Filed 11/7/18 P. v. Sanchez CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSUE SAMUEL SANCHEZ, Defendant and Appellant.	B285241 (Los Angeles County Super. Ct. No. BA446099)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edmund Wilcox Clarke, Judge. Affirmed.

Elana Goldstein, 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, Idan Ivri and Nikhil Cooper, Deputy Attorneys General, for Plaintiff and Respondent.

Police officers responding to a call about a disruptive crowd found defendant Josue Sanchez "doing doughnuts" in a convertible while numerous people looked on. Defendant sped away and led the officers on a brief high-speed chase that ended when he crashed into the median and three parked cars. Defendant fled the scene on foot and was apprehended a few blocks away. A jury found him guilty of recklessly fleeing a pursuing police officer and hit and run resulting in property damage.

Defendant contends these convictions must be reversed because the prosecutor violated his Fifth Amendment rights and committed *Griffin*[1] error by indirectly commenting on his failure to testify during closing and rebuttal arguments. Defendant further argues that the prosecutor relied on inadmissible hearsay—statements of "anonymous bystanders"—and that the trial court erred in failing to rule on a motion in limine addressing that evidence. Defendant acknowledges that his counsel failed to raise these arguments below and contends those omissions constituted ineffective assistance of counsel.

We affirm. Defendant forfeited both of these arguments by failing to object in the trial court. The lack of objections below was not ineffective assistance, however, because the prosecutor's comments did not implicate *Griffin* and any evidentiary error was not prejudicial.

PROCEDURAL HISTORY

An information filed September 16, 2016 charged defendant with fleeing a pursuing peace officer's motor vehicle while driving recklessly (Veh. Code, § 2800.2) and hit and run with property damage (Veh. Code, § 20002). The information further alleged

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[1]*Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).

that defendant had suffered two prior strike convictions (Pen. Code, §§ 667, subds. (b)-(j), 1170.12, subd. (b)) and served three prior prison terms (Pen. Code, § 667.5, subd. (b)). Defendant pled not guilty to the charges and denied the allegations.

A jury found defendant guilty of both charged offenses. At the subsequent court trial regarding defendant's prior offenses, the trial court dismissed one of the prison priors on the prosecution's motion. The court found the others true and ruled that they constituted strikes. The court sentenced defendant to a total of five years in prison: the midterm of two years on the reckless evasion count, doubled due to defendant's strikes, plus an additional year for one of the prison priors. The court imposed and struck another year for the other prison prior (Pen. Code, §§ 667.5, subd. (b), 1385, subd. (c)), and imposed and stayed 180 days for the hit and run (Pen. Code, § 654). Defendant timely appealed.

FACTUAL BACKGROUND

I. Prosecution Evidence

Los Angeles Police Department officers Luis Anchondo and Anthony Cabriales testified that they were on patrol on April 15, 2016 when they were dispatched to the area of Main and Broadway Place at around 11:50 p.m. to disperse a large crowd. Anchondo drove himself and Cabriales to the area in a marked patrol car. Both officers testified that they saw about 30 to 40 pedestrians watching a Chevrolet Camaro convertible "doing doughnuts," or rotating in tight circles and creating a cloud of smoke by rapidly spinning its rear wheels.

The officers activated their lights and sirens to conduct a traffic stop of the Camaro, at which point the Camaro "momentarily stopped." Both officers testified that during that

moment, the driver looked at or made "visual contact" with them. Anchondo testified that he could see the driver during that "second or so," from 40-45 feet away, because the top of the convertible was down and the intersection was illuminated by streetlights. Both he and Cabriales testified that they did not see anyone else in the car with the driver, who was wearing a white shirt and dark pants. They identified defendant as the driver in court. They did not recognize a photograph of defendant's brother, though Cabriales testified that he had seen that man in the hallway outside the courtroom.

Both officers testified that the Camaro accelerated away from them quickly and drove southbound on Broadway Place. Anchondo estimated that the car was traveling at least 80 miles per hour. Both officers testified that it wove into the northbound lanes at least twice as they pursued it down Broadway.[2] The short-lived chase ended when the Camaro crashed into an "elevated concrete island" or "center divider" about a half-mile down Broadway. It also struck three parked cars before coming to a stop.

The crashes sent up a cloud of dust or smoke. Anchondo and Cabriales could not see through it, so they exited the patrol car. Anchondo testified that he "observed a male Hispanic in his 20's running away from the location"; Cabriales testified that he did not see anyone fleeing. Both officers testified that "anonymous bystanders" at the scene told them that the driver had run south. Anchondo stated, "we had bystanders telling us

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[2]They also testified that they saw the driver toss an object they believed to be a firearm from the car. No firearm was recovered, however, and defendant was not charged with any firearm-related crimes.

he ran southbound, he ran southbound, and then pointed their hands towards 40th Place." Cabriales stated, "They were advising that the individual driving that car had begun running southbound Broadway [*sic*]."

Anchondo testified that he put out an alert to other police officers to look for the driver. He and Cabriales then searched the Camaro. Cabriales testified that both the driver and passenger airbags had deployed. Anchondo found a bill of sale for a 1995 Chevrolet Camaro in the glove compartment. It was dated April 15, 2016 and included defendant's name and a copy of his driver's license. Cabriales put defendant's name out over the radio.

Los Angeles Police Department officer Guillermo Garcia testified that he and his partner were on patrol around midnight on April 16, 2016. He responded to a request for backup and drove to the area of Broadway and 41st Place. Once there, he observed a car driving the wrong way down a one-way street with its headlights off. Garcia conducted a traffic stop of the car. Defendant was a passenger in the back seat. Garcia testified that defendant was wearing a red shirt and gray pants.

Garcia detained defendant and the three other occupants of the car and radioed Anchondo and Cabriales to tell them he had apprehended defendant. Anchondo testified that he heard a call about the possible apprehension of a suspect approximately 10 minutes after the crash. He and Cabriales went to the scene and both identified defendant. Anchondo testified that he "immediately recognized" defendant despite the difference in his clothing, and that Cabriales "essentially agreed with me." Cabriales testified that he identified defendant as the person who had been driving the Camaro. Garcia confirmed that both

Anchondo and Cabriales identified defendant. Garcia also identified defendant in court.

II. Defense Evidence

Alex Davila testified that he was defendant's younger brother. Davila was 22 at the time of trial; defendant was 39 or 40 at that time.

Davila testified that he and defendant went to a "car rally" in Los Angeles on April 15, 2016. Davila was wearing a white shirt and blue jeans that night, and he was driving the Camaro when the police arrived on the scene. He testified that he got into a car accident and then ran from the scene of the accident. He called a friend and the friend picked him up.[3]

Mark Darcho Balian, the owner of a gas station and auto repair shop, testified that he examined photographs of the crashed Camaro and reviewed "information from all data and Mitchell programs for the airbag subject on the '95 Camaro." He testified that both the driver and passenger airbags had deployed, which, given sensors in that model of car, led him to expect that there had been a passenger in the car at that time of the crash. He conceded it was possible for a passenger airbag to deploy without someone in the seat, but testified that in his experience that did not happen very often. Balian stood by his opinion after being confronted with a 1995 Camaro owner's manual on cross-examination; that manual stated, "It is possible that in a crash, only one of the two airbags in your vehicle will deploy. This is rare but can happen in a crash just severe enough to make an airbag inflate."

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[3]The court appointed an attorney for Davila, advised him of his Fifth Amendment rights, and cautioned him about the possible consequences he could face if he testified.

DISCUSSION

I. *Griffin* Error

At the beginning of closing argument, the prosecutor stated: "Ladies and gentlemen, the defendant destroyed the property of three other individuals. They've probably never been made whole in this case. He drove recklessly. He damaged public property, and he put people's lives at risk. And he's not taking responsibility. In fact, he threw his brother up here earlier today, still not taking responsibility for his actions." Toward the end of his rebuttal, he made similar remarks: "And really, ultimately, ladies and gentlemen, this is a case about responsibility. And the defendant just won't take responsibility. At every turn he won't. He's gone so far - - and I hope you're appalled by it - - to basically put his brother on the stand to lie for him." Defense counsel did not object to or request an admonishment regarding either statement.

Now, however, defendant argues that the statements were improper comments on his decision not to testify. The United States Supreme Court has held that the Fifth Amendment of the United States Constitution provides a defendant with the right to remain silent, and prohibits a prosecutor from commenting on a defendant's exercise of that right. (*Griffin*, *supra*, 380 U.S. at pp. 614-615; see also *People v. Lewis* (2001) 25 Cal.4th 610, 670.) "Under the rule in *Griffin*, error is committed whenever the prosecutor or the court comments, either directly or indirectly, upon defendant's failure to testify in his defense. It is well established, however, that the rule prohibiting comment on defendant's silence does not extend to comments on the state of the evidence, or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Medina*

(1995) 11 Cal.4th 694, 755.) Remarks are deemed to constitute *Griffin* error when it is "reasonably probable that the jury was misled into drawing an improper inference regarding defendant's silence." (*Id.* at p. 756; see also *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020 (*Denard*).) "A defendant cannot complain on appeal of error by a prosecutor unless he or she made an assignment of error on the same ground in a timely fashion in the trial court and requested the jury be admonished to disregard the impropriety. [Citations.] This procedural requirement has been applied repeatedly to cases involving claims of *Griffin* error." (*People v. Mesa* (2006) 144 Cal.App.4th 1000, 1006 [citing *People v. Turner* (2004) 34 Cal.4th 406, 421; *People v. Medina*, *supra*, 11 Cal.4th at p. 756, and *People v. Mincey* (1992) 2 Cal.4th 408, 446].) "The only exception is for cases in which a timely objection would have been futile or ineffective to cure the harm." (*Mesa*, *supra*, 144 Cal.App.4th at p. 1007.) Defendant has not shown that a timely objection would have been futile or ineffective. To the contrary, the record reflects that the trial court was responsive to meritorious objections raised by defense counsel throughout the trial.

Defendant seeks to avoid forfeiture by arguing that his counsel was ineffective for failing to object on *Griffin* grounds. "In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it 'fell below an objective standard of reasonableness . . . under prevailing professional norms.' (*Strickland v. Washington* [1984] 466 U.S. 668, 688.) Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions

can be explained as a matter of sound trial strategy.' (*People v. Carter* (2003) 30 Cal.4th 1166, 1211.) If the record 'sheds no light on why counsel acted or failed to act in the manner challenged,' an appellate claim of ineffective assistance of counsel must be rejected 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.' [Citations.]" (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746.)

Defendant cannot establish that counsel's performance was deficient. "[N]ot every statement made before a jury that touches on [a] defendant's right[] to silence and representation amounts to a constitutional violation." (*People v. Bryant* (2014) 60 Cal.4th 335, 387.) "For example, a prosecutor is permitted to comment on the state of the evidence and the defendant's failure to call a logical witness, despite the mere possibility that the statement might also be interpreted as a reference to the defendant's failure to testify." (*Ibid.*) Likewise, "[a] prosecutor may comment upon the credibility of witnesses based on facts contained in the record, and any reasonable inferences that [may] be drawn from them." (*People v. Martinez* (2010) 47 Cal.4th 911, 958; see also *People v. Padilla* (1995) 11 Cal.4th 891, 945, disapproved on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 ["a prosecutor is free to give his opinion on the state of the evidence, and in arguing his case to the jury, has wide latitude to comment on both its quality and the credibility of witnesses"].) Here, the primary thrust of the prosecutor's comments was that Davila's testimony lacked credibility. The argument was supported by facts in the record, namely Davila's admission that he did not tell anyone he was driving or even present until very late in the proceedings and did not remember details of the crash. It is not

reasonably probable that the jury was misled into drawing an improper inference regarding defendant's silence from the prosecutor's remarks.

Defendant contends the remarks are analogous to those found to be *Griffin* error in *Denard*, *supra*, 242 Cal.App.4th 1012, *People v. Sanchez* (2014) 228 Cal.App.4th 1517, and *People v. Medina* (1974) 41 Cal.App.3d 438. We disagree.

In *Denard*, the prosecutor stated, "The defendant clearly does not want to take responsibility for his actions. He has put it upon [Rosa] to testify to get himself convicted. He has not taken responsibility himself. That is the kind of man he is."[4] (*Denard*, *supra*, 242 Cal.App.4th at p. 1019.) Although the prosecutor used the term "responsibility" just as the prosecutor did here, the gist of the argument in *Denard* was that defendant made someone close to him identify him rather than taking the stand himself. Here, in contrast, the prosecutor called attention not merely to defendant but rather to the dubious nature of his brother's testimony.

We find a similar distinction in *People v. Sanchez*, *supra*, 228 Cal.App.4th at pp. 1521, 1523, in which the prosecutor argued that the defendant, who was on trial for stealing copper wire from the electric company and had been found hiding in the wheel well of a truck, was "still in that wheel well in a very real sense, and this time he's hiding from all of you. . . . Pull him out of that wheel well one last time." (*Ibid.*) The court of appeal

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[4]Rosa was the defendant's ex-wife. She reluctantly testified as prosecution witness that she had no difficulty identifying the defendant in surveillance photos and videos the police showed her during their investigation. (See *Denard*, *supra*, 242 Cal.App.4th at pp. 1018-1019.)

found *Griffin* error in these remarks because "[t]he most reasonable interpretation of the comment is that defendant was 'hiding' from the jury in a figurative sense by not testifying; he was hiding because he refused to get on the stand and tell the jury why he was in the SCE yard the night of the incident." (*Id.* at p. 1527.) The court also noted the emphasis on defendant personally rather than his case generally. (*Ibid.*) Here, although the prosecutor referenced defendant personally, the emphasis was on his solicitation of implausible testimony rather than his own silence.

The statements in *People v. Medina*, *supra*, 41 Cal.App.3d at p. 457 are even more distinguishable. There, the prosecutor clearly remarked on defendant's silence by arguing, "whatever else we say about [the testifying witnesses], that they are lying or otherwise, their testimony is unrefuted. No one has come forward and said that it is false. No one has come before you to show you it wasn't that way. You have not heard that." The implication was that defendant should have come before the jury and refuted the testimony of the prosecution witnesses. The prosecutor here did not suggest that defendant was concealing facts that only he knew, nor did he question defendant's failure to refute evidence the prosecution presented.

We find more persuasive the Attorney General's analogy to *People v. Rusling* (1969) 268 Cal.App.2d 930. There, the prosecutor highlighted defendant's failure to plead guilty and reminded the jury, "this is our third day of trial now, when the evidence is overwhelmingly against him." (*Id.* at p. 937.) The appellate court found this was not *Griffin* error: "In the context in which it was made the remark was in the nature of a comment on defendant's failure to admit guilt rather than his failure to

testify. The clear implication of the entire paragraph in which the remark appears is that despite overwhelming evidence against him, defendant had the audacity to plead not guilty and to burden the State with a three day trial. As such, although not falling within the proscription of *Griffin*, the statement exceeded the bounds of reasonable argument. Regardless of the weight of evidence against him, a defendant's character may not be impugned because he has elected to stand trial." (*Id.* at p. 938.) The remarks about defendant's failure to accept responsibility here are in a similar vein. Defendant has forfeited any argument that they were improper on that basis, however, and his counsel reasonably could have decided to let the remarks pass so as not to bring further attention to them. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1312.)

Moreover, even if we assume counsel performed deficiently, defendant has not demonstrated the requisite reasonable probability that the result would have been different had any objection to the remarks been lodged and sustained. (See *Strickland v. Washington*, *supra*, 466 U.S. at p. 694.) The court instructed the jury that defendant had an absolute right not to testify and that the jury should not draw any conclusions from his silence. The evidence against defendant was strong; the challenged remarks did not "'serve to fill an evidentiary gap in the prosecution's case.'" (*People v. Vargas* (1973) 9 Cal.3d 470, 481; see also *Denard*, *supra*, 242 Cal.App.4th at p. 1022). Two eyewitnesses to the chase and hit-and-run identified defendant as the driver of the car; Anchondo testified that he saw only one person run from the crashed Camaro; and the bill of sale named defendant as the only owner of the car. In the face of this evidence, any performance error by counsel would have been

harmless. (*Denard*, *supra*, 242 Cal.App.4th at p. 1022.)

II. Bystander Evidence

Anchondo testified that "[t]here were bystanders" around the area where the Camaro crashed, and that they told the officers, "he ran southbound, he ran southbound, and then pointed their hands towards 40th Place." Cabriales also testified that bystanders "were advising that the individual driving that car had begun running southbound Broadway [*sic*]." Defense counsel did not object to this testimony. Defense counsel likewise did not object during closing, when the prosecutor argued, "Now, the bystanders that the officers came into contact with when they're running upon this terrible traffic collision are telling these officers, he fled south. It's not a 'they.' It's not a, wow, one guy went north and one guy went south or one guy went east and another one west or another guy went south. They're pointing in the direction, he fled south one person [*sic*], one person. . . . [T]hey're told he's going south, and then he's caught only a few blocks away." Defense counsel also remained silent when the prosecutor argued, "there is only one person in the car. The officers confirm it. These bystanders confirm it."

Defendant now argues that the officers' testimony about the bystanders' comments was improper hearsay. He asserts that the prosecutor's arguments prove that, as the prosecutor "used the bystanders' comments about how many suspects there were and in what direction he [*sic*] fled for the truth of the matter asserted—that there was only one person in the Camaro and that the driver exited the vehicle and fled south." He argues that the trial court abused its discretion in admitting the bystander evidence and committed an unspecified error by failing to rule on the prosecutor's motion in limine seeking its admission. He

further argues that the bystander evidence was "crucial to the prosecutor's ability to prove that the driver of the Camaro was appellant," and that his counsel rendered ineffective assistance by failing to object to the evidence.

Defendant has forfeited his contention that the bystander evidence was inadmissible hearsay by failing to object to the evidence on that basis below. (*People v. Partida* (2005) 37 Cal.4th 428, 434-435; see also Evid. Code, § 353.) He also has forfeited his related contention about the trial court's failure to definitively rule on the prosecutor's motion in limine concerning the bystander evidence. Defense counsel—who did not object to the evidence on hearsay grounds while the court was discussing the motion before trial—did not request a ruling or bring the matter to the court's attention at a later time. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1171 ["A properly directed motion *in limine* may satisfy the requirements of Evidence Code section 353 and preserve objections for appeal. [Citation.] However, the proponent must secure an express ruling from the court."].)

Defendant has not demonstrated that his counsel rendered ineffective assistance by failing to object to the bystander evidence. Even if the bystander evidence was inadmissible hearsay, defendant has not demonstrated how its admission prejudiced him. Both Anchondo and Cabriales testified that there was only one person in the car before the crash, defendant's name was the sole name on the bill of sale found in the car, and Anchondo testified that he saw the driver flee on foot. Garcia offered uncontroverted testimony that defendant was found riding in a car traveling the wrong way on a nearby one-way street within 10 minutes of the crash. The jury reasonably could infer from this that defendant, who was also wearing different

clothing, fled the crash scene in that general direction and was attempting to escape undetected. It is not reasonably probable that defendant would have received a more favorable outcome at trial had his counsel objected to the bystander evidence.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.