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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RODNEY F. KINNEY, Defendant and Appellant.	B277773 (Los Angeles County Super. Ct. No. YA092134)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven R. Van Sicklen, Judge. Affirmed.

Lori A. Quick, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant Rodney Kinney of conspiracy to commit a crime (robbery) (Pen. Code, § 182, subd. (a)(1)) and second degree robbery (Pen. Code, § 211). The trial court sentenced him to state prison for three years. Defendant contends the trial court erred in admitting his statements to the police and defense counsel provided ineffective assistance by failing to object to the prosecutor's alleged misconduct in closing argument. We affirm.

BACKGROUND[1]

On March 10, 2015, three men robbed a Verizon Wireless store in Manhattan Beach, making off with cell phones, electronic tablets, and cash. Among the items taken was a decoy cell phone equipped with a GPS tracking device.

Shortly after the robbery, responding to information they received about the suspects' location, Manhattan Beach Police Department officers went to the Culver Center in Culver City. There, in an alley, they encountered defendant, Jacob Stephens, and Carl Gamboa.

In another nearby alley, police officers found a duffel bag. Tablets and cell phones were scattered around the duffel bag. Latex gloves, 11 cell phones, and four iPhones were inside the bag. Also in the alley was a box with a UPS label addressed to the Manhattan Beach Verizon Wireless store. Defendant, Stephens, and Gamboa were arrested.

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[1] Because the issues defendant raises on appeal do not concern facts involving the offenses themselves, we provide a brief recitation of the facts for context.

Defendant spoke with detectives on the evening of his arrest and twice the next day. He initially minimized any involvement in the robbery, but by the third interview admitted being the getaway driver. He also admitted he went with Stephens into the Manhattan Beach Verizon Wireless store three days before the robbery.

DISCUSSION

I. The Trial Court Did Not Err in Admitting Defendant's Statements to the Police

Defendant challenges the sufficiency of the *Miranda*[2] advisement before the recorded interviews conducted the day after his arrest[3] and asserts he never waived his *Miranda* rights.

A. Background

On the night of his arrest, City of Manhattan Beach Police Officer David Mitchell advised defendant of his *Miranda* rights from a preprinted card as follows: "'You have the right to remain silent. Do you understand?' [¶] 'Anything you say may be used against you in court. Do you understand?' [¶] 'You have the right to the presence of an attorney before and during questioning. Do you understand?' [¶] 'If you cannot afford an attorney, one will be appointed for you free of charge before any questioning. Do you understand?'" Defendant said he

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

[3] The recorded interviews occurred during the evening of March 11, 2015. The crimes were committed the evening of March 10, 2015. Defendant was detained and arrested later that same evening or during the early hours of the next day, i.e., the day of the recorded interviews.

understood his rights and spoke with Officer Mitchell. The *Miranda* advisement was given after defendant's arrest at the scene of his detention.

On March 11, 2015, Detectives Michael Rosenberger and Taylor Klosowski recorded two interviews with defendant. At the beginning of the first interview, Detective Rosenberger asked defendant to provide personal information such as his full name, date of birth, address, place of employment, and prior arrests. The detective interspersed the *Miranda* warnings between these questions:

"[Detective Rosenberger]: 3/23—what's your date of birth?

"[Defendant]: '93.

"[Detective Rosenberger]: '93, okay. I have to get my little, uh—*you know you have the right to remain silent*?

"[Defendant]: Yeah. I keep trying to figure out what happened.

"[Detective Rosenberger]: Okay, no problem. What's your home address?

"[Defendant]: 5339 5th Avenue, Los Angeles, California 90043.

"[Detective Rosenberger]: *And anything you say can be used against you in court; do you understand that*?

"[Defendant]: (no audible answer)

"[Detective Rosenberger]: Okay. Where do you work at?

"[Defendant]: Corinthian International Parking Service and I also just got hired for, it's Ranford; it's like an agency doing warehouse (inaudible)[.]

"[Detective Rosenberger]: Okay. *And if you cannot afford an attorney, one will be appointed for you free of charge before any questioning*.

"[Defendant]: (inaudible) with that, sir.

"[¶]-[¶]

"[Detective Rosenberger]: All right. *And you know you have the right to an attorney before and during questioning, as well*?

"[Defendant]: Yes, sir." (Italics added.)

In the recorded interviews, defendant gave his version of the events and incriminated himself.

At trial, just before opening statements, defense counsel moved to exclude the recorded interviews: "[I]n the first interview, the *Miranda* rights are interspersed between questions, basically booking questions; name, birth date, how old are you, things like that. . . . And then there's no actual, yes I want to talk to you."

The prosecutor noted defendant had previously been advised of—and waived—his *Miranda* rights by the arresting officer.

The trial court denied the defense motion, stating, "All right, I'll just say this, [defense counsel]. I think you're right. There were other things going on. But technically it's all there. And I don't think legally there needs to be any more. He was given the basic rights to remain silent, and then he was asked, tell me what happened tonight. [¶] So on its face, I think it's okay; not perfect, but it's not a *Miranda* warning that's so insufficient, inadequate that it would prevent statements from coming in."

B. Standard of Review

The prosecution has the burden to establish the *Miranda* waiver was "'knowing, intelligent, and voluntary under the

totality of the circumstances of the interrogation.'" (*People v. Duff* (2014) 58 Cal.4th 527, 551(*Duff*).) "On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's findings on disputed facts if supported by substantial evidence." (*People v. Williams* (2010) 49 Cal.4th 405, 425 (*Williams*).)

C. Analysis

Our independent review of the record persuades us no second *Miranda* advisement was necessary before the recorded March 11, 2015 interviews. (*Williams, supra,* 49 Cal.4th at p. 434.) At the time of defendant's arrest, the arresting officer read defendant his *Miranda* rights from a card and defendant waived them. Defendant does not challenge this *Miranda* advisement or his waiver. Defendant spoke with the officer at that time, although he was not truthful in the first interview.

Defendant remained in custody for fewer than 24 hours before the second interview. Applying criteria set forth in *Williams* (i.e., the amount of time between the first and second interviews, the location of the interrogation, a new interrogating officer, indicia that defendant "subjectively" comprehended and waived his rights), we conclude the recorded interviews were "reasonably contemporaneous with [defendant's] prior knowing and intelligent waiver." (*Williams, supra,* 10 Cal.4th at p. 434, internal quotation marks omitted; see also *Duff, supra,* 58 Cal.4th at p. 555.) Neither party briefed this issue, however.

1. Adequacy of the *Miranda* Warnings

"*Miranda* prescribed the following four now-familiar warnings: [¶] '[A suspect] must be warned prior to any

questioning [1] that he has the right to remain silent, [2] that anything he says can be used against him in a court of law, [3] that he has the right to the presence of an attorney, and [4] that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" (*Florida v. Powell* (2010) 559 U.S. 50, 59-60.) "Reviewing courts . . . need not examine *Miranda* warnings as if construing a will or defining the terms of an easement. The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" (*Duckworth v. Eagan* (1989) 492 U.S. 195, 203 (*Duckworth*).) A warning that "touche[s] all of the bases required by *Miranda*" is valid. (*Ibid.*)

Here, Detective Rosenberger used the following words in his advisement to defendant (1) "you know you have the right to remain silent," (2) "anything you say can be used against you in court," (3) "if you cannot afford an attorney, one will be appointed for you free of charge before any questioning," and (4) "you have the right to an attorney before and during questioning." Defendant acknowledges Detective Rosenberg's *Miranda* warning is "technically . . . all there." Nevertheless, he argues Detective Rosenberger's *Miranda* warning was insufficient because it was interspersed among questions seeking booking information and did not advise defendant he could have an attorney present before and during the interview. Defendant contends it is "less than clear that [he] was truly cognizant of the advisements as they were being given."

To illustrate his point, defendant provides a single example. When Detective Rosenberger asked defendant, "you know you have the right to remain silent," defendant responded, "Yeah. I keep trying to figure out what happened." That

response, defendant contends, "certainly indicates that he was not necessarily comprehending the advisement." We disagree.

The response demonstrates defendant understood he could remain silent. Moreover, in light of Officer Mitchell's *Miranda* advisement from a preprinted card the previous night, defendant's claimed lack of comprehension is unpersuasive. Detective Rosenberger's warning "touched all of the bases required by *Miranda*" and reasonably conveyed to defendant his *Miranda* rights.[4] (*Duckworth, supra,* 492 U.S. at p. 203.)

2. Waiver of *Miranda* Rights

A valid *Miranda* waiver does not require "any particular words or phrases . . . [and] need not be of predetermined form . . . . [The California Supreme Court has] recognized that a valid waiver of *Miranda* rights may be express or implied." (*People v. Cruz* (2008) 44 Cal.4th 636, 667 (*Cruz*).) The presumption is against a finding of a *Miranda* waiver. (*Id.* at p. 668.) The prosecution may overcome that presumption by demonstrating the *Miranda* warning was given and the accused understood it before making uncoerced statements. (*Berghuis v. Thompkins* (2010) 560 U.S. 370, 384.) "[U]ltimately the question becomes whether the *Miranda* waiver was knowing and intelligent under the totality of the circumstances surrounding the interrogation." (*Cruz, supra,* 44 Cal.4th at p. 668.)

Defendant asserts there was no express or implied waiver based on Detective Rosenberger's *Miranda* advisement. Other

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[4] Defendant initially asserted Detective Rosenberger did not advise him of his right to an attorney before and during questioning. The record demonstrates otherwise, however, and defendant concedes the point in his reply brief.

than as to the right to remain silent, defendant did not expressly acknowledge he understood his rights. According to defendant, he gave no indication he even heard the *Miranda* warnings. The Attorney General acknowledges defendant did not audibly respond to Detective Rosenberger's advisements that any statements could be used against him in a court of law and he had a right to an appointed attorney if he could not afford one. However, the previous night, defendant affirmatively told Officer Mitchell he understood his *Miranda* rights. The recorded *Miranda* advisement and defendant's statements gave no indication of coercion. The totality of circumstances reflect defendant's knowing and intelligent waiver of his *Miranda* rights. (*Cruz, supra,* 44 Cal.4th at pp. 667-668.)

II. Ineffective Assistance of Counsel

A. Background

During closing argument, the prosecutor told the jury:

"So I've now shown you the elements of both crimes. I've shown you why each element has been proven beyond a reasonable doubt. And now is the time when I ask you to do justice in this case.

"You know, Shawn Khodai was a retail worker at Verizon, and he didn't deserve—he didn't need to undergo this traumatic experience. It wasn't fair to him. He's clearly suffered because of that. He was in fear of his life. He thought he was going to be shot. You know, that's not right. And nobody should have to go through that.

"So this is about doing justice for the victim. It's about sending a message that this behavior is not okay. You cannot go into a store and stick a gun in someone's face because you need

money or because you think that might is right and that you'll take what you want with fear and violence. That is not the society we live in. Right? This is a society based on rules and laws, and that's what keeps us—holds us altogether. And when people do what defendant Kinney did and his friends, they tear that apart, and they threaten our very existence.

"So you have to send a message and say that this behavior is not acceptable. And it's definitely criminal, and we've proved that.

"So it's about accountability at this time. Hold the defendant accountable for what he did. He was clearly the get-away driver. He states it from his own mouth. The evidence supports that. And just, you know, remember at the Culver Center, they're all found together. The loot is there. The car is there. I mean, this is really a strong case. We essentially have a full confession that's recorded."

Defense counsel did not object.

B. Analysis

Defendant contends the prosecutor engaged in misconduct with comments to "send a message" that defendant's conduct was not acceptable and to do justice for the victim and his trial attorney's failure to object constituted ineffective assistance.

Defendant bears the burden to demonstrate his trial attorney's performance was inadequate, as measured by objective standards, and the ineffective assistance was prejudicial, i.e., there was a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . [¶] Reviewing

courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. [Citation.] Defendant's burden is difficult to carry on direct appeal, . . . : Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission." (*People v. Vines* (2011) 51 Cal.4th 830, 875-876, internal quotation marks omitted.)

In arguing the prosecutor's "send a message" comment was misconduct, defendant relies on *United States v. Sanchez* (9th Cir. 2011) 659 F.3d 1252, 1256-1257: "'[P]rosecutors may not urge jurors to convict a criminal defendant in order to protect community values, preserve civil order, or deter future lawbreaking. The evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence.' . . . Further, it is improper to make 'statements designed to appeal to the passions, fears and vulnerabilities of the jury.'" Defendant relies on *People v. Stansbury* (1993) 4 Cal.4th 1017 (reversed on other grounds in *Stansbury v. California* (1994) 511 U.S. 318) to urge prosecutorial misconduct based on the comment that a guilty verdict "is about doing justice for the victim." In *Stansbury,* the Supreme Court held: "an appeal to the jury to view the crime through the eyes of the victim is misconduct . . . ; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (*Id.* at p. 1057.)

Defendant's claim his trial counsel provided ineffective assistance of counsel in the face of the prosecutor's misconduct is unavailing. As the authorities cited above provide, we reject a claim of ineffective assistance unless the appellate record affirmatively discloses trial counsel did not have a rational tactical purpose. The prosecutor's challenged statements were brief and made in the context of holding defendant "accountable" for crimes the evidence showed he committed. "Defense counsel reasonably could have concluded that she did not want to draw additional attention to those statements by objecting, having the court rule on the objections, striking them, and having the court give an admonition. Because this would have been a reasonable trial strategy, we cannot find defense counsel's performance deficient." (See *People v. Fernandez* (2013) 216 Cal.App.4th 540, 565.) So it is here.

Moreover, under the second prong of the test in *Strickland v. Washington* (1984) 466 U.S. 668, "the defendant [also] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (*Id.* at p. 687.) Defendant has not made that showing here. Counsel on appeal concedes "a jury reasonably could have found [defendant] guilty of the robbery based on the evidence and this statements, [but] there is a reasonable probability they would not have found him guilty of the conspiracy had the prosecutor not appealed to their passions and prejudices and their fear of crime." This argument overlooks defendant's admission that he and Stephens went into the Manhattan Beach Verizon Wireless store three days before the robbery on what he termed a bogus pretext.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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