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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. FELIX LEE WILLIAMS, Defendant and Appellant.	B234517 (Los Angeles County Super. Ct. No. NA076260)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Affirmed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Felix Lee Williams appeals from the judgment entered following his convictions by jury on count 1 – first degree murder (Pen. Code, § 187, subd. (a)) with a principal armed with a firearm (Pen. Code, § 12022, subd. (a)(1)) and a special circumstance finding (Pen. Code, § 190.2, subd. (a)(17)(A)) and on count 2 – attempted robbery (Pen. Code, §§ 664, 211). The court sentenced appellant to prison for life without the possibility of parole. We affirm the judgment.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence, the sufficiency of which is undisputed, established that on August 30, 2007, Jose Luis Magana (the decedent) worked at a construction company. It was a cash business and he carried wads of cash in his left front pants pocket. Magana knew Thomasina Martin (referred to at trial and hereafter as Sina). In the past, Sina had sold clothes on a corner, and she had sold some to Magana. Jesse Magana (Jesse), Magana's brother, testified that whenever Jesse had seen Sina sell clothes to Magana, Magana had paid her with cash retrieved from Magana's left front pants pocket.

About 9:00 a.m. on August 30, 2007, Magana, Jesse, and Jose Flores, Magana's friend and coworker, were at 20th and Locust in Long Beach. Sina drove to, and conversed with, Magana. Magana gave her money from his left front pants pocket and she quickly drove away.

Flores testified about 9:55 to 10:05 a.m., a man approached Magana and, demanding "the" money, attempted to rob Magana. Flores fled but was later returning when he heard a gunshot. Magana had been shot and mortally wounded. The shooter, the man who had attempted to rob Magana, ran to a brown car parked in an alley, entered the passenger side, and the car drove away. About 10:02 a.m. on August 30, 2007, a 911 operator received a call about the shooting.

Flores described the shooter to police as a Black male about six feet three inches tall, weighing 200 pounds, and having a flat face. Flores testified the shooter was young and tall with an average build and a somewhat flat face. Flores was unable to identify the

shooter from a photographic lineup that included a photograph of Benjamin Bowie. Los Angeles Police Detective Mark McGuire, the investigating officer in this case, testified Bowie had a flat face. Flores identified a photograph of a Mazda as the car the shooter entered.

On August 30, 2007, prior to 10:00 a.m., Wilfredo Duarte was driving his car and looking for his dog. He entered the intersection of 20th and Locust and at some point asked Magana and Flores if they had seen the dog. Duarte drove away but was later driving towards 20th and Locust when he heard a gunshot coming from that direction. He saw a man running from that intersection towards an alley on 20th between Locust and Pine. The man, a heavyset African-American perhaps five feet eleven inches tall, was wearing a grey sweatshirt and jeans. The man entered the passenger side of the Mazda, which was in the alley, and the Mazda sped away.

Duarte later caught up to the Mazda and recorded its license plate number. He observed two African-American males in the Mazda. The driver was heavyset, had facial hair and hair on his head, and had a large head. Duarte returned to the shooting scene and gave the license plate information to a 911 operator. Deloris Williams (Deloris), appellant's mother, who lived in Long Beach, was the registered owner of the Mazda.

The Williams family members were close and presented conflicting testimony concerning what happened on August 30, 2007, concerning the Mazda. Jeanine Smith, appellant's sister, testified that on August 30, 2007, she told McGuire that she had had the Mazda all day. However, she also testified that on the morning of August 30, 2007, she and appellant had the Mazda, although she did not remember who had it first. She further testified that between 6:00 a.m. and noon on August 30, 2007, she and appellant had the Mazda, and she gave conflicting testimony as to whether she had it at noon. Further still, she testified she drove a Pontiac to the home of Mary Knox. Smith gave conflicting testimony as to whether her daughter Jessica was with Smith when Smith drove to Knox's home. After Smith drove to Knox's home, Smith, Knox, and Jessica went in Knox's car to Deloris's house and later to the Mazda. Smith then drove away in the Mazda.

Knox, appellant's cousin and a close friend of Smith, testified that about 10:00 a.m. on August 30, 2007, Smith arrived at Knox's home, but Knox never saw Jessica that day.

About 4:18 p.m. on August 30, 2007, police saw Smith driving Deloris and Jessica in the Mazda. Police detained them, searched the Mazda, and found inside an airline itinerary for appellant. The itinerary was purchased or printed on August 21, 2007. The itinerary reflected a September 7, 2007, flight leaving Long Beach and arriving in Wichita, Kansas, and a September 23, 2007, return flight.

Tracie Sonnier, appellant's girlfriend, testified that at 7:45 a.m. on August 30, 2007, Sonnier, who lived in Moreno Valley, spoke to appellant, who lived in Long Beach with Deloris. Sonnier spoke to him on the phone when he was at work. They did not plan to see each other that day but planned appellant would come to Moreno Valley that weekend.

On four occasions between 11:04 and 11:40 a.m., appellant unsuccessfully tried to call Sonnier. About lunchtime, the two talked on the phone. Appellant sounded upset and said something had happened but he did not want to talk about it. Appellant said he would be unable to come to Moreno Valley that weekend and indicated he would have to "stay low for a while."

Shortly before 9:00 p.m., Sonnier and appellant spoke by phone and appellant was upset. About 9:00 p.m., Sonnier drove from Moreno Valley to Compton, where she picked up appellant at one of his sister's homes. Sonnier and appellant drove back to Moreno Valley. Appellant was upset, did not give details, and told Sonnier that he did not want to get her involved. Appellant also told Sonnier that his mother and sister were in jail and police were after him. Sonnier suggested appellant talk to police but appellant said he wanted a lawyer and, at some point, appellant said it was none of Sonnier's business. Sonnier left appellant at a hotel.

On August 31, 2007, Sonnier went to appellant at the hotel. On September 1, 2007, Sonnier was in appellant's hotel room when she overheard him say on the phone, "It wasn't me. It was that stupid ass nigger. I swear to God[.]" At times during the

weekend, appellant became emotional. On one occasion, he began crying and told Sonnier, "If he would have just taken his ass home like he was supposed to." Sonnier had known appellant since 2005, and this was the first time she had seen him cry. On September 2, 2007, appellant checked out the hotel and Sonnier drove him to Compton. The next time she saw him was in court.

Millard Jarmon testified that on August 30, 2007, Jarmon and appellant were custodians at California State University at Long Beach (CSULB) on Seventh and Bellflower and their shift was from 4:00 a.m. to 12:30 p.m. About 8:30 to 9:00 a.m., Jarmon left work early because it was his birthday and he gave his pager to appellant. Jarmon did errands until about 10:00 a.m. Shortly thereafter he went to his home at 21st and Locust, which was about 15 to 20 minutes travelling time from CSULB. Police had cordoned off the area near 20th and Locust. The last time Jarmon saw appellant at CSULB was on August 30, 2007. Jeffrey Mellon, appellant's supervisor at CSULB, testified he saw indications appellant had been at work but when Mellon began looking for him about 7:00 a.m., Mellon could not find him.

William Martin testified he had known appellant since childhood. Martin had been in the Rolling 20's gang in high school and he and appellant had nicknames. On August 30, 2007, appellant telephoned Martin at 9:42 a.m. for two minutes, 9:44 a.m. for three minutes, 10:54 a.m. for eight minutes, and 11:05 a.m. for 14 minutes.[1] Martin told detectives that appellant told Martin that appellant was going to get money and asked Martin if Martin wanted to " 'make some money[.]' " Martin suspected appellant intended to do something illegal, and Martin told him no. Later, appellant told Martin on the phone that appellant had "fucked up" by letting someone use appellant's car, and police were at appellant's house. McGuire testified that, in gang terminology, the phrase "making money" referred to illegal activity such as committing robbery or selling drugs.

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[1] Martin gave to McGuire cellphone records to account for Martin's whereabouts on the morning of August 30, 2007.

As mentioned, about 9:00 a.m., Sina and Magana conversed, he gave her money, and she drove away. Phone records admitted into evidence established the following calls, and that those from appellant's phone were from his cellphone. We will later discuss the calls referred to in the sentences italicized below in this paragraph. *At 9:07 and 9:09 a.m., Sina's phone called the phone of her younger sister Myeshia Williams (Myeshia). At 9:11 and 9:23 a.m., Myeshia's phone called Bowie's phone. At 9:25, 9:26, 9:27, and 9:28 a.m., Myeshia's phone called appellant's phone*. At 9:29 a.m., Bowie's phone called Myeshia's phone and the call lasted 111 seconds. At 9:40 a.m., appellant's phone called Myeshia's phone. *At 9:43 a.m., Sina's phone called Myeshia's phone, and the call lasted 64 seconds. At 9:54 a.m., Myeshia's phone called appellant's phone, and the call lasted 63 seconds*.[2]

On September 3, 2007, appellant's phone called from Arizona, New Mexico, then Texas. On September 4, 2007, appellant's phone called from Wichita, Kansas. Police detained appellant in Kansas and, in November 2007, brought him to California. Appellant presented no evidence.

ISSUE

Appellant claims the prosecutor committed misconduct during jury argument by arguing facts that were not in evidence, depriving appellant of his right to due process of law.

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[2] Between 10:24 and 11:18 a.m., there were multiple calls between the phones of appellant and Myeshia. At 10:33 a.m., Bowie's phone called Myeshia's phone. At 10:45 a.m. and 12:29 p.m., appellant's phone called Smith's home phone, and at 12:53, 1:00, 1:05, and 1:08 p.m., appellant's phone called Smith's cellphone.

DISCUSSION

1. *No Prejudicial Prosecutorial Misconduct Occurred.*

a. *Pertinent Facts.*

During opening jury argument, the prosecutor argued Sina betrayed Magana. The prosecutor urged that after Sina asked to borrow money, Magana gave her money from a wad of cash he retrieved from his pocket, she thanked him and drove away, and "[t]hat set the wheels of motion that ultimately led to his death. [¶] Because the evidence has shown that *[Sina] called Myeshia Williams, her sister, who then called Benjamin Bowie, Felix Williams, to go ahead and rob him*. It didn't go as planned. It cost Pepe Magana his life." (Italics added.)

b. *Analysis.*

Appellant claims the prosecutor committed misconduct by arguing facts not in evidence when the prosecutor made the above italicized comments. Appellant asserts in his opening brief, "The problem with this argument was that while it was known that there were telephone calls between the numbers associated with those people, there is no evidence that these people are the ones who were actually placing and receiving the calls and, more importantly, there was no evidence as to what was said during the conversation."[3] We reject appellant's claim.

A prosecutor's intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious it infects the trial with such unfairness as to render the conviction a denial of due process. 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 the trier of fact. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) A prosecutor is given wide latitude during argument, and said argument may be vigorous as long as it amounts

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[3] We assume without deciding that appellant's prosecutorial misconduct and due process issues were preserved for appellant review.

to fair comment on the evidence, including reasonable inferences drawn from the evidence. (*Ibid.*)

Appellant's argument challenges the previously italicized comment which the prosecutor made during opening argument concerning certain pre-crime cellphone calls, i.e., the calls from Sina to Myeshia, and the calls from Myeshia to Bowie and appellant. These calls are those referred to in the italicized sentences in the second to the last paragraph of our Factual Summary. Appellant's argument implicates the following issues: (1) whether phones belonged to Sina, Myeshia, Bowie, and appellant, (2) if so, whether calls were made from the phones belonging to Sina and Myeshia, (3) if so, whether Sina and Myeshia made the calls that were made on their respective phones,[4] (4) whether calls were received on phones belonging to Myeshia, Bowie, and appellant, (5) if so, whether Myeshia, Bowie, and appellant received the calls that were received on their respective phones, (6) if so, whether conversations occurred during the received calls, and (7) what the content of those conversations was.

Fairly read, appellant's previously quoted assertion in his opening brief concedes the first two above enumerated issues. As to the third issue, it is common knowledge people obtain and possess cellphones for personal use. Appellant cites no testimony from Sina, Myeshia, or Bowie that the phones belonging to Sina and Myeshia, respectively, were used by anyone other than those two respective persons. The jury reasonably could have concluded Sina and Myeshia made the calls that were made on their respective phones. The prosecutor's argument on this issue was fair comment on the evidence.

Moreover, fairly read, appellant's previously quoted assertion in his opening brief concedes the fourth above enumerated issue. As to the fifth issue, again, people possess cellphones for personal use. Appellant cites no testimony from Sina, Myeshia, or Bowie that the phones belonging to Myeshia, Bowie, and appellant, respectively, were used by anyone other than Myeshia, Bowie, and appellant. The jury reasonably could have

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[4] We reject appellant's suggestion in his reply brief that the prosecutor's challenged argument reasonably may be construed as indicating Bowie called appellant.

concluded Myeshia, Bowie, and appellant received the calls that were received on their respective phones. The prosecutor's argument on this issue was fair comment.

Before discussing the sixth and seventh above enumerated issues, we note the prosecutor's comment is divisible into two parts, i.e., (1) "[Sina] called Myeshia Williams, her sister" and (2) "[Myeshia] then called Benjamin Bowie, Felix Williams, to go ahead and rob him."

As to the first part, i.e., "[Sina] called Myeshia Williams, her sister," appellant's previously quoted assertion in his opening brief, fairly read, concedes the sixth above enumerated issue (i.e., that a conversation occurred during the received call), thus leaving the seventh issue (what the content of the conversation was). However, notwithstanding appellant's concession, the above quoted comment stated neither the fact of a conversation nor any content thereof. To that extent, appellant's claim fails.

As to the second part, "[Myeshia] then called Benjamin Bowie, Felix Williams, to go ahead and rob him," again, appellant's previously quoted assertion in his opening brief, fairly read, concedes the sixth above enumerated issue (i.e., that a conversation occurred during the received call), thus leaving the seventh issue (what the content of the conversation was). However, again, notwithstanding appellant's concession, the above quoted comment stated neither the fact of a conversation nor any content thereof.

In particular, the prosecutor did not state "[Myeshia] then called *and told* Benjamin Bowie, Felix Williams, to go ahead and rob him." The comment explicitly referred only to the fact Myeshia *called* Bowie and appellant, and to the fact of the existence of a *purpose*: "to go ahead and rob him." The prosecutor's comment reasonably may be construed as indicating only that Myeshia *called* Bowie and appellant *for the purpose of telling them* to go ahead and rob Magana.

In sum, the jury reasonably could have construed the second part of the prosecutor's comment, not as reflecting a conversation or its content, but as reflecting simply a conclusion on the prosecutor's part that Myeshia called with a particular state of mind, whether or not a conversation in fact ensued. The burden is on appellant to demonstrate error from the record; error will not be presumed. (*In re Kathy P*. (1979)

25 Cal.3d 91, 102; *People v. Garcia* (1987) 195 Cal.App.3d 191, 198.) Appellant has failed to demonstrate the prosecutor, by the second part of the challenged comment, either intended to state, or in fact stated, the fact of a conversation or any content thereof. Appellant's claim fails.

Given the frequency and sequence of the pre-crime phone calls made by Sina to Myeshia, and subsequently by Myeshia to Bowie and appellant, the jury reasonably could have concluded Sina was calling Myeshia, and Myeshia was calling Bowie and appellant, with a sense of urgency about what Sina and Myeshia, respectively, believed was an important matter. As appellant suggests, Sina and Myeshia conceivably could have had an innocent explanation for these pre-crime calls. However, appellant cites no testimony from Sina, Myeshia, or Bowie providing that explanation.

In sum, there was substantial evidence Sina had made past sales to Magana, who customarily had carried wads of cash in his left front pants pocket. On August 30, 2007, Magana gave her money from that pocket. Sina called Myeshia shortly thereafter. There was evidence of the urgency and importance of the pre-crime calls of Sina, Myeshia, Bowie, and appellant. The attempted robbery and shooting occurred shortly after those calls. There was evidence of urgent and important post-crime calls. Appellant has cited no testimony from Sina, Myeshia, or Bowie providing an innocent explanation for the pre-crime or post-crime calls. There was evidence of appellant's flight, i.e., evidence of appellant's consciousness of guilt.

In light of the above and the rest of the evidence in this case, the jury reasonably could have concluded Myeshia called Bowie and/or appellant for the purpose of telling Bowie and/or appellant to go ahead and rob Magana, and that Sina called Myeshia so the latter would make her call. The prosecutor's argument on this issue was fair comment. In sum, the prosecutor's argument that "[Sina] called Myeshia Williams, her sister, who

then called Benjamin Bowie, Felix Williams, to go ahead and rob him" was not misconduct and did not violate appellant's right to due process.[5]

Finally, in light of the above discussion, there was ample evidence upon which the jury reasonably could have concluded that Sina called Myeshia, who then called Bowie and/or appellant, to say "go ahead and rob [Magana]," even absent the prosecutor's challenged comment. There was also ample, although circumstantial, evidence of appellant's guilt. No prejudicial prosecutorial misconduct occurred. (Cf. *People v. Yeoman* (2003) 31 Cal.4th 93, 149; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[5] The prosecutor later argued to the jury that phone record entries reflecting Myeshia's post-crime calls were "called panic." Appellant argues in his reply brief the prosecutor thereby committed misconduct by arguing the contents of those phone calls. Again, however, the prosecutor's argument did not expressly state what the contents of the calls were, but expressed his conclusion as to Myeshia's state of mind, and was fair comment.

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.