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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARLOS HERNANDEZ-OCHOA, Defendant and Appellant.	B276257 (Los Angeles County Super. Ct. No. VA137169)

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

John A. Colucci, 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, Blythe J. Leszkay and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Carlos Hernandez-Ochoa (defendant) of first degree murder for stabbing his cousin near the bank of the Los Angeles River. On appeal, he argues that his conviction must be overturned because (1) the trial court erred in limiting his forensic expert's testimony, (2) the prosecutor mischaracterized the law in her closing argument, and (3) the trial court may have erred in conducting an in camera hearing regarding a prosecution witness. We conclude there was no error, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In the early morning hours of July 30, 2011, someone stabbed Francisco Rivera approximately 40 times in the head, neck, and chest and left him to die in a pool of his own blood on a bike path beside the Los Angeles River. More than three years later, police matched DNA found on Rivera's shoes and socks, in the pool of blood, and on cigarette butts near his body to defendant. Surveillance video also showed a truck like defendant's traveling to and from the murder scene the night of the killing. When defendant was arrested and placed in a jail cell with two undercover police officers, he told the officers that he used a "knife" to stab his cousin "[l]ike 40 something" times because someone put a "green light on him"; defendant admitted that he also cut himself a few times with the knife during the attack.

II. Procedural Background

The People charged defendant with first degree murder (Pen. Code, § 187, subd. (a)),[1] and further alleged that he

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

personally used a deadly and dangerous weapon (§ 12022, subd. (b)). The jury found defendant guilty as charged and found the weapon allegation to be true. The trial court sentenced defendant to 26 years to life, comprised of 25 years to life for the murder plus an additional year for the weapon enhancement.

Defendant filed this timely appeal.

DISCUSSION

I. Limitation on Expert Witness Testimony

Defendant argues that the trial court violated his constitutional right to present a defense by precluding his forensic expert from testifying that there may have been two assailants because Rivera's body revealed stab wounds consistent with injuries from two different knives. Because a defendant's right to present a defense is not violated if a trial court adheres to the rules of evidence (*People v. Jones* (1998) 17 Cal.4th 279, 305), his claim turns on whether the court abused its discretion in excluding this testimony (*People v. McDowell* (2012) 54 Cal.4th 395, 426).

Evidence Code section 801 limits the opinion testimony an expert witness may offer: To be admissible, an expert opinion must be "[r]elated to a subject that is sufficiently beyond common experience that the opinion . . . would assist the trier of fact," and it must be "[b]ased on matter . . . that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject . . . ." (Evid. Code, § 801.) This section operates to make a trial court "a gatekeeper" charged with "exclud[ing] speculative or irrelevant expert opinion." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.)

Here, the trial court issued a pretrial ruling permitting the expert to testify that the wounds on Rivera's body were consistent

with the use of two different knives, but precluding her from testifying that there was more than one assailant. Absent evidence that wounds from the two different knives were inflicted simultaneously (and thus by two different people wielding the two different knives at the same time), the court ruled, an opinion that there was more than one assailant was pure speculation because it was "beyond the scope of anybody's expertise unless they're physically watching the incident go down." In so ruling, the court did not abuse its discretion. Wounds seeming to come from two different knives could have been inflicted by one person with two knives or by two people with separate knives; without more, selecting between the two scenarios is guesswork. The soundness of the court's ruling is further confirmed by the expert's subsequent acknowledgment, during cross-examination, that the two different types of wounds she relied upon to opine that there was more than one knife could, in fact, be inflicted by the same knife.

II. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct during her closing argument by (1) mis-describing the "beyond a reasonable doubt" standard, and (2) improperly using everyday examples to explain the concept of deliberation and premeditation underlying the first degree murder instruction. We review claims of prosecutorial misconduct for an abuse of discretion. (*People v. Peoples* (2016) 62 Cal.4th 718, 792-793.)

Prosecutorial misconduct can violate federal or state guarantees of due process. Federal due process is denied if the conduct """"infects the trial with such unfairness as to make the conviction a denial of due process."""" (*People v. Adams* (2014) 60 Cal.4th 541, 568.) Due process under state law is denied

"""only if [the prosecutor's conduct] involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' [Citation.]""" (*Ibid.*) A prosecutor may commit misconduct during closing argument, but only when """[i]n the context of the whole argument and the instructions," [citation], there was "a reasonable likelihood" the jury understood or applied the complained-of comments in an improper or erroneous manner.'" (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

Although defendant did not properly preserve his claims of prosecutorial misconduct because he did not—as to either alleged instance of misconduct—make a timely objection and request an admonition (*People v. O'Malley* (2016) 62 Cal.4th 944, 1010), we have the discretion to overlook this forfeiture and reach the merits of his claims.[2] We consider each claim separately.

A. Mis-defining "beyond a reasonable doubt"

During her closing argument, the prosecutor explained that "proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charges are true. It is not proof beyond all possible doubt, but beyond a reasonable doubt." She then turned to a discussion of how witness testimony is to be evaluated: "When we talk about witnesses, you are going to focus on how reasonable the testimony is considering all the evidence. How well those witnesses could see. How consistent or inconsistent the statements were. Was the testimony influenced by bias[?] [W]hat was their attitude?"

Although the prosecutor's comments largely tracked the standard jury instructions pertaining to proof beyond a

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[2] This obviates any claim of ineffective assistance of counsel for not properly preserving the error.

reasonable doubt and evaluation of witness testimony (see CALCRIM Nos. 220 [reasonable doubt], 226 [witness testimony]), defendant argues that her discussion of the law governing witness testimony immediately after the law defining proof beyond a reasonable doubt—and, in particular, her use of the word "reasonable" regarding witness testimony—could be construed as telling the jury that a finding that the People's evidence is "reasonable" satisfies the beyond a reasonable doubt standard, in contravention of *People v. Centeno* (2014) 60 Cal.4th 659, 672-674. Although *Centeno* held that "it is error for the prosecutor to suggest that a 'reasonable' account of the evidence satisfies the prosecutor's burden of proof" (*id.* at p. 672, italics omitted; accord, *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353), the prosecutor's argument in this case did not make any such suggestion. The prosecutor told the jury to "focus on how reasonable the testimony is" *after* telling it that she was discussing "[w]hen we talk about witnesses." There is no reasonable likelihood that the jury misconstrued her comments about reasonable assessment of witnesses as committing the sin condemned in *Centeno*—equating a reasonable view *of all the evidence* with proof beyond a reasonable doubt. What is more, the prosecutor prefaced all of her comments with the proviso that if "there's anything on my PowerPoint that is different from the law and the instructions the court has given you, you follow what the law, what those instructions give you." There was no error.[3]

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[3] For the first time in his reply brief, defendant asserts that the prosecutor's closing comment that "[a]ll those elements lead you to only one reasonable verdict in this case, and that is that the defendant is guilty" amounts to an equation of "proof beyond a reasonable doubt" with "reasonableness." Aside from the fact

B. Use of improper analogies

During her closing argument, the prosecutor argued that defendant's decision to kill his cousin was deliberate and premeditated (and hence first degree murder). In so doing, she parroted the instruction that "a cold, calculated decision to kill can be reached quickly" and offered three analogies to elucidate the speed with which a calculated decision can be made. First, she urged that a person at a "four-way stop sign" engages in premeditation and deliberation when deciding whether and how to proceed: "You don't sit there for days or hours trying to decide if you go at the stop sign. You go. You look. You think about whether or not you can go without getting hit by any other vehicles, and you move forward." Second, she offered a "football example"—namely, that a "quarterback [who] gets the ball" has to deliberate because he "has to look everywhere. He has to look for the defensive lineman. He has to look for [the] safety. He has to look for who is he going to throw the ball at. Is he going to throw left? Right? Is he going to go far? Is he going to just run with it? All of those decisions he's thinking about, and it takes a split second." Lastly, she said, "You can also think of it in terms of baseball. When that [batter] gets that ball . . . he has to decide right there and then, do I hit it or do I not?"

Defendant asserts that the stop sign and baseball analogies run afoul of cases barring prosecutors from telling jurors that the "reasonable doubt standard" is "the same standard people

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that arguments raised for the first time in a reply brief are waived (*People v. Mickel* (2016) 2 Cal.5th 181, 197), this argument lacks merit because there is no reasonable likelihood that the jury would somehow equate any mention of the word "reasonable" with a dilution of the burden of proof.

customarily use in deciding whether to change lanes" and when making other "'every day'" decisions. (*People v. Nguyen* (1995) 40 Cal.App.4th 28, 36; *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-986; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172; see generally *People v. Brannon* (1873) 47 Cal. 96, 97.)

We reject this assertion for two reasons. First, the prosecutor was not offering her analogies to define "proof beyond a reasonable doubt"; she was offering them to define the concepts of premeditation and deliberation. Accordingly, the cases defendant cites—and the principle they embody—are inapplicable. Second, the analogies are not improper on their own merits. "'[D]eliberation means a "'careful weighing of considerations in forming a course of action"'" (*People v. Salazar* (2016) 63 Cal.4th 214, 245), and "'"premeditation" means thought over in advance'" (*People v. Sandoval* (2015) 62 Cal.4th 394, 424). "'"The process of premeditation and deliberation does not require any extended period of time"'"; what matters is "'the extent of the reflection, not the length of time.'" (*Salazar*, at p. 245; *People v. Mayfield* (1997) 14 Cal.4th 668, 767, overruled in part on other grounds in *People v. Scott* (2015) 61 Cal.4th 363, 390.) Each of the analogies the prosecutor offered involve an actor who was carefully weighing considerations in advance of making a decision; none of the actors was making a reflexive decision. In the context of the prosecutor's broader argument that paraphrased the jury instructions defining "premeditation" and "deliberation," as well as her proviso that the jury ignore her comments if they conflicted with the instructions, we conclude it was not error for the prosecutor to use the analogies she used.

III. In Camera Hearing

Prior to trial, the prosecutor advised defendant's attorney that one of the two undercover officers who had been placed in the jail cell with defendant when he incriminated himself had been relieved from duty but subsequently reinstated. Defendant's attorney conceded that he had "no real grounds for a *Pitchess* [*v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) motion]" because the entire conversation was corroborated by a recording and because the officer wrote no reports that could be impeached, but nevertheless asked the trial court to conduct an in camera hearing with the officer to ascertain whether the reason for the relief from duty constituted impeachment evidence under *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*). The court conducted that hearing, and ruled that "there is no . . . *Brady* type discoverable material to be disclosed." We independently review whether a so-called *Brady* violation has occurred. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 176.)

Evidence is "*Brady* material" if it is (1) exculpatory or impeachment evidence, (2) material to the outcome of the trial, and (3) not disclosed by the prosecution (or, in this case, the court). (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 709-710 (*Johnson*).) We have examined the transcript from the in camera hearing, and independently conclude that the reasons underlying the officer's temporary relief from duty do not fall within the definition of *Brady* material.

Defendant invites us to conduct a far broader inquiry, asserting that the prosecutor was effectively making a *Pitchess* motion in encouraging the trial court to conduct an in camera hearing for *Brady* material. We decline this invitation. To begin, it is wholly inconsistent with defendant's position before the trial

court that there were "no real grounds" for a *Pitchess* motion. More to the point, *Pitchess* motions are governed by the statutory procedures for examining and disclosing the personnel records of law enforcement officers set forth in Evidence Code sections 1040 through 1047; those procedures are mandatory and must be followed. (*Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393, 401, fn. 2 [procedures are the "exclusive method" for obtaining these records].) Further, a motion by the prosecution—even if one had been made in this case—would not have entitled the defense to the fruits of that motion. (*Johnson*, *supra*, 61 Cal.4th at p. 719.)

DISPOSITION

The judgment is affirmed.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ