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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.

JUVENITO GOMEZ,

Defendant and Appellant.

B282482

(Los Angeles County
Super. Ct. No. A039160)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard M. Goul, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb, Blythe J. Leszkay and Charles Sarosy, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Juvenito Gomez (defendant) was convicted by a jury of the 1988 first degree murder (Pen. Code,¹ § 187, subd. (a)) of Jesus Ramirez. The jury found true the allegation that defendant personally used a firearm in the commission of the murder (§ 12022.5, subd. (a)). The trial court sentenced defendant to a term of 25 years to life in prison for the murder, plus a three-year enhancement term for the firearm allegation.

Defendant filed a timely notice of appeal. He contends the trial court erred in instructing the jury on evidence of flight after the commission of a crime, and also contends the prosecutor committed misconduct during closing argument by misstating the burden of proof and referring to excluded evidence. We review defendant's forfeited claim of instructional error pursuant to section 1259 and determine that the instruction was properly given. We find that defendant has forfeited most of his claims of prosecutorial misconduct. We see no merit to one of the two reviewable claims of misconduct. We find that any prejudice from the other reviewable claim was cured by the trial court's admonition to the jury. We affirm the judgment of conviction.

BACKGROUND

In January 1988, Diana Garcia worked as a cashier at a bar in Long Beach. She interacted with the bar's customers, one of whom was defendant. Defendant approached Garcia on several occasions and said that he liked her and wanted her to be his girlfriend. He asked her out. Garcia replied that she had a boyfriend. She was dating Jesus Ramirez at the time. Defendant

¹ Further undesignated statutory references are to the Penal Code.

insisted that she be his girlfriend, constantly harassed her and told her to end her relationship with her boyfriend.

The night of the murder, defendant said he would kill Ramirez if Garcia did not leave him.² He displayed a handgun. She was afraid. When Ramirez came to the bar that night, Garcia broke up with him. She did so because of defendant's threats and because Ramirez was with another woman. When Garcia left the bar at 2:00 a.m., Ramirez followed her and told her he loved her. He asked her not to break up with him.

Garcia and Ramirez walked down the street together. When they were two blocks from the bar, defendant slowly drove up next to them. Defendant said, "Diana, get in my car." Garcia and Ramirez kept walking and did not respond. Defendant followed them for a few minutes and then drove away.

Garcia and Ramirez turned onto a different street. Defendant drove up behind them and stopped his car. Garcia said to Ramirez, "Don't turn to look at him. Let's go. Let's go." Ramirez refused to leave. Defendant got out of his car, approached Ramirez, pulled out his handgun and shot Ramirez in the head. Ramirez fell to the ground, began to convulse and died.

Defendant returned to his car; Garcia followed him asking, "Why? Why?" He responded, "I told you I'd kill him." Defendant pushed Garcia to the ground and drove away.

Garcia ran to Ramirez's nearby house, where Ramirez's family called the police. When the police arrived, she told them what happened. She also told them that she had encountered a woman in the bar who lived in the same house as defendant and

² In response to the prosecutor's questions, Garcia clarified that she had seen defendant at the bar before the night of the murder.

his brother; she believed this information would help police locate defendant. Garcia identified defendant from a photograph police showed her. She had no doubt that defendant was the person who shot Ramirez. Defendant had a distinctive platinum tooth in his front teeth. Garcia never saw defendant again until he was brought back to California for proceedings in this matter.

Police located Guadalupe Pacheco in Long Beach. She was married to defendant's brother. Defendant lived with the couple at the time. Pacheco identified defendant from the same photograph shown to Garcia. Pacheco did not remember what month the police came to her residence, but she never saw or interacted with defendant after that visit.

In 2014, defendant surfaced in Texas. Defendant's fingerprints matched the fingerprints of "Miguel Lopez Escamilla." The "Escamilla" fingerprints were taken in Texas in 1987 from contact with law enforcement. Defendant's fingerprints also matched the fingerprints of "Pedro Simon Lopez." The "Lopez" fingerprints were taken for a Texas identification card in 1997, 2002, and 2008.

Detectives began reinvestigating Ramirez's murder. Garcia identified defendant again from the 1988 photograph. Detectives went to Texas and brought defendant back to California for trial, during which defendant presented no evidence. (2RT 117.)

DISCUSSION

1. The Jury Instruction on Evidence of a Defendant's Flight After a Crime

In his opening brief, defendant argues that the flight instruction was improperly given because there was no evidence of flight. In his reply brief, defendant argues for the first time

that the instruction was improperly given because defendant's identity was contested. Respondent contends defendant's first claim has been forfeited. We agree. We find the second claim forfeited as well. At defendant's request, we review the instruction pursuant to section 1259 and find the instruction was properly given.

a. Section 1259 Permits Review of Defendant's Forfeited Claim of Instructional Error.

"Normally, a defendant is held to waive the right to appeal alleged errors by failing to make an appropriate objection in the trial court; however, an appellate court may review any instruction given even though no objection was made in the lower court if the substantial rights of the defendant are affected. (Pen. Code, §§ 1259, 1469.)" (*People v. Arredondo* (1975) 52 Cal.App.3d 973, 978.) "Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) "The cases equate 'substantial rights' with reversible error, i.e., did the error result in a miscarriage of justice? (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*People v. Arredondo, supra*, 52 Cal.App.3d at p. 978.)

Claims of instructional error present questions of law, which we review de novo. (*People v. Guiuan* (1998) 18 Cal.4th 558, 569.) Reviewing the claim de novo and pursuant to section 1259, we find the instruction was correctly given and that defendant's substantial rights were not affected.

b. A Flight Instruction Is Proper When the Jury Could Infer That the Defendant Left the Crime Scene to Avoid Detection Or Arrest.

The trial court instructed the jury with CALCRIM No. 372, which provides: “If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself.”

“ ‘In general, a flight instruction “is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt.” ’ ” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.) “To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*Ibid.*)

“ ‘ “[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.” ’ ” (*People v. Abilez* (2007) 41 Cal.4th 472, 522.)

The flight instruction does not require “a defined temporal period within which the flight must be commenced.” (*People v. Carter* (2005) 36 Cal.4th 1114, 1182.) A flight instruction has been found appropriate where the prosecution offered evidence that the defendant left California “in the days immediately following the charged offenses.” (*Ibid.*) A flight instruction has

also been found proper where the defendant fled the crime scene in 1991 and “police searched unsuccessfully for him in 1991 and 1992. He was ultimately arrested more than four years after the crimes at the Los Angeles International Airport.” (*People v. Avila* (2009) 46 Cal.4th 680, 710.)

c. There Is Sufficient Evidence of Flight to Support the Instruction.

Garcia testified that defendant pushed her down and left the scene immediately after shooting Ramirez. Garcia’s testimony alone is sufficient to support the flight instruction.

There is also sufficient evidence to support an inference that defendant fled Long Beach after the shooting. Although defendant had been a customer at the Long Beach bar before the shooting, Garcia never saw defendant again after the shooting. Pacheco testified that although defendant had been living with her and other family members in Long Beach, she never saw him again after police came to her residence in 1988 asking about defendant.

The prosecutor was not required to show that defendant left Long Beach in a defined temporal period or that he reached a far away haven. (*People v. Carter, supra*, 36 Cal.4th at p. 1182 [time]; *People v. Abilez, supra*, 41 Cal.4th at p. 522 [haven].) Defendant absented himself from locations he frequented before the crime and police tried but were unable to locate him. This is sufficient to support an inference of flight. (See *People v. Avila, supra*, 46 Cal.4th at p. 710 [defendant left crime and scene and police were unable to locate him in two years of searching].)

d. Even If Defendant's Claim That Disputed Identity Bars a Flight Instruction Were Not Forfeited, It Would Lack Merit.

Defendant claims in his reply brief that the flight instruction should not have been given because Garcia's identification of defendant was disputed. Defendant has forfeited this claim.

A claim raised for the first time in a reply brief is treated as forfeited. (*People v. Carrasco* (2014) 59 Cal.4th 924, 990 [noting that "[o]bvious reasons of fairness militate against consideration of an issue" raised in such a manner].)³

Even if the claim were not forfeited, it would lack merit. Defendant relied on *People v. Anjell* (1979) 100 Cal.App.3d 189 to support his argument that a flight instruction may not be given when the defendant's identity is disputed. "The court that decided *People v. Anjell, supra*, has since retreated from the overly broad dictum on which defendant relies, holding that the case 'does not stand for such a sweeping proposition.' (*People v. Rhodes* (1989) 209 Cal.App.3d 1471, 1475.) Elsewhere, *Anjell's* broad dictum has been widely rejected." (*People v. Mason* (1991) 52 Cal.3d 909, 943.)

³ Claiming that an instruction is unsupported by evidence in the opening brief does not entitle defendant to assert in his reply brief the new theory as to why the instruction should not have been given. (See *People v. Carrasco, supra*, 59 Cal.4th at p. 990 ["Contrary to defendant's assertion, raising a claim of ineffective assistance of counsel in an opening brief on appeal does not entitle a defendant to assert at oral argument or in a supplemental reply brief new theories as to how counsel was purportedly ineffective."].)

As the California Supreme Court has explained, “If there is evidence identifying the person who fled as the defendant, and if such evidence ‘is relied upon as tending to show guilt,’ then it is proper to instruct on flight. (§ 1127c.) ‘The jury must know that it is entitled to infer consciousness of guilt from flight and that flight, alone, is not sufficient to establish guilt. ([§ 1127c.) The jury’s need to know these things does not change just because identity is also an issue. Instead, such a case [only] requires the jury to proceed logically by deciding first whether the [person who fled] was the defendant and then, if the answer is affirmative, how much weight to accord to flight in resolving the other issues bearing on guilt. The jury needs the instruction for the second step.’” (*People v. Mason, supra*, 52 Cal.3d at p. 943 & fn. 13 [disapproving *People v. Anjell* in fn. 13]; see *People v. Elliott* (2012) 53 Cal.4th 535, 584, and cases cited therein [noting that court had previously held multiple times that there is no error in giving flight instruction where “sole question for the jury was whether defendant was the perpetrator of the charged offenses”].)

2. Prosecutorial Misconduct—Burden of Proof

Defendant contends the prosecutor committed misconduct during closing argument by misstating the burden of proof. Respondent contends defendant has forfeited most of this claim by failing to object in the trial court. We agree.

a. Defendant Has Forfeited Half His Claims.

“[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its . . . obligation to overcome reasonable doubt

on all elements [citation].’ [Citation.] To establish such error, bad faith on the prosecutor’s part is not required.” (*People v. Centeno* (2014) 60 Cal.4th 659, 666.)⁴

Defendant identifies four sections of the prosecutor’s closing argument that defendant claims contain misstatements of the burden of proof:

(1) The prosecutor referred back to an earlier discussion of circumstantial evidence involving a wet street and reminded jurors that “when I gave you that example, there was one reasonable explanation of what had happened” and other “possible” explanations. The prosecutor then argued, “So in court, if you have only one reasonable explanation, and that explanation is that the defendant is guilty, then you are beyond a reasonable doubt. If there is more than one reasonable explanation, and one says the defendant is not guilty, you are not beyond a reasonable doubt. That’s it.” Defense counsel did not object.

(2) Immediately after this argument, the prosecutor stated: “Now, [defendant’s attorney] doesn’t have to prove anything to you. He has no burden. Only I do. But we are both allowed to call witnesses. And the failure to disprove some of this evidence should tell you all you need to know about whether [Garcia] is telling you the truth, whether she—” Defense counsel’s objection was sustained.”

⁴ “‘[T]he term prosecutorial “misconduct” is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.’” (*People v. Centeno, supra*, 60 Cal.4th at pp. 666-667.)

(3) The prosecutor then continued his argument by asking, “Was there anybody who told you the defendant lived somewhere other than Long Beach?” Defense counsel again objected that the prosecutor was shifting the burden of proof, but this objection was overruled. The prosecutor continued, “There was not. The evidence you have in court, the only evidence you have is that the defendant lived in Long Beach at the time of this crime.” Defense counsel did not object.

(4) The prosecutor argued there was no evidence to show that defendant had remained in Long Beach after Pacheco spoke with police. Defense counsel did not object.

“To preserve a claim of prosecutorial misconduct for appeal, a criminal defendant must make a timely objection, make known the basis of his objection, and ask the trial court to admonish the jury.” (*People v. Brown* (2003) 31 Cal.4th 518, 553.) A defendant need not object if an objection would have been futile or an admonition would not have cured the harm. (*People v. Panah* (2005) 35 Cal.4th 395, 462.)

Defendant has not shown that objections to the identified statements would have been futile. A prosecutor’s misstatements of law, including a misstatement of the burden of proof, are generally curable by an admonition from the court. (*People v. Centeno, supra*, 60 Cal.4th at p. 674.) Thus, defendant has forfeited claims concerning the first and fourth sets of remarks above.

b. Defendant’s Reviewable Claims Fail.

Defendant has preserved his claims that the second and third sets of remarks by the prosecutor were attempts to lower the prosecution’s burden of proof or shift it to the defense.

The second set of remarks involves the prosecutor's statement that "the failure [of defendant] to disprove some of this evidence should tell you all you need to know about whether [Garcia] is telling you the truth." As the trial court recognized, this statement could be understood as suggesting that defendant had some burden of proof. The trial court ordered this statement stricken and admonished the jury: "[T]he only burden of proof falls upon the People. Just refer to the reasonable doubt instruction and the fact that the defendant has the right to rely upon the state of the evidence."

The trial court had given its instructions on these topics very shortly before this admonition. Immediately before closing arguments began, the trial court instructed the jury: "A defendant in a criminal trial is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. When I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt. [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence that was received throughout the entire trial. Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

The court further told the jury that a defendant "may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt."

The trial court also gave the jury an instruction which dealt with the very situation defendant claims is present here. The trial court instructed the jury: “You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys’ comments on the law conflict with my instructions, you must follow my instructions.”

The trial court’s summary of the law concerning the burden of proof, together with its reference back to the recently given detailed instructions on this area of the law, was sufficient to cure any misstatement by the prosecutor or misunderstanding by jurors of the prosecutor’s remarks.

Defendant’s other preserved claim concerns the prosecutor’s statement that there was no evidence that “defendant lived somewhere other than Long Beach” and “the only evidence you have is that the defendant lived in Long Beach at the time of this crime.” These remarks were a summary of the evidence: Pacheco had testified that defendant lived with her in Long Beach, and there was no evidence that defendant lived somewhere else at the time of the crime. The remarks do not suggest that the jury was required to believe Pacheco unless the defendant discredited her. The prosecutor simply pointed out that there was no evidence that defendant lived somewhere else. The prosecutor was permitted to comment on a defendant’s failure to introduce material evidence.⁵ (*People v. Hughes* (2002) 27 Cal.4th 287, 372.) The remarks were proper.

⁵ The argument appears to have been in response to defense counsel’s earlier argument that the prosecutor had not proven that defendant lived in Long Beach at the time of the crime.

3. Prosecutorial Misconduct—Excluded Evidence

Defendant contends the prosecutor committed misconduct by arguing there was no evidence that defendant had changed his name for immigration purposes. Defendant contends this argument was particularly egregious because the prosecutor had moved to exclude this very evidence.

Defendant acknowledges that he did not object to this argument or request an admonition but contends that an objection would have been futile because there was no evidence on defendant's immigration status and the objection could have caused "the potentially irrelevant and inflammatory evidence [defendant] had agreed to exclude to be known by the jury."

It was defendant who first raised the issue of immigration in the closing arguments. Defense counsel argued: "There are many reasons why a person would have names that are different, but one consistent for many years. Work permits. Job opportunities. Immigration purposes. It doesn't mean that a person is wanted for murder" This argument suggests that defense counsel wants it both ways: he did not want the jury to hear the "potentially inflammatory" evidence of defendant's actual immigration status, but he wanted the jury to speculate that defendant might have had other reasons for using different names.

The prosecutor's rebuttal was not false, deceptive or misleading. There is nothing in the record on appeal to suggest that defendant changed his name to avoid immigration consequences. The pretrial discussion of the immigration evidence indicates that defendant was in fact arrested when he attempted to "to be processed to become a citizen." The prosecutor's stated concern was that this fact would tell the jury

that defendant was not a citizen. The trial court agreed, noting “the climate we live in now, the jurors don’t need distraction. I want them to focus on the evidence and not the status.” Defense counsel agreed. Thus, the prosecutor’s remarks did not deceive or mislead the jury.

DISPOSITION

The judgment is affirmed.

ROGAN, J.*

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.

* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.