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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. MICHAEL ANGEL RIVERA Defendant and Appellant.	B293718 (Los Angeles County Super. Ct. No. KA113051)

APPEAL from a judgment of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed.

Julie Caleca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

FACTUAL AND PROCEDURAL BACKGROUND

Michael Angel Rivera (Appellant) was convicted of grand theft of personal property in violation of Penal Code[1] section 487, subdivision (a).

The details surrounding the crime follow.

On June 30, 2016, the Los Angeles County Sheriff's Department conducted a "bait bike operation" at the Metropolitan Transportation Authority (MTA) gold line train station in Azusa. In a bait bike operation, undercover law enforcement leave a bait bicycle at the train station, surveil it, wait until suspects come and steal the bike, then follow and arrest them. On the date in question, undercover deputies left the bait bike—a 2013 Cannondale—unlocked, leaning against the bicycle rack at the train station. A short period of time later, one of the undercover deputies saw a male ride a bicycle around the area of the bike racks who "look[ed] interested in" the bait bike. A few minutes later, the deputies observed Appellant walk up to the bicycle rack and ride away on the bait bike. Appellant was stopped and arrested half a block away; he indicated to the arresting officer that he liked bikes and that he took the bike for himself because it was unlocked.

On August 2, 2018, trial by jury commenced. The sole issue at trial was whether the value of the bait bike exceeded $950. Theft is divided into two categories: grand theft and petty theft. (§ 486.) Theft of personal property exceeding $950 equates to grand theft, a felony. (§ 487, subd. (a).)

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

As to the value of the bicycle, one of the undercover deputies testified the Cannondale bike was in "good to new" condition on the date of the June 30, 2016 operation.

The evidence established the 2013 Cannondale bait bike was purchased on October 2, 2014 for $1,270.99 from Incycle Bicycles in Pasadena. On December 29, 2016, approximately six months after the undercover operation, the bait bike was appraised at $1,330 by the general manager at Incycle, Jason Chancellor.

At trial, Chancellor testified as an expert for the prosecution. Since 2003, he had worked for Incycle, had managed various Incycle store locations, and was the general manager of the Pasadena location since 2013. Chancellor had conducted about "a hundred" appraisals for bicycles, and currently appraised "two to three a week." In calculating the fair market value of the bicycle, Chancellor considered the age of the bike, the condition of the bike, the valuation provided in the Bicycle Bluebook, as well as how much the bike could be sold for based on the location of the Incycle store in question—the retail value of the Cannondale bike sold at the Pasadena location "could be 30 percent more" than at the Incycle at the Chino or Rancho Cucamonga locations.

The prosecution rested its case-in-chief on Friday, August 3, 2018, and defense counsel notified the court that its expert witness (an employee of Giant Santa Monica Bicycle Shop) would testify that the bike's value was "$750 at best" when trial recommenced the following Monday, August 6, 2018. However, on Monday, the defense notified the court that it had "lost its [expert] witness over the weekend."

The court was informed that an employee of Incycle, Mark Farias, posted this tweet via Twitter on Saturday, August 4, 2018:

> "Giant Santa Monica has an expert defending bike thieves in court. What the fuck. Trying to get felons off the hook is [a] betrayal to the bike community. You assholes should be ashamed."

Defense counsel indicated to the court that her expert learned of the tweet from his boss, the owner of Giant Santa Monica. As a result of the tweet, "it was perfectly made clear to [the defense expert] that if his name or the store's name and/or both were associated with this trial, that he would lose his job. So at this point we have lost our expert based on Incycle's mechanic's witness intimidation." The defense expert had told defense counsel he would be fired if he testified. Consequently, he refused to testify.

Appellant requested a mistrial, arguing the tweet amounted to witness intimidation and interfered with his constitutional right to a fair trial. Defense counsel explained that before taking the stand, Chancellor was provided with the defense expert's statement, which included his name (William Jimenez) and place of employment at Giant Santa Monica. Defense counsel argued: "It's very disingenuous for the People to say that Incycle, their witness, had nothing to do with this. The People specifically provided Mr. Chancellor with Mr. Jimenez's statement on Friday before he testified. Mr. Jimenez's personal information and work information was on there. I understand experts are given the information because they need to know what the opinion of the defense expert is going to be, [and] some of that should have been sanitized, but it wasn't. So for the

People to say that Mr. Chancellor had nothing to do with this, or even make that implication when he's the only witness who was aware that Mr. Jimenez worked for Giant Santa Monica, [i]t's disingenuous to say that."

The prosecutor admitted giving Chancellor the information. She argued no threat was communicated and this was an employment issue between the defense expert and his employer. The prosecutor stated she had told her witness "not to discuss the case while [they] were at the courthouse, not to discuss the case amongst each other, and not to discuss the case in the hallways." The prosecutor further remarked the defense counsel had not subpoenaed her expert.

The trial court denied Appellant's request for mistrial and stated: "I think part of the problem . . . is you did not have [Jimenez] under subpoena, so he's not required to be here. Had he been under subpoena, it would have been a different story." The court explained: "This is a mess. And there's shared blame here. You didn't subpoena the guy, so now we can't force him into court. Even if he was subpoenaed, the threat issue would have been a different issue, and now without an expert he's gonna get convicted of a felony." The court further reasoned: "I can't force people not to discuss it. There could have been a news reporter in here who could have put out a tweet or done something like that. I can't stop people from talking about the case unless they're a juror or an attorney." Chancellor was "not violating any court order" and the court "ha[s] no authority over him."

Defense counsel thereafter requested a two-week continuance to secure a new expert, informing the court that she believed she could "find an expert that will testify consistent to

what Mr. Jimenez was going to testify to." The trial court granted the requested continuance.

On August 23, 2018, trial resumed.

Chris Demarchi testified as the expert for the defense. Demarchi had been in the cycling industry for 29 years—he began his career working in a bicycle shop and was currently part-owner of a race team and program that provided people the opportunity to join a racing club and purchase/sell bicycle equipment, ride clothes, etc. Demarchi had sold "probably more than 15 different" brands of bicycles. In determining the fair market value of the bait bike, Demarchi considered the components and parts of the bike, factors in any "wear and tear" that would decrease the value of the bike, and he checks Craigslist and Ebay in addition to the Bicycle Bluebook. Demarchi testified that the store location where the "used bike" is sold would also affect its sales price. He also testified that a bicycle depreciates in value about 20 percent in its first year, and thereafter appreciates about 15 percent a year.

Demarchi opined the fair market value of the bait bike was $850 at the time of the theft in June 2016. He testified the bike could not have been worth $1,330 in June 2016 because of depreciation and because some of its components were now obsolete. Demarchi had not inspected the bait bike in person, but rather, analyzed a photo of the bait bike.

On August 24, 2018, the jury found Appellant guilty of grand theft of personal property. On October 5, 2018, he was sentenced to two years in state prison.

Appellant timely appealed.

DISCUSSION

Appellant argues the trial court abused its discretion in denying his motion for a mistrial. Appellant contends mistrial should have been granted because his right to a fair trial was violated when "the prosecutor failed to control her witness [Chancellor], which resulted in witness intimidation and interfered with Appellant's Sixth Amendment right to present a crucial defense witness."

A. *Standard of Review and Applicable Law*

A motion for a mistrial should be granted " 'only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial.' " (*People v. Clark* (2011) 52 Cal.4th 856, 990.) The defendant bears the burden to show the trial court abused its discretion in denying his motion for a mistrial. (*People v. Maury* (2003) 30 Cal.4th 342, 437.) "The fundamental idea of a mistrial is that some error has occurred which is too serious to be corrected, and therefore the trial must be terminated, so that proceedings can begin again." (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678, italics omitted.)

"A defendant's constitutional rights to compel the attendance of witnesses, as guaranteed by the Sixth Amendment, and to due process, as guaranteed by the Fourteenth Amendment, are violated when the prosecution interferes with the defendant's right to present witnesses." (*People v. Mincey* (1992) 2 Cal.4th 408, 460; *People v. Lucas* (1995) 12 Cal.4th 415, 456.) Such violative prosecutorial misconduct "involves ' " 'the use of deceptive or reprehensible methods to attempt to

persuade either the court or the jury.' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; see also *People v. Adams* (2014) 60 Cal.4th 541, 568.)

Prosecutorial misconduct will not result in reversal of a conviction unless it is reasonably probable an outcome more favorable to the defendant would have been obtained in the absence of the misconduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245, overruled on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) "Defendant bears the burden of demonstrating at least a reasonable possibility that the witness could have given testimony that would have been both material and favorable; that the prosecution engaged in activity that was entirely unnecessary to the proper performance of its duties and of such a character as to transform a defense witness from a willing witness to one who would refuse to testify; and a causal link between that misconduct and his inability to present witnesses on his own behalf." (*People v. Harris* (2005) 37 Cal.4th 310, 343.)

Appellant first " 'must demonstrate prosecutorial misconduct, i.e., conduct that was "entirely unnecessary to the proper performance of the prosecutor's duties and was of such a nature as to transform a defense witness willing to testify into one unwilling to testify." ' " (*People v. Lucas, supra,* 12 Cal.4th at p. 457.) "Second, he must establish the prosecutor's misconduct was a substantial cause in depriving the defendant of the witness's testimony. [Citation.] The defendant, however, 'is not required to prove that the conduct under challenge was the "direct or exclusive" cause. [Citations.] Rather, he need only show that the conduct was a substantial cause.' " (*Ibid.*) And

third, "the defendant must show the testimony he was unable to present was material to his defense." (*Ibid.*)

B. *Analysis*

Appellant cannot show that the prosecution interfered with his right to present a witness as a result of witness intimidation.

Based on the record before us, we do not see any actions by the prosecution amounting to "deceptive or reprehensible methods" that interfered with Appellant's right to present witnesses or right to a fair trial. The prosecution instructed its expert witness, Chancellor, "not to discuss the case while [they] were at the courthouse, not to discuss the case amongst each other, and not to discuss the case in the hallways." Appellant has not demonstrated to us that these instructions and the witness's decision nonetheless to discuss the case with an employee who later tweeted about it amounts to prosecutorial misconduct. The prosecution did its part to ensure the witness does not discuss the case. That the witness chose to do so was beyond the prosecutor's control.

Furthermore, it was not the prosecution's conduct that amounted to the alleged "witness intimidation," but rather, the witness's employer's conduct (i.e., threatening Jimenez that he would be fired if he testified). Had Appellant subpoenaed Jimenez, the trial court would have been well in its power to order him to testify; the trial court said as much during the hearing on August 6, 2018.

Nothing in the record indicates the prosecution's actions set into motion a "chain of events" that rendered Appellant's trial unfair or interfered with his right to present witnesses on his behalf. Appellant's chance of receiving a fair trial was not irreparably damaged; he indicated to the court at the August 6,

2018 hearing that he "can find an expert that will testify consistent to what Mr. Jimenez was going to testify to" and, indeed, he did so by the time trial resumed two weeks later. Appellant argues now that he was prejudiced because the credentials of his second expert were not as good as the credentials of his first expert and the local "pool" of experts was tainted by the tweet, implying that the second expert was not up to snuff. We are not persuaded and there is nothing in the record to support that argument. If anything, the jury could have found the prosecution's expert less credible given his store's involvement in setting the price of the bait bike when it was originally purchased. The trial court accommodated Appellant's problem by giving him exactly what he asked for—a two-week continuance to retain a new expert. Nothing in the record indicates Appellant was prejudiced in any way.

DISPOSITION

The judgment is affirmed.

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STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.