Filed 10/9/18 P. v. Welch CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JEMAR WELCH, Defendant and Appellant.	B281532 (Los Angeles County Super. Ct. No. NA099773)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard Romero, Judge. Remanded for resentencing.

Gary V. Crooks, 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, Senior Assistant Attorney General, Noah P. Hill and Heather B. Arambarri, Deputy Attorneys General, for Plaintiff and Respondent.

Jemar Welch, convicted of second-degree murder, appeals his conviction on the grounds of instructional error; insufficiency of the evidence; prosecutorial misconduct; and cumulative error; and he also requests resentencing due to a change in state law. We affirm the conviction and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

Welch was charged with murder (Pen. Code,[1] § 187) after he shot and killed Alexander Johnson in a street confrontation.

Welch and Johnson were members of rival gangs: Welch belonged to the Insane Crips, and Johnson was a member of the Rollin' 20s. They had clashed at least twice before. In the first incident, Johnson overheard a conversation between Welch and Ronnisha Garcia in which Welch told Garcia, "Don't let me find out you hanging out with these bum niggas." Johnson confronted Welch, saying, "Rollin' Crip. Who you calling a bum-ass nigga?" In response, Welch said, "What the fuck?" and identified himself as "Baby Insane." In the second incident, Johnson approached Welch at a government building and said, "20 Crips." Welch laughed at him.

On the afternoon of the shooting, Johnson was standing on the sidewalk with Lequoin Dunn, Kevin Hawkins, Dravon Richardson, and Todd Montgomery. Welch drove up and dropped off his friend Shane Calloway, a fellow member of the Insane Crips. Johnson left the group to go home at the same time that Welch began to back up his car. Welch hit Johnson with the rear of his car. Johnson tapped Welch's car with his hand, walked around to the driver's side, told Welch to get out of the car, and

---

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

said he needed a "fade," meaning a fight. Johnson walked to the middle of the street and waited for Welch to get out of the car. Welch jumped out, reached for a gun, and shot Johnson twice. Johnson had not reached for a gun. Johnson fell to the ground; Welch ran to his car and drove away.

Dunn, who saw the shooting, ran to Johnson and told Hawkins to alert Johnson's mother. Calloway, who heard the shots but did not see the shooting, came out front and saw Johnson on the ground. Garcia, who had seen Welch stop his car in front of Johnson and walk toward him, heard the gunshots and ran to tell her mother she thought Welch had just shot Johnson.

Johnson died of his wounds. One bullet entered Johnson's chest and traveled from front to back in a downward direction. The other shot took a shallow path through and across Johnson's back, exiting in the middle of his back. The bullets' trajectories were consistent with Johnson being shot in the chest as he began to crouch or duck, and then shot again in the back as he continued a crouching or ducking away motion. It could not be determined which shot was fired first. The trajectories were also consistent with Johnson bending over.

Welch claimed he shot Johnson in self-defense. According to Welch, he saw Johnson and others standing on the sidewalk as he parked his car to let Calloway out. He recognized Johnson because of their prior interactions. Welch noticed that Johnson was wearing a backpack. This was significant to Welch because Johnson had begun to reach into his backpack in one of their earlier confrontations, and he believed that Johnson had been searching for a gun. When Welch saw Johnson on the day of the shooting, he thought Johnson probably had a gun in his backpack.

Welch denied hitting Johnson with his car. He testified that Johnson acted "real belligerent, pacing back and forth in the street," saying something Welch could not hear from inside his car. Welch testified that he was "nervous," on his guard, and afraid of what Johnson might do. He exited the car anyway.

According to Welch, when he left his car, Johnson approached him and said, "What's up, man." Welch stepped back to turn toward the sidewalk and move around the back of his car, but Johnson's companions stood behind the car. "When I turned back towards Alexander Johnson, that's when his shoulder dropped, and the backpack came off." Johnson reached into the backpack and began pulling out a gun; Welch saw the handle. Welch pulled out his revolver and fired twice. After he shot Johnson he "jumped back" into his car and "sped" away, later discarding the gun in a trash can.

At trial, Welch accounted for the fact that no other witness testified that Johnson was reaching for a gun by stating that the witnesses were Johnson's "friends and homies."

Other witnesses had seen Johnson with a backpack on the day of the shooting. Calloway reported that Johnson was wearing a backpack when he and Welch drove up. Dunn testified that Johnson had a backpack that day, but he did not bring it out into the street with him because he was going to fight. Garcia testified that at the time of the shooting the backpack was in the street, not near Johnson but as though tossed toward the opposite side of the street. Garcia estimated that the backpack was about 10 feet away from Johnson immediately after the shooting. She testified that Montgomery left with the backpack; her mother testified that Richardson threw a backpack that was the same color as Johnson's into a nearby alley after the shooting.

The jury convicted Welch of second degree murder and found true the special allegations that the murder was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)) and that Welch personally used and discharged firearms (§ 12022.53, subds. (b), (c), and (d).) The court sentenced Welch to 15 years to life in state prison for the murder, plus a consecutive 25 years to life in state prison for the use of a firearm within the meaning of section 12022.53, subd. (d). Welch appeals.

DISCUSSION

I. Consciousness of Guilt Instructions

The court instructed the jury with CALCRIM Nos. 371 and 372. As given here, CALCRIM No. 371 provides, "If the defendant tried to hide evidence against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself." CALCRIM No. 372 states, "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his 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."

Welch acknowledges that these instructions correctly state the law but argues that they are argumentative and pro-prosecution, and that they lighten the prosecutor's burden of proof. The California Supreme Court has rejected numerous challenges to jury instructions related to consciousness of guilt, including those concerning flight and suppression of evidence, explaining that "[t]hese standard instructions explicitly state

that any inference regarding guilt to be drawn from the circumstances described by them—a willfully false or misleading statement, destruction or suppression of evidence, and flight—is permissive and insufficient alone to prove guilt." (*People v. Tully* (2012) 54 Cal.4th 952, 1024 [considering CALJIC consciousness of guilt instructions].) The Supreme Court has also concluded the instructions are neither argumentative nor improperly favorable to the prosecution. (See, e.g., *People v. Holloway* (2004) 33 Cal.4th 96, 142 ["'cautionary nature of the [CALJIC consciousness of guilt] instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory"']; *People v. Taylor* (2010) 48 Cal.4th 574, 630 [CALJIC consciousness of guilt instructions not impermissibly argumentative]; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224 [CALJIC consciousness of guilt instructions not improperly pro-prosecution and do not lessen burden of proof], abrogated on other grounds by *People v. Lenix* (2008) 44 Cal.4th 602.) While these cases concerned the CALJIC consciousness of guilt instructions, their reasoning is entirely applicable to CALCRIM Nos. 371 and 372. The instructions were not argumentative and did not lessen the burden of proof.

A. CALCRIM No. 371

Welch also argues that CALCRIM No. 371, though justified by his own testimony, was improper on the particular facts of this case because it focused exclusively on the defendant's suppression of evidence and did not address the evidence that Johnson's friend removed his backpack from the scene. According to Welch, the instruction diverted the jury's attention from the backpack suppression and focused it on Welch's suppression of evidence, lightening the prosecutor's burden of

proof. He contends that CALCRIM No. 371 should have been modified to address "the fact that a friend of the victim suppressed evidence and that conduct may have shown that person's awareness of appellant's lack of guilt." He argues also that CALCRIM No. 371 "should have been balanced by an instruction to the jury that if it found that some third party had removed evidence from the scene of the shooting that might have been relevant to the circumstances of the killing, the jury should consider the meaning and importance of that suppression of evidence." Had Welch believed that the evidence merited an instruction addressing the removal of the backpack, he could have requested one. We have found no such request in the record. A trial court "has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal." (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

B. CALCRIM No. 372

Welch argues that CALCRIM No. 372 is argumentative and inconsistent with section 1127c because it does not inform the jury that it may consider a defendant's flight in determining his innocence, only his guilt. He asserts that the mention only of guilt in the instruction "is the equivalent of an inference of guilt because the inference that the defendant was aware of his guilt necessarily includes inferring the object of his awareness, i.e., his guilt." He also contends that the instruction lessened the prosecutor's burden of proof. These arguments have been rejected by California courts. See, e.g., *People v. Price* (2017) 8 Cal.App.5th 409, 454-458; *People v. Paysinger* (2009) 174

Cal.App.4th 26, 29-32; *People v. Hernandez Rios* (2007) 151 Cal.App.4th 1154, 1158-1159.)

Welch also argues that under the facts of this case the instruction was misleading and should not have been given because it was at least as likely that Welch's flight was due to fear of reprisal from Johnson's fellow gang members as it was to consciousness of guilt. In this one-paragraph argument Welch cites no authority for the proposition that the availability of another possible interpretation for the defendant's flight means that the instruction should not be given, nor are we aware of any such authority. Welch was free to argue to the jury that he fled out of fear of the rival gang members rather than consciousness of guilt, although he chose to argue that he fled because the police would not have believed him in light of the removal of Johnson's backpack and the witnesses' accounts. Welch has not established any error.

II. CALCRIM No. 3472

As given here, CALCRIM No. 3472 provides, "A person does not have the right to self-defense if he provokes a fight or quarrel with the intent to create an excuse to use force." At trial Welch neither objected to this instruction nor proposed any modifications. On appeal, Welch argues that it was not justified by the evidence, incorrectly stated the law, was argumentative and pro-prosecution, and lessened the burden of proof. We find no merit to these contentions.

The California Supreme Court approved a jury instruction very similar to CALCRIM No. 3472 in *People v. Enraca* (2012) 53 Cal.4th 735, 761, explaining that the self-defense doctrine "'may not be invoked by a defendant who, through his own wrongful conduct (e.g., the initiation of a physical attack or the commission

of a felony), has created circumstances under which his adversary's attack or pursuit is legally justified.' [Citation.]" In *Enraca*, the trial court instructed the jury with CALJIC No. 5.55, which provides, "The right of self-defense is not available to a person who seeks a quarrel with the intent to create a real or apparent necessity of exercising self-defense." (*Ibid.*) Courts have relied upon *Enraca* when considering CALCRIM No. 3472. "While *Enraca* involved the CALJIC analog to CALCRIM No. 3472, the language of the two instructions is materially the same. CALCRIM No. 3472 is therefore generally a correct statement of law." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1333 (*Eulian*).)

Relying on *People v. Ramirez* (2015) 233 Cal.App.4th 940 (*Ramirez*), Welch argues that it was error to give CALCRIM No. 3472. In *Ramirez*, the court concluded that CALCRIM No. 3472 inaccurately states the law in the particular circumstance in which a defendant contrives a non-deadly fight but his opponent suddenly and unexpectedly escalates the confrontation with lethal force. (*Id.* at p. 945.) Welch did not claim that he contrived to "provoke only a non-deadly confrontation and [Johnson] respond[ed] with deadly force." (*Eulian*, *supra*, 247 Cal.App.4th at p. 1334.) According to Welch, he did not contrive any fight at all: Johnson walked into the street and advanced on Welch, reaching into his backpack for a gun. The prosecution presented evidence that Welch initiated the confrontation by tapping Johnson with his car, prompting Johnson to request a fight; and that then Welch exited the car and immediately shot Johnson, who had not reached for a weapon. Neither version of events permits the conclusion that Welch intended to provoke a non-deadly conflict but that Johnson unexpectedly escalated it to

deadly force. Accordingly, Welch has not shown that this case presents "the rare case" (*ibid.*) in which CALCRIM No. 3472 inaccurately states the applicable law.[2]

Welch claims that CALCRIM No. 3472 should not have been given because there was "an absence of any credible evidence that appellant had contrived the confrontation that Alex Johnson instigated." He argues that the conviction should be reversed because Johnson actually confronted Welch. As there was testimony that Welch initiated the confrontation by hitting Johnson with his car, the court properly instructed the jury with CALCRIM No. 3472.

Welch also contends that the trial court should have modified CALCRIM No. 3472 to instruct the jury that "if someone removed evidence from the scene that might have established the right to self-defense, you may take this into account in deciding whether the defendant acted in self-defense." Welch provides no authority supporting the proposition that the court had a sua sponte duty to modify the instruction in this manner. To the extent Welch "believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions." (*People v. Dennis* (1998) 17 Cal.4th 468, 514.) "His failure to do so waives the claim in this court." (*Ibid.*)

Welch additionally claims that CALCRIM No. 3472 is argumentative because it did not mention that Johnson's backpack, which would have resolved the question of whether or not Johnson was reaching for a gun, had been taken from the

---

2 In addition to arguing that *Ramirez*, *supra*, 233 Cal.App.4th 940, is distinguishable, the Attorney General argues that the case was incorrectly decided. We need not decide this issue.

scene by one of Johnson's associates. He argues that the instruction should have instructed the jury "that just as self-defense may not be contrived, the *lack of* self-defense may not be contrived," and that the absence of this modification rendered the instruction argumentative and impermissibly biased toward the prosecution. He further asserts that the instruction "stated in an argumentative way that appellant did not have the right to provoke a fight with the intent to use force" and implied that Welch had provoked a fight with the intent to use force. A jury instruction is improperly argumentative if it invites the jury to draw inferences favorable to one party from specified items of evidence on a disputed question of fact. (*People v. Wright* (1988) 45 Cal.3d 1126, 1135-1138.) As CALCRIM No. 3472 does not imply that any particular conclusions should be drawn from specific items of evidence, it is not argumentative.

III. Sufficiency of the Evidence

Welch argues that his conviction for second degree murder was not supported by substantial evidence because the prosecution failed to prove that he did not act in self-defense or unreasonable self-defense. "'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.] We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of

the judgment the existence of every fact the trier could reasonably deduce from the evidence.' [Citation.]" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

Welch identifies discrepancies between witness accounts and describes Dunn's testimony that Welch hit Johnson with the car as "uncorroborated," "isolated," "not 'substantial,'" and a "mere 'modicum' of evidence in view of the totality of the evidence." He presents the evidence favorable to his theory of self-defense, contends that there was "no evidence" that anything but fear motivated Welch to shoot Johnson, and argues that the evidence was "substantial" that he shot Johnson in self-defense. Welch argues that he could have shot Johnson in self-defense even if Johnson was not armed and points out that the backpack that would have proven whether Johnson was armed was missing, asserting that it cannot be concluded that there was sufficient evidence to support the implied finding that he did not act in self-defense. Alternatively, Welch contends that the evidence of their prior conflicts, the rivalry between the two gangs, and Johnson's belligerent behavior on the street establishes that there was insufficient evidence to support an implied finding that he did not act in imperfect self-defense.

These arguments are essentially an invitation to substitute our judgment for that of the jury, which this court cannot do. We neither reweigh the evidence nor reevaluate the credibility of witnesses. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) If the circumstances reasonably justify the findings made by the trier of fact, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Ibid.*) Here, there was evidence from which the jury could have concluded that Welch shot Johnson without

Johnson ever reaching for a weapon or doing anything more provocative than seeking a fistfight. The evidence was sufficient to support the jury's determination that Welch did not act in self-defense or in imperfect self-defense.

IV. Prosecutorial Misconduct

Welch argues that the prosecutor committed misconduct by misstating the evidence and the law, arguing facts not in evidence, attempting to shift the burden of proof to the defense, and disparaging defense counsel. "'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'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."'" [Citations.] 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*).)

To preserve a claim of prosecutorial misconduct for appeal, a defendant must make a timely objection, make known the basis of the objection, and ask the trial court to admonish the jury. (*Hill*, *supra*, 17 Cal.4th at p. 820.) Welch acknowledges that his trial counsel "seldom" objected to this allegedly pervasive misconduct, but argues that his failure to object is excusable because of the sheer number of instances of misconduct. Alternatively, he contends that by failing to object his counsel rendered ineffective assistance of counsel within the meaning of *Strickland v. Washington* (1984) 466 U.S. 668. Because Welch

claims ineffective assistance of counsel, we consider the alleged misconduct despite the failure to object.

When evaluating alleged prosecutorial misconduct, we review the prosecutor's remarks to determine whether there is a reasonable likelihood that the jury misconstrued or misapplied them. (*People v. Cole* (2004) 33 Cal.4th 1158, 1203.) We do not view the prosecutor's remarks in isolation but consider them "in the context of the argument as a whole." (*Ibid.*)

A. Alleged Factual Misstatements

Welch identifies more than one dozen misstatements of the evidence in the prosecutor's closing argument, but the majority of these claimed misstatements are reasonable inferences from the evidence. Closing argument presents an opportunity to argue all reasonable inferences from evidence in the record. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342.) The fact that other reasonable inferences may be drawn from the evidence in the record does not make it misconduct for a prosecutor to argue the inferences favorable to his or her case. The prosecutor has the right to fully state his or her views as to what the evidence shows and to urge whatever conclusions he or she deems proper. (*Ibid.*)

Welch correctly observes that the prosecutor's assertion that "no witness ever saw Alexander Johnson with a gun," was inaccurate because Welch testified that he saw Johnson with a gun. Considered in isolation, the sentence was imprecise because Welch was a witness, but in context it is clear that the prosecution was challenging Welch's credibility by contrasting his account of events with the testimony of numerous other witnesses. There is no reasonable possibility that the jury understood that statement as implying that Welch's testimony "was not evidence."

B. Alleged Misstatements of the Law

Welch next contends that the prosecutor misstated the law when he argued, consistent with CALCRIM No. 3472, that the right to self-defense may not be contrived. This argument, like the challenge to CALCRIM No. 3472 discussed above, is based on *Ramirez*, *supra*, 233 Cal.App.4th 940. As we noted above, the specific factual scenario considered in *Ramirez*—when a defendant intends to provoke a non-deadly fight but the victim responds unexpectedly with lethal force—is not present here, and *Ramirez* therefore is inapposite. We perceive no misstatement of law in the prosecutor's argument.

Welch's remaining arguments confuse the prosecutor's arguments as to what the evidence showed with actual statements of the law. Welch first argues that the prosecutor misstated the law when he said, "The defendant's actions are not reasonable because it is not reasonable to shoot an unarmed man who is just saying that he wants to fight[,] especially when you are in a car and you can drive away if you want to." Contrary to Welch's argument, the prosecutor did not assert that Welch could not have acted in self-defense if Johnson was unarmed, nor did he state that Welch had a duty to retreat; instead, he argued that the evidence did not support Welch's claim of self-defense. Welch also claims that the prosecutor misstated the law on rebuttal when he responded to Welch's repeated description of Johnson as violent in closing argument. The prosecutor, however, did not "argu[e that] the defense attorney's argument was not allowed." The prosecutor contended that the evidence did not warrant the conclusion that Johnson was violent and that it showed that Welch initiated the quarrel. We identify no misstatement of the law here.

C. Alleged Disparagement of Defense Counsel

Welch argues that during the rebuttal argument, the prosecutor disparaged former defense counsel when he "accused [Welch's prior] lawyer of 'manipulating things' by showing witnesses other witness statements." We find no impropriety in the prosecutor's argument. Evidence was presented at trial that prior counsel had provided witness Garcia with statements made by two other witnesses, and Garcia's account of the incident at trial diverged from the statements she had made to the police near the time of the incident. The evidence permitted the inference that Garcia's testimony changed because she was provided statements made by other witnesses, and it also permitted the inference that prior counsel, who provided those statements, had manipulated witness testimony by such conduct. In closing argument a prosecutor may argue his or her interpretation of the evidence and may urge inferences based on that evidence. (*People v. Valencia* (2008) 43 Cal.4th 268, 283-284 [not misconduct for prosecutor to argue that the number of times witnesses spoke with members of the defense team meant that the witnesses must have been coached].)

Welch's final contention is that the prosecutor disparaged defense counsel with his argument regarding defense counsel's statements about Johnson and violence. Welch argues only that his attorney's argument was consistent with one of the jury instructions; he does not identify any respect in which the prosecutor's comments disparaged his trial counsel. We find no disparagement in this argument.

V. Cumulative Error

Welch argues that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Because we have found none of the claimed errors to constitute individual errors, they cannot as a group constitute cumulative error. (*People v. Richardson* (2008) 43 Cal.4th 959, 1036.)

VI. Senate Bill No. 620

The trial court sentenced Welch to a term of 15 years to life for the murder, plus 25 years to life in prison because he personally and intentionally discharged a firearm, causing death or great bodily injury. (§ 12022.53, subd. (d).) At the time of sentencing, section 12022.53, subdivision (h), prohibited the court from striking this firearm enhancement, and section 12022.53, subdivision (f), required the court to impose it. Senate Bill No. 620, which went into effect on January 1, 2018, gives the trial court new discretion to strike a firearm enhancement under section 12022.53: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) Welch contends, the People concede, and we agree the new law applies retroactively to this case. (See *People v. Conley* (2016) 63 Cal.4th 646, 656.) As there is no indication in the record that it would be futile to remand to allow the trial court to determine whether to strike the enhancement previously imposed under section 12022.53, remand for resentencing is appropriate.

DISPOSITION

The conviction is affirmed and the matter remanded for resentencing.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.