Filed 7/26/18 P. v. Avendano CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GASPAR AVENDANO,<br><br>Defendant and Appellant. | B279975<br><br>(Los Angeles County Super. Ct. No. YA 094390) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Modified and, as modified, affirmed.

Lenore De Vita, 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, Noah P. Hill and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Gaspar Avendano guilty of first degree burglary. On appeal, he contends that the trial court improperly admitted statements he made in a recorded phone call and that the prosecutor committed misconduct. We reject these contentions but modify the judgment to correct a sentencing error.

## FACTUAL AND PROCEDURAL BACKGROUND

### I. Factual background

Barry Giberman's house abutted a public golf course. Someone wanting to access his house could simply walk across the golf course. On the evening of April 6, 2014, Giberman went to bed, leaving the back doors to the house and detached garage unlocked. When he got up the next morning, his camera bag, which had been in his bedroom, was gone. Other items, including his briefcase, were missing. Two keys had also been removed from his key chain. One key opened the gate to the complex's common areas and the other was to Giberman's Woodland Hills office. Giberman found his briefcase and camera bag, but their contents, including Giberman's camera, were gone. The value of all stolen items was $4,000.

DNA samples from the briefcase and camera bag matched Avendano. The statistical probability that the DNA sample from the camera bag would randomly match Avendano was one out of 5.4 quadrillion.

Avendano was arrested. While in jail, he called his uncle. The jury listened to the recorded call.[1] Avendano reminded his uncle that once "I was over there on Century and I went into a place to – uh – use the bathroom, do you remember I told you something like that?" "Uh, well uh – something similar, then . . . I went and – and I did the same thing like that and but it seems an incident occurred there and they wa – they want to know if it was me . . . or not. You understand? And since – and since I used the bathroom in –then – uh – uh – they try to – and – and like they did DNA, well, it comes out that . . . I was there, then but no . . . they don't have the exact dates when the incident occurred, well and – and that is what I am . . . wanting to argue again, then. And I have to fight another case again, but the others, now the other cases, well thank God, like I don't know if – if I told you, you understand? That they didn't find me guilty, but on the minor cases yes. And – and my release date supposedly had to be next month – next year, but now that – now that this case comes up, well, I have to – no –nothing changes, but when – when – like I said, when they drop the charges again about this one – when I win the case well, then – in the beginning they wanted to give me – I don't know how many years they wanted to give me, then, but that's why I had asked you for the books, uncle, because I wanted to see if I would defend myself again but – but well, and what do you gain."

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[1] Avendano and his uncle spoke in Spanish, and the call was translated and transcribed into English.

II. Procedural background

On November 17, 2016, a jury found Avendano guilty of first degree burglary (Pen. Code, § 459)[2] and found true an allegation that another person other than an accomplice was present (§ 667.5, subd. (c)). On December 22, 2016, the trial court, after finding that Avendano had suffered four prison priors (§ 667.5, subd. (b)), sentenced him to six years plus four 1-year terms, for a total of 10 years.

DISCUSSION

I. Admissibility of Avendano's phone call

Before trial, the defense moved to exclude Avendano's phone call to his uncle on the ground it was "too vague" and "not enough of a direct admission" and was more prejudicial than probative. The trial court found no "legal basis to exclude" the evidence and that it was not more prejudicial than probative. Avendano maintains on appeal that the phone call should have been excluded. We disagree.

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Evidence is relevant if it has any tendency in reason to prove any disputed fact that is of consequence to the determination of the action. (*Id.*, § 210; *People v. Williams* (2008) 43 Cal.4th 584, 633–634.) But, under Evidence Code section 352, a court has discretion to exclude even relevant evidence if its probative value is substantially outweighed by the probability its admission will create a substantial danger of undue prejudice. (*People v. Williams* (2013)

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[2] All further undesignated statutory references are to the Penal Code.

58 Cal.4th 197, 270–271.) We review a trial court's rulings on the admissibility of evidence and application of Evidence Code section 352 for abuse of discretion. (*People v. Masters* (2016) 62 Cal.4th 1019, 1056.) The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. (*People v. Partida* (2005) 37 Cal.4th 428, 439.)

Avendano asserts that the phone call was irrelevant because nothing in it established he was talking about *this* offense rather than some other crime. He thus points out that he said "since I used the bathroom" "they did DNA"; however, there was no evidence Avendano used the bathroom at Giberman's house. Avendano also referred to other offenses, e.g., going into someone's house on Century, to "other cases" and to "minor cases." He therefore argues that perhaps he was talking about other cases and not this one.

Avendano interprets his statements favorably to his case, ignoring alternative, not so favorable, interpretations. That Avendano's statements were open to interpretation went to the weight of the evidence, not its admissibility. Admissibility does not require complete unambiguity. (*People v. Ochoa* (2001) 26 Cal.4th 398, 438, abrogated on another ground by *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.) In *People v. Guerra* (2006) 37 Cal.4th 1067, 1122,[3] for example, the defendant, who was on trial for murder, said to a bailiff, " 'In my country, I do this, no problem, I go home tonight.' " *Guerra* rejected the defendant's claim that " 'I do this' " was ambiguous, rendering the

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[3] Disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151, disapproved by *People v. Doolin* (2009) 45 Cal.4th 390.)

statement inadmissible. (*Ibid.*) Rather, any ambiguity went to the weight of the evidence and not its admissibility. Similarly, Avendano, in the context of explaining why he was in jail, asked his uncle whether he recalled Avendano going "into a place" on Century to use a bathroom. Avendano then said, "Uh, well uh – something similar, then, uncle, that I – see – well – uh – I went and – I did the same thing like that and but it seems an incident occurred there and they wa – they want to know if it was me or . . . not." Although ambiguous, the jury could have found that Avendano was talking about this crime and analogizing it to another time when he went into a place on Century without permission to use a bathroom.

Hence, not only was the evidence relevant, having a tendency to prove the disputed fact that Avendano stole the items from Giberman, it was, for that reason, also more probative than prejudicial. " ' "Prejudice" as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial . . . merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant.' " (*People v. Doolin*, *supra*, 45 Cal.4th at p. 438.) "Prejudice" refers to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues. (*Id.* at p. 439.) But "prejudicial" is not synonymous with "damaging." (*People v. Karis* (1988) 46 Cal.3d 612, 638.) Notwithstanding the phone call's ambiguity, it tended to establish that Avendano was in Giberman's house.

We also disagree that admitting the statement violated Avendano's federal due process rights. (See generally *People v. Partida*, *supra*, 37 Cal.4th at p. 439, citing *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) The application of ordinary rules of evidence generally does not impermissibly infringe on a defendant's constitutional rights. (*Holmes v. South Carolina* (2006) 547 U.S. 319, 326–327; *People v. Cornwell* (2005) 37 Cal.4th 50, 82, disapproved on another ground in *People v. Doolin*, *supra*, 45 Cal.4th at p. 421, fn. 22.)

II. Ineffective assistance of counsel

Notwithstanding the phone call's relevance and probative value, Avendano makes the related claim that his trial counsel was ineffective for (1) failing to object to the prosecutor's alleged misstatements, (2) "conceding" facts, and (3) failing to object to other crimes evidence. (See generally *Strickland v. Washington* (1984) 466 U.S. 668 [defendant claiming ineffective assistance of counsel must establish error and prejudice].)

First, at a pretrial hearing, the prosecutor said that during the phone call Avendano "says he went into the house to use the bathroom." Defense counsel corrected the prosecutor's representation: "He says that there was a prior incident in which he had gone into a location to use the bathroom, and then he says to his uncle that this incident . . . is much in th[e] same manner. . . . [¶] So he didn't actually say that he was in the house. He says, by reference, that he refers to an incident that predates that and says that this is the same type." Avendano now asserts that his trial counsel, in making this statement, accepted a faulty premise that his statement was an admission he was in the house, thereby undermining the argument that the phone call should be excluded. Perhaps it did. Counsel was

making the difficult argument that Avendano's statements were too vague to constitute admissions. We fail to see what counsel could have argued or not argued to accomplish that outcome, given the relevance and probative value of the phone call.

Second, Avendano faults his trial counsel for not objecting when the prosecutor said Avendano went "into that *house* on Century to use the bathroom" when, in fact, Avendano said he went into that "*place*." Any misstatement was not made before the jury. In any event, it was reasonable to infer that the "place" Avendano went into was a house.

Third, defense counsel did not ask to have Avendano's references to other crimes redacted. Avendano said, "I have to fight another case again, but the others, now the other cases, well thank God, like I don't know if – if I told you, you understand? That they didn't find me guilty, but on the minor cases yes." The general rule is evidence of prior crimes is inadmissible to prove the defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) Even if we assumed defense counsel should have asked that these references to other crimes be redacted, no prejudice to defendant resulted. Avendano's comments were brief and, moreover, ambiguous. He did refer to other cases, but it is unclear whether he was also saying he was found not guilty on them. In any event, there is no reasonable probability that, but for counsel's failings, the result would have been more favorable to Avendano. (*People v. Scott* (1997) 15 Cal.4th 1188, 1211–1212.) Avendano's DNA was on the stolen items. And, a more than reasonable interpretation of Avendano's statements is he was admitting going into Giberman's house, just like he did "over there on Century."

III. Prosecutorial misconduct

Avendano next contends that the prosecutor committed misconduct by referring to uncharged conduct, misstating the evidence, and appealing to the sympathies of the jury.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] . . . Additionally, when the claim focuses upon comments made by the prosecutor 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." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) "To preserve for appeal a claim of prosecutorial misconduct, the defense must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Price* (1991) 1 Cal.4th 324, 447; see also *People v. Jackson* (2016) 1 Cal.5th 269, 349.)

A. Uncharged crimes

Avendano first takes issue with the prosecutor's reference to uncharged crimes during his opening statement. Generally, evidence that a defendant committed crimes other than the charged one is inadmissible to prove that the defendant has a bad

character or a criminal disposition. (Evid. Code, § 1101, subd. (a).) Here, the prosecutor alluded to other crimes when the prosecutor said that after law enforcement got a "hit" on Avendano's DNA, a detective went "to Pitchess County Detention facility where the defendant is being housed at that time, on something unrelated" to present him with a search warrant for a DNA swab. Defense counsel did not object, although an admonition would have cured any error. (*People v. Jackson*, *supra*, 1 Cal.5th at p. 349.) The issue is therefore forfeited.

In any event, reversal is not required as a result of this brief, mild comment. The prosecutor did not further attempt to connect Avendano's detention in Pitchess to his character. Therefore, the prosecutor's comment did not infect the trial with such unfairness as to make Avendano's conviction a denial of due process (see *Darden v. Wainwright* (1986) 477 U.S. 168, 181) or render the verdict unreliable, given the DNA evidence and Avendano's admissions.

B. Misstating the evidence

At trial, Giberman testified that "strange as it may sound" only two keys were missing from his key chain: the key to the common areas and the one to his office. He also said that his briefcase was missing papers from work. Based on this testimony, the prosecutor argued: "Um, this was really weird. Only two keys were taken. But one of the keys has access [to] all the common areas from the residences around the . . . golf course. And the other was a key to his office. So, um, I would argue to you that shows a little bit of sophistication, that these were keys that were taken with a certain intent. You know, to either commit additional crimes, maybe to go to the office building. But only two keys were taken." Avendano now contends that this

argument was based on facts not in evidence. Prosecutors, however, have wide latitude in their closing arguments, provided the argument amounts to fair comment on the evidence, including reasonable inferences and deductions drawn therefrom. (*People v. Gamache* (2010) 48 Cal.4th 347, 371; *People v. Sandoval* (2015) 62 Cal.4th 394, 439.) Notwithstanding the absence of direct evidence that the missing keys were marked in some way to indicate what doors they opened, the prosecutor could reasonably infer it was no coincidence that Avendano took those two keys.

Avendano also argues that the prosecutor misstated the evidence when he said that Avendano went into someone's "house" on Century, because Avendano actually said he went into a "place" to use a bathroom. However, Avendano was analogizing what happened on Century to the current crime. The important inference in the analogy is he did not have permission to be at the "place," just as he did not have permission to be in Giberman's house. Hence, the argument was a fair comment on the evidence.

C. Appealing to jury's sympathies

Finally, Avendano contends that the prosecutor appealed to the jury's passions and sympathy when he argued:

> "Final thoughts. Do justice for Barry Giberman. This case is not about, um, the Manhattan Beach Police, not about the crime lab, it is about Barry Giberman and what happened to him. He's never going to be the same. You already heard he had to put security in his house and he always locks his doors. Um, he probably thinks about this when he goes to bed. [¶] I mean, the idea of having

somebody lurking around your bedroom while you are sleeping is just hard to shake. He may never shake that. So do justice for Barry. That's what this case is all about."

Defense counsel responded to this argument by saying she had no quarrel with the prosecutor's directives, except one: do justice for Giberman. Counsel reminded jurors:

"Your job as jurors is to protect the process that you are involved with. It is not to feel any sort of sympathy or empathy for Mr. Giberman. It is to protect our process, which guarantees that Mr. Avendano remains cloaked with the mantle of innocence until the People overcome it. [¶] So all of us who may have felt for Mr. Giberman, you can feel for him as a citizen of the world as a person. As a juror, your job is to make sure that all the force of the government has brought to bear against Mr. Avendano is justified. That everything that has happened to him has been justified by the People now presenting sufficient evidence to you. That's what your job is. [¶] Not that there is anything wrong with Mr. Giberman. He was a very nice man. And no one should have the sanctity of their home invaded. No one should have to suffer the loss of priceless mementos. But you must put whatever feeling that engenders in you aside and do what you are here for, which is to guarantee the integrity of the due process afforded to Mr. Avendano."

In summation, the prosecutor returned to this argument: "This case is about Barry Giberman, you know, just doing justice for him, because this is a stain that he can never clean. He will never feel the same. And, um, that is really sad. So do justice for Barry and hold this defendant accountable."

"It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial. [Citations.] We recognize that the prosecutor 'may vigorously argue his case and is not limited to "Chesterfieldian politeness" ' [citations], but the bounds of vigorous argument do not permit appeals to sympathy or passion." (*People v. Fields* (1983) 35 Cal.3d 329, 362–363, fn. omitted; see also *People v. Arias* (1996) 13 Cal.4th 92, 160.) An appeal for sympathy for the victim is out of place during an objective determination of guilt. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.)

Here, the prosecutor's entreaty to the jury to "[d]o justice for Barry Giberman" was an appeal to the jury's sympathies. However, defense counsel did not object, and therefore the issue is forfeited. Even so, the comment does not warrant reversal. Although the trial court gave no admonition, defense counsel, in essence, admonished the jury that its job was "to protect the process that you are involved with," and "not to feel any sort of sympathy or empathy" for Giberman. Defense counsel's reminder was certainly no substitute for an instruction from the trial court, but it did serve to remind the jury of its obligations. Even if defense counsel had not made the tactical decision to address the prosecutor's appeals to the jury in this manner, we would conclude that the comments do not warrant reversal.

IV. Prison priors

The information alleged that Avendano had four prison priors, and the trial court imposed sentence on them. However, by the time Avendano was sentenced in this case in 2016, two of his prison priors—case no. TA074556 for possessing a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and case no. YA085626 for receiving stolen property (§ 496, subd. (a))—had been reduced to misdemeanors under Proposition 47 (§ 1170.18). Where, as here, a defendant's prior felony conviction is reclassified as a misdemeanor before he is sentenced in a new case, he may not be sentenced on the enhancement. (*People v. Abdallah* (2016) 246 Cal.App.4th 736.) The People agree, as do we, that *Abdallah* applies and that the sentences imposed on the two prison priors must be stricken, thereby reducing Avendano's sentence by two years.

## DISPOSITION

The one-year prior prison term enhancements in case nos. TA074556 and YA085626 are stricken, thereby reducing Avendano's aggregate sentence to a total of eight years. As modified, the judgment is affirmed. The clerk of the Superior Court is directed to forward a corrected abstract of judgment to the Department of Corrections and Rehabilitation. The clerk of this court is directed to send a copy of this opinion and the remittitur to the Department of Corrections and Rehabilitation. (Cal. Rules of Court, rule 8.272(d)(2).)

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KALRA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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