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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. AYLETT DRAKE HAUKI, Defendant and Appellant.	2d Crim. No. B284740 (Super. Ct. No. 1481620) (Santa Barbara County)

Iconic musician Carole King, in her hit song "*Smackwater Jack,*" explains a simple and straightforward sentiment: "[Y]ou can't talk to a man [w]ith a shotgun in his hand . . . ." Aylett Drake Hauki appeals his conviction by jury for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(2))[1] with a firearm use enhancement (§ 12022.5, subd. (a)(1)), and negligent discharge of a firearm (§ 246.3). The trial court suspended imposition of

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

sentence and placed appellant five years probation with 364 days county jail. We affirm.

Facts

On September 25, 2015, appellant pushed Alberto Macias down his front door steps with a shotgun and shot at the pavement, causing buckshot to ricochet into Macias's legs. Macias was there to finish a window tint job on appellant's mobile home. Before arriving that morning, Macias sent two text messages to appellant that he was on his way. Macias knocked on the front door, called out appellant's name, and knocked on the bedroom window before setting up a ladder and putting a squeegee and an X-acto knife on the ladder.

Macias returned to the front door and knocked again. As Macias started to walk down the stairs, appellant opened the door, pushed Macias down the stairs with a shotgun, and said "'Get the fuck out of here.'" Macias opened his hands with his palms pointed outward and replied, "'What's your problem? You're the one that kept bugging me to come over here and do this.'" Angry, appellant said "'You think I'm playing?'" and fired a 12-gauge pistol grip shotgun at the walkway, causing buckshot to ricochet into Macias's legs.

Appellant's neighbor, Deanna Baker, saw appellant reload the shotgun. Appellant was "pissed off" and yelled, "'I'm going to blow your head off!'" Macias stood in the street, empty handed. Appellant was arrested minutes later and yelled, "Somebody was trying to break into my house! That's what happened. I told him to 'get outta here,' but he didn't wanna leave . . . so I shot a round in the air and he ran away. [That's] the third time he's done that . . . jiminy."

Santa Barbara County Sheriff's Detective Joel Rivlin photographed a divot in the walkway where the buckshot hit. A Winchester 9-pel, double aught buck shotgun shell was in the trashcan and three 12-gauge shotguns were in appellant's bedroom.

At trial, appellant said that he was asleep, heard someone breaking in, and grabbed his shotgun. When appellant unlocked the front door, a man wearing a hat "shoved a knife" past his face. Appellant said it was a 10-inch Smith & Wesson knife and claimed the man thrust the knife a second time at his throat. Appellant hit the man with the shotgun, causing the man to lose his balance and grab the side of the door. Appellant poked the man in the chest with the gun barrel and racked the shotgun as the man fell over the stair rail and dropped the knife. The man grabbed the knife and tried to throw it. Appellant realized it was Macias, changed his aim, and shot at the walkway in front of Macias.

Prosecutorial Misconduct

At trial, appellant was certain that Macias tried to stab him with a 10-inch Smith & Wesson knife. Defense counsel argued that Macias "never left it on th[e] ladder" and "we know for a fact he had a blade on him."

On rebuttal, the prosecution argued: "You cannot speculate as to what's not supported by the evidence. And what we just heard was speculation. The defense theory is that because Mr. Macias said he had some kind of blade or X-acto knife, . . . and the fact that Ms. Stilwell [appellant's neighbor] saw him holding something at some point that morning that we know that it was probably the blade, and we also know that he probably had it with him when he went up to the stairs to talk to [appellant], and

that the door probably hit him, and that because the door probably hit him, his hands probably went up in the air with the knife, . . . and [appellant] believed probably that that's why he was being stabbed. That is speculation."

Defense counsel objected and the trial court instructed that "each counsel can comment on the evidence."

The prosecution told the jury that the defense argument was "speculation, because that is not the testimony that came out even from the [appellant]. . . . He said . . . that someone tried to stab him with a 10-inch knife, a Smith & Wesson. So this whole idea about, 'Well, what about the blade, the retractable blade? That was probably it,' no, because [appellant's] own testimony indicates the only weapon that he saw on Mr. Macias would have been the 10-inch Smith & Wesson [knife]. There is no evidence to show that that's what occurred. So the defense can get creative and try and throw out alternative theories for fun, but that's not supported by the evidence. . . . [¶] If you're to believe [appellant's] testimony, then you would have to believe that someone had a 10-inch Smith & Wesson knife. You can't put a weapon in someone's hand that nobody testified to."

Appellant contends that it was prosecutorial misconduct but concedes that he withdrew his objection after the jury was instructed that counsel's arguments are not evidence and each side can comment on the evidence. "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Appellant argues that counsel was ineffective in not objecting but the Sixth Amendment

does not require trial counsel to make futile or frivolous objections. (*People v. Osband* (1996) 13 Cal.4th 622, 678.)

Waiver aside, there was no misconduct. A prosecutor may criticize a defense theory that lacks evidentiary support and has wide latitude in describing deficiencies in defense counsel's account of the evidence. (*People v. Bemore* (2000) 22 Cal.4th 809, 846; see *People v. Medina* (1995) 11 Cal.4th 694, 759 ["no misconduct where prosecutor said counsel can "'twist [and] poke [and] try to draw some speculation, try to get you to buy something"'"].) The prosecution asked the jury to focus on appellant's testimony. We reject the argument that the prosecution's remarks lowered the burden of proof or prejudiced appellant.[2] This is not a case in which the prosecution trivialized the deliberative process or tried to turn the trial into a game by encouraging the jurors to guess what happened. (See, e.g., *People v. Centeno* (2014) 60 Cal.4th 659, 669.)

Appellant claimed Macias was about to throw a 10-inch Smith & Wesson knife at him. Macias denied that he had a knife or threatened appellant. This was corroborated by two neighbors who witnessed the shooting and police testimony that no knife was found. Appellant stated that he fired the shot because

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[2] The jurors were instructed on reasonable doubt and the People's burden of proof (CALCRIM Nos. 103, 220), that they alone judge the credibility of witnesses (CALCRIM Nos. 105, 226), that they must decide what the facts are and what happened based on the evidence presented (CALCRIM No. 200), and that if an attorney's comments conflict with the jury instructions, the jury must follow the trial court's instructions (CALCRIM Nos. 200, 222). It is presumed that the jury understood and followed the instructions. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

Macias would not leave. Appellant was angry and shouted, "Get out of here or I'm going to blow your fucking head off!" We reject the argument that it is reasonably probable that appellant would have received a more favorable verdict but for the alleged prosecutorial misconduct. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Ineffective Assistance of Counsel - Impeachment Testimony

Appellant argues that trial counsel was ineffective in not questioning Rex Matsunaga, appellant's and Macias's mutual friend, about a conversation that occurred before the shooting. At an Evidence Code section 402 hearing, Matsunaga said that appellant and Macias visited his restaurant to lunch with Matsunaga. During the meeting, appellant told Macias, "'I don't expect you to come back since you're not going to finish the windows.'" Macias responded, "'No, I don't have a ladder.'" Appellant paid Macias $40 for the work he had done and Macias left.

Defense counsel argued that the out-of-court statement was admissible to impeach Macias's testimony that both appellant and Matsunaga asked Macias to go back and finish the job. The trial court ruled that Matsunaga could testify about Macias's out-of-court statement (i.e., "No, I don't have a ladder") because it was inconsistent with Macias's testimony. Defense counsel called Matsunaga as a witness but did not question him about Macias's "I don't have a ladder" statement.

To prevail on a claim of ineffective assistance of counsel, appellant must show deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) On review, great deference is given to counsel's tactical decisions and we do

not second-guess reasonable tactical decisions. (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) Defense counsel may have decided there was little to be gained in soliciting testimony that Matsunaga personally asked Macias to finish the job. Matsunaga testified that Macias had a reputation for being dishonest. Questioning Matsunaga further about what was said at the restaurant would have distracted the jury from the issue of whether appellant acted in self-defense (CALCRIM No. 3470) and used reasonable force to defend his home (CALCRIM No. 3475). Defense counsel argued that Macias was a grafter and lied "about the blade . . . . You know, he's the kind of guy that tells his friends that, 'Yeah, I'm homeless, . . . help me out, give me some charity, money, food,' something like that. You know, he's a convicted felon." That is not ineffective assistance of counsel. "'[I]n the heat of a trial, defense counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. . . .' [Citation.]" (*People v. Riel* (2000) 22 Cal.4th 1153, 1197.)

It is not reasonably probable that appellant would have obtained a more favorable verdict but for counsel's deficient performance. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.) Appellant admitted that he used the shotgun to shove Macias down the stairs, shot in front of Macias's feet, and saw Macias "jump[] up in the air." It was damning evidence. Before trial, appellant never said that Macias lunged at him with a 10-inch Smith & Wesson knife or that Macias tried to throw a knife at him.

Use of Force Training

Appellant asserts that the trial court abused its discretion in not permitting Herbert Thrasher to testify about the use of

force training that appellant received 20 years earlier. Thrasher was appellant's co-worker and supervisor when appellant worked as a corrections officer. Appellant asserts that Thrasher could have corroborated appellant's testimony that he was trained in the use of force and reasonably believed he had to fire the shotgun to defend himself against a home intruder. The trial court ruled that Thrasher could not be asked about the use-of-force training because Thrasher did not train appellant or attend a use of force class with appellant, and was not an expert on the reasonable use of force. Appellant was permitted to testify about the use-of-force training and presented expert testimony that a person wielding an edged weapon is a deadly threat.

We review for abuse of discretion. (Evid Code, § 352; *People v. Harrison* (2005) 35 Cal.4th. 208, 230.) A trial court may exclude evidence that is cumulative, that would confuse the jury or consume undue time, or that is more prejudicial than probative. (Evid. Code, § 352; *People v. Gutierrez* (2009) 45 Cal.4th 789, 828.) The trial court reasonably concluded that Thrasher's proffered testimony lacked probative value and created an undue risk that the jury would assume appellant acted reasonably because he was a retired corrections officer. The use-of-force training took place more than 20 years ago and had little probative value. Appellant stated it was standard training and offered to all law enforcement and corrections officers. (See § 832.)

Assuming, arguendo, that the trial court erred in limiting Thrasher's testimony, it did not prejudice appellant or violate his constitutional right to present a defense. (See *People v. Lawley* (2002) 27 Cal.4th 102, 155 [ordinary rules of evidence do not impermissibly infringe on an accused's constitutional right to

present a defense].) The evidence was overwhelming. The alleged error, if any, was harmless under any standard of review. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see *People v. Alcala* (1992) 4 Cal.4th 742, 790-791 [applying *Watson* harmless error]; *Chapman v. California* (1967) 386 U.S. 18, 24.)

Appellant argues that the cumulative effect of the alleged errors denied him a fair trial. The alleged errors, whether considered separately or in combination, were inconsequential. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057.) Having failed to establish multiple errors, appellant's cumulative error claim is meritless. (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 491.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

John McGregor, Judge

Superior Court County of Santa Barbara

Sylvia Ronnau, under appointment by the Court of Appeal for Defendant and Respondent.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Michael C. Keller, Acting Supervising Deputy Attorney General, Yun K. Lee, Deputy Attorney General, for Plaintiff and Respondent.