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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PHILIP THOMAS HANES, Defendant and Appellant.	2d Crim. No. B269116 (Super. Ct. No. 14C21538) (San Luis Obispo County)

Philip Thomas Hanes was convicted by jury of second degree murder and sentenced to 15 years to life in prison, plus 1 year for using a deadly weapon. (Pen. Code, §§ 187, 189, 12022, subd. (b)(1).) The evidence of Hanes's guilt was compelling. The victim made dying declarations accusing Hanes of stabbing her. Deputies arrived at Hanes's home to find Hanes bloodied but uninjured, his girlfriend near death, and the murder weapon, which had been cleaned with detergent. The jury rejected Hanes's claim of self-defense.

Hanes argues that two errors deprived him of a fair trial. His claim of prosecutorial misconduct fails because the improper questions were brief and isolated, and the trial court promptly cured the impropriety by admonishing the jury to ignore the questions and answers. By failing to timely object, Hanes forfeited his challenge to testimony showing that he threatened to shoot work supervisors who treated him unfairly. The trial court had discretion to admit this evidence, in any event. If errors were made, they were harmless given the overwhelming evidence of guilt. We affirm.

FACTS AND PROCEDURAL HISTORY

On the night of June 4, 2014, Tina Beddow called 911, saying, "Please help me," "I've been stabbed" and "I'm dying." She was able to designate an address in Templeton, where she lived with appellant Hanes. Hanes's voice can be heard in the 911 recording, demanding that Beddow give him the telephone. Beddow told the dispatcher, "He stabbed me in the lungs," and specified, "His name is Phil Hanes." Beddow then said, "I'm dead . . . I can't breathe anymore."

Arriving deputies found Beddow, in pain and in "large pools of blood" flowing from a two-inch knife wound. She repeated that she was dying. A deputy's microphone captured Beddow saying, "I wanted to leave. . . . He stabbed me . . . because I was leaving." Beddow bled to death.

Hanes was inside the house, with blood on his shirt, pants and bare feet. A trail of blood led down the hallway to the kitchen where Beddow collapsed. A partial footprint was in the blood. The blood appeared to have been swiped with a sponge, in an attempt to clean it up.

A knife, 11 and a half inches long, with a blade of over 6 inches, was on the hallway floor. The empty knife sheath was in Hanes's bedroom, on top of a gun safe, with a sharpening stone affixed to it.

An autopsy revealed that the knife was plunged with sufficient force to drive it four and a half inches into Beddow's chest, passing through her right lung and liver before being stopped by her spinal cord. A bruise at the top of the wound may have been caused by the knife handle striking Beddow's chest. Beddow's liver had two separate intersecting wound tracks, suggesting that the knife was partially withdrawn, then re-entered the organ.

Beddow informed deputies that Hanes washed the knife used in the stabbing. Hanes initially denied washing the knife. Later, he confessed that he washed it with detergent "because I had blood on my hands and on the knife and I just wanted to get it off." Hanes sharpened the knife on the day of the stabbing, for "no particular reason."

In recordings made shortly after the stabbing, Hanes claimed that he stabbed Beddow because she tried to kill him, though he had no defensive wounds. He intended to nick her a little, a quarter or half inch, to teach her not to approach him with a knife. Hanes explained to detectives that he may have cleaned blood off of the floor because "it felt nasty on my feet. I did not like that blood on my feet." At trial, Hanes denied cleaning any blood from the floor.

Hanes was recorded telling detectives, "I'm gonna go with self defense[.] She came after me, she threatened me, she

told me she was gonna kill me."[1] The detective who interviewed Hanes recalled that Hanes had multiple versions of the event. Ultimately, Hanes agreed that "the knife was in my hand."

Hanes's defense at trial was that Beddow attacked him while in the throes of a methamphetamine-induced psychosis. Tested postmortem, Beddow's blood contained no methamphetamine, no opiates, no cocaine, and no marijuana. Beddow had a blood alcohol level of .20, which supported her statement to paramedics that she had been drinking but not using drugs on the night of the stabbing.

Autopsy photographs showed that Beddow had what Hanes's expert referred to as "meth mouth," i.e., fractured teeth, caries, and infections. Beddow was treated at a hospital on April 11, 2014. The treating physician's impression was that Beddow had psychosis induced by methamphetamine abuse, as marked by her hallucinations, paranoid delusions, and lack of sleep for several days. Beddow tested positive for methamphetamine on that date, and admitted to the physician that she abuses drugs. Hanes's adult daughter testified that she and Beddow used heroin and methamphetamine intravenously, starting in 2010.

Hanes's expert opined that methamphetamine abusers can develop a psychosis "even after they stop the meth," a mental condition in which a person is not in contact with reality and may act violently. A paramedic testified that Beddow

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[1] Hanes undermined the self-defense theory by agreeing when the prosecutor said, "today, as you sit here, you're not telling this jury that the knife went into Tina's chest because you [were] defending yourself, right?" Hanes testified that he did not think Beddow was trying to kill him that night.

displayed no symptoms of psychosis, such as hostility, hallucinations, violence, delusions or paranoia after the stabbing.

Hanes was an instrument control technician at nuclear power plants for 29 years. He denied ever being violent with or hitting women. When he met Beddow, she weighed 87 pounds and was deeply into a heroin and methamphetamine addiction. Hanes was aware of Beddow's addiction, and saw her inject drugs. He took her to the hospital on April 11, 2014, because she was hallucinating.

On the day of the stabbing, Hanes began drinking 24-ounce beers at 3:30 p.m., and had measurable alcohol in his system at 10:00 a.m. the next day. That evening, Beddow became upset when Hanes slapped her bottom and told her that she had a "big ass." They had both been drinking. After they argued, Hanes took a sleeping pill and went to bed, locking Beddow out of the bedroom.

Hanes testified that he awoke to Beddow pounding on the door, screaming, yelling and cussing. Hanes left his bedroom, used the toilet in the hallway bathroom, then turned to see Beddow walking down the hallway toward him, yelling and waving a knife. A scuffle over the knife ensued. At trial, he recalled "a sliding feeling" and falling on the floor. However, in a recorded interview after the stabbing, he said, "I don't remember falling with her on the ground." Hanes's five-year-old grandson Logan, who was in a bedroom at Hanes's home, heard Beddow scream and say "Get off me."

Hanes testified that he saw Beddow lying on her back next to him with a knife in her, which he pulled out and tossed. When she stood up, still yelling and screaming, a "shocking" amount of blood poured from her. According to Hanes, the victim

stopped yelling and said, "You f-ing stabbed me." He does not know how the knife got in her chest.

After a while, Hanes went to look for his phone, and realized that Beddow had already called 911. He repeatedly asked her to give him the telephone, before the police arrived. He told her, "You brought this all upon yourself and you're probably going to die."

Hanes retrieved the knife from the floor in front of Logan's bedroom, tossed it into the kitchen sink, where he washed his hands with detergent and patted dry the knife handle, before going to a neighbor's house to seek help. He then decided to put the knife back on the hallway floor, realizing that the police were going to be involved and he did not want to disturb a crime scene. When deputies arrived, he told them that the knife was in the dishwasher, though he did not recall putting it there.

At trial, Hanes clearly recalled that the knife was lying on a table in the living room that day, before he saw Beddow walking down the hall yelling and waving it at him during the night. Conversely, he was recorded telling detectives, after the slaying, "I think I put the knife in the bathroom when I was taking a piss and she picked it up. That's what I think happened. I think I took it out of the scabbard, put it in the bathroom[] when I went to take a piss, turned around was taking a piss, come around and she's got the mother fucker."

The jury convicted Hanes of murder, but found that the murder was not willful, deliberate or premeditated. It found that he personally used a deadly or dangerous weapon. The trial court denied Hanes's motion for a new trial. Hanes was

sentenced to 15 years to life for the murder plus 1 year for the weapon use.

DISCUSSION

1. Evidence of a "Hit List"

Anticipating that Hanes would testify, the prosecution proposed to confront him on cross-examination with evidence that Hanes threatened to shoot supervisors at a nuclear power plant where he formerly worked. The purpose of this evidence was to negate Hanes's claim of self-defense, to show an absence of mistake and Hanes's state of mind, and to rebut any testimony that he is a peaceful, loving, malice-free person who would never consider taking the life of another.

Defense counsel argued that prejudice from the proposed testimony would outweigh its relevance. (Evid. Code, § 352.)[2] The evidence dates from 2006-2007 and is stale; moreover, it is unreliable because Hanes's coworkers, who heard of the "hit list" years ago, never reported it until they heard about Beddow's killing. Defense counsel insisted that no evidence would be introduced regarding Hanes's good character, so there was no need to admit countervailing evidence of bad character.

The trial court indicated that it would reserve its ruling until Hanes testified. Before Hanes testified, there was a disagreement whether Hanes's expert witness could testify that Beddow attacked Hanes during a psychosis induced by methamphetamine abuse. The court ruled that the defense could introduce expert testimony that Beddow's April 11, 2014 psychotic episode was a precursor of her alleged violence on the day of the stabbing and pertains to Hanes's claim of self-defense. The court noted, however, that "the People would have the right

[2] Unlabeled statutory references are to the Evidence Code.

under Evidence Code section 1103(b), if the defendant introduces evidence that a victim has a violent character, to introduce evidence of the defendant's violen[t] character."

During cross-examination, Hanes stated that he is not a violent person and would never threaten anyone with violence. The prosecutor asked, "You never threatened two supervisors at PG&E that they were on a hit list that you going to go postal if you got a terminal illness or you were ever going to be locked up in jail, you told them that, didn't you?" Hanes replied, "It's an absolute lie," and denied telling coworkers that he had such a list.

On rebuttal, the prosecution presented Hanes's former coworkers at the nuclear plant, Lee Roy Marsh and Kenneth Youngreen. Marsh testified that Hanes identified by name three PG&E colleagues that Hanes intended to shoot "if he only had a short time to live." Hanes made the threats roughly once a year, between 2004 and 2008. In 2010, Marsh learned that he was one of the people that Hanes intended to shoot. Youngreen testified that on numerous occasions, Hanes listed five supervisors he thought about killing because they treated him unfairly, saying that he would shoot these people if he had a terminal illness or faced a life sentence in jail. The witnesses contacted authorities when they learned that Hanes was arrested for Beddow's murder, worried that if he made bail, he might make good on his threats to kill PG&E workers.

The trial court instructed the jury with CALCRIM No. 375. It read, in part, "The People presented evidence that the defendant threatened to shoot co-workers at PG&E. [¶] . . . [¶] If you decide that the defendant committed the acts, you may, but are not required to, consider that evidence for the limited purpose

of deciding whether or not: [¶] The defendant acted with the intent to kill in this case; or [¶] The defendant's alleged actions were the result of mistake or accident; or [¶] The defendant was a nonviolent person. [¶] In evaluating this evidence, consider the similarity or lack of similarity between the uncharged acts and the charged offenses. [¶] Do not consider this evidence for any other purpose."

Defense counsel did not contemporaneously object when the prosecutor asked Hanes questions about a hit list during cross-examination. Counsel also failed to object on the record to the testimony of witnesses Marsh and Youngreen. A verdict cannot be set aside nor a judgment reversed for erroneous admission of evidence, if the record contains no timely objection. (§ 353.) Appellate courts generally will not review challenges to the admissibility of evidence absent an objection on the ground urged on appeal. (*People v. Fuiava* (2012) 53 Cal.4th 622, 670.) Hanes's claim was forfeited by the failure to object. (*People v. Doolin* (2009) 45 Cal.4th 390, 434.) We shall address the issue however, because Hanes claims that the error has constitutional due process proportions. (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1171-1173.)

Evidence of a person's character or trait cannot be used to prove conduct on a specified occasion. (§ 1101, subd. (a).) Evidence that a person committed a crime or other act may be introduced when relevant to prove "some fact," such as motive, opportunity, intent, preparation, plan, knowledge, identity, lack of mistake or accident. (§ 1101, subd. (b).) Before the jury hears the evidence, the court must ascertain that it "'tends logically, naturally and by reasonable inference' to prove the issue upon

which it is offered[.]" (*People v. Schader* (1969) 71 Cal.2d 761, 775.)

Here, a conditional threat was made in 2004-2008 to shoot supervisors who treated Hanes unfairly—but only if Hanes had a terminal illness or faced a long prison term. A threat to shoot colleagues does not prove, by reasonable inference, Hanes's motive or intent to stab Beddow while drunk and enraged. "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23.) Nor do the threats prove opportunity, preparation, plan, knowledge, identity, lack of mistake or accident. (§ 1101, subd. (b).)

The Attorney General urges us to "look beyond the requirements of section 1101" and instead focus on section 1103, subdivision (b).[3] Under that statute, if "a defendant offers evidence to establish that the victim was a violent person, thereby inviting the jury to infer that the victim acted violently during the events in question, then the prosecution is permitted to introduce evidence demonstrating that (1) the victim is not a

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[3] "In a criminal action, evidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant" to prove that the victim acted in conformity with her character for violence. (§ 1103, subd. (b).)

violent person and (2) the defendant was a violent person, from which the jury might infer it was the defendant who acted violently." (*People v. Fuiava, supra,* 53 Cal.4th at p. 696; compare *People v. Myers* (2007) 148 Cal.App.4th 546, 552-553 [evidence that the victim acted violently once, at the time of the charged offense, does not open the door to character evidence about the defendant's violent nature when he claims self-defense].)

Hanes contends that the hit list evidence was inadmissible under section 1103, subdivision (b), "because the defense did not introduce evidence of past violent character on the part of Beddow." Evidence that Beddow was violent in the past came from Hanes, who testified that (1) Beddow threatened half a dozen times to "cut [his] balls off," but he never took the threat literally, and (2) "she's hit me before" on one occasion, but did not hurt him.[4]

Though the defense evidence proving that Beddow had a violent character was skimpy, the trial court acted within its discretion, and its determination was not arbitrary, capricious or patently absurd. (*People v. Rogers* (2013) 57 Cal.4th 296, 326.) The court admitted defense evidence allowing the jury to infer that Beddow was a drug-addled psychotic with a propensity for violence who attacked Hanes first, so that he acted only in response to her violence. Hanes made a tactical choice to present evidence of the victim's character for violence, but "[t]he defense choice of strategy often makes admissible in rebuttal certain

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[4] When Beddow was hospitalized on April 11, 2014, she was hallucinating and defensive, but not violent or threatening. Hanes's expert opined that "it would not surprise [him]" if a person suffering from a psychosis "would be violent."

evidence which would not be admissible in the prosecution's case-in-chief" regarding Hanes's own character for violence. (*People v. Blanco, supra,* 10 Cal.App.4th at p. 1176 [after the defense produced evidence that the victim had a history of accosting people and demanding money and tried to rob the defendant, the prosecution was allowed to introduce evidence that the defendant had a reputation for violence because he beat his wife and threatened his neighbors with violence].) Evidence of Hanes's threats of violence was admissible under section 1103, subdivision (b).

Even if Hanes had preserved his appellate challenge by raising timely objections to the "hit list" questions, and assuming for the sake of argument that the testimony should have been excluded as improper evidence of bad character, any error was harmless because, as we shall see in section 3 of this opinion, excluding the hit evidence would not reasonably have resulted in a more favorable determination, given the overwhelming evidence of guilt. (*People v. Fuiava, supra,* 53 Cal.4th at p. 671; *People v. Doolin, supra,* 45 Cal.4th at p. 439.)

2. Prosecutorial Misconduct

Hanes sought a new trial on the ground that the prosecutor asked improper questions. While cross-examining Hanes, the prosecutor noted that Hanes referred to Beddow as "a bitch," during interviews with detectives. Hanes explained that he does not generally use this epithet, and blamed his state of intoxication during the interview. The prosecutor posed more questions about the epithet, finally asking, "Are any of these women in the jury bitches in your eyes?" Hanes replied, "I wouldn't know. I don't know them." The prosecutor pressed on, "What about the judge?" When Hanes answered, "I have no

idea," the prosecutor said "Certainly can be, though, right?" Defense counsel did not object or move to strike. Instead, he asked for a sidebar.

After the jury left the courtroom, defense counsel argued that the prosecutor had engaged in misconduct, insulting the jury and inflaming their passions and biases by suggesting that Hanes considered the majority-woman jury panel and even the judge as "a potential bitch." Defense counsel requested sanctions, or for a special instruction, but did not ask for a new trial. When the jurors returned, the court admonished them, "ladies and gentlemen, the last line of questioning pertaining to the jury and the court was an improper line of questioning. You are to disregard it in its entirety, both the questions and the responses."

The following day, defense counsel asked the court to question the jurors about the prosecution's insinuations that Hanes somehow believes that the jurors or the judge are "bitches." The court agreed. It brought the jurors into the courtroom, individually, to ask whether the questions affected their ability to be fair and whether they would be able to disregard the questions and not consider them during deliberations. The jury members and alternates each professed to be unaffected, and agreed to be fair and to disregard the questions in deliberations. Afterward, defense counsel stated, "I'm not going to pursue a mistrial motion at this time." After the guilty verdict, defense counsel requested a new trial based on the prosecutor's questions.

A new trial may be granted if the prosecutor is "guilty of prejudicial misconduct during the trial . . . before a jury" (Pen. Code, § 1181, (5)), and the defendant's chances of

receiving a fair trial have been irreparably damaged. (*People v. Ayala* (2000) 23 Cal.4th 225, 282.) The trial court has considerable discretion to decide whether any prejudice can be cured by admonition or instruction. (*People v. Collins* (2010) 49 Cal.4th 175, 198.)

Here, defense counsel did not object to the prosecutor's questions and Hanes answered them. The court advised the jury that the line of questioning was improper and admonished the panel to disregard the questions and the answers. When the trial court promptly admonishes the jury to disregard an improper line of questions, "we presume the jury heeded the admonition." (*People v. Burgener* (2003) 29 Cal.4th 833, 874.)

The admonition alone would have been enough to cure the impropriety. Yet the court went further the next day, individually asking jurors whether the "bitch" questions affected their ability to be fair and extracting promises from panel members to ignore the questions during deliberations. Defense counsel was satisfied, and expressly waived a mistrial motion based on misconduct. Not until after the guilty verdict did the defense claim prejudice from the prosecutor's questions.

Assuming that the prosecutor's questions improperly appealed to the jurors' emotions, or inflamed their passions or prejudices, the trial court did not abuse its discretion by denying Hanes's post-verdict request for a new trial. The questions invoking the jury and the judge were "brief and isolated." (*People v. Dement* (2011) 53 Cal.4th 1, 40.) In addition, the court admonished the jury to disregard the questions and not to consider them during deliberations, which each juror agreed to do. The admonishment cured the harm. (*People v. Cunningham*

(2001) 25 Cal.4th 926, 1000-1001.) Hanes's right to a fair trial was not irreparably damaged.

3. Harmless Error

If error was committed during the trial, it "did not result in substantial prejudice to defendant," who received a fair trial. (*People v. Price* (1991) 1 Cal.4th 324, 465.) "Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) Here, even if defense counsel neglected to object to the "hit list" evidence, even if that evidence should not have been admitted, and even if the prosecutor asked two improper questions, the mistakes did not, singly or cumulatively, prejudice Hanes's right to a fair trial. The errors were few and were harmless beyond a reasonable doubt, given the overwhelming evidence of Hanes's guilt.

The jury heard the victim's 911 call, stating that she had been stabbed in the lung and was dying. The prognosis proved to be correct. Beddow identified Hanes as her assailant, whose voice can be heard in the background, demanding that Beddow give him the phone. In a second dying declaration, Beddow accused Hanes of stabbing her because she wanted to leave him. Deputies found Hanes in the house with blood on his shirt, pants and feet, though he was uninjured. The evidence points inescapably to the conclusion that Hanes consumed quantities of beer, then stabbed Beddow in a drunken rage.

Blood trails on the floor appeared to have been swiped. In a recorded interview, Hanes admitted to detectives that he wiped the blood because it felt "nasty" on his feet. At trial, Hanes contradicted himself and denied cleaning up the

blood. A long knife was found on the hallway floor, which Hanes admittedly sharpened on the day of the stabbing. Beddow told arriving deputies that Hanes washed the knife. Hanes initially denied this, but was later recorded saying that he washed the knife with detergent. He replaced the knife on the hallway floor once he realized that deputies were on their way to his home.

By removing blood from the floor and from the knife, Hanes demonstrated an awareness of his culpability that is entirely at odds with any possible conclusion that the stabbing was an accident or mistake. Washing and drying the knife was not mere fastidiousness, but was an effort to remove incriminating blood and fingerprints from the murder weapon. Hanes would not have engaged in these activities had he merely been defending himself from a psychotic person's unprovoked attack.

The non-accidental nature of the crime is bolstered by autopsy evidence showing two intersecting wound tracks in Beddow's liver, suggesting two insertions of the knife into the victim. Bruising at the entry point indicated that the knife was thrust with enough force that the handle struck the victim's chest and the blade struck her spine.

As part of his self-defense claim, Hanes told deputies that he removed the knife from its protective sheath and carried it into the hallway bathroom while he used the toilet. A scuffle supposedly ensued when Beddow entered the bathroom and took the knife. At trial, Hanes contradicted himself and told the jury that the knife was left on a living room table, until he saw Beddow walking down the hallway toward him, yelling and waving the knife. Hanes told deputies that he did not fall to the ground while scuffling with Beddow for possession of the knife.

Conversely, he told the jury that he fell to the floor. He did not know how the knife got in Beddow's chest, but the victim said to him, tellingly, "You f-ing stabbed me."

Hanes's inconsistent and conflicting statements do not help him. It is unreasonable to believe that Hanes would open his locked bedroom to use the hallway toilet when he had one in his room; particularly when it was immediately after a person he believed was psychotic screamed and pounded on his door demanding entry. It is equally unreasonable to believe that Hanes would leave a newly-sharpened unsheathed knife within the reach of his five-year-old grandchild; and that he failed to recall if he fell to the floor in the scuffle with the victim. At one point during his testimony, Hanes denied that he was defending himself from Beddow or thinking that she was trying to kill him that night. Though instructed on Hanes's claim of self-defense, the jury did not accept it, owing to the irreconcilable conflicts between his recorded statements to detectives and his trial testimony.

Given the totality of the evidence, it is not reasonably probable that the jury would have reached a different result had the "hit list" testimony been excluded. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.) Nor did the prosecutor's lack of circumspection in including the judge and jurors while questioning Hanes infect the trial with such unfairness as to make the conviction a denial of due process. It is not reasonably probable that the trial outcome was affected by the prosecutor's brief references to the jurors or the judge, given the strength of the evidence showing guilt. (*People v. Shazier* (2014) 60 Cal.4th 109, 150-151 [prosecutor's misconduct in insinuating that jurors might not be able to placate family and friends if they exonerated

the defendant was an isolated incident, mitigated by an instruction not to consider public opinion, and the evidence against the defendant was very strong].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge
Superior Court County of San Luis Obispo

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