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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MARCOS MARQUEZ,

Defendant and Appellant.

2d Crim. No. B264080
(Super. Ct. No. BA428365-01)
(Los Angeles County)

Marcos Marquez appeals a judgment following his conviction for unlawfully taking of a vehicle (Veh. Code, § 10851, subd. (a)) and resisting a peace officer (Pen. Code, § 148, subd. (a)). We affirm.

FACTS

On June 27, 2014, Vanessa Rivas discovered her Cadillac CTS was missing. On July 15, Sheriff Deputy Goro Yoshida and a fellow officer were driving their patrol car. Yoshida saw a Cadillac CTS traveling at a high rate of speed. He turned on his lights and siren. The Cadillac pulled over to the

right curb. Marquez was driving. He "exited out of the driver's side door" and "began running away." He evaded police by jumping over a gate near a residence. Yoshida knew Marquez "from prior contacts with him."

A month later police officers learned that Marquez might be staying at an address on Buelah Avenue. A team of officers and an "aero unit" went to the Buelah address. Marquez ran out the back of the residence and climbed onto the roof of an adjoining house. Sheriff Deputy George Sakabu ordered him to come down from the roof. Marquez did not comply and disappeared from view. Suddenly Sakabu "felt a weight fall" on his head. He next saw Marquez running "towards the fence on the other side of the street." Sakabu was "dazed and confused." He told another officer that Marquez "hit him in the head." Marquez found a bicycle and left the scene. Officers eventually apprehended him.

In his defense, Marquez testified that he had been convicted of felony possession for sale of methamphetamine in 2006. He was "up on the roof " of the house "on the day we are talking about." He came down from the roof, but he did not "land on" Sakabu or touch him.

On cross-examination, the prosecutor asked questions about the stolen Cadillac. Marquez answered that he did not know the Cadillac was stolen. He said that Rivas's father owned the Cadillac and wanted to sell him the car. Because Marquez was "thinking about buying the Cadillac," Rivas's father let him borrow it. He ran from the police because in the past police officers had beaten him and had falsely accused him.

The prosecutor asked, "Didn't you tell the officers that arrested you that maybe you have a meth problem?"

Marquez: "I was under the influence. I didn't tell them I had a meth problem." Prosecutor: "You were under the influence?" Marquez: "Correct." Marquez said he saw Sakabu hit "his head against [a] dried tree branch and slip . . . towards the sidewalk. [Sakabu] slipped from there . . . . From there, [Marquez does not] know what happened to him."

At trial the jury found Marquez guilty of unlawfully driving a vehicle and resisting a peace officer, a misdemeanor. It found him not guilty of the charged offenses of 1) battery with injury to Police Officer Sakabu, 2) "simple battery" on Sakabu," and 3) resisting an executive officer (Sakabu), a felony.

DISCUSSION

Prosecutorial Misconduct

Marquez contends the prosecutor "committed misconduct during his cross examination of [Marquez] when inquiring into facts that went far beyond [Marquez's] direct examination testimony." (Boldface omitted.)

The People claim a challenge to the scope of cross-examination requires an objection. Marquez's counsel made no such objection. We agree this precludes raising the issue on appeal.

A defendant forfeits the claim that a prosecutor exceeded the scope of permissible cross-examination by not objecting "to any of the now challenged cross-examination questions" at trial. (*People v. Gray* (2005) 37 Cal.4th 168, 215.) """As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct . . . ."" (*Ibid.*) "'Because we do not expect the trial court to recognize and correct all possible or arguable misconduct

on its own motion . . . , defendant bears the responsibility to seek an admonition if he believes the prosecutor has overstepped the bounds . . . .'" (*Ibid.*; see also *People v. Foster* (2010) 50 Cal.4th 1301, 1350-1351 [defendant's failure to object at trial that the prosecutor committed misconduct by exceeding the proper scope of cross-examination forfeited the claim on appeal].) Here Marquez's trial counsel did not object to the portion of the cross-examination Marquez now highlights on appeal. Nor did he claim prosecutorial misconduct regarding that cross-examination.

But even on the merits, Marquez has not shown misconduct. He claims that he testified on direct examination to show that he did not commit battery on a police officer. He claims prosecutorial misconduct included questions about the offense of taking the Cadillac, which he did not testify about on direct.

"'Although it is misconduct for a prosecutor *intentionally* to elicit inadmissible testimony [citation], merely eliciting evidence is not misconduct.'" (*People v. Chatman* (2006) 38 Cal.4th 344, 379-380.) "When a defendant voluntarily testifies, the district attorney may fully amplify his testimony by inquiring into the facts and circumstances surrounding his assertions, or by introducing evidence through cross examination which explains or refutes his statements or the inferences which may necessarily be drawn from them." (*People v. Cooper* (1991) 53 Cal.3d 771, 823.) "Evidence relevant for these purposes is admissible even though it incidentally involves an unrelated offense." (*People v. Harris* (1981) 28 Cal.3d 935, 953.) "A defendant cannot, by testifying to a state of things contrary to and inconsistent with the evidence of the prosecution, thus indirectly denying the testimony against him, but without

testifying expressly with relation to the same facts, limit the cross-examination to the precise facts concerning which he testifies." (*Cooper*, at p. 822.)

In his direct testimony, Marquez said he was on the roof, he came down from the roof, and he did not hit Sakabu. The inferences from his testimony were that he was acting reasonably, did not flee, was not guilty of assaulting or evading Sakabu, and that Sakabu lied. The prosecution could contest this defense to show Marquez had a criminal motive for being on that roof and for evading or assaulting Sakabu. (*People v. Cooper, supra*, 53 Cal.3d at p. 822; *People v. Hayes* (1990) 52 Cal.3d 577, 617; *People v. Crawford* (1968) 259 Cal.App.2d 874, 879-880.) The prosecution could show that Marquez ran from the police because he knew they were pursuing him for taking the Cadillac. His actions involving Sakabu were causally related to the earlier offense. The People were entitled to challenge the credibility of the innocent version of facts in Marquez's direct testimony.

Ineffective Assistance of Counsel

Marquez contends his trial counsel was ineffective for failing to object when the prosecutor cross-examined him. We disagree.

To establish ineffective assistance the defendant must prove both that his counsel's performance was deficient and that it was prejudicial to the outcome of the case. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 692.)

"'Whether to object to inadmissible evidence is a tactical decision; because trial counsel's tactical decisions are accorded substantial deference . . . , failure to object seldom establishes counsel's incompetence.'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1185.) "'Generally, failure to object is a matter of

trial tactics as to which we will not exercise judicial hindsight. . . . A reviewing court will not second-guess trial counsel's reasonable tactical decisions.'" (*Ibid.*)

The People note that counsel's performance here is not comparable to cases where a defense counsel was negligent, made no objections or was inattentive during cross-examination. Marquez's trial counsel successfully objected twice to the prosecutor's cross-examination questions. His effective defense resulted in Marquez being acquitted of the most serious charges--battery with injury to a police officer (Pen. Code, § 242); simple battery on an officer (*ibid.*); and resisting an executive officer, a felony (*id.*, § 69).

Part of the cross-examination involved the prosecutor's attempt to impeach Marquez's claim that he did not commit battery on the police officer.

As the People note, Marquez's counsel may have reasonably believed this line of prosecution questioning helped his case. During cross-examination, Marquez testified that there was no criminal intent. The car was not stolen. He borrowed it from the owner. He was thinking about buying that car.

Marquez's counsel may have initially decided not to ask Marquez questions on direct about the unlawful taking of a vehicle offense because the People's case on that issue was strong. But the prosecution's cross-examination on that issue revealed a defense, which, if believed, could have led to Marquez's acquittal on this count. That would explain why counsel, as a matter of strategy, would not object. In fact, during closing argument Marquez counsel raised the "lend the car" theory as a defense. The prosecutor also recognized this defense

and told jurors, "If you believe that story about Vanessa's dad, *walk him out of here*." (Italics added.)

We have reviewed Marquez's remaining contentions and we conclude he has not shown grounds for reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Kathleen Kennedy, Judge

Superior Court County of Los Angeles

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

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