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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.

DANIEL ALEJANDRO NUNO,

Defendant and Appellant.

2d Crim. No. B267882
(Super. Ct. No. 2012029231)
(Ventura County)

Daniel Alejandro Nuno appeals a judgment following conviction of first degree murder with a finding that he personally discharged a firearm causing death during commission of the offense. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).)¹ We affirm.

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

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns the murder of Ricardo Gonzalez in the driveway of his parents' residence. In the evening of August 9, 2012, Nuno drove to the Fillmore residence of Irene and Desiderio Gonzalez.² Ricardo was then visiting his parents with his child. As Ricardo and his child left the residence, Nuno confronted Ricardo in the driveway and shot him in the head. Irene witnessed the shooting; a neighbor's surveillance cameras captured Nuno's presence in the driveway that evening. When deputies arrested Nuno shortly thereafter, his jeans contained a bloodstain that DNA analysis identified as the blood of Ricardo. The medical examiner who conducted an autopsy on Ricardo's body opined that Ricardo died immediately from a gunshot wound.

Events Preceding the Murder

Nuno and Ricardo's brother, Eric Gonzalez, were longtime friends who had used methamphetamine together. In May 2011, Eric ended his friendship with Nuno following their arrest for possession of methamphetamine because Nuno would not "man up" to the possession offense.

On August 9, 2012, Eric lived with his parents in Fillmore. The Ponce family lived next door and had surveillance cameras on their property. At approximately 9:00 p.m. that evening, the cameras captured a burgundy-colored Buick automobile backing into the Ponce driveway. Nuno drove a burgundy-colored Buick Regal automobile.

Nuno walked to the garage-apartment on the Ponce property and asked its occupant, Merced Zamora, for "Rica's"

² We will refer to members of the Gonzalez family by their first names not from disrespect, but to ease the reader's task.

address and telephone number. Zamora knew that Ricardo's nickname was "Rica," and therefore responded that Rica was sometimes at his parents' home next door. Nuno left and walked to the Gonzalez residence. Zamora later identified Nuno in a photographic lineup as the man who had inquired regarding Ricardo.

Nuno knocked on the door of the Gonzalez residence and asked to speak with Eric. Nuno wore a baseball cap, jeans, and a T-shirt, and had a teardrop tattoo near his eye. Irene recognized Nuno from his youth; she was also acquainted with his mother and brother and previously had seen Nuno with Eric. Nuno awaited Eric outside. Irene later identified Nuno from a photographic lineup and again at trial as the man who came to her door and who shot Ricardo.

Eric eventually met Nuno outside and they smoked cigarettes by the wall between the Ponce and Gonzalez properties. The Ponce surveillance camera captured two persons and two dots of light consistent with the burning embers of cigarettes.

Several minutes later, Ricardo drove into his parents' driveway, approached Eric and Nuno, and shook hands with Nuno. The surveillance cameras captured Ricardo's driveway arrival at 9:22 p.m. Ricardo's child and Irene walked from the residence to meet Ricardo, the child excitedly calling, "Daddy. Daddy." Nuno interjected with an insult. Ricardo then entered the residence with Irene and his child.

Eric stayed behind in the driveway with Nuno. After a few minutes, Eric asked Nuno to leave and Eric walked into his home. Nuno followed Eric and began to cross the threshold of the Gonzalez residence, but then stopped and returned outside. The

surveillance cameras indicated that Nuno left the Ponce driveway in his Buick automobile at 9:28 p.m.

Ricardo's Murder

At 9:40 p.m., Nuno placed a telephone call to Ricardo that lasted nearly two minutes. Cell tower information revealed that Nuno was nearby during the call. Several minutes later, the surveillance cameras captured an image of Nuno parking in the Gonzalez driveway.

At 9:44 p.m., Ricardo left his parents' home and walked toward his vehicle in the driveway. His child and Irene followed. When Irene heard a man speak to Ricardo, she turned and saw Nuno remove a firearm from his waistband. Ricardo stated: "I don't have anything on me," and "I have too many expenditures, but tomorrow I can lend it to you." Ricardo also stated the name "Danny." Nuno held the weapon with both hands and fired it at Ricardo's face. A muzzle flash illuminated Nuno's face; the flash was also captured by the surveillance camera.

Nuno fled in an older dark-colored automobile. Irene summoned Eric who telephoned for emergency medical and police assistance. Irene informed Eric that she saw the man who shot Ricardo, and it was the man with whom Eric had spoken earlier. Paramedics responded quickly to Eric's call, but Ricardo had died immediately from massive brain damage.

Aftermath and the Investigation

Approximately two and one-half hours later, Ventura County sheriff's deputies contacted Nuno at his girlfriend's residence. Nuno exhibited symptoms of methamphetamine intoxication and admitted that he had used methamphetamine that day. Deputies then arrested Nuno for being under the influence of methamphetamine.

When Nuno was arrested, his jeans contained a red stain that was presumptively positive for blood. The nature of the stain was consistent with “blow back” -- a blood spatter type stain. DNA analysis of the bloodstain revealed that Nuno and Ricardo were possible major contributors to the stain to a very high degree of probability.

Deputies discovered a spent .380-caliber shell casing in the Gonzalez driveway approximately three feet from Ricardo’s body. Deputies later executed a search warrant at Nuno’s residence and found a firearm magazine, containing a .380-caliber unspent bullet, hidden in an inoperable vehicle. The unspent bullet found in the magazine and the spent shell casing found in the Gonzalez driveway bore the same Winchester head stamp.

Several days following the shooting, Eric collected the remains of the cigarettes that he and Nuno had smoked in the driveway. Forensic analysis of the two cigarette stubs revealed a DNA profile matching Nuno on one stub and a DNA profile matching Eric on the other.

Neither Nuno’s hands nor his automobile contained gunshot residue. A criminalist testified at trial, however, that washing or wiping could remove gunshot residue.

Jail Visitation Statements

On August 12, 2012, at the request of Sheriff’s Detective Brian Richmond, Eric agreed to have a monitored visit with Nuno at the county jail to elicit information regarding the murder. Richmond did not prepare a script or suggest questions to Eric. Jail visitation conversations are recorded and the participants are reminded of the recording by a recorded message. At trial, the prosecutor played the video recording of Eric’s visit.

During the jail conversation, Nuno initially denied shooting Ricardo but then later stated that he did not recall the incident. Near the end of the conversation, Nuno cried and begged Eric for forgiveness, although he did not expressly admit that he shot Ricardo. At that point, Richmond asked another deputy to call Eric away. Richmond then asked Eric to ask the questions necessary to obtain Nuno's admission to the crime. Following this break in the visit, Eric once again spoke with Nuno, who then denied that he visited the Gonzalez residence to harm Eric or his brother.

In sum, during the two conversations, Nuno stated that it wasn't he who killed Ricardo (five denials), and that he didn't know anything about the crime (18 denials). Near the close of the second conversation, Nuno stated, "I don't know what you're talking about" three times before asking Eric to pray for him.

Conviction and Sentencing

The jury convicted Nuno of first degree murder and found that he personally discharged a firearm causing death during commission of the offense. (§§ 187, subd. (a), 189, 12022.53, subd. (d).) The trial court sentenced Nuno to a 25-years-to-life term for first degree murder, plus a consecutive 25-years-to-life term for the firearm use enhancement. The court also imposed a \$300 restitution fine, a \$300 parole revocation restitution fine (suspended), a \$40 court security assessment, and a \$30 criminal conviction assessment; ordered restitution to the victim's family and the Victim's Compensation Board; and awarded Nuno 1,127 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Nuno appeals and contends that: 1) the trial court erred by admitting evidence of his jailhouse statements, and 2) the

prosecutor committed misconduct by misstating the prosecution's burden of proof. Nuno concedes that he did not object at trial to these asserted errors. For that reason, he argues that he did not receive the effective assistance of counsel.

The parties have also submitted supplemental briefing regarding the retroactive application of Senate Bill No. 620, awarding discretion to the trial court to strike a section 12022.53 firearm enhancement.

DISCUSSION

Jailhouse Conversation and Miranda

Nuno argues that his jail visitation conversation with Eric was a custodial interrogation conducted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, because Eric acted as a police agent. He asserts that his statements to Eric were inadmissible for that reason, and the error is not harmless beyond a reasonable doubt.

During a 30- to 40-minute street-argot conversation with Eric, Nuno repeatedly denied committing the crime, stated that he did not know what Eric was speaking about, discussed his methamphetamine use, complained about his family and coworkers disliking him, and finally blamed the devil. Nuno cried and begged Eric for forgiveness, but also ended the conversation by repeatedly stating that he did not know what Eric was "talking about." Eric persisted with direct questions regarding his brother's murder despite Nuno's continued denials. Detective Richmond did not suggest a script for Eric to follow but urged him to question Nuno and obtain admissions to the murder. The conversation occurred in a visiting room that was audiotaped and videotaped, and the participants were warned by a recording that their conversation was being recorded.

To establish a claim for ineffective assistance of counsel, defendant must establish that counsel's performance was deficient and that defendant suffered prejudice thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Patterson* (2017) 2 Cal.5th 885, 900; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) In demonstrating deficient performance, defendant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness. (*Mickel*, at p. 198; *People v. Orloff* (2016) 2 Cal.App.5th 947, 955.) In demonstrating prejudice, defendant bears the burden of establishing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Patterson*, at p. 901.)

We presume that counsel's actions fall within the broad range of reasonableness, and afford great deference to counsel's tactical decisions. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198.) For this reason, a reviewing court will reverse a conviction based upon the ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had no rational tactical purpose for an action or omission. (*Ibid.*; *People v. Orloff*, *supra*, 2 Cal.App.5th 947, 955.) Moreover, counsel's failure to make an unmeritorious motion does not constitute ineffective assistance of counsel. (*People v. Jennings* (2010) 50 Cal.4th 616, 667, fn. 19; *People v. Szadzewicz* (2008) 161 Cal.App.4th 823, 836.)

Any objection to the jailhouse conversation between Eric and Nuno would have been meritless. Despite Richmond's characterization of Eric as his "agent," Eric was a brother of the victim and a longtime friend of Nuno. Although Nuno was in custody for a drug offense, he was not in custody for *Miranda* purposes for the murder of Ricardo. (*Howes v. Fields* (2012) 565

U.S. 499, 502, 508 [questioning of prisoner may not be custodial when prisoner removed from prison population and questioned about unrelated crime occurring outside prison].) “Because the dual elements of a police-dominated atmosphere and compulsion are absent when the defendant is unaware that he is speaking to a law enforcement officer, however, *Miranda* is inapplicable when the defendant does not know that the person he is talking to is an agent of the police.” (*People v. Davis* (2005) 36 Cal.4th 510, 554.)

Prosecutorial Misconduct

Nuno contends that the prosecutor committed misconduct during summation by misstating the standard of proof. He points to the prosecutor’s phrases which he has removed from context: “with absolute confidence,” “beyond a shadow of a doubt,” and “[f]orget reasonable doubt.” Nuno asserts that the misconduct is prejudicial error beyond a reasonable doubt because it undermined the presumption of innocence and lightened the prosecutor’s burden of proof.

The standards governing review of claims of prosecutorial misconduct are well settled. (*People v. Adams* (2014) 60 Cal.4th 541, 568.) When a prosecutor’s intemperate behavior is sufficiently egregious that it infects the trial with such a degree of unfairness as to render the subsequent conviction a denial of due process, the misconduct violates the federal Constitution. (*Ibid.*) Prosecutorial misconduct that falls sort of rendering the trial fundamentally unfair may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the court or jury. (*Ibid.*)

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood that the jury understood or applied the complained-of

comments in an improper or erroneous manner. (*People v. Centeno* (2014) 60 Cal.4th 659, 667; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1269.) A prosecutor possesses wide latitude, however, to vigorously argue his case and to make fair comment upon the evidence. (*People v. Edwards* (2013) 57 Cal.4th 658, 740.) In our assessment of prosecutorial misconduct, we do not lightly infer that the jury drew the most damaging rather than the least damaging inferences from the prosecutor's statements. (*Centeno*, at p. 667.)

To preserve a claim of prosecutorial misconduct for appeal, a defendant must make timely and specific objections and request a jury admonition to disregard the improper argument. (*People v. Adams, supra*, 60 Cal.4th 541, 568-569.) The failure to object and request an admonition is excused if doing either would have been futile or if the admonition would not have cured the harm. (*People v. Winbush* (2017) 2 Cal.5th 402, 485.) We generally presume, however, that jurors will heed an admonition to disregard questions or arguments to which the trial court has sustained an objection. We also presume jurors understand and follow the court's instructions. (*People v. Espinoza* (2016) 1 Cal.5th 61, 79; *People v. Romero and Self* (2015) 62 Cal.4th 1, 28.)

During summation, the prosecutor stated: "Over the last two weeks, I presented to you the tools you need to convict this man with absolute confidence. We talked about reasonable doubt in voir dire. Forget reasonable doubt. We just proved our case beyond a shadow of a doubt. The evidence is overwhelming. . . . [Y]ou will feel good about your decision to convict in this case." Nuno did not object to the prosecutor's statements.

Although a defendant singles out words and phrases of claimed misconduct, we view the statements in the context of the

whole argument. (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Here, in the context of the entire argument, the prosecutor did not misstate or dilute the standard of proof. Indeed, the prosecutor's comments regarded the strength and quantum of evidence that he presented. There is no reasonable likelihood that the jury understood or applied the complained-of comments to require a standard of proof other than beyond a reasonable doubt. (*People v. Centeno, supra*, 60 Cal.4th 659, 667 [standard on review]; *People v. Cowan* (2017) 8 Cal.App.5th 1152, 1159 ["It is improper for the prosecutor to misstate the law, and in particular to attempt to reduce the People's burden of proof beyond a reasonable doubt"].) We do not lightly infer that the jury drew the most damaging rather than the least damaging inferences from the prosecutor's statements. (*Centeno*, at p. 667.) If anything, the prosecution suggested a higher standard than that required, and the trial court correctly informed the jury on reasonable doubt. The prosecutor's statements do not constitute misconduct; for this reason, Nuno did not receive the ineffective assistance of counsel due to counsel's failure to object to the statements and request an admonition. Failure to make an unmeritorious motion does not constitute ineffective assistance of counsel. (*People v. Jennings, supra*, 50 Cal.4th 616, 667, fn. 19; *People v. Szadzewicz, supra*, 161 Cal.App.4th 823, 836.)

Senate Bill No. 620 and Section 12022.53 Firearm Enhancement

On October 11, 2017, the Governor signed Senate Bill No. 620. This legislation provides that effective January 1, 2018, section 12022.53, subdivision (h) is amended to permit the trial court to strike, in its discretion, a firearm enhancement. The amended section 12022.53, subdivision (h) provides: "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.” (Stats. 2017, ch. 682, § 2.) The People concede that if Nuno’s appeal is not final as of January 1, 2018, then the amended section applies to his sentencing absent the unlikely circumstances of a referendum. (*People v. Brown* (2012) 54 Cal.4th 314, 323-324; *People v. Francis* (1969) 71 Cal.2d 66, 75-76.)

During Nuno’s sentencing, the trial judge stated: “There’s many times in my job that I send people to state prison and I feel bad about it. . . . Mr. Nuno, I feel nothing for you. I feel the same towards you that you felt toward the victim in this case. To the family that was begging me to take away the defendant’s ability for parole, I wish I could do that but the law doesn’t allow it. What I do want to do, though, is I want to make a statement because I know that eventually if Mr. Nuno ever faces a parole board one of the things the parole board will do is they contact the trial judge to see how they feel about the case. In all likelihood, I won’t live to see that day. It will be decades before Mr. Nuno is available for parole. But when the judge is unavailable many times what they do is they look at the record and they try to see did the judge give any indication of what they think should happen in the future. I want to make sure that I make it crystal clear what I think. This defendant showed callousness and cruelty to not only the victim, but to his 80-year-old mother and to his young son. For that reason alone, he is unfit to walk in free society. And I hope the parole board listens very carefully to my words and I hope that they never grant this man parole. He has forfeited his right to walk freely and

voluntarily in this community and that is for the protection of the community and protection of future victims that I believe are very likely to occur if anybody ever lets him out of prison.”

In view of the trial judge’s comments, it serves no purpose to remand the matter for resentencing. (*People v. Gamble* (2008) 164 Cal.App.4th 891, 901 [idle act to remand where record demonstrates trial court would not have exercised discretion even if it believed it could do so]; *People v. Bravot* (1986) 183 Cal.App.3d 93, 98 [given trial judge’s remarks, “virtual certainty” he would receive the same sentence on remand].) Indeed, the trial judge stated that he was unable to lawfully impose a sentence of life without parole and hoped the parole board would never grant parole to Nuno. A remand for resentencing would be an idle act.

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Ryan J. Wright, Judge

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