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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ADRIAN MACIAS, Defendant and Appellant.	B238553 (Los Angeles County Super. Ct. No. VA 112507)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

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Adrian Macias appeals from his conviction for one count of attempted murder. He contends that the prosecutor committed prejudicial misconduct by arguing that, as a matter of law, a punch cannot inflict great bodily injury, and thus cannot justify deadly force in response. We affirm.

FACTS

Appellant first met the victim, Martin Loya, the day before the shooting. Appellant's friend Maggie was sitting in the passenger seat of a car when Loya approached it. Loya beat on the passenger-side window with his fists and threatened to beat her up. Appellant told Loya to back away from the car. Loya approached appellant, took off his sweater and shirt, grabbed the waistband of his pants and said, "[W]hat are you going to do about it[?]" Appellant thought that Loya might have had a gun in his pants from the way Loya grabbed at them. Another of appellant's friends restrained Loya. Appellant had a gun in his pocket but did not use or display it. Appellant was intimidated and left without any further confrontation.

Around 3:00 or 4:00 the next morning, appellant visited a friend's apartment to socialize and found out Loya was present. Appellant asked if he could have a word with Loya and the two met outside in an alley. Loya walked toward appellant, took off his sweater, and said to appellant, "[W]hat's up youngster[?]" He also told appellant to "put [your fists] up." Loya appeared anxious and angry. Appellant verbally warned Loya to back up and gestured for him to stop approaching, then shot Loya four or five times when Loya did not comply. Due to his injuries, Loya remains paralyzed and unable to speak.

Appellant did not dispute that he shot the victim but argued at trial that the shooting was in self-defense. He testified that he thought that Loya was going to hurt or kill him. Appellant had been getting high on methamphetamine for several days and had not slept in three or four days at the time of the shooting.

PROCEDURE

Appellant was charged with attempted willful, deliberate and premeditated murder. (Pen. Code,[1] §§ 664, 187.) The jury was instructed on the principles of self-defense with CALJIC Nos. 5.17, 5.30, 5.31, 5.51, 5.52 and 5.55. CALJIC No. 5.30 stated: "It is lawful for a person who is being assaulted to defend himself from attack if, as a reasonable person, he has grounds for believing and does believe that bodily injury is about to be inflicted upon him. In doing so, that person may use all force and means which he believes to be reasonably necessary and which would appear to a reasonable person, in the same or similar circumstances, to be necessary to prevent the injury which appears to be imminent." CALJIC No. 5.31 stated: "An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon him."

The jury found appellant guilty of attempted murder but did not find that it was willful, deliberate and premeditated. The jury found true the special allegation that appellant personally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (b), (c), (d).) Appellant was sentenced to prison for 32 years to life, consisting of the seven-year middle term for the offense plus 25 years to life for the special allegation.

DISCUSSION

Appellant contends that the prosecutor committed prejudicial misconduct by arguing during his closing argument that a punch cannot inflict great bodily injury.

1. The Challenged Argument

The challenged argument was made during the prosecutor's closing argument. Additional background is necessary to consider appellant's arguments.

In his opening argument, the prosecutor stated the following regarding CALJIC No. 5.31: "And the instructions as you read them, it says an assault with fists does not justify the use of deadly force in self-defense. Okay. You can't have somebody coming

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

at you saying I'm going to fist fight you and you pull out a gun and shoot them. [¶] . . . [¶] [Y]ou can't just say well, they are going to hit me so I'm going to shoot them, right? That's the law."

Defense counsel did not object to the quoted argument then, but addressed it in his own argument as follows: "[The prosecutor] said if it's fists only that are coming at you he essentially said you cannot use deadly force. You cannot shoot him in a [*sic*] that scenario. [¶] That, ladies and gentlemen, is false. That is one hundred percent false. I have [CALJIC No. 5.31] up on the screen for you." Defense counsel continued: "And that's simply not the law. Okay. You don't have to trust me on this. You will have your own set of these instructions when you get into the back room. Please read them, all of you, at the very beginning so that you can have this clarity in deciding what to do with Mr. Macias' life. This is imperative that this not get messed up."

In his rebuttal argument, the prosecutor restated his arguments about great bodily injury. He noted that his son had suffered a bruise under his eye in a recent Judo tournament and stated, "That's not great bodily injury." He also argued, "Getting popped in the face, getting punched in the face, that hurts. [¶] . . . [¶] . . . But that's not great bodily injury." Defense counsel objected and asked to approach. The trial court overruled and denied his request to approach. The prosecutor continued his argument as follows: "If you want to use a deadly weapon in self-defense then you've got to believe that the guy's about to inflict great bodily injury on you. And a reasonable person would have to believe that the guy was about to inflict great bodily injury on you." He later argued again: "And getting punched in the face is not great bodily injury." Defense counsel again objected and asked to approach. The trial court again overruled the objection and denied his request to approach, stating, "This is argument."

Shortly thereafter, the prosecutor argued, "We can't equate harm, the word harm or getting hurt, with great bodily injury. Okay. It's real important to make sure we're clear on that. And that's what the law is. I'm not making this up. I'm not misstating it. You can read it." Appellant again objected, "Your Honor, once again, there's no

definition in the instructions for great bodily injury. That's my objection." The trial court overruled appellant's objection.

During a break in the proceedings, the court essentially reversed itself. It noted an instruction on the meaning of great bodily injury was necessary. The trial court instructed the jury on the definition of great bodily injury as follows: "Ladies and gentlemen, before resuming argument there is one additional instruction I need to include at this time and it is simply this; great bodily injury as used in this instruction means a significant or substantial physical injury. Minor, trivial, or moderate injuries do not constitute great bodily injury." Defense counsel then requested the opportunity to reopen his closing argument. The trial court denied the request.[2]

2. The Prosecutor's Statements Did Not Rise to the Level of Prejudicial Misconduct

A. Standard of Review

During argument, a prosecutor has wide latitude to draw inferences from the trial evidence. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) However, it is improper for the prosecutor to misstate the law. (*People v. Hill* (1998) 17 Cal.4th 800, 829.) A defendant need not make a showing that the prosecutor acted in bad faith. (*People v. Benson* (1990) 52 Cal.3d 754, 793.) Rather, prosecutorial behavior violates the federal Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) Under the federal standard, the misconduct must effectively result in the denial of defendant's right to a fair trial.

Misconduct not rising to that level violates California law only if it involves """""the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."""""" (*People v. Farnam* (2002) 28 Cal.4th 107, 167.) When the prosecutorial behavior at issue focuses on remarks made before the jury, the question is whether the

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[2] Appelant forfeited the argument raised on appeal because although he objected on another ground in the trial court, he did not object on the specific ground raised on appeal. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

jury likely construed or applied the remarks in an objectionable fashion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202.)

B. No Prejudicial Misconduct

Appellant argues that the prosecutor committed prejudicial misconduct by misstating the law regarding serious bodily injury and self-defense. Specifically, the prosecutor argued that "an assault with fists does not justify the use of deadly force in self-defense," and "getting punched in the face is not great bodily injury."

The prosecutor effectively stated only a portion of CALJIC No. 5.31, omitting part of the instruction. The entirety of CALJIC No. 5.31 provides: "An assault with the fists does not justify the person being assaulted in using a deadly weapon of self-defense *unless that person believes and a reasonable person in the same or similar circumstances would believe that the assault is likely to inflict great bodily injury upon [him] [her]*." (CALJIC No. 5.31, italics added.)

While the prosecutor's statements were incomplete and, in that regard, potentially misleading, they were rendered harmless in the context of the trial and did not violate federal or state misconduct standards. Defense counsel verbally called attention to the prosecutor's statement and put a copy of CALJIC No. 5.31 on a screen in the courtroom for the jury to examine in full. The judge, following a request by defense counsel, read a definition of great bodily injury, noting that it refers to "a significant or substantial physical injury. Minor, trivial, or moderate injuries do not constitute great bodily injury."[3] Following this instruction, the prosecutor made no further reference to what constitutes great bodily injury. The jury instructions were given to the jury and they had the opportunity to examine them in full during deliberations. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 670 [reviewing court presumes jurors are intelligent and possess

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3 Appellant contends that this instruction did nothing to remedy prosecutor's misleading statement that a punch cannot inflict serious bodily injury. However, it is clear from the instruction itself that a punch may or may not suffice to inflict a "significant or substantial physical injury." We must presume jurors followed the instructions. (Cf. *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803.)

common sense].) "Absent some contrary indication in the record, we presume the jury follows its instructions . . . ." (*Cassim v. Allstate Ins. Co.*, *supra*, 33 Cal.4th at p. 803.) Finally, the judge instructed the jury as follows: "If anything concerning the law said by the attorneys in their arguments or any other time during the trial conflicts with my instructions on the law, you must follow my instructions." "We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8.) Assuming the selected quotation constituted misconduct, appellant suffered no prejudice from the assumed misconduct under either the state or federal standard.[4]

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.

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[4] Appellant argues that in the event we conclude waiver occurred regarding his misconduct argument, he received ineffective assistance of counsel. In light of our conclusion that no prejudicial misconduct occurred, we need not further address this contention.