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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ROBLES,

Defendant and Appellant.

B266165

(Los Angeles County
Super. Ct. No. TA136797)

APPEAL from a judgment of the Superior Court of Los Angeles County, John J. Lonergan, Jr., Judge. Affirmed.

Dwyer + Kim and Jin H. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Esther P. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jose Robles of one count of second degree burglary (Pen. Code, § 459),¹ after which he admitted a single prison enhancement (§ 667.5, subd. (b)). The court sentenced him to two years in state prison. He appeals from the judgment of conviction, contending that his trial counsel was ineffective for failing to object to a comment in the prosecutor’s closing argument. We disagree. He also asks that we review the transcript of the trial court’s in camera review of *Pitchess* material. We have done so, and find no abuse of discretion in the trial court’s ruling that no discoverable material existed. Therefore, we affirm the judgment.

BACKGROUND

Prosecution Evidence

Jose Zambrana managed a multi-unit apartment building on West 137th Street in Compton, California. On the evening of March 22, 2015, Zambrana saw defendant drive up in a car with two other male passengers and park outside apartment 5, which was vacant for remodeling. Zambrana knew defendant because he would visit people in the building and “hang out,” and apparently slept in the building on occasion. Defendant opened the door of apartment 5 with a key, and he and the two men removed boxes and other items from the apartment, and loaded them into the car. The two other men then drove off while

¹ Further unspecified statutory references are to the Penal Code. The trial court dismissed a second burglary charge under section 1118.1 for insufficient evidence.

defendant stayed. Zambrana did not confront defendant and the others because he feared they were armed. The next morning he discovered boxes of tile, tools, and a stainless steel sink with a faucet were missing from the apartment.

On March 25, 2015, Zambrana saw defendant at apartment 5 and asked him where he got a key to the apartment and whether he had taken anything. Defendant said he didn't know what Zambrana was talking about. Later that day, Zambrana saw defendant shatter the window to apartment 1 and called the police.

Deputy Mizrain Orrego of the Los Angeles County Sheriff's Department arrived and spoke with Zambrana. According to Deputy Orrego, Zambrana pointed at defendant, who was walking down 137th Street, and told him that defendant took items from an apartment that day, March 25 (rather than on March 22). Deputy Orrego stopped defendant, placed him in the patrol car, and advised him of his *Miranda* rights, which defendant waived. Deputy Orrego asked defendant if he had been at the location of the burglary reported by Zambrana. Defendant responded that he broke into an apartment and took a faucet and other construction equipment (apparently referring to the March 22 burglary of apartment 5). Defendant also stated that he tried to break into another apartment (apparently referring to apartment 1).

Detective Sarah Dieguez spoke to Zambrana on March 26, 2015. Zambrana told Detective Dieguez that on March 22, 2015, defendant broke into two different buildings and took six boxes of tile and maintenance tools. Zambrana then told Detective Dieguez that on March 25, 2015, he saw appellant break a window.

Defense Evidence

Namus Zokhrabov was Zambrana's supervisor at the apartment building. From March 22 through 25, 2015, Zokhrabov saw multiple "unauthorized" individuals around apartments 1 and 5. Zokhrabov explained that he saw around six individuals drinking and smoking around the apartments. Zokhrabov also saw that the materials brought in to renovate the apartment units were missing.

DISCUSSION

I. Ineffective Assistance

Defendant contends that his trial counsel was ineffective for failing to object to a single comment made by the prosecutor in closing argument. We disagree.

"In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.'

[Citations.] Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation.] If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory

explanation.’ [Citations.] If a defendant meets the burden of establishing that counsel’s performance was deficient, he or she also must show that counsel’s deficiencies resulted in prejudice, that is, a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.)

Relevant Proceedings

At trial, defense counsel vigorously cross-examined Deputy Orrego about defendant’s confession, implying that Deputy Orrego had fabricated defendant’s statements and failed to comply with his duty “to protect and serve.”² In her redirect examination of Deputy Orrego, the

² As here relevant, the following cross-examination occurred:

“Q [By Defense Counsel]: Did you record the interview, sir?

“A [Deputy Orrego]: No.

“Q Do you have the means to record the interview?

“A No.

“Q Do you have a cell phone?

“A Yes.

“Q What kind of cell phone do you have?

“ . . .

“THE WITNESS: A Motorola phone.

“Q [By Defense Counsel]: Okay. Does it have a camera function on it, sir?

“A Yes.

“Q Does it have a video function on it?

“A Yes.

“Q Okay. So you did have the means to record the interview, correct?

“A. Yes, sir.

“Q Okay. Were there any other officers around while you did the interview?

“A Yes.

“Q Okay. Did you ask any of them to come up and watch you interview Mr. Robles?

“A No.

“Q Okay. So the only person who saw this alleged confession is you, right?

“A Yes.

“Q Okay. So as my client was confessing to two felonies, you didn’t think it was a good idea to maybe have him write out a confession?

“[The Prosecutor]: Objection. Argumentative.

“THE COURT: Sustained.

“Q [By Defense Counsel]: But did he write out a confession?

“A No.

“Q And you didn’t record the confession, right?

“[The Prosecutor]: Objection. Asked and answered.

“THE COURT: Sustained. Asked and answered.

“Q [By Defense Counsel]: Okay. Do you happen to remember exactly what my client said as he sat in the back of your patrol car?

“ . . .

“A No.

“Q Now, in your capacity as a deputy sheriff, you’re there to protect and serve; isn’t that right, sir.

“A Yes.

“Q And you arrived on the scene for a vandalism call, right?

“A Yes.

“Q Which eventually in your mind turned into a burglary call, correct?

“A Yes.

“Q And then you questioned Mr. Robles and according to you, he told you that he was culpable; is that correct?

“A Yes.

“Q So you’ve got my client. He’s allegedly confessing. He is telling you everything. He’s not holding anything back, right?

“A Yes.

“Q Okay. At any time after his confession or at any subsequent time did you ask him where the property was?

“A No.

“Q So Mr. Robles is confessing. He’s telling you I did this. This is why I did it. But you didn’t think to ask ‘Okay. Where’s the property? Let me go get it.’ You didn’t ask that?

“A I don’t recall.

prosecutor asked Deputy Orrego what would happen “if the sheriff’s department discovered that you had made up a confession by someone and submitted it with your report?” Defense counsel objected, and at sidebar, the prosecutor explained that she was asking the question because defense counsel called Deputy Orrego’s credibility into question on cross-examination by alleging that the confession by appellant was fabricated. The trial court explained that the question, as phrased, was speculative since Deputy Orrego would be unable to lay a foundation as to the protocols of an internal affairs investigation. The trial court noted that both sides may “argue all day long and tell the jury and make the argument[,] do you believe the deputy who’s doing his job or do you believe the alternative, [which] would be somebody is not telling the truth? There’s two different versions and both of you can argue that all day long.”

Thereafter, in closing argument, as part of her explanation of Deputy Orrego’s encounters with Zambrana and defendant, the prosecutor made the single comment which, on appeal, defendant contends his attorney should have objected to as misconduct. We

“Q Okay, but you just said that you didn’t ask. Is it that you don’t remember or you didn’t ask?

“A If I can refresh with my report, I’ll be able to tell.

“Q Would that refresh your recollection to review your report?

“A Yes.

“ . . .

“Q [By Defense Counsel]: Is your recollection refreshed, sir.

“A Yes.

“Q Did you ever ask him that?

“A No.”

italicize the purportedly objectionable comment in the lengthy excerpt of the prosecutor's argument, below:

“So when Deputy Orrego took a report from Mr. Zambrana [on March 25], is it reasonable that Mr. Zambrana said no, no, no, he [defendant] actually took this stuff earlier and that Deputy Orrego interpreted it as earlier that day? Yes, that's reasonable because the day Deputy Orrego was called to the scene was days after the burglary actually took place [on March 22]. [¶] And when the People said we are going to find out together exactly what happened, that's why you have only one count to decide . . . because when the evidence came out, it was clarified. . . . On the 22nd is when the burglary took place, but this wasn't reported until the 25th and the reason it was reported on the 25th is because that's the day that the deputies actually responded and that Mr. Zambrana gave a statement.

“If you're Deputy Orrego and you are responding to the scene and you think you are responding to the scene about something that is happening and the witness is telling you I saw this person break into this window and earlier I saw him taking stuff in and out of the apartment, that is a reasonable miscommunication that could happen. It's safe to assume the deputy is thinking, oh, okay, that happened earlier today. It doesn't mean there's a conspiracy against [defendant]. It doesn't mean Mr. Zambrana is making the whole thing up.

“And the other thing *you have to believe is that Deputy Orrego is going to put his whole livelihood on the line and make up a confession by the defendant just for this case* because the defendant told Deputy Orrego exactly what happened and Deputy Orrego is a certified

translator of English to Spanish. He testified in English, but he spoke to the defendant in Spanish. And that's what he told him. Why he wanted to tell Deputy Orrego all of that information, the People don't have to prove that. For whatever reason he was feeling open that day and he said I went in there. I took the stuff. I took it because I was gonna sell it." (*Italics added.*)

In his closing argument, defense counsel followed up on his suggestion that Deputy Orrego fabricated defendant's confession:

"Now that we've established that Mr. Zambrana is just not credible, the next thing that the prosecution is going to stand on is [appellant's] confession. Really? Really? He confessed? Okay. Then let's look at it. Deputy Orrego said he asked my client if what Mr. Zambrana said was true. Did he enter the apartment on that day and take certain items? Do you remember that? I asked him if what Mr. Zambrana said was true? Do you remember him saying that? But think about that. By Mr. Zambrana's own testimony Mr. Robles never entered the apartment on March 25th so how can my client admit to something that the prosecution's own witness said didn't happen? That's why there's no count 2 because the prosecution's own witness said it didn't happen. So how can my client admit to something that their own witness has indicated didn't happen? Also, my client allegedly confessed to a felony because he was feeling talkative and helpful according to [the prosecutor], but the officer couldn't be bothered to write out the confession for this felony, videotape the confession for this felony, have an officer as a witness to corroborate the substance of the confession. And most importantly when I asked Deputy Orrego

exactly what my client said, he said I don't remember. I just remember that he confessed. Really? Really? Ladies and gentleman, that is highly suspect and the reason why that's highly suspect is because this officer did a 15-minute investigation, 15 minutes. A television sitcom without commercials is 21 minutes. That means that this gentleman did less work than an episode of Seinfeld. That is not proof beyond a reasonable doubt. It's just not."

No Ineffective Assistance

Defendant contends that the prosecutor's comment – "you have to believe . . . that Deputy Orrego is going to put his whole livelihood on the line and make up a confession by the defendant just for this case" – constituted improper vouching for Deputy Orrego's credibility, because it relied on matter outside the record. According to defendant, it "signaled to jurors that [the prosecutor] had information about the discipline that would be imposed if Orrego were caught fabricating the confession – namely, the loss of his career." Defendant also argues the comment violated the trial court's ruling excluding testimony by Deputy Orrego concerning internal discipline. Therefore, according to defendant, his trial counsel had a duty to object, and was ineffective for failing to do so. As we explain, we disagree.

First, the prosecutor's comment was not objectionable. Contrary to defendant's contention, it did not violate the court's evidentiary ruling. In ruling, the court informed the attorneys that they could "argue all day long and tell the jury and make the argument[,] *do you believe the deputy who's doing his job or do you believe the alternative,*

[which] would be somebody is not telling the truth?" (Italics added.)

The prosecutor's argument was consistent with the court's ruling permitting argument on whether the jury should believe Deputy Orrego, who was "doing his job" investigating Zambrana's report and eliciting defendant's confession, or whether Deputy Orrego was doing the "alternative" (i.e. not doing his job) by "not telling the truth."

Moreover, in context, the comment did not constitute improper vouching. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record. [Citations.] Nor is a prosecutor permitted to place the prestige of [his or her] office behind a witness by offering the impression that [he or she] has taken steps to assure a witness's truthfulness at trial. [Citation.] However, so long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' [his or her] comments cannot be characterized as improper vouching. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 971.)

California case authority is not entirely consistent concerning whether a prosecutor's comment referring to the disciplinary or professional consequences of lying as a witness constitutes improper vouching for the witness' credibility. However most decisions, including the most recent California Supreme Court authority on the topic, have found no impropriety. (See *People v. Dykes* (2009) 46 Cal.4th 731, 774 (*Dykes*) [comment that if defendant were believed, then officer was

“lying, risking his career and everything it stands for, to somehow frame this man,” held fair comment on the evidence]; *People v. Anderson* (1990) 52 Cal.3d 453, 478-479 (*Anderson*) [comment that officers had many years of experience and would not “jeopardize” their reputations by lying to convict one defendant held not to be improper vouching, being based on evidence of officers’ experience and “inferences reasonably drawn therefrom, rather than . . . personal belief or knowledge”]; *People v. Caldwell* (2013) 212 Cal.App.4th 1262, 1270 (*Caldwell*) [rebuttal argument questioning why officers would “put their career on the line for this case” and commit perjury to convict defendant held proper as a response to defense argument questioning officers’ credibility; comment was not personal assurance of officers’ veracity or use of prestige of prosecutor’s office]; compare *People v. Padilla* (1995) 11 Cal.4th 891, 946, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 [doubting propriety of comment that ballistics expert “would have ‘risked his whole career of 17 years” by lying, but finding no prejudice]; *People v. Woods* (2006) 146 Cal.App.4th 106, 114 [finding comment that officers risked their “careers, pensions, house notes, car notes” constituted improper reference to matters outside the record].)

Here, under the authority of *Dykes, supra*, 56 Cal.4th at page 774, *Anderson, supra*, 52 Cal.3d at pages 478-479, and *Caldwell, supra*, 212 Cal.App.4th at page 1270, the prosecutor’s comment suggesting that Deputy Orrego would not “put his whole livelihood on the line and make up a confession by the defendant just for this case” was not improper. It

was fair comment responding to the suggestion from defense counsel's cross-examination of Deputy Orrego that the deputy fabricated defendant's confession and violated his duty to protect and serve.

Moreover, the thrust of the prosecutor's argument as a whole was that inconsistencies in Zambrana and Deputy Orrego's versions of events could be rationally explained without irrational speculation that Zambrana and Deputy Orrego collaborated to frame defendant. In his closing argument, defense counsel attacked the evidence of defendant's confession as "highly suspect" based on a "15-minute investigation" in which Deputy Orrego "couldn't be bothered to write out the confession for this felony, videotape the confession [or] have an officer as a witness to corroborate the substance of the confession," and also did not remember defendant's specific words. In light of the attorneys' arguments as a whole, it was not reasonably likely that the jury would understand the prosecutor's isolated comment (referring to Deputy Orrego "put[ting] his [job] on the line" by lying) as a comment relying on "evidence outside the record," "the prestige of [the prosecutor's] office," or the prosecutor's "personal knowledge or belief." (*Frye, supra*, 18 Cal.4th at p. 971.) Rather, in context, the comment amounted to little more than a common sense observation that Deputy Orrego had no motive to lie. Because the prosecutor's comment was not objectionable, trial counsel was not ineffective for failing to object.

Second, even if the comment was improper, the record suggests a tactical reason why defense counsel did not object. As we have noted, the prosecutor's argument was consistent with the trial court's evidentiary ruling, which discussed the permissible bounds of

argument. Thus, the record contains a rational explanation for trial counsel's failure to object: an objection would have been overruled (given the court's earlier ruling) and a futile objection would only call attention to the comment.

Finally, even if trial counsel should have objected, it is not reasonably probable that, had he done so and been successful, a different result would have been reached. The comment was brief. Defense counsel had ample opportunity to, and did, challenge Deputy Orrego's credibility. Especially in light of Zambrana's eyewitness testimony, there is no reasonable probability that if trial counsel had successfully objected to the prosecutor's comment and had it stricken, a different result would have been reached.

II. *Pitchess*

Defendant made a *Pitchess* motion for disclosure of citizen complaints made against Deputy Orrego. The trial court granted the motion with respect to complaints regarding dishonesty. Following an in camera hearing, the court ruled that there were no discoverable complaints. Defendant asks that we review the transcript of the in camera hearing to determine whether the custodian of records properly presented the court with all documents covered by the court's ruling, and whether the court abused its discretion in not disclosing any complaints. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) We have done so, and conclude that the hearing was conducted properly and that the court did not abuse its discretion in ruling there were no complaints subject to disclosure.

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.