Filed 8/31/17 P. v. Martin CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOHN MARTIN, Defendant and Appellant.	B277431 (Los Angeles County Super. Ct. No. BA444350)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Swain, Judge. Affirmed in part, reversed in part, and remanded.

Robert F. Somers, 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, Victoria B. Wilson, Supervising Deputy Attorney General, Chung L. Mar, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted John Martin (defendant) of assault with a deadly weapon. The conviction arose from an incident in which defendant confronted a woman on the street with a knife, walked her into a nearby liquor store, and stabbed a store employee after being asked to leave. The events inside the liquor store were captured on surveillance video, and the police also recovered the knife and a bloody shoe believed to be defendant's. The main issues we consider are whether the prosecution committed misconduct during closing argument by stating the knife and shoe were available to the defense for forensic testing, and whether the trial court erred by not convening a *Marsden*[1] hearing. We also address two asserted sentencing errors, one of which requires a remand for further proceedings.

I. BACKGROUND

A. The Offense Conduct

At approximately eight o'clock in the evening on February 21, 2016, a woman named Lala Karapetyan (Karapetyan) was walking home on Hollywood Boulevard. A man she did not know, later identified as defendant, suddenly jumped out of the bushes near where she was walking and stopped about two feet in front of her.

Defendant told Karapetyan not to move, but she initially did not take him seriously because "from his appearance" he did not seem "normal." Karapetyan tried to walk around defendant, but he followed her and said, "I have a knife"—showing her a knife with a blade of one to two inches that was in his hand. While displaying the knife, defendant told Karapetyan several

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

times that "'today is the end of you, the last day.'" Karapetyan was scared, and when a couple approached where she and defendant were standing, defendant moved immediately beside Karapetyan and told her "'don't you talk'" while holding the knife low towards her side.

Once the couple walked by, defendant forced Karapetyan to accompany him to a nearby liquor store at knifepoint. The store was near where Karapetyan lived, and the store employees knew her from previous times she had been in the store. Karapetyan, speaking in Russian, asked the clerk at the register to call the police because defendant was threatening her. The register clerk then told defendant several times to leave the store, but he did not comply.

At that point, a second store employee, Mikhail Gotlinksy (Gotlinsky), heard the commotion and came out from the store's back room. Gotlinsky saw Karapetyan, who appeared frightened, and heard the register clerk telling defendant to leave the premises. Gotlinsky joined in and asked defendant to leave several times. Defendant responded by turning around suddenly, hitting Gotlinsky in the side with "something sharp," and immediately running out of the store thereafter.

When defendant ran out of the store, Gotlinsky ran after him for a short distance until Gotlinsky's legs began to hurt. Gotlinsky then returned to the store, and he began to feel pain in his left side. When he put his hand to his side, he felt that it was wet; and when Gotlinsky looked at his hand and his side, he saw both were "covered in blood." The register clerk called 911, and an ambulance arrived to take Gotlinsky to the hospital (where he stayed overnight).

The police apprehended defendant on Hollywood Boulevard less than an hour later that evening. Defendant's shirt and shorts were covered in blood, and he was carrying a bloody shirt in his right hand, which appeared to be bleeding. According to one of the officers who made contact with defendant after he was apprehended, defendant was wearing only one shoe.

That same evening, Los Angeles Police Department Officer Nestor Escobar and his partner conducted follow-up investigation at a restaurant where "the possible suspect" in the stabbing of Gotlinsky had been seen earlier. The restaurant was less than a quarter-mile from the liquor store. Outside the restaurant, Officer Escobar found a small trail of blood leading from the restaurant's entrance to a city trash can about ten feet away. Inside the trash can, Officer Escobar and his partner found a shoe with fresh blood on it, and underneath the shoe, a Swiss Army Knife with its blade extended.

B. Trial and Conviction

The Los Angeles County District Attorney charged defendant with assault with a deadly weapon, in violation of Penal Code section 245, subdivision (a)(1). At trial, the prosecution played surveillance video from the liquor store that captured the confrontation between defendant, Gotlinsky, and the register clerk (with Karapetyan also visible).[2] Karapetyan and Gotlinsky also testified at trial, and both identified

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[2] The video depicts defendant holding a shoe in his hand.

defendant in court as the man with Karapetyan in the liquor store.[3]

The jury found defendant guilty after deliberating for 35 minutes. The trial court sentenced defendant to a total of 11 years in state prison. When imposing sentence, the trial court "stay[ed] any punishment" on three prior prison term enhancements alleged under Penal Code section 667.5, subdivision (b). The court also "stayed" the $300 parole revocation restitution fine, telling defendant "[t]hat means you don't have to pay it unless you violate your parole and are returned to prison."

II. DISCUSSION

We reject both of defendant's principal contentions on appeal. We hold, first, that the prosecution did not improperly shift the burden of proof to the defense when it expressly acknowledged it was "100 percent" the "People's burden to prove this case to you beyond a reasonable doubt" while also stating that the shoe and knife recovered by the police were equally available to the defense for forensic testing. We further hold, second, that the trial court did not err in failing to convene a *Marsden* hearing because defendant's colloquy with the court at the relevant time reveals no clear indication defendant wanted a substitute attorney. We accordingly affirm defendant's conviction but remand to permit the trial court to impose or strike the prior prison term enhancements that it ordered "stayed."

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[3] The register clerk also testified, but he could not identify anyone in court.

A. Defendant's Misconduct Claim Fails

1. The closing arguments

During the defense closing, defendant's attorney argued the case was one of mistaken identity. Defense counsel conceded "the video evidence . . . looks a lot like [defendant]," but counsel argued there was no definitive evidence connecting defendant to the shoe and knife found by Officer Escobar in the trash can. The defense specifically criticized the prosecution for not introducing forensic evidence, i.e., fingerprints on the knife or testing of the blood found on the shoe. Defense counsel also urged the jury not to let the prosecution "shift the burden," meaning, accept an argument that "the defense could have done this, the defense could have brought this out." The defense explained, "That's completely improper. That's what the prosecutor's job is."

During rebuttal argument, the prosecution responded:

> [The Prosecutor]: So, this is not an eyewitness case. You have physical evidence in this case. You have the shoe. You have the knife. You have the video. You have everything. Again, you guys will have that when you go back there. You can see the shoe.
>
> Now, defense counsel said something and it is true, this is true 100 percent. It is the People's burden to prove this case to you beyond a reasonable doubt. It is my burden 100 percent and not burden shifting at all, but while defense counsel was harping on that is because he has equal access to all the stuff that we have as far as the evidence. If he wants to get the shoe tested, he can get the shoe tested.

[Defendant's Attorney]: Objection, shifting the burden.

The Court: Sustained.

[The Prosecutor]: Again, it is my burden, but if he wants it tested, he can get it tested.

[Defendant's Attorney]: Same objection.

The Court: Sustained.

[The Prosecutor]: Everybody has equal access to the evidence. Everybody can do whatever they want with it.

[Defendant's Attorney]: Same objection, your Honor.

The Court: Sustained.

2. Analysis

"The standards governing review of misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such "'unfairness as to make the resulting conviction a denial of due process.'" [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' [Citation.] . . . When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" [Citation.]" (*People v. Williams* (2013) 56 Cal.4th 630, 671 (*Williams*).) The prosecution can be found to have committed misconduct if it presents argument to the jury that shifts the

burden of proof to the defense. (*People v. Hill* (1998) 17 Cal.4th 800, 831-832.)

The general rule is that "'[i]n order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition.'" (*People v. Williams*, *supra*, 56 Cal.4th at p. 671; accord, *People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081 [purpose of the requirement is to encourage defendants to bring errors to the attention of the trial court so they may be corrected].) Defendant repeatedly objected to the prosecution's argument, and in each case, the trial court sustained the objection. Defendant did not, however, ask the trial court to admonish the jury to warn against any impropriety in the prosecution's comments. While the absence of a request for an admonition means, as a technical matter, that defendant's misconduct argument is forfeited (*People v. Winbush* (2017) 2 Cal.5th 402, 482; *People v. Charles* (2015) 61 Cal.4th 308, 328), we address the argument on the merits to avoid any need to analyze whether defense counsel's performance was deficient.

"There is "'[a] distinction . . . between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.'" (*People v. Thomas* (2012) 54 Cal.4th 908[ ].) The former is permissible because a prosecutor generally is permitted to remark on the state of the evidence at closing argument. (E.g., *People v. Weaver* (2012) 53 Cal.4th 1056, 1077[ ].) '[T]he prosecutor may comment "'on the state of the evidence, or on the failure of the defense to introduce material evidence or call logical witnesses.'"' [Citation.]" (*People v. Jasso* (2012) 211 Cal.App.4th 1354, 1370.)

The lines in this area of the law are admittedly fine, but we do not believe the specific comments made by the prosecution here crossed the line into improper argument. The prosecution was obviously cognizant of the need to avoid suggesting the defense had a burden of proving innocence, and the prosecution repeatedly and explicitly framed its argument not in terms of the defense carrying a burden of proof, but as a comment on the state of the evidence at the conclusion of trial. Put more concretely, while the prosecution expressly conceded it was "the People's burden to prove this case to you beyond a reasonable doubt" and implicitly conceded there was no forensic evidence tying the shoe or knife to defendant, the prosecution fairly noted there was also no forensic evidence indicating the shoe and the knife were *not* connected to defendant either. Thus, while we are not critical of the trial court for sustaining the defense objections—the comments were close to the line and caution was warranted—the challenged portion of the prosecution's argument was not misconduct in our view. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 607 [prosecution's question to expert witness about whether the defense could have tested the bullets removed from murder victims was not improper burden shifting because "[p]ointing out that contested physical evidence could be retested did not shift the burden of proof"].)

Regardless, defendant cannot demonstrate any prejudice attributable to the prosecution's remarks concerning the shoe and the knife. The evidence of identity was quite strong (as defense counsel's concession regarding the video evidence indicates), and there is therefore no reasonable probability of a different result

absent the challenged argument by the prosecution.[4] (See, e.g., *People v. Bryant* (2014) 60 Cal.4th 335, 429 [no reversal for misconduct during argument because there was no "reasonable probability the outcome would have been more favorable to [the defendant] in the absence of the prosecutor's" challenged remarks].)

B. There Was No Marsden *Error*

1. Procedural background

At trial, just before the jurors selected in voir dire were sworn in, the trial judge held a hearing outside the presence of the jurors because she "was told you gentlemen might want to discuss something before the jury comes in." Defendant's attorney confirmed that was the case and stated for the record that he did not "think it's in [defendant's] interest to proceed any further on the trial" because it would "cost [defendant] 10 actual years in prison." Defense counsel explained the prosecution had offered a plea agreement that would call for an 8-year sentence and that, in his judgment, "[t]here's a good likelihood that . . . by the end of tomorrow there could be a guilty verdict and [defendant] could be looking at 21 years in prison." Defense counsel stated he had so advised defendant and wanted to be sure "that [defendant] isn't going forward on some type of false hope that he can do better than eight years . . . ."

The trial court told defendant it had reviewed a summary of the facts of the case, believed they "seem pretty strong for the

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[4] There is no fundamental unfairness that would justify applying the *Chapman v. California* (1967) 386 U.S. 18 standard of prejudice.

prosecution," and explained the possibility that defendant's sentence, if convicted, could exceed the eight years he had been offered by the prosecution. The trial court further informed defendant that it was not "trying to persuade [him] one way or the other" but rather "want[ed him] to know that [defense counsel] is telling you the truth from my standpoint." Defendant and the trial court then engaged in the following exchange:

> The Defendant: [M]aybe at this point do you recommend a recommendation [*sic*] maybe ineffective counsel at this point?
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> The Court: No.
>
> The Defendant: Seems like my attorney doesn't want to move on with these proceedings.
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> The Court: I know [defense counsel] very well —
>
> The Defendant: Okay.
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> The Court: — And he's looking out for your interests. And this is not a difficult thing for him to do in terms of trying a case. He's a very good lawyer. This is not difficult for him. He's just looking after your best interests. I know him well enough to know that.
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> The Defendant: Maybe that wasn't the word I was looking for. The word I was looking for —
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> The Court: *Marsden*?
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> The Defendant: You wouldn't accept that?
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> The Court: I wouldn't grant a *Marsden* actually, so you don't need to talk about this any further. I think [defense counsel] just wanted to make sure that you understood his position and I

wanted you to know that I think that what he's telling you is reasonable and fruitful, but it's your decision, obviously, so —

The Defendant: I would like — I spoke with [defense counsel] and I would like to proceed with trial.

The Court: Okay.

2. Analysis

In *Marsden*, our Supreme Court held that a defendant who asks to discharge appointed counsel and substitute new counsel must be given an opportunity to explain to the trial court the reasons for the request—an opportunity now commonly referred to as a "*Marsden* hearing." (*Marsden*, *supra*, 2 Cal.3d at pp. 123-124; *People v. Knight* (2015) 239 Cal.App.4th 1, 6; see also *People v. Rodriguez* (2014) 58 Cal.4th 587, 623 ["When a defendant seeks to obtain a new court-appointed counsel on the basis of inadequate representation, the court must permit her to explain the basis of her contention and to relate specific instances of inadequate performance. The court must appoint a new attorney if the record clearly shows the current attorney is not providing adequate representation or that the defendant and counsel have such an irreconcilable conflict that ineffective representation is likely to result"].) "[A] trial court must conduct . . . a *Marsden* hearing only when there is at least some clear indication by the defendant, either personally or through counsel, that defendant wants a substitute attorney." (*People v. Sanchez* (2011) 53 Cal.4th 80, 83; see also *People v. Carter* (2010) 182 Cal.App.4th 522, 527-528 [the duty to conduct a *Marsden* inquiry arises only when the defendant asserts directly or by implication that his

attorney's performance has been so inadequate as to deny him his constitutional right to effective counsel].)

In defendant's exchange with the trial court, he did not clearly indicate he wanted a substitute attorney; rather, he seemed concerned about whether his attorney would still represent him if he wished to proceed to trial. The entire discussion began when defendant's attorney informed the trial court he had advised his client to accept the prosecution's plea offer (perhaps to forestall a later post-conviction claim of ineffective assistance of counsel). The trial court then gave defendant its assessment of the merit of defense counsel's advice, and defendant responded by asking the court merely whether it would "recommend" he assert his attorney was ineffective. That *question* is neither a clear indication defendant wanted another lawyer nor an assertion that defendant believed his lawyer had provided constitutionally deficient representation. Then, after the court assured defendant it would not be difficult for his attorney to try the case, defendant said "maybe that wasn't the word I was looking for." Apparently trying to be helpful, the trial court then made the first mention of *Marsden*, and without asking what the court meant (and also without explicitly confirming that was the word he was looking for), defendant asked if the court would accept "that." The trial court said no, and defendant's next comment, if anything, revealed his relationship with appointed counsel was intact: "I would like—I spoke with [defense counsel] and I would like to proceed with trial."

The scenario in this case thus bears some similarities with the scenario in *People v. Dickey* (2005) 35 Cal.4th 884 (*Dickey*). In between the guilt and penalty phases of trial in that case, the

defendant asked the trial court to appoint separate counsel who could prepare a new trial motion that would argue his guilt-phase attorney performed incompetently. (*Id.* at p. 918.) In discussing that request, the trial court (not defendant or his attorney) interjected with a reference to *Marsden*, and defendant thereafter informed the court that he was not satisfied with his lawyer's competence. (*Id.* at p. 919.) The trial court did not immediately hold a *Marsden* hearing at that point and instead waited until the penalty phase concluded to hear defendant's motion for new trial, which was prepared with the assistance of separate appointed counsel. (*Id.* at p. 920.) The new trial motion argued the court should have held a *Marsden* hearing when the issue arose during the discussion with defendant prior to the penalty phase, but the trial court acknowledged its invocation of *Marsden* was a "poor choice of words" and ruled there was no reason to have a *Marsden* hearing, because "[i]t was not asked for." (*Ibid.*) On appeal, our Supreme Court affirmed, holding the defendant "did *not* clearly indicate he wanted substitute counsel appointed for the penalty phase." (*Ibid.*)

As in *Dickey*, the trial court here introduced the term *Marsden* into the discussion it was then having with defendant. Defendant did not request a *Marsden* hearing, nor did he request substitute counsel or even state his own view that his lawyer was incompetent (instead asking only what the court might "recommend"). In the absence of any such request, the trial court was not obligated to conduct a *Marsden* hearing.

C. The Prior Prison Term Enhancements Were Incorrectly Stayed

Defendant admitted, and the trial court found true, three section 667.5, subdivision (b) prior prison term allegations. The trial court "stayed" any punishment for the prior prison term enhancements.

Defendant and the Attorney General agree, as do we, that staying the prior prison term enhancements in this case constitutes an unauthorized sentence. (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1561-1562; *People v. Bradley* (1998) 64 Cal.App.4th 386, 391-392; see also *People v. Brewer* (2014) 225 Cal.App.4th 98, 104.) The Attorney General asks that we remand with directions to the trial court to either impose the enhancements or strike them. Defendant urges us to strike the enhancements ourselves "because the trial court expressed a clear intent not to add the enhancements," as evidenced by its decision to stay them.

Although defendant may well be right that the trial court intended its stay of the enhancements as an exercise of its sentencing discretion to impose no more than an 11-year sentence (see, e.g., *People v. Jefferson* (2007) 154 Cal.App.4th 1381, 1388), we believe the prudent course is to remand with instructions to the trial court to either strike or impose the prior prison term enhancements. That is what we will do.

D. There Is No Need to Correct the Parole Revocation Fine

Defendant finally contends the judgment should be amended to state the parole revocation fine imposed pursuant to section 1202.45, subdivision (a) is "suspended," rather than

"stayed." We see no need to order such a correction. (*People v. Butler* (2016) 243 Cal.App.4th 1346, 1351.)

DISPOSITION

The case is remanded to the superior court with directions to either impose or strike the admitted prior prison term enhancements, and to deliver an amended abstract of judgment to the Department of Corrections and Rehabilitation that reflects the imposition or striking of those enhancements. The judgment is otherwise affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, 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.