 318 (*McWhorter*), the California Supreme Court held that "'where -- as a result of improper police conduct -- an accused confesses, and subsequently makes another confession, it may be presumed the subsequent confession is the product of the first because of the psychological or practical disadvantages of having "'let the cat out of the bag by confessing."' [Citations.]'" (*Id*. at p. 359.) A subsequent confession, however, may be admitted if it is sufficiently attenuated from the prior involuntary confession. "'The degree of attenuation that suffices to dissipate the taint "requires at least an intervening independent act by the defendant or a third party" to break the causal chain in such a way that the second confession is not in fact obtained by exploitation of the [primary] illegality. [Citations.]'" (*McWhorter, supra,* 47 Cal.4th at p. 360, quoting *People v. Sims* (1993) 5 Cal.4th 405, 444-445.)

Here, appellant's statements to Sergeant Saldana were sufficiently attenuated from his prior coerced statements to Detectives Sibbald and Cahalan. First,

appellant initiated the conversation in the police car, which is an intervening independent act that broke the causal chain. Second, it was undisputed that appellant's truck remained on the premises after appellant was transported to the police station. Third, there was substantial evidence to support the trial court's finding that Sergeant Saldana did not meaningfully participate in the prior interrogation. Thus, the statements were made to a different person, in a different setting, in a conversation initiated by appellant, after the threat to take appellant's truck had dissipated. Sergeant Saldana did not attempt to exploit the prior threat to take appellant's truck and made no explicit reference to appellant's statements to Detectives Sibbald and Cahalan. Finally, our review of the complete transcript of the conversation reveals that Sergeant Saldana's questions were not inherently coercive. In short, the trial court did not err in admitting the statements made to Sergeant Saldana.

In any event, any error was harmless beyond a reasonable doubt. Appellant was acquitted of the robberies of Cabrera and Silva, and the evidence of his presence at the robberies of Hong and Park was overwhelming. Both Hong and Park identified him, and the jury was shown video surveillance of both robberies. Thus, the only question is whether it is reasonably probable that a different result would have been obtained as to counts 4 and 5 if the statements had been excluded. We think not. First, the statements referring to a "one-day spree" could have been construed as appellant's observation of Guarisco's conduct. More important, the evidence virtually precluded a finding that appellant was a mere bystander. Both Guarisco and appellant were present at both robberies. The modus operandi of the Hong and Park robberies was nearly identical, with appellant asking for a Sweet Swisher cigar, followed by Guarisco's pulling a gun and demanding money. The robberies occurred 15 minutes apart, and a gun similar to the one used in the

robberies was found in appellant's room. On this record, we find no rational jury would have reached a different verdict on counts 4 and 5, even if appellant's statements to Sergeant Saldana had been excluded.

B. *Cross-examination of Sergeant Saldana*

Appellant next contends he was denied a fair trial because the trial court prevented him from cross-examining Sergeant Saldana "about the impact of coercion on the reliability of appellant's admissions." We find no error.

1. Relevant Background

During trial, defense counsel confirmed that Sergeant Saldana had received training in interrogation. Defense counsel asked Saldana whether, if appellant were under the influence of medication during an interrogation, that might "make him more cooperative." The trial court sustained an objection that the question called for speculation. Defense counsel then asked about using appellant's grandmother's illness during the interrogation. Sergeant Saldana stated he did not use the grandmother's illness to get appellant to make statements because it would be "upsetting." Defense counsel asked: "It would be upsetting because you're getting information that's not reliable?" The trial court sustained an objection that this question called for speculation. Defense counsel continued: "Because as a police officer, as the boss, as a person who teaches this, an interrogation that is done after a person has been threatened, gives you bad information. Would you agree?" The court sustained an objection that this inquiry called for speculation. Defense counsel later asked: "It's absurd and it's wrong because it makes someone cooperate, like say, what do you want to hear, I'll tell it to you?" The court also sustained an objection to this question as calling for speculation.

2. Confrontation Rights and Right to Present a Defense

Appellant contends he was denied his rights to confront his accusers and to present a defense because the trial court precluded him from asking Sergeant Saldana about the unreliability of admissions following instances of coercion. He is mistaken. Although Sergeant Saldana received training in interrogation, he did not testify that he had the expertise to opine on the impact of coercion on the reliability of admissions. His opinion on this issue *would* have been speculative. In addition, the trial court's evidentiary rulings did not preclude appellant from presenting evidence on this issue by calling his own expert witness. (See, e.g., *People v. Page* (1991) 2 Cal.App.4th 161, 179, 188 [defense called professor of psychology to testify "concerning factors which can lead a person to give an inaccurate statement in an interrogation setting"].) In short, the trial court did not err in sustaining the objections and precluding defense counsel's inquiries.

C. *Prosecutorial Misconduct*

Finally, appellant contends the prosecutor committed multiple acts of misconduct. "'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such '"unfairness as to make the resulting conviction a denial of due process."' [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' [Citation.] When a claim of misconduct is based on the prosecutor's comments before the jury, '"the question is whether there is a reasonable likelihood that the jury construed or applied any of the

complained-of remarks in an objectionable fashion."' [Citation.]" (*People v. Friend* (2009) 47 Cal.4th 1, 29.) We address each alleged instance of misconduct.

1. Voir Dire

During voir dire, the prosecutor asked a prospective juror whether the juror was comfortable with the idea that an individual who aids and abets in the commission of a crime is "equally guilty" with the person who actually carries out the crime. The juror replied: "Maybe I do. Maybe the person that committed the crime is more guilty than . . . . " The prosecutor stated: "Maybe more culpable, but in terms of sentencing that's something you have to trust the judge to decide. So that's different. We're talking about different things. One is whether they are equally guilty, and when it comes to sentencing, that's when the judge decides. That's not what the jury decides. So can you understand even if they're equally guilty, maybe sentencing may be different." The court sustained an objection, stating: "I think [the prosecutor] is accurately stating the law, but the objection as far as discussing the issues of sentencing" is sustained. Prior to jury deliberations, the court instructed the jury that, "You must reach your verdict without any consideration of punishment."

Appellant contends the prosecutor committed misconduct by discussing sentencing consequences and falsely implying that "an aider and abettor might receive a more lenient sentence than a person who was 'more guilty.'" We find no misconduct. The prosecutor clearly stated that sentencing is an issue "the judge decides." In any event, any error was cured by the court's admonition prior to jury deliberations that the jury must reach its verdict without any consideration of punishment.

2. Vouching

During his closing argument, the prosecutor stated, "So based on the evidence we know beyond a reasonable doubt that defendant Guarisco is guilty of all the robbery --" Defense counsel objected, stating: "Can't say, 'we.' He's vouching." The court sustained the objection. The prosecutor then drew several sustained objections by using the term "we" on several other occasions.

During the defense closing argument, appellant's counsel argued that the prosecutor "really, really, really wants you to convict my guy. Really, really, wants that, okay?" Defense counsel also stated: "[Appellant's] grandmother told you he was crying. So you got some kid who is crying. And you got a bunch of cops. They are telling him to say this or say that."

The prosecutor began his rebuttal argument as follows:

> "Good morning, ladies and gentlemen. My job as a Deputy District Attorney is to make sure that justice is served. That sounds corny, but that's true. Make sure the guilty are convicted and the innocent are let go. Similarly, Detective Sibbald and a police -- the police officer's job, they're not in the business of catching [the] wrong people. That's not what their job is about.
>
> "Detective Sibbald didn't do his investigation that led to both defendants. Didn't use all the resources to go to defendant Lewis's house for the purpose of catching the wrong person.
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> "At the beginning of jury selection first thing I did was I introduced myself to you and I told you, unlike the defense attorneys . . . I don't represent the victims. I don't represent the police, the detective sitting at the table. I don't represent the police. I represent the People of the State of California to make sure that the laws are enforced.
>
> "Now, I don't have any clients. Now, having said that. Do I want a conviction in this case as Mr. Fletcher said that I do? Of course, I do."

Appellant contends the prosecutor's statements and use of the term "we" constituted improper vouching for the prosecution's witnesses. We disagree. Appellant has cited no case that the use of the term "we" constitutes vouching per se. When viewed in context, the prosecutor appeared to be using the term "we" to collectively describe the audience. His comments implied that the term "we" referred to those who had heard the evidence, and that such evidence demonstrated that Guarisco was guilty of the robberies. The prosecutor was not using the term "we" to refer to himself and the police officers. The prosecutor used "we" in a similar context on the other occasions. He did not use the term to bolster the veracity of a witness's testimony by referring to evidence outside the record or to place the prestige of his office behind a witness. In short, the prosecutor's conduct did not amount to vouching. (See, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 757 [no impermissible vouching occurred because "prosecutor properly relied on facts of record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief"]; *People v. Huggins* (2006) 38 Cal.4th 175, 207 [no improper vouching where prosecutor asked jury to believe the prosecution's version of events].)

As to the prosecutor's statements that his job was to make sure that justice was served and that police officers were not in the business of catching the wrong people, those statements were made in response to defense counsel's argument that the prosecutor "really, really, really" wanted the jury "to convict my guy," and that the officers had told appellant what to say during the interrogation at his house. The prosecutor's statements were within the proper bound of rebuttal argument. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1026 ["Arguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct

if they fall within the proper limits of rebuttal to the arguments of defense counsel."].)

3. Burden of Proof

During the defense closing argument, appellant's counsel stated: "See, the problem is is that every witness who testified told you that they were removed of their property by one person and one person only, and that was Mr. Guarisco and clear about it, that when Mr. Guarisco robbed the girls my client's not anywhere in the county. I don't know where he is at. [He] [h]as nothing to do with it."

In rebuttal, the prosecutor argued that Cabrera saw appellant's blue truck in the alley. He stated: "And the person that she saw in the driver's seat, common sense tells you it was Anthony Lewis . . . ." Later, the prosecutor stated: "Now, if defendant Lewis wasn't in that blue truck and he wasn't -- and it wasn't his blue truck, then where was he? Where is an alibi witness to say defendant Lewis was -- " At this point, defense counsel objected, and the trial court held a sidebar. After the sidebar, the prosecutor continued to argue that appellant had not presented evidence to establish an alibi. Among other comments, the prosecutor stated: "Did you hear a witness who testified where defendant Lewis was? And I just want you to be clear or want to be clear that the burden of proof [in] this case is on the prosecution. I have to prove to you beyond a reasonable doubt that it was both defendants who were involved in the crimes that they are charged with. It's my burden, but the defense can call logical witness[es] say[] -- to help their defense. . . ." The prosecution also noted that appellant could subpoena people to testify as alibi witnesses. The defense continued its objection. The trial court ultimately denied a mistrial motion related to this issue.

Appellant now contends the prosecutor committed misconduct by improperly suggesting that appellant had a duty to present alibi witnesses when no

alibi argument was made. Defense counsel, however, had argued that when Cabrera and Silva were robbed, appellant was "not anywhere in the county." Thus, during rebuttal, the prosecutor could respond by arguing that appellant had presented no evidence showing that he was not in the county. (See *People v. Hughes* (2002) 27 Cal.4th 287, 372 [prosecutor may comment on "'"the state of the evidence or on the failure of the defense to introduce material evidence or call logical witnesses"'"]; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1026 ["Arguments by the prosecutor that otherwise might be deemed improper do not constitute misconduct if they fall within the proper limits of rebuttal to the arguments of defense counsel."].) Because the prosecutor's comments were in response to defense counsel's argument, there was no misconduct.

4. Discovery Violation

After the jury's deliberation, the jury asked for playback of the audio recording of the conversation between Sergeant Saldana and appellant in the patrol vehicle. At that time, defense counsel noticed that People's exhibit No. 24 was labeled "Redacted and Clarified." After hearing testimony from the prosecutor, the trial court found that People's exhibit No. 24 had been "clarified" so that appellant's statements were more audible. The court found that it could hear appellant say "one-day crime spree" on the original, unredacted, unclarified audio recording. The court further found that the statement about a "one-day crime spree" was played for the jury from "the original unredacted, unenhanced, unclarified audio C.D. that was originally provided to the defense." The jury heard playback of the audio recording of the conversation by listening to portions of People's exhibit No. 24 -- the redacted and clarified audio recording -- then from People's exhibit No. 16 -- the original unredacted, unenhanced, unclarified audio

recording -- and finally from People's exhibit No. 24 again. This was the exact sequence that occurred during trial.

Appellant now contends he was denied his right to due process because the prosecution "sandbagged" him by waiting until the presentation of evidence concluded before revealing that appellant's admission to a "one-day crime spree" was enhanced to be more convincing. We conclude there was no error, as the record supports the trial court's determination that appellant's statement about a "one-day crime spree" was played from the original, unenhanced audio recording. In any event, any error was harmless beyond a reasonable doubt for the same reasons previously stated at Part A.2.

5. Cumulative Error

Finally, appellant contends the multiple instances of misconduct, taken as a whole, resulted in reversible error. Having found no misconduct, we reject this argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J. WILLHITE, J.