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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ESTEVAN RAMIREZ, Defendant and Appellant.	B264557 (Los Angeles County Super. Ct. No. BA422100)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Affirmed.

Victoria H. Stafford, 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, Jonathan J. Kline and Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Estevan Ramirez appeals the judgment entered following his conviction by jury of first degree murder (Pen. Code § 187 (a))[1] with personal use of a firearm, personal and intentional discharge of a firearm, and personal and intentional discharge of a firearm causing death (§ 12022.53, subds. (b), (c) & (d)). We affirm.

FACTUAL SUMMARY

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following facts. David Diaz was shot and killed on June 25, 2013. Appellant had been a friend of Diaz for several years, and he was staying at Diaz's house in June 2013. In the early evening of June 25, 2013, Diaz called appellant and asked for a ride home from his girlfriend's house. Appellant and his girlfriend Gloria Gonzalez picked up Diaz, with Gonzalez driving and appellant in the front passenger seat. As they were waiting for Diaz to say goodbye to his girlfriend, Gonzalez saw appellant reach under the front passenger seat, take out a gun, and place it under his shirt.

Diaz entered the car and sat in the rear passenger seat behind appellant. Diaz then reached under the front passenger seat, leaned forward and whispered something to appellant. Gonzalez could not hear much, but she did hear Diaz say "gun" in Spanish. Appellant directed Gonzalez to drive to Diaz's house, and he leaned forward and appeared to be angry.

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[1] Subsequent section references are to the Penal Code.

After they arrived at Diaz's house, Gonzalez went inside to get something while appellant and Diaz remained outside. When she returned, Gonzalez saw appellant and Diaz arguing, but only appellant was speaking angrily. Gonzalez entered the car and drove away, but quickly returned after appellant called and asked her to come back and pick him up.

When Gonzalez drove up, appellant sat in the front passenger seat and Diaz sat in the seat behind him. Gonzalez once again saw the gun under appellant's shirt. Appellant and Diaz spoke to each other in muffled words, but Gonzalez heard Diaz say the Spanish word for "gun." Appellant placed his hand on the gun and made a gesture like he was shooing Diaz away; appellant appeared to be angrier than before.

Appellant turned up the volume of the car radio and told Gonzalez where to drive. He had Gonzalez make several turns; they eventually crossed over railroad tracks and turned right. After they completed the final turn, appellant suddenly turned to his left towards the rear seat, pulled out the gun with his right hand, swung his right arm over his left shoulder, and shot Diaz.

The shooting completely surprised Gonzalez. Before he was shot, Diaz never acted in an aggressive or threatening manner towards appellant. Gonzalez was very upset and afraid, and she began screaming and crying. Appellant told Gonzalez to drive away, but she stalled the engine and could not restart it. Appellant switched places with Gonzalez and restarted the engine, but the car stalled again near the driveway of a home owned by the Martinez family.

Appellant quickly exited the car with the gun and ran down Martinez's driveway. Two members of the Martinez family saw appellant run down their driveway and climb over a fence while

carrying a gun. The Martinez family had a video surveillance camera at their home. It recorded appellant running down the driveway from the stalled car and jumping over a fence, with the gun clearly visible in his hand.

A short distance from the Martinez residence, a bystander saw appellant running down the street. Appellant stopped, looked in every direction, took off his shirt, wrapped it up, and threw it under a parked car.

Sheriff's deputies arrived and found Diaz in the rear passenger seat, shot through the head, and mortally wounded There was a large amount of blood and brain matter in the car where Diaz had been shot. The criminalist concluded blood on the right rear passenger door had a "downward directionality," and a triangular "void pattern" on the right rear passenger seat indicated the victim had been sitting up against the seat when he was shot. Deputies recovered a .45-caliber casing from the driver's seat and an expended bullet from an area at the base of the rear window. Fingerprints were found throughout the car, and many were later matched to appellant.

Deputies visited the Martinez residence and obtained a copy of the video surveillance tape showing appellant running with a gun. They also interviewed family members who saw appellant, and on a later date they identified appellant from a photographic lineup.

During a search of the surrounding area, deputies found two black T-shirts under the parked car identified by the bystander. Forensic testing later showed appellant was a possible contributor of DNA on one of the shirts. The murder weapon was not found during a search of the crime scene and surrounding area.

An autopsy was conducted on Diaz's body. A deputy medical examiner determined Diaz died from a gunshot wound to the head. The entrance wound was just above Diaz's right eyebrow and the exit wound was behind his right ear. The deputy medical examiner concluded the bullet traveled from front to back in a slightly downward and slightly left-to-right path through Diaz's head. The bullet path was consistent with the shooter holding the gun slightly above the left side of Diaz's head when the bullet was fired into his right forehead. The deputy medical examiner found stippling at the entrance wound, which indicated the muzzle of the gun was between six inches and two feet from Diaz's forehead when it was fired.

Deputies arrested appellant on June 29, 2013, at an Inglewood motel. At the time of his arrest, appellant was wearing a bulletproof vest and carrying a backpack with spare clothes and personal items.

On the night of the shooting, Gonzalez also fled from the stalled car but headed in a different direction from appellant. She spent the night at her aunt's house. Sheriff's personnel located Gonzalez there and conducted a recorded interview of her on June 26, 2013. The interview was consistent with the testimony Gonzalez ultimately gave at the trial. Shortly after the interview, Gonzalez left California and hid in Arizona and New Mexico because she was afraid. Sheriff's personnel located Gonzalez through an interstate search, and brought her back to Los Angeles for further interviews and testimony at trial.

DISCUSSION

1. The Trial Court Properly Gave CALCRIM No. 361.

Appellant contends the trial court erred by giving CALCRIM No. 361 to the jury. We disagree.

By way of background, appellant testified in his own defense at trial. He testified that he and Gonzalez picked up Diaz at his girlfriend's house on the night of the shooting. Diaz sat in the rear passenger seat and was fidgeting around; he appeared to be nervous and under the influence of methamphetamine. Appellant denied seeing a gun in the car and denied retrieving a gun from under the front passenger seat. Gonzalez drove everyone to Diaz's house, where appellant and Diaz exited and went upstairs to Diaz's bedroom. In the bedroom, Diaz took out a gun from his waistband and put it on the bed while he went to the bathroom.

Appellant testified he waited for Diaz downstairs. When Diaz arrived, he was tugging at his waistband and said he wanted to kill someone named "Barney." Appellant told Diaz he was "out of his mind," but Diaz insisted that appellant take him to kill Barney. Appellant tried to get away, but Diaz followed him and quickly jumped in the car when Gonzalez picked up appellant. Diaz sat in the back seat, directly behind appellant.

Appellant testified that once they were in the car, Diaz cocked the gun, pressed it against appellant's right shoulder, and instructed appellant to tell Gonzalez where to drive. Diaz ordered appellant to roll up his window, turn off his cell phone, and slide back the front passenger seat. As appellant complied, he looked in the visor mirror and saw Diaz looking behind him while holding the gun. Appellant quickly turned around, grabbed Diaz's arm and tried to push the gun away; while doing so, the gun accidentally fired into Diaz.

When he was asked to give a specific "play by play" of the shooting sequence on direct- and cross-examination, appellant testified he turned to his left; using his left hand, appellant grabbed Diaz's right hand that was holding the gun; appellant pulled Diaz's right hand around the headrest; using his right hand, appellant pushed the gun away; while appellant was pushing it away, the gun accidentally fired in Diaz's hand and fell between appellant and the passenger seat; and appellant then picked up the gun and put it on the floorboard in front of him.

Appellant testified that Gonzalez stalled the car right after Diaz was shot. Appellant took over, but the car stalled again. Appellant grabbed the gun from the passenger floorboard and fled on foot. Appellant ran down a driveway, jumped over a fence, and ran into another street. Diaz's blood was splattered on appellant's face, so he took off his shirts, wiped the blood from his face, and threw the shirts away. Appellant also threw the gun away into a nearby trash can.

Appellant testified he ran from the area and slept on the street between two parked cars. The next morning, appellant stole a car and broke into another car where he found a bulletproof vest. Appellant eventually went to the Inglewood motel and paid for a room with money given to him by a friend. Appellant initially could not identify his friend, then said his friend was "Scrappy." People visited appellant at the motel, but he could identify only one of them as "Lupe." Appellant did not tell anyone about the shooting.

Following the presentation of evidence, the trial court conducted a conference on jury instructions. The court said it intended to use CALCRIM No. 361, which reads: "If the defendant failed in his testimony to explain or deny evidence against him and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

Defense counsel objected to the instruction, contending there was no evidence appellant failed to explain or deny during his testimony. The court responded there were several occasions when appellant claimed he did not remember things, and the instruction permitted the jury to determine "whether or not that failure to recall is purposeful." The prosecutor added, "the People's case against the [appellant] is so grossly different to the [appellant's] account to what happened that day, and he did not give an explanation as to why Gloria [Gonzalez] would indicate something completely different . . . ." The court replied, "[t]hat question wasn't asked, and there's obviously, certain speculation with regard to that." The court concluded CALCRIM No. 361 was appropriate, and gave it over defense counsel's objection.

Appellant contends the trial court erred by giving CALCRIM No. 361, because there was no evidentiary basis to support the instruction. This claim is subject to de novo review, as it involves the determination of applicable legal principles. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 217; *People v. Berryman* (1993) 6 Cal.4th 1048, 1089.)

Our Supreme Court recently addressed CALCRIM No. 361 in *People v. Cortez* (2016) 63 Cal.4th 101 (*Cortez*). *Cortez* held "the instruction applies only when a defendant completely fails to explain or deny incriminating evidence, or claims to lack knowledge and it appears from the evidence that the appellant could reasonably be expected to have that knowledge." (*Id.* at p. 117.) The defendant in *Cortez* was charged with murder and attempted murder from her role in driving a car used by the shooter and his companion in a gang encounter. The defendant testified and claimed to be an innocent participant. But in so doing, the defendant said she did not know about important factors, such as why the shooter got out of the car, what had happened when the shooter encountered the victims, where gunfire had come from, how a bullet ended up on the floorboard of her car, and whether the shooting was related to gang activity. (See *id.* at p. 121.)

Cortez upheld the use of CALCRIM No. 361, because "there was ample evidence that appellant 'could reasonably be expected to know' these facts or circumstances." (*Cortez*, *supra,* 63 Cal.4th at p. 121.) As the Court explained, "[t]he instruction acknowledges to the jury the 'reasonable inferences that may flow from *silence*' when the defendant 'fail[s] to explain or deny evidence against him' and 'the facts are peculiarly within his knowledge.' " (*Id.* at p. 117; accord, *People v. Saddler* (1979) 24 Cal.3d 671, 682 (*Saddler*) [holding that CALJIC No. 2.62, the equivalent of CALCRIM No. 361, is appropriate when there are "facts or evidence in the prosecution's case within [appellant's] knowledge which he did not explain or deny."].)

The same principle justifies the use of CALCRIM No. 361 here. In his testimony, appellant repeatedly claimed he could not remember or did not know about significant matters of which he should have been aware. In the crucial sequence when appellant said he struggled with Diaz over the gun, appellant testified he did not remember which side of the seat Diaz was sitting on; he did not remember how the gun was positioned when he grabbed it; he could not recall whether Diaz had his finger on the trigger when the gun fired; and he did not remember how much time elapsed between grabbing Diaz's hand and discharge of the gun.

Similarly, appellant repeatedly avoided testimony about many of the details in his narrative of events before and after the shooting. Thus, appellant testified he could not remember whether he removed any clothes other than the two discarded T-shirts he threw under a car; where he hid from the police and slept through the night after the shooting; what time he laid down to sleep; how long he slept into the next morning; where he stole his getaway car; what kind of car he stole; what kind of car he entered to take the bulletproof vest; and the names of people other than "Lupe" who visited him at the Inglewood motel.

Just as in *Cortez*, all of these were matters where appellant "claims to lack knowledge and it appears from the evidence that the defendant could reasonably be expected to have that knowledge." (*Cortez, supra,* 63 Cal.4th at p. 117.) There accordingly was no error in the trial court's use of CALCRIM No. 361.

Even if the use of CALCRIM No. 361 involved error, it was harmless. Appellant contends there was structural error that requires reversal without any showing of prejudice, but there is no support for this proposition. Courts have uniformly applied the harmless error standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*), when reviewing claims of instructional error pertaining to CALCRIM No. 361 and CALJIC No. 2.62. (See *Saddler*, *supra,* 24 Cal.3d at p. 683; *People v. Vega* (2015) 236 Cal.App.4th 485, 501; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1471 (*Lamer*); *People v. Roehler* (1985) 167 Cal.App.3d 353, 393.)

Any error was harmless, because there was very strong evidence of appellant's guilt. As summarized above, appellant's former girlfriend, Gonzalez, gave a detailed account of the crime, which indicated appellant shot Diaz without justification or provocation. Physical evidence linked appellant to the shooting and supported Gonzalez's version of the facts. A video camera recorded appellant as he ran from the crime scene with a gun. Appellant fled from the scene, discarded the murder weapon and identifying clothes, and went into hiding until he was arrested.

In contrast, appellant's testimony was unpersuasive and incomplete. His description of the sequence of the struggle and shooting conflicted with the physical evidence and was impossible to comprehend. That was particularly true for appellant's claim that he pushed Diaz's right hand into a position where a bullet could be fired at close range through Diaz's right forehead on a slightly downward path to the area behind his right ear -- a maneuver the prosecutor aptly described as requiring the flexibility of "Gumby arms."

Beyond the comparative strength of the evidence, CALCRIM No. 361 cautions the jury that any failure in the defendant's testimony "is not enough by itself to prove guilt. The People must still prove the defendant guilty beyond a reasonable doubt." In addition, the trial court instructed the jury with CALCRIM No. 200 that "[s]ome of these instructions may not apply," and you should "follow the instructions that do apply to the facts as you find them." Courts have recognized that this instruction mitigates any prejudicial effect, because one can assume the jury disregarded CALCRIM No. 361 or CALJIC No. 2.62 if it determined there was no evidence of the defendant's failure to explain or deny adverse evidence. (See *Saddler*, *supra,* 24 Cal.3d at p. 684; *Lamer*, *supra,* 110 Cal.App.4th at p. 1472.) The trial court also instructed the jury fully and properly on the defenses of accident and lawful self-defense and the lesser crimes of second degree murder and voluntary manslaughter, so the jury was able to consider appellant's claims. And the jury returned a verdict after only 2 hours 18 minutes of deliberation, which is a factor that also supports the absence of prejudice. (See *Saddler,* at p. 684.)

In short, one cannot say it is "reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*Watson*, *supra,* 46 Cal.2d at p. 836.) There was no prejudice from the use of CALCRIM No. 361.

2. There Was No Prosecutorial Misconduct.

Appellant also contends the prosecutor committed misconduct during closing argument. As our Supreme Court has explained, "A prosecutor's misconduct violates the Fourteenth Amendment to the federal Constitution when it 'infects the trial with such unfairness as to make the conviction a denial of due

process.' [Citations.] In other words, the misconduct must be 'of sufficient significance to result in the denial of the defendant's right to a fair trial.' [Citation.] A prosecutor's misconduct 'that does not render a criminal trial fundamentally unfair' violates California law 'only if it involves " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' " (*People v. Harrison* (2005) 35 Cal.4th 208, 242 (*Harrison*); accord, *People v. Curl* (2009) 46 Cal.4th 339, 354.)

When a prosecutor's closing argument is challenged, 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.' " (*Harrison*, *supra,* 35 Cal.4th at p. 244; *People v. Clair* (1992) 2 Cal.4th 629, 663 (*Clair*).) The prosecutor's statements are examined in the context of the entire argument and the instructions given to the jury. (See *People v. Morales* (2001) 25 Cal.4th 34, 44-46; *People v. Hill* (1998) 17 Cal.4th 800, 831-832.) The court does not "lightly infer" that the jury drew the most damaging meaning from the prosecutor's statements. (*People v. Howard* (1992) 1 Cal.4th 1132, 1192.) If the challenged statements "would have been taken by a juror to state or imply nothing harmful, they obviously cannot be deemed objectionable." (*People v. Benson* (1990) 52 Cal.3d 754, 793.)

During closing argument, the prosecutor commented on the dramatic differences between the testimony by appellant and Gonzalez. Among other things, the prosecutor said appellant "completely failed to explain to you Gloria's testimony. He got up there, and he told a story, and he didn't give us any reason why Gloria would say something completely different. [¶] And you have an instruction. If he failed to explain adverse testimony, you can use that against him."

Appellant asserts this argument was misconduct because it violated the trial court's "ruling" on the proper use of CALCRIM No. 361. As noted, during the instructions conference the prosecutor argued CALCRIM No. 361 was proper because appellant's testimony was "grossly different" from the account given by Gonzalez, and appellant "did not give an explanation as to why Gloria [Gonzalez] would indicate something completely different . . . ." The trial court replied "[t]hat question wasn't asked, and there's obviously, certain speculation with regard to that." Appellant argues the trial court's statement was a "ruling" which governed the use of CALCRIM No. 361, but that is wrong. The trial court's statement was simply a comment or expression of disagreement with the prosecutor's argument made in the instructions conference; it was not a ruling or order.

Appellant asserts the prosecutor's argument misstated the law by "repeatedly" inviting the jury to apply CALCRIM No. 361 in evaluating appellant's failure to explain Gonzalez's adverse testimony. This misconstrues the prosecutor's statements. In her opening argument, the prosecutor relied to a large extent on Gonzalez's testimony in asserting appellant's guilt. When defense counsel addressed the jury, she argued at length that Gonzalez lacked credibility, and she frequently asserted Gonzalez's testimony made no sense. In her rebuttal argument, the prosecutor contrasted Gonzalez and appellant and repeatedly emphasized it was appellant's version of the shooting that made no sense. Among other things, the prosecutor stated, "He completely failed to explain to you Gloria's testimony"; "he testified, and in his testimony why does he contradict some of what Gloria says"; "he doesn't explain why she says what she

says, and he can't"; and "we have no explanation as to why their two versions are completely different."

The prosecutor's remarks did not misapply CALCRIM No. 361 or improperly shift the burden of proof, as appellant has argued. Viewed in context, the prosecutor's remarks logically and properly contrasted the testimony of Gonzalez and appellant. This was a case in which two witnesses were present during the fatal shooting, and the result largely turned on the logic and credibility of their competing testimony. The prosecutor focused on the strengths of Gonzalez and the inadequacies of appellant's account. This argument was consistent with the trial court's instructions in CALCRIM Nos. 226 and 302 on principles concerning the credibility of witnesses and the convincing force of the evidence. While the prosecutor referred generally to the instruction about appellant's failure to explain or deny testimony, this was done once and without quotation or specific reference to CALCRIM No. 361.

Under these circumstances, there is no a reasonable likelihood the jury construed or applied the prosecutor's remarks in an objectionable fashion. (See *Clair, supra,* 2 Cal.4th at p. 663, fn. 8 ["We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade."]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21 ["prosecutorial commentary should not be given undue weight in analyzing how a reasonable jury understood . . . instructions"].) The prosecutor's argument was not misconduct.

Even if the prosecutor's brief reference to appellant's failure to explain or deny testimony against him was improper, it was not prejudicial under the *Watson* standard. As discussed earlier, there was strong evidence of appellant's guilt. In addition, CALJIC No. 361 told jurors they could consider appellant's failure to explain or deny evidence against him "if he could reasonably be expected to have done so based on what he knew." In accordance with this language, the jury was free to disregard the prosecutor's remarks if it found appellant could not have known why Gonzalez's version of the shooting was different from his own. This was reinforced by the instruction in CALCRIM No. 200 that the jury was bound by the court's instructions if an attorney presented argument conflicting with them.

Given all these circumstances, one cannot say it is "reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error." (*Watson*, *supra,* 46 Cal.2d at p. 836.) There was no prejudice from the prosecutor's argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

JOHNSON (MICHAEL), J.*

We concur:

EDMON, P. J.

ALDRICH, 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.