Filed 3/27/17 P. v. Danner CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JOHN STEVEN DANNER, Defendant and Appellant.	2d Crim. No. B268557 (Super. Ct. No. 14C-02521) (San Luis Obispo County)

John Steven Danner appeals after a jury convicted him of second degree murder (Pen. Code,[1] §§ 187, subd. (a), 189) and found true an allegation that he personally used a firearm in committing the offense (§ 12022.53, subds. (b)-(d)). The trial court sentenced him to 40 years to life in state prison. Appellant contends (1) the court erred by excluding evidence of the victim's reputation for violence; (2) the court erred in refusing to instruct the jury on involuntary manslaughter; and (3) the prosecutor

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

committed prejudicial misconduct during his closing argument. We affirm.

STATEMENT OF FACTS

Prosecution

On February 7, 2014, appellant was living in Paso Robles with his mother Christine Ruda, Ruda's boyfriend Billy Don Law, and her ex-boyfriend Robert Little. Appellant and Law had a contentious relationship. On Thanksgiving Day 2013, Law knocked out one of appellant's teeth by punching him in the face and permanently injured his hand in the process. On another occasion, Law hit Little with a baseball bat. Little testified that Law had a "little man complex," had threatened appellant with violence, and often bragged about the numerous fights in which he had participated.

At about 2:30 a.m. on February 7, appellant and Little were in the back yard "high" on methamphetamine when appellant heard Ruda and Law arguing inside the house. The interior of the house was dark because the electricity had been turned off due to nonpayment. Appellant went in his bedroom, opened his safe, and removed his two guns: a .357 caliber revolver and a fully-loaded .45 caliber semiautomatic pistol. He placed both guns in his waistband and decided to confront Law.

Appellant looked into Ruda and Law's bedroom and told Law, "leave her alone, or I'll shoot you." Law, who was naked and unarmed, rushed out of the bedroom and replied, "Oh, yeah?" As appellant was walking backwards, he removed the pistol from his waistband and fired all 13 shots at Law. Two to six of the shots were fired after Law fell to the floor. Ruda came out of her bedroom and one of the bullets hit her left arm.

Appellant and Little drove Ruda to the hospital and left Law lying on the floor. At the hospital early that morning, appellant exhibited symptoms of being under the influence of methamphetamine and told the police he had "emptied the gun into Bill." Appellant rejected the possibility that Law was still alive because appellant was a "good shot and he knew that all the bullets had entered Bill." When appellant was arrested and handcuffed, he angrily uttered that Law "deserved to die."

The police went to the scene of the shooting and found Law's body lying on the floor. The police also found appellant's pistol, thirteen .45 caliber semiautomatic bullet casings, multiple bullet holes, and several additional guns. An autopsy revealed that Law suffered approximately 26 gunshot wounds and had several through-and-through wounds to his heart. Law also suffered a wound to his right lung that was by itself potentially fatal. Stippling from one bullet in Law's back indicated that the bullet had been fired from six inches to two-and-a-half feet away.

Defense

Appellant testified in his own defense. He admitted that he and Little snorted methamphetamine before he shot Law. His testimony regarding the shootings was substantially similar to what he told the police. He admitted that he fired all 13 bullets at Law and could not see whether Law had a weapon. He also acknowledged that he intended to kill although he had never seen Law physically harm Ruda. Appellant nevertheless "felt as if it was kill or be killed" because Law had previously threatened to "kick [his] ass." He also admitted shooting Law in the back after he fell to the floor and that upon his arrest he said "that piece of shit deserved to die."

Little testified that Law was rushing toward appellant when appellant shot him. Little had also seen Law fire guns with his injured hand and reiterated that Law had once attacked him with a baseball bat.

Jack Shelter was a friend of Law's and previously dated Ruda. Shelter testified that appellant and Law "screamed and hollered at each other a lot" but he had never seen them physically fight. Shelter had never seen appellant get into a physical confrontation with anyone. He recalled that Law was "a very gentle person, but when [he] got mad, you didn't talk to [him], you didn't reason with [him], you just stepped back or you could get hurt." Shelter also recalled an incident in which Law donned night-vision goggles, armed himself with a knife and pistol, and said he was "going out to look for some Mexicans" he believed were stealing from him.

DISCUSSION

Evidence of Law's Reputation for Violence (Evid. Code, § 1103)

Appellant contends the court abused its discretion and violated his due process rights by preventing him from asking Little whether Law had a reputation for violence, as contemplated under Evidence Code section 1103.[2] The record,

---

[2] Evidence Code section 1103 provides in relevant part: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: [¶] (1) Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Evidence Code section 1324 states that "Evidence of a person's general reputation with reference to his character or a trait of his character at a relevant

however, belies appellant's claim that he was precluded from asking Little this question. In purporting to demonstrate otherwise, appellant first refers us to portions of Ruda's testimony during the prosecution's case-in-chief, in which the court sustained hearsay objections to two questions regarding Law's "reputation as a fighter." Ruda was allowed, however, to testify that appellant knew Law had such a reputation.

Appellant then refers to a discussion that took place outside the jury's presence a week later, after the prosecution had rested on its case-in-chief. In that discussion, defense counsel erroneously recalled asking Little if Law had a reputation as a fighter.[3] Neither the prosecution nor the court pointed out this error. From the ensuing discussion, it appears that the objections were sustained only because the questions were asked (of Ruda, not Little) during the prosecution's case-in-chief. Defense counsel complained that the court's ruling "puts me in the position that I have to recall Mr. Little to rebut what has been said, because he wasn't even allowed to testify on a legitimate self-defense issue."

The court responded: "[W]e can make Mr. Little available. And it shouldn't take long to put in whatever evidence he has as to Mr. Law's reputation. But there's certainly been all kind of evidence about him [*sic*] macho, little man's complex, the different things he said, and that wasn't through your witnesses,

---

time in the community in which he then resided or in a group with which he then habitually associated is not made inadmissible by the hearsay rule."

[3] Although Little testified during the prosecution's case-in-chief, he was never asked on cross-examination whether Law had a reputation for fighting.

it was through the prosecution's witnesses on cross." Defense counsel responded that he was still entitled to ask Little whether Law had a reputation as a fighter, and warned that appellant would have grounds for appeal "if I'm precluded from getting an answer to that question[.]" The court reiterated that counsel would not be so precluded.

Defense counsel subsequently called Little to testify and asked if he "kn[e]w if [Law] had a reputation as a fighter[.]" Little responded, "He [Law] told me he used to go to bars and pick fights[.]" Defense counsel then asked, "[H]ad you . . . heard from any other sources about what a good fighter he was?" After the prosecutor made a hearsay objection, Little replied, "Not really." The court asked the prosecutor if he wanted a ruling on his objection and the prosecutor responded, "No, that's fine. Sorry I opened my mouth."

As the foregoing discussion reflects, the court did not prevent appellant from questioning Little regarding Law's reputation for violence. To the extent appellant might complain he was erroneously precluded from asking *Ruda* whether Law had a reputation as a fighter, counsel made no effort to ask that question on direct examination when he called her to testify for the defense. In any event, Ruda effectively testified that Law had a reputation for fighting when she stated that appellant knew Law had such a reputation. Moreover, appellant acknowledges that Ruda's testimony on this issue may not have been helpful to the defense because "a jury may question the mother of a defendant on trial for murder as having an obvious bias." Finally, there was ample evidence of Law's violent character and the evidence of appellant's guilt was overwhelming. Accordingly, any error in limiting appellant's

ability to present evidence of Law's reputation for violence was harmless under any standard of review.

Refusal to Instruct on Involuntary Manslaughter

Appellant was charged with first degree murder and the jury was instructed on that crime along with the lesser included offenses of second degree murder (of which he was convicted) and voluntary manslaughter. Appellant claims the court erred in refusing to also instruct the jury on involuntary manslaughter. We disagree.

"Manslaughter is the unlawful killing of a human being without malice." (§ 192.) Voluntary manslaughter is an unlawful killing conducted "upon a sudden quarrel or heat of passion." (*Id.*, subd. (a).) Involuntary manslaughter is such a killing "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*Id.*, subd. (b).) Voluntary and involuntary manslaughter are both lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.)

"If supported by substantial evidence, a trial court has the duty to instruct on a lesser included offense. [Citation.] 'The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. . . .' [Citation.]" (*People v. Trujeque* (2015) 61 Cal.4th 227, 271.) Instructions on a lesser offense are not required "'when there is no evidence that the offense was less than that charged. [Citations.]'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) "Ultimately, '[i]t is for the court alone to decide whether the evidence supports instruction on a lesser included offense.' [Citation.]" (*People v.*

Trujeque, at p. 271, italics omitted.) We independently review the trial court's decision to refuse such an instruction. (*Ibid.*)

The court did not err in refusing to instruct the jury on involuntary manslaughter. In arguing to the contrary, appellant asserts "the jury could have concluded that [he] killed Law as a result of his act of having threatened Law when Law was assaulting appellant's mother. This could have been viewed as a criminal threat under section 422 or simply criminal negligence based on appellant's knowledge of Law's volatile temper and nature." Appellant offers no legal authority to support this assertion, and none exists. Appellant fired 13 close-range shots at a naked and unarmed victim. At trial, he admitted that he shot Law with the intent to kill him. In light of this evidence, no reasonable juror could have found appellant was guilty of only involuntary manslaughter. Moreover, in convicting him of second degree murder the jury necessarily found he acted with malice. Because an involuntary manslaughter is committed *without* malice and the jury resolved that issue adversely to appellant, any error in refusing to instruct on involuntary manslaughter was necessarily harmless. (*People v. Pulido* (1997) 15 Cal.4th 713, 726.)

Alleged Prosecutorial Misconduct

Appellant contends that his conviction must be reversed due to prosecutorial misconduct during closing argument. We are not persuaded.

"'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.] '[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 960.) We view challenged statements in the context of the argument as a whole (*People v. Dennis* (1998) 17 Cal.4th 468, 522), and "we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

In his closing argument, defense counsel Vogel stated that Law "really wanted to see what it was like to kill someone." In his rebuttal, the prosecutor argued that Vogel "presumes to put words in [Law's] mouth" in representing that he "wanted to know what it was like to kill someone" and offered that Vogel was confusing the instant case with another current murder case in which his friend was acting as defense counsel. Vogel objected and the court replied, "This is argument; it's permitted." The prosecutor continued: "And a witness in that case said that [the defendant] said he wanted to know what it would be like to kill somebody. That's where that came from. Mr. Vogel needs to keeps his cases straight. It has nothing to do with this case, and it is not in evidence." After the case was submitted to the jury,

Vogel stated his intent to make a record of his objection and represented that his challenged statement was not based on what had been argued in the other case. The court found that the prosecutor's remarks did not amount to misconduct.

Appellant asserts that the prosecutor committed misconduct by referring to facts not in evidence and disparaging defense counsel. The People respond that appellant forfeited his claim by (1) failing to object to the comment that "Mr. Vogel needs to keep his cases straight"; and (2) failing to request an admonition after counsel represented that he had not done what the prosecutor suggested. The People alternatively assert that the prosecutor did not commit misconduct and that if he did, the error is harmless.

We conclude that appellant forfeited his claim that the prosecutor committed misconduct by stating defense counsel "needs to get his facts straight." There was no objection, so the claim is not preserved for appeal. (*People v. Tully* (2012) 54 Cal.4th 952, 1021.) Appellant did, however, preserve his claim that the prosecutor committed misconduct by referring to the facts of another murder case. Because the initial objection was overruled, counsel could reasonably conclude that a further objection would be futile. Counsel's failure to request an admonition is of no moment because the court found that the prosecutor's remarks did not amount to misconduct.

Moreover, we agree with appellant that the challenged remarks were improper. It is well-settled that a prosecutor generally commits misconduct by referring to facts outside the record. (*People v. Frye*, *supra*, 18 Cal.4th at p. 976.) The error, however, does not compel reversal. The court instructed the jury that "[n]othing that the attorneys say is

evidence" and that the jury was required to "decide what the facts are in this case" based only on "the evidence that was presented in this courtroom." We presume the jury relied on the instructions, not the arguments of counsel, in reaching its verdict. (*People v. Morales* (2001) 25 Cal.4th 34, 47.) Moreover, the challenged remarks were brief and did not relate to the determination of appellant's guilt, the evidence of which was overwhelming. Because it is not reasonably probable that the remarks had any effect on the verdict, the error is harmless. (*People v. Crew* (2003) 31 Cal.4th 822, 839; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Michael L. Duffy, Judge
Superior Court County of San Luis Obispo

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Kamala D. Harris, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Carl N. Henry, Deputy Attorney General, for Plaintiff and Respondent.