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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.

FLAVIO MACIAS, JR.,

Defendant and Appellant.

B291144

(Los Angeles County
Super. Ct. No. KA110524)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bruce F. Marrs, Judge. Affirmed with directions.

Kathy R. Moreno, 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, Shawn McGahey Webb and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Flavio Macias, Jr., was charged with the first degree murder of his neighbor, Luis Segura. A security camera captured some of the events. At trial, the prosecution played that footage as the investigating detective narrated it. The jury found Macias guilty as charged. On appeal, he contends that the detective's narration was inadmissible and violated his right to a fair trial. He also contends that the trial court failed to inquire as to a juror's competence and that the matter should be remanded for a hearing on his ability to pay fines and assessments. We reject these contentions. However, we remand the case so that the trial court can exercise its sentencing discretion under newly enacted legislation. We otherwise affirm the judgment.

BACKGROUND

In 2015, Maria Camargo and her husband Segura had lived next door to Flavio Macias and his brother Jonathan Macias¹ for about 16 years. Camargo had problems with Flavio, who used methamphetamine and acted strangely. Camargo told her husband she did not want Flavio coming near their home.

Late on the night of August 23, 2015, Camargo heard Flavio's family dog barking. She then heard a wail and a brick falling. The dog stopped barking. Ten to 15 minutes later, Flavio knocked on the door. When Segura asked Flavio what he wanted, Flavio said he did not want anything and left.

The next day, August 24, 2015, Segura was outside, washing a van. At some point, he came inside and told his wife he was getting a beer for Flavio. Through a window, Camargo could see her husband talking to Flavio. Thereafter, Camargo

¹ We refer to the Macias brothers by their first names for the sake of clarity, intending no disrespect.

saw Jonathan with Flavio by the van. Suddenly, the van “drop[ped],” as if something heavy like a sack of sand had been put in it. It looked to Camargo that Flavio closed the van’s door, which she thought was strange. Not seeing her husband, she went outside and asked Flavio, who was walking up his driveway, where was Segura. Flavio saluted her as if to say “hi.”

Camargo found Segura in the van. Segura’s face and head were beaten. The injuries were consistent with blows from a hammer and cement pavers. Inside Flavio’s home, officers found bloody clothes and shoes that tested positive for Segura’s DNA.² They also found a cement paver and hammer, which had Segura’s blood on them.

Segura died from multiple blunt injuries to the head.

A jury found Flavio guilty of first degree murder (Pen. Code, § 187, subd. (a))³ and found true the allegation he used a deadly and dangerous weapon (§ 12022, subd. (b)(1)).⁴ On July 5, 2018, the trial court sentenced Flavio to 25 years to life, doubled under the “Three Strikes” law to 50 years to life. The trial court also imposed a five-year term (§ 667, subd. (a)(1)), a one-year term (§ 12022, subd. (b)(1)), and 2 one-year priors (§ 667.5, subd. (b)).

² An officer also found a dead dog. The dog had been stabbed and had suffered blunt force trauma.

³ All further statutory references are to the Penal Code unless otherwise indicated.

⁴ The jury acquitted Flavio of cruelty to an animal. Jonathan was also charged with murder, but he is not a party to this appeal.

DISCUSSION

I. Narration of the video surveillance footage

As we now describe in greater detail, Detective

Q. Rodriguez narrated a video of the crime.⁵ Flavio contends that this narration deprived him of his right to a fair trial.

(U.S. Const., 6th & 14th Amendments.) We disagree.

A. *The narration*

Detective Rodriguez obtained video footage from Segura's neighbor who lived across the street. The footage was from two cameras; hence, there were two views of the incident. While the eight to 10 minute video played for the jury, the detective narrated it.⁶

The detective began with noting that a fence separated Segura's and Flavio's yards. He then told the jury that they would see an individual wearing a white shirt with an emblem on it jump over the fence. There is no dispute this was Flavio.

Jurors would then see Flavio go to Segura's front door, speak to someone, and walk back toward his house. Flavio and Jonathan walked towards the street. Flavio then could be seen next to Segura's van. After Segura repositioned his car in the driveway, Flavio and Jonathan walked behind some foliage and trees, and, in the detective's words, "you're suddenly just gonna see [Segura] just drop." "I don't know what you guys will see, but I don't see a sign of a struggle up there. I just saw [Segura] immediately drop to the floor." The detective added that the jury

⁵ We have reviewed the video.

⁶ The detective viewed two versions of the footage with the jury, the second being an enhanced version.

would see something white, like a shirt, fall. Defense counsel objected that he did not see that. The trial court overruled the objection and said it was up to the jury to determine what they saw in the video.

When Detective Rodriguez said that it appeared Segura was dragged to the west, defense counsel objected again that this was not in the video and called for speculation. The trial court overruled the objection. When the detective referred to stones being tossed over the fence, defense counsel objected that he did not see stones being thrown. Counsel made a continuing objection to the detective's descriptions.

The detective then said that Flavio appeared to raise an object over his head and slam it "straight down to where [Segura]'s location was." The detective continued to describe how Flavio, after going back to the area where paving stones had been found, jumped over the fence into Segura's yard, picked up a paving stone, and slammed it down again. After walking behind a tree, Flavio came back into view and repeated the same motion of "slamming something onto where we believe [Segura] is." Flavio walked toward the planters and "you see some shadowing as though maybe he tossed something over. But they'd have to look at that and determine that." Flavio picked up the paving stone and walked back to the planter area, and although "you don't see him throw it over, but you put 2 and 2 together, and that's where the paving stone was found."

The detective described what "appear[ed] like [Segura]'s being drug" toward the van, and "it looked like he was bent down, he was trying to put him into his van. That's what it appeared." Both suspects loaded Segura into his van. The detective

commented that Jonathan was walking back and forth, acting as a lookout.

A. *Prejudicial error did not occur.*

Flavio contends that the detective's narration of the video went beyond the detective's personal knowledge and was not proper lay opinion testimony. Lay opinion testimony is admissible if it is rationally based on the witness's perception and helpful to a clear understanding of the witness's testimony. (Evid. Code, §§ 800, 702, subd. (a).) A lay opinion must concern a subject of such common knowledge that people of ordinary education could reach a conclusion as intelligently as the witness. (*People v. Fiore* (2014) 227 Cal.App.4th 1362, 1383.) A lay witness officer therefore can identify a person depicted in surveillance video of a crime as the defendant, where the officer was familiar with the defendant's appearance. (*People v. Leon* (2015) 61 Cal.4th 569, 600–601.) However, a lay witness generally may not opine about another person's state of mind. (*People v. Chatman* (2006) 38 Cal.4th 344, 397.) We review a trial court's admission of lay opinion testimony for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

We are skeptical that the entirety of the detective's narration was admissible as a lay opinion. While he could explain the relationship of different items of evidence in the context of the investigation, for example, where Segura was found versus where the murder weapons were found, he was in no better position than the jurors to interpret the video. That it appeared to the detective, for example, that there was no struggle and that Flavio slammed stones down onto, apparently, Segura was not proper opinion testimony.

However, we need not decide whether all or parts of the narration were irrelevant, speculative or improper opinion testimony. Even if parts of the narration were inadmissible, we cannot conclude, under the applicable standard of review, that the detective's narration so undermined the defense that reversal is required. The erroneous admission of evidence does not require reversal except where the error caused a miscarriage of justice under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.) A miscarriage of justice occurs when, after examining the entire cause, including the evidence, it is reasonably probable a result more favorable to the appealing party would have been reached absent the error.⁷ (*Watson*, at p. 836.)

Here, Flavio conceded he killed Segura but denied it was murder of the first degree. Instead, Flavio posited two reasons why the degree of murder should be reduced: when he killed Segura, Flavio was either intoxicated by methamphetamine or was provoked. Flavio relies on evidence of his methamphetamine use and on the pathologist's testimony that Segura might have had offensive injuries to support these theories. Flavio then points to the detective's statement he (the detective) did not see any struggle on the video as crucial to the jury's assessment of his theories because it undermined his defense that he lacked the requisite intent for first degree murder.

We are unpersuaded that the detective's narration undermined Flavio's defense. The video was irrelevant to

⁷ Even if we reviewed any error for prejudice under the *Chapman v. California* (1967) 386 U.S. 18 standard—whether the error was harmless beyond a reasonable doubt—reversal would not be warranted.

whether Flavio was so intoxicated when he committed the murder that he lacked the requisite intent for first degree murder. There is no argument that the video shows, for example, Flavio ingesting drugs or that it otherwise speaks to him being under the influence of drugs. Rather, evidence of any intoxication came primarily from Camargo, who said she knew that Flavio had used methamphetamine in the past and had been behaving strangely in the days leading up to the murder.

The video was similarly irrelevant to any defense based on provocation sufficient to reduce the degree of murder.⁸

Provocation exists where it is shown that an intent to kill exists but it is not the deliberate and malicious intent essential to first degree murder. (*People v. Valentine* (1946) 28 Cal.2d 121, 131.) There simply was no evidence Segura provoked Flavio. In the minutes preceding her husband's murder, Camargo witnessed no confrontation between her husband and Flavio. Instead, her husband came inside and got a beer for Flavio, suggesting there was no present animus between them. As to the video, Detective Rodriguez did tell the jury he did not see a struggle, but conceded, "I don't know what you guys will see." However, a struggle would still not establish that Segura did something provocative. Instead, the evidence of premeditation and deliberation was strong, particularly since Flavio committed the crime with Jonathan, who is clearly shown on the video watching the street while Flavio is killing Segura.

⁸ The trial court instructed the jury on considering provocation to determine the degree of murder, under CALJIC No. 8.73.

We also have no reason to find that the detective's narration overrode the jury's independent analysis of the video. In addition to viewing the video during Detective Rodriguez's testimony, the jury asked that the video be sent into the jury room during deliberations. Jurors were thus able to test what they saw against the detective's observations. (See *People v. Larkins* (2011) 199 Cal.App.4th 1059, 1068.)

II. Failure to inquire into juror's competence

During a break in the defense closing argument, Juror No. 6 told a detective that her primary language was Spanish and she had not understood everything. The trial court opined that probably half of the jurors did not understand everything. "Nobody does. The language we use is a little antiquated and it's certainly not what you're going to hear on Saturday Night Live or Jimmy Kimmel." Because the trial court did not further inquire into the juror's competence, Flavio contends the trial court violated his right to a trial by an impartial jury. We disagree.

A criminal defendant is entitled to trial by an impartial jury. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 16.) A juror must remain impartial throughout trial. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 483.) If a juror's impartiality is called into question, a court must hold a hearing. (*Ibid.*) However, not every incident involving a juror requires further investigation. (*People v. Cleveland* (2001) 25 Cal.4th 466, 478.) A hearing is required when the court possesses information, which if true, would constitute good cause to doubt the juror's ability to perform his or duties. (*Ibid.*) Whether to investigate a juror's conduct is left to the trial court's sound discretion. (*Ibid.*)

Here, the trial court did not abuse its discretion by declining to conduct further proceedings. Although a juror must

possess a sufficient knowledge of English to understand the proceedings and the evidence on which a juror would base his or her decision (Code Civ. Proc., § 203, subd. (a)(6); *People v. Eubanks* (2011) 53 Cal.4th 110, 130), Juror No. 6's bare statement was insufficient to trigger a duty to hold a hearing. All she said was she had not understood everything. This, as the trial court indicated, was an unremarkable statement given the legal and factual issues. Also, her statement came in the middle of closing argument, during a break. By this point, the juror had gone through voir dire and trial and had heard instructions and most of argument. Although the record of voir dire has not been provided, clearly neither the trial court nor the attorneys were concerned about the juror's ability to understand the proceedings when any problem would have been most apparent. That the juror did not understand "everything" did not provide the trial court with sufficient information to inquire further.

III. Ability to pay hearing

The trial court imposed a \$10,000 restitution fine under section 1202.4, subdivision (b), a \$30 court facility assessment under Government Code section 70373, and a \$40 court operations assessment under section 1465.8. Under recent authority holding that such a fine and assessments may not constitutionally be imposed absent evidence of the defendant's ability to pay them, Flavio contends that the matter must be remanded so that the trial court can conduct an ability to pay hearing. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157.) We disagree because the issue was forfeited.

After imposing the fine and assessments, the trial court asked defense counsel if he had the restitution requests. Defense counsel responded he did. When asked if he had any comments,

counsel merely said, “At this point, I don’t have a basis to contest the restitution calculation. I’m inclined to submit.” Therefore, counsel expressly submitted.

Even if counsel had not submitted, the issue has been forfeited. *People v. Dueñas*, *supra*, 30 Cal.App.5th concerned imposition of the \$300 minimum fine under section 1202.4, subdivision (b). The scenario involving a minimum fine, however, is not before us. Here, the trial court imposed a maximum \$10,000 restitution fine. Under that circumstance, the statute provides that a court may consider a defendant’s inability to pay. (§ 1202.4, subd. (d); *People v. Avila* (2009) 46 Cal.4th 680, 729.) Flavio did not object to the \$10,000 fine. Having failed to object on the ground of inability to pay, the issue is forfeited as to the fine and to the assessments. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Scott* (1994) 9 Cal.4th 331, 353.)

IV. Sentencing issue

Flavio’s sentence included a five-year term for a prior serious felony under section 667 subdivision (a). When he was sentenced in 2018, the trial court had no discretion to strike the felony. After he was sentenced, Senate Bill No. 1393 went into effect on January 1, 2019. (Sen. Bill No. 1393 (2017–2018 Reg. Sess.).) That bill amended sections 667, subdivision (a), and 1385, subdivision (b), to allow a court to exercise its discretion to strike or to dismiss a serious-felony prior for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Senate Bill No. 1393 applies retroactively to all cases, such as this one, not final when the bill took effect. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.)

The People argue that remand is unwarranted because the trial court, by virtue of denying Flavio's *Romero*⁹ motion and denying his motion to strike his one-year priors, would not have exercised its discretion to strike the five-year felony. We disagree and conclude that remand is necessary for the trial court to exercise its discretion. We express no opinion as to how that discretion should be exercised.

DISPOSITION

The sentence is vacated and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.

⁹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.