Filed 5/25/12 P. v. Ruiz CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. EDGAR ANTONIO RUIZ, Defendant and Appellant.	B229633 (Los Angeles County Super. Ct. No. MA046882)

APPEAL from a judgment of the Superior Court of Los Angeles County, Hayden A. Zacky. Affirmed.

Robert Bryzman, 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, James William Bilderback II, and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Edgar Antonio Ruiz of carjacking (Pen. Code, § 215, subd. (a);[1] count 1), attempted second degree robbery (§§ 664, 211; count 2), and arson of property (§ 451, subd. (d); count 3.) As to all counts, the jury found the offenses were committed to benefit a criminal street gang. (§ 186.22, subd. (b).) As to counts 1 and 2, the jury further found that a principal personally used a firearm in the commission of the offenses. (§ 12022.53, subds. (b), (e)(1).) The trial court sentenced Ruiz to a determinate term of 11 years and 4 months on his robbery and arson convictions as charged in counts 2 and 3, and a consecutive, indeterminate term of 15-years-to-life on his carjacking conviction as alleged in count 1. We affirm the judgment.

FACTS

Count 1 — The Carjacking

On September 13, 2009, at around 4:30 p.m., Octavio Ramos Bravo and his wife and their young children were driving home in Baldwin Park in the family's Honda Civic when Bravo noticed three males walking in the neighborhood. As Bravo parked the car, and was about to get his children out of the back seat, the three males walked up to Bravo. The males were identified by substantial evidence at trial as defendant Ruiz, accompanied by Larry Rodriguez, and Cirilo Castillo.[2] One of the males asked Bravo for the key to his car. When Bravo did not immediately comply, one of the other males lifted his shirt to show a handgun in his waistband. Bravo then handed over his key. While the carjackers were getting into the car, Bravo raced to get his children from the back seat. As the carjackers drove the family car away, one said to Bravo's wife, "Sorry senora, but we need the car to do something."

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

[2] Rodriguez and Castillo were jointly charged with Ruiz, but tried separately. They are not parties to Ruiz's current appeal. Ruiz's appeal does not challenge the identity of the carjackers.

Count 2 — The Attempted Robbery

On September 15, 2009, at around 8:00 a.m., David Fowler was outside his home in Lancaster, trimming his front lawn with a weed-whacker. Fowler saw a black or blue Honda pull up, and two males get out of the car's back seat. One of the males walked up to Fowler from behind. The other, Castillo, approached Fowler from the front. Castillo told Fowler to give his wallet to the male who was behind him. Fowler had his wallet in his back pocket, and he could already feel someone's hand on it. Fowler refused to turn over the wallet. Instead, he "revved" the weed-whacker and raised it toward Castillo. At that point, the male standing behind Fowler went back into the car. At the same time, Castillo pulled out a handgun and pointed it at Fowler, and said something Fowler could not hear over the noise created by the weed-whacker. Castillo then got back into the car, and the car drove away.

Later the same day, Los Angeles County Sheriff's Department (LACSD) Deputy Diego Andrade drove Fowler to a location on Santa Rosa Circle in Lancaster, to see if he could identify three males who were being detained – Ruiz, Rodriguez, and Castillo. Fowler said two of the males looked like the men who had attempted to rob him earlier in the day. Fowler was "pretty sure" Ruiz was involved in the attempted robbery, but not 100 percent sure. Fowler also identified a burned car as the one he had seen earlier in front of his house.

Count 3 — The Arson

On September 15, 2009, at about 9:50 in the morning, LACSD Detective Dale Parisi and his partner were on patrol when they received a radio broadcast of a recent attempted robbery. As Detective Parisi and his partner drove toward the area of Avenue K and Challenger in Lancaster, they saw a cloud of smoke coming from the desert. The officers drove onto a dirt roadway into the desert and came upon a dark-colored Honda Civic on fire. Detective Parisi entered the license plate into his computer and learned the vehicle had been carjacked recently in Baldwin Park by three males. Detective Parisi put out a broadcast to look for suspects.

While on the scene with the fire department, Detective Parisi received a radio broadcast that other deputies were in pursuit of three male suspects running on a nearby dirt road in the desert. Ultimately, the suspects were detained on Yaffa Street. Detective Parisi responded to the location where the three suspects — defendant Ruiz, Rodriguez and Castillo — were being detained.

Detective Parisi searched Castillo and found two lighters. A black Honda key was found in Ruiz's pants pocket. Ruiz assisted the officers in the recovery of a handgun, which was found wrapped in a peach-colored bandana inside a bush.

Sergeant Derek Yoshino of the Los Angeles County Sheriff's Department opined that the car fire resulted from the direct application of an open flame to a combustible material, and that the fire was accelerated by an accelerant. An aerosol can, which could have been the accelerant, was found in the front seat of the car.

Trial

The People filed an information charging all three defendants as follows: carjacking (count 1; § 215, subd. (a)); attempted second degree robbery (count 2; §§ 664, 211); and arson of property (count 3; § 451, subd. (d).) As to all three counts, the information alleged the offenses were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b).) As to counts 1 and 2, the information alleged that a principal personally used a handgun in the commission of the offenses. (§ 12022.53, subds. (b), (e)(1).)

The charges against Ruiz were tried to a jury in October 2010. The prosecution presented evidence establishing the facts summarized above. Ruiz did not present any evidence in his defense. His counsel argued that the evidence did not prove the charges beyond a reasonable doubt, and, in particular, did not prove the gang allegation. The jury found Ruiz guilty as charged, and found the ancillary gang and firearm allegations to be true. The trial court sentenced Ruiz as noted at the outset of this opinion.

Ruiz filed a timely notice of appeal.

DISCUSSION

I. Prosecutorial Misconduct

Ruiz contends all of his convictions must be reversed because the prosecutor engaged in misconduct during her rebuttal argument on behalf of the People. We disagree.

A. The Governing Law

A prosecutor's argument that appeals to a jury to convict a defendant based on passion or prejudice rather than the evidence at trial falls under the law of misconduct. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 694.) So too does a prosecutor's argument that misstates the law. (*People v. Hill* (1998) 17 Cal.4th 800, 829.) When prosecutorial misconduct infects a trial with such unfairness so as to make a defendant's conviction a denial of due process, the error rises to one of constitutional magnitude under the federal Constitution. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct that does not render a defendant's trial fundamentally unfair under federal constitutional precepts may still be prosecutorial misconduct under state law when it involves the use of " 'deceptive or reprehensible methods' " in an attempt to persuade a jury. (*Id*. at p. 1215.)

Prosecutorial misconduct under the federal constitutional perspective requires the reversal of a defendant's conviction unless a reviewing court finds it harmless beyond a reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) Prosecutorial misconduct under state law requires reversal when a reviewing court finds that it is reasonably probable the result of a defendant's trial would have been more favorable without the misconduct. (*Ibid*.)

B. The Trial Events

In closing argument, Ruiz's counsel highlighted the defense's view of the weaknesses in the prosecution's case, spending a major part of the argument addressing the gang enhancement allegation. In the course of this argument, counsel stated: "The prosecution needs you to read minds and needs you to infer beyond a reasonable doubt [that the crimes were committed] somehow to benefit that gang or promote gang

activity . . . because that's what the law [requires] and that's what the instruction [requires]."

In her rebuttal argument, the prosecutor — implicitly responding to the defense argument concerning the gang allegation — stated that the prosecution was not trying to have the jurors "read anyone's mind," explaining that they could "look at circumstantial evidence" and make "reasonable inferences from those facts." She also noted that, under the jury instructions, the jurors could view circumstantial evidence to be "just as strong and just as good as direct evidence." The following exchange then ensued:

"[The Prosecutor]: What I would like to refer you also to is the law. And in the Penal Code, *we have a portion that talks about the reason that the gang allegation was created.* . . . [I]t went into effect where the California Legislature finds that the State of California was in a state of crisis caused by --- [Italics added.]

"[Defense Counsel]: Your Honor, this is not proper.

"[The Court]: That's sustained . . . .

"[The Prosecutor]: --- that California needed to protect its society against gangs.

"[Defense Counsel]: Your Honor . . . I am sorry. The law is the law.

"[The Court]: I am sorry.

"[The Prosecutor]: I am arguing the law.

"[The Court]: I understand. . . . [W]hy don't you go ahead and argue your reasonable inferences based on the law. But in terms of legislative history, let's not go there, please.

"[The Prosecutor]: Okay. Thank you. [¶] So let's talk about the circumstantial evidence and what you can consider is motive. . . ."

C. Analysis

We begin with the People's argument that Ruiz forfeited his claim of prosecutorial misconduct because he did not request an admonition. The People's forfeiture argument is well-taken. As a general rule, a request for an admonition is required unless the prosecutorial misconduct was "so serious that a curative admonition would have been ineffective." (*People v. Arias* (1996) 13 Cal.4th 92, 159.) Here, the alleged misconduct

is the prosecutor's truncated attempt to make reference to the legislative history of the gang enhancement statute. This is not the type of egregious misconduct which could not be addressed by an admonition. The failure to request an admonition means the claim of prosecutorial misconduct is forfeited on appeal.

Even if Ruiz's claim of prosecutorial misconduct was not forfeited, we are not persuaded that reversal is required. Assuming an accurate reading to a jury of the legislative findings written into a statute is misconduct, the misconduct does not require reversal of a guilty verdict under any possibly applicable standard of review where, as here, the reading certainly had no impact on the outcome of trial. The proposition offered by Ruiz's argument is that the prosecutor's fleeting reference to the legislative history of the gang enhancement statute implicitly invited the jurors to convict him guilty, and or to find the gang enhancement allegations true, merely because he was a gang member and society needs to be protected against gangs. We find that leap to be speculative at best.

To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must demonstrate a reasonable likelihood that jury understood or applied the complained-of-remarks in an improper or erroneous manner. (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another issue in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) And, in conducting this inquiry, a reviewing court may not lightly infer that the jury drew the most damaging, rather than the least damaging, meaning from the remarks. (*People v. Frye, supra*, 18 Cal.4th at pp. 969-970.) On the contrary, a reviewing court must consider the challenged remarks in the context of the whole argument along with the jury instructions. (*People v. Schmeck* (2005) 37 Cal.4th 240, 286.) We see no possibility that the jury here may have decided to convict Ruiz merely based on his status as a gang member.

In the final analysis, the prosecutor's isolated, passing attempt to make reference to the legislative history of the gang enhancement statute did not make Ruiz's trial into an unfair proceeding. The prosecutor's reference was a minor part of trial. The jury was otherwise properly exposed to a gang element within the framework of trial, and we see no possibility of an effect on the proceedings. The prosecutor's reference was not a

deceptive or reprehensible attempt to persuade the jury. By stating that the Legislature enacted the gang enhancement statute to address a "crisis" of gang crime, the prosecutor did no more than relay a commonly accepted perspective. An attempt to persuade the jury to find Ruiz liable based upon the ills of gangs in our society is not reasonably imputable from the prosecutor's comments.

II. Instructing on Attempted Theft as a Lesser Offense of Attempted Robbery

Ruiz contends his conviction for attempted robbery must be reversed because the trial court failed to instruct sua sponte on the lesser included offense of attempted theft. We disagree.

A trial court has a sua sponte duty to instruct on all lesser included offenses which are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) However, an instruction on a lesser included offense is not required when there is no evidence to support a jury's finding that the offense was less than that charged. (See *People v. Berryman* (1993) 6 Cal.4th 1048, 1080-1081 [trial court instructed on voluntary manslaughter as a lesser included offense of murder; court was not required to instruct sua sponte on involuntary manslaughter as a lesser included offense].) Theft is a lesser included offense of robbery, which includes the additional element of force of fear. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1331.) Thus, the issue presented by Ruiz's argument on appeal is whether there was evidence upon which the jury could have concluded that Ruiz committed an attempted theft, without the use of force or fear. We find that there was not.

Viewing the evidence under the light of substantial evidence principles, it is not possible that the jury could have found that the evidence established an attempt to pick the pocket of the victim, Fowler, with no more force than was necessary to carry off his wallet. One man approached Fowler from behind, while another approached Fowler from the front. The male in front of Fowler told him to give his wallet to the male who was behind Fowler. Fowler then felt the hand of the man behind him on his wallet. Fowler said he was stunned at this point. After this, in rapidly unfolding events, Fowler

"revved" his weed-whacker, the assailant behind walked away, and the assailant in front pulled out a handgun.

The robbery in the instant case involved threatened force by two men, resulting in fear on the part of the victim, as demonstrated by his being "stunned" and pointing the weed-whacker at the two men. (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771.) Given these circumstances, there was no possible scenario under which Ruiz committed an attempted theft but not an attempted robbery.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

GRIMES, J.