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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ERNEST MICHAEL HAYWOOD,<br><br>Defendant and Appellant. | 2d Crim. No. B291140<br>(Super. Ct. No. MA070741-01)<br>(Los Angeles County) |

Ernest Michael Haywood appeals his conviction, by jury, of attempting to dissuade a witness. (Pen. Code, § 136.1, subd. (a)(2).)[1] His record of prior felony convictions includes convictions of murder (§ 187) and robbery (§ 211) in 1975 and convictions of robbery in 1991 and 1993. (§ 211.) The trial court sentenced appellant, as a third strike offender, to a term of 25 years to life in state prison. It further imposed three, consecutive five-year enhancement terms for his prior convictions, resulting

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

in a total term of 40 years to life. (§ 667, subd. (a)(1).) Appellant contends the prosecutor committed misconduct by arguing facts not in evidence, impugning appellant's right to trial and misstating the presumption of innocence, and that his trial counsel was ineffective for failing to object to the misconduct. He further contends this matter should be remanded for resentencing under Senate Bill No. 1393. We remand the matter to allow the trial court to determine whether the prior serious felony conviction enhancements should be stricken in the interest of justice. In all other respects, we affirm.

*Facts*

Appellant shared a make-shift tent in a homeless encampment in Lancaster with Christina Torrence. Torrence testified that, in October 2016, after they had an argument, appellant set the tent on fire using lighter fluid. All of Torrence's belongings were destroyed. She rebuilt the tent. In March 2017, after another argument, appellant again set the tent on fire. Torrence called 911 to report the fire. Appellant was arrested riding his bicycle about one mile away.[2]

Once in custody, appellant telephoned Torrence very frequently, despite a protective order prohibiting him from contacting her. Daniel Tobin, a sergeant in the Los Angeles County Sheriff's Department, obtained recordings of each call made from the jail to cell phone numbers associated with Torrence, and each call made from the jail using appellant's personal identification number (PIN). Sgt. Tobin determined that, between April 12, 2017 and June 21, 2017, appellant called Torrence 80 times. Some of the calls were made using appellant's

[2] The jury acquitted appellant of arson (§ 451, subd. (d)) its lesser included offenses. (§ 452, subds. (b), (d).)

PIN. Others were made using the PINs of inmates in the same housing unit as appellant. Sgt. Tobin later discovered two additional cell phone numbers associated with Torrence and determined that appellant made an additional 28 calls to those numbers between April 2017 and September 2017. From February 2018 to March 2018, appellant called Torrence's various numbers 66 times.

In a call on April 12, 2017, appellant told Torrence she shouldn't come to court to testify against him. He complained that he couldn't "get out of" the charges, "Unless yo ass don't, don't show up. You tell them I didn't do it." Two days later, appellant advised Torrence to find his public defender and "say man listen, I was just high on some crack and I was mad at him because he wouldn't go nowhere with me. And I don't know what happened but I just said that about him. He didn't do nothing. And then tell the people that they pull a gun on you [and] force you to come down there. And you just was scared. That's all you gotta do." Appellant also told Torrence, "Just say man I made that shit up cause I was mad at him and now I'm feeling guilty."

On March 19, 2017, appellant had a call with his mother in which he told his mother, "If [Torrence] call again just tell her if she want to help me just don't show up to court or take the charges off." On March 23, 2017, he complained to his mother that Torrence came to court. Appellant's mother said Torrence didn't listen to her. Appellant replied, "So what. Just tell her [I] said don't . . . come to court."

On April 4, 2017, appellant called his friend Eric, to have him tell Torrence not to show up at court. "Make sure you,

you holler at her man. Just tell her don't show up to none of them man. I can beat this thing."

Sgt. Tobin testified that he listened to all the telephone calls appellant made from jail to Torrence. He testified that in those approximately 140 calls, he did not hear appellant "accuse the victim of framing him," nor did he hear appellant "accuse the victim of lying." Tobin did not hear appellant "tell the victim to . . . go to court and tell the truth." Tobin also listened to calls between appellant and his mother, and between appellant and other unknown people. In those calls, he did not hear appellant tell his mother or the other people that the victim was lying. Appellant also did not say that the victim was framing him or that she was trying to set him up. "[T]here were calls where [appellant] denied culpability, but nothing specifically saying that the victim was trying to frame him or lied about the circumstances in the case."

*Discussion*

*Prosecutorial Misconduct*

Appellant contends the prosecutor committed misconduct in her closing argument when she discussed the content of telephone calls made by appellant recordings of which were not introduced in evidence. In addition, appellant contends the prosecutor unfairly penalized him for exercising his right to trial and misstated the presumption of innocence in doing so.

Facts Not in Evidence. In her closing argument, the prosecutor argued that appellant made about 140 calls from jail, "and not a single one was made where the defendant asked anybody how did this fire start. . . . So there's a reason you never hear a call about him asking about the fire, because he already knew." The prosecutor also argued that, if appellant believed

Torrence was lying, he would have asked about that. "Not a single call of[] those 140 calls did you hear the defendant ask anybody why is [Torrence] lying? Why isn't [Torrence] telling the truth? Mom, why don't you tell [Torrence] to tell the truth? Nothing, not a single question. . . . You don't hear this because she's not, and he knows it. In those 140 jail calls, there's never even the word 'truth' used."

Appellant contends these comments were misconduct because the contents of all 140 calls were not received in evidence. Thus, the prosecutor was referring to facts not in evidence.

As an initial matter, this contention has been forfeited because appellant did not object to the argument on this basis and did not request that the jury be admonished to disregard statements concerning facts not in evidence. (*People v. Brown* (2003) 31 Cal.4th 518, 553; *People v. Montiel* (1993) 5 Cal.4th 877, 914, disapproved on other grounds, *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) We reject appellant's contention that his trial counsel was ineffective for failing to object. As we explain, the prosecutor's argument was not misconduct. Any objection by trial counsel would properly have been overruled. Counsel is not ineffective for failing to make futile or frivolous objections. (*People v. Osband* (1996) 13 Cal.4th 622, 678.)

Had the contention not been forfeited, we would reject it because the prosecutor's argument did not refer to facts outside the record and was not prejudicial misconduct. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the

conviction a denial of due process." . . . [Citation.]' [Citation.]" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214 (*Gionis*).) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves """"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""" [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

It is misconduct for a prosecutor to refer in closing arguments to facts not in evidence "because such statements 'tend[] to make the prosecutor [her] own witness – offering unsworn testimony not subject to cross-examination. . . .' [Citations.]" (*Hill*, *supra*, 17 Cal.4th at p. 828.) However, the prosecutor has wide latitude to make vigorous arguments, as long as those arguments amount to fair comment on the evidence, including reasonable inferences or deductions to be drawn from the evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 221.) "When the claim focuses on the prosecutor's comments to the jury, we determine whether there was a reasonable likelihood that the jury construed or applied any of the remarks in an objectionable fashion." (*People v. Booker* (2011) 51 Cal.4th 141, 184-185 (*Booker*).)

The prosecutor's comments here do not amount to prejudicial misconduct because they were consistent with Sgt. Tobin's testimony. Tobin testified that he listened to all of the calls and did not hear appellant complain that Torrence was lying, nor did appellant encourage Torrence to tell the truth when she went to court. The prosecutor's argument was a reasonable comment on Tobin's testimony. It did not involve deceptive or reprehensible methods of persuasion (*Hill, supra*, 17 Cal.4th at p.

828), nor did it "'"infect[] the trial with such unfairness as to make the conviction a denial of due process." . . .'" (*Gionis*, *supra*, 9 Cal.4th at p. 1214.)

Appellant's Exercise of the Right to Trial. In her rebuttal argument, the prosecutor argued, "The defendant has an absolute right to a trial. Absolute right. And he exercised that right. But exercising that right doesn't mean that you're innocent. It doesn't mean you have a defense. It doesn't even mean you have a valid argument to make. It means you go through a jury trial and relive what you did." Appellant's trial counsel objected. The trial court stated it did not understand what the prosecutor meant "as far as he gets to sit here and relive it." It also sustained the objection and told the jury that every person accused of a crime has a right to a jury trial, "[s]o you may not hold it against the defendant in any way that he has exercised his right to have a trial."

The prosecutor continued, "The point of that wasn't to hold it against him that he's exercising his right. The point of that was to let you know that just because someone exercises that right doesn't mean that they are innocent." Defense counsel objected again and again the trial court admonished the jury, "we have the presumption of innocence that you've all heard about, and you will receive further instructions with regard to the presumption of innocence. Certainly that is something that applies to the defendant here, Mr. Haywood, as well as any criminal defendant. So I don't think that [the prosecutor] is commenting on that with regard to the presumption of innocence."

Asked to rephrase yet again, the prosecutor continued, "At the end of the day, the presumption of innocence is

rebuttable, and it's rebuttable when you have evidence. And in this case the evidence was overwhelming. The evidence was more than sufficient to rebut the presumption of innocence." The trial court again admonished the jury that it would "give you instructions momentarily . . . with regard to the law. If anything that either counsel says conflicts with my instructions, you must follow my instructions."

Appellant contends the prosecutor's rebuttal argument unfairly penalized appellant for exercising his right to trial and misstated the presumption of innocence. The prosecutor's comment on appellant's exercise of his right to a jury trial invited the jury impermissibly to infer that appellant's demand for a trial was a waste of time and resources because the state does not prosecute innocent people. She also misstated the presumption of innocence by implying that the presumption of innocence ended with the presentation of evidence. We are not persuaded.

The prosecutor's rebuttal argument did not attempt to penalize appellant for exercising his right to trial or improperly shift or lessen the prosecution's burden of proof. Instead, the prosecutor stated and restated that appellant had an "absolute right to a trial" and that his exercise of the right to trial did not mean he was innocent. These statements do not misrepresent the law and amount to fair comment on the evidence. (*People v. Mendoza* (2007) 42 Cal.4th 686, 702; *Hill*, *supra*, 17 Cal.4th at p. 819.) A prosecutor is entitled to argue that the presumption of innocence can be overcome or rebutted by the evidence. (*Booker*, *supra*, 51 Cal.4th at p. 185.) As the court noted in *Booker*, "Although we do not condone statements that appear to shift the burden of proof onto a defendant (as a

defendant is entitled to the presumption of innocence until the contrary is found by the jury), the prosecutor here simply argued the jury should return a verdict in his favor based on the state of the evidence presented." (*Ibid.*) There was no misconduct.

*Senate Bill No. 1393*

Appellant's 40-year sentence includes three five-year enhancement terms for his prior serious felony convictions. (§ 667, subd. (a)(1).) At the time of his sentencing, the trial court lacked discretion to strike the enhancements in the interests of justice. (Former § 1385, subd. (b); Stats. 2018, ch. 1013, §§ 1, 2.) Effective January 1, 2019, Senate Bill No. 1393 removed that prohibition. (*People v. Jones* (2019) 32 Cal.App.5th 267, 272.) The new legislation applies to appellant because his case is not yet final. (*In re Estrada* (1965) 63 Cal.2d 740, 747; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

Respondent concedes appellant is entitled to a limited remand for resentencing. We agree. At the time of sentencing, the trial court could not exercise informed discretion on the question of whether to impose the prior serious felony enhancements because its power to strike them had not yet been conferred by the Legislature. We will remand so that the trial court can exercise its discretion in this regard.

*Disposition*

The matter is remanded to the trial court for the purpose of allowing it to determine whether the five-year prior serious felony conviction enhancements (§ 667, subd. (a)(1)), should be stricken in the interest of justice. (§ 1385.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Shannon Knight, Judge

Superior Court County of Los Angeles

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