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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

QUENTIN EUGENE BELL,

Defendant and Appellant.

2d Crim. No. B244483
(Super. Ct. No. BA226492-01)
(Los Angeles County)

Quentin Eugene Bell used a small metal baseball bat to beat his then four-year old son, Aquil. Aquil survived, after a lengthy hospitalization, with permanent physical and intellectual impairments. A jury convicted appellant of child abuse (Pen. Code, § 273a, sub. (a))[1], and inflicting corporal injury on a child. (§ 273d, subd. (a).) With respect to both offenses, the jury further found that appellant personally used a deadly and dangerous weapon, that he personally inflicted great bodily injury on the victim, and that the victim was under five years of age when the offenses occurred. The trial court sentenced appellant to an aggregate term in state prison of 19 years.

Appellant contends his state and federal constitutional rights to due process were violated because the offenses occurred in December 2001, but he was not arrested until 2009. The same delay, he contends, also violated his state constitutional right to a

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

speedy trial. (Cal. Const., art. I, § 15.) Appellant contends no substantial evidence supported the jury instruction on flight (CALCRIM No. 372), and that his trial counsel was ineffective for failing to object to it. Finally, he contends the prosecutor committed misconduct in his closing arguments and in his questioning of certain witnesses. We affirm.

Facts

Appellant has four biological children with Nichole Goods, including two sons: Marcellous, born in 1996, and Aquil, born in 1997. In October 2001, Goods was sharing an apartment in Lancaster with her children and Kenneth Brasher, appellant's stepbrother. Around the beginning of October, Goods sent Marcellous and Aquil to stay with appellant. Appellant was living in Los Angeles with his then-girlfriend, Giulia Bruglio and their two-year old daughter, Jayleen.

Marcellous testified that, on December 13, 2001, Aquil hit Jayleen with a metal bat that was 15 or 16 inches long. Marcellous saw appellant take the bat from Aquil and beat him with it.[2] Appellant used the bat to hit Aquil on the head and all over his body. After the hitting stopped, Marcellous watched as appellant "hogtied" Aquil and put him in a closet. Marcellous looked in on Aquil afterwards and thought that he was dead.

Later that day, appellant drove Aquil to the office of his pediatrician, Dr. Mayo DeLilly. Appellant's girlfriend, Jayleen and Marcellous were also in the car. When they reached the doctor's office, appellant took Aquil inside. He signed the patient log as Aquil's uncle (and appellant's stepbrother), Kenneth Brasher. Appellant told the doctor that Aquil fell and hit his head while playing. Aquil was unconscious and having trouble breathing. The doctor called an ambulance to take Aquil to the emergency room

[2] In an interview with police on December 14, 2001, Marcellous said that appellant hit Aquil " 'with a bat or sink thing, faucet.' " At trial, Marcellous testified he did not recall saying anything about a faucet, but he did recall the bat. Marcellous also told the detective in 2001 that appellant was mad at Aquil because Aqiul had started to pack a suitcase, saying he wanted to go see his mom. At trial, Marcellous could not recall when that incident occurred in relation to appellant beating Aquil.

at Children's Hospital. Appellant did not follow the ambulance to the hospital. Instead, appellant drove away.

Aquil spent 20 days in the intensive care unit (ICU), 18 of those days on mechanical ventilation. Dr. Timothy Deakers, who supervised Aquil's treatment in the ICU, testified Aquil was in a coma and had life-threatening injuries when he reached the hospital. He had "a bilateral subdural hematoma, or blood on top of the brain, and also . . . cerebral adema, or swelling of the brain." Aquil also had "bilateral retinal hemorrhages[,]" and abrasions and bruises on his back and lower extremities. Trauma is the most common cause of such injuries. Aquil's injuries could, in Dr. Deaker's opinion, have resulted from being hit on the head by an adult man using a hard object. That sort of blow would not necessarily cause lacerations to the scalp or forehead.

Aquil remained hospitalized for another four months, until May 2002. Thereafter, he received occupational, physical and speech therapy. Despite therapy, Aquil continues to walk with a limp and is partially paralyzed on his right side. He attends special education classes.

Aquil's mother, Nichole Goods, testified that she learned he had been hospitalized when she received a telephone call from Kenneth Brasher on December 13, 2001. Goods testified that appellant always knew how to contact her, but he never called to tell her about Aquil or to check on him. Brasher testified that he could not remember anything about 2001, including any details about Marcellous and Aquil's stay with appellant, whether they were ever physically abused by either parent, or the extent of Aquil's injuries.

The investigating police officer obtained photographs of appellant and Brasher from the Department of Motor Vehicles. She showed the photographs to Dr. DeLilly and two members of his staff who were working when Aquil was brought into the office. One staff member identified appellant as the person who dropped off Aquil. The others were not able to make an identification from the photographs. Another staff member described the person who brought Aquil in as having tattoos on his neck. Appellant has tattoos on his neck; Brasher does not. Goods identified the

handwriting on the patient log as appellant's. The investigating officer did not search the house where the boys had been staying with appellant and never recovered the bat described by Marcellous.

The defense theory at trial was that either Brasher or Goods inflicted Aquil's injuries, by shaking him rather than by hitting him. Although Goods testified that she sent Marcellous and Aquil to stay with appellant in October 2001, she told a social worker in 2002 that the boys went to stay with appellant about one week before Thanksgiving. Marcellous testified they had been at appellant's house for about one week before the beating. He also testified, however, that he went to live with appellant sometime around Halloween that year, and that his permanent residence in 2001 was in Lancaster, with his mother. Appellant's mother, Delores Gladney, testified that Goods and Brasher lived with her on and off while the children were young. She saw Goods hit Marcellous with her fist, a belt and shoes. She also saw Goods shake both boys by their shoulders. Appellant never came to visit Gladney while Goods was living there. Two friends of appellant's testified that they saw Goods hit the children, but never appellant.

An emergency room physician, Dr. Paul Bronston, testified as an expert witness for the defense and opined that Aquil's injuries were more consistent with shaken baby syndrome than with blunt force trauma. If Aquil had been hit on the head with a bat, Dr. Bronston would have expected to see swelling and red marks on his head. No swelling or red marks were noted in the hospital charts or visible on photographs taken of Aquil in the days after his admission to the hospital. Dr. Bronston opined that severe shaking could have caused a subdural hematoma that bled for weeks before Aquil lost consciousness and had difficulty breathing.

Discussion

Due Process

Aquil was injured on December 13, 2001. A felony complaint for an arrest warrant was filed against appellant on January 14, 2002. No further action was taken against appellant until 2009, after appellant's arrest on unrelated charges. Appellant's preliminary hearing was held promptly after his arrest, in December 2009. Appellant's

first trial commenced in 2011 and ended in a mistrial after defense counsel suffered a debilitating stroke. His second trial began in August 2012. Appellant contends the pre-arrest delay violated his rights to due process under the state and federal constitutions, and also violated his state constitutional right to a speedy trial.

"The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution protect a defendant from the prejudicial effects of lengthy, unjustified delay between the commission of a crime and the defendant's arrest and charging. [Citations.] Such prearrest or precharging delay does not implicate the defendant's state and federal speedy trial rights (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15), as those rights do not attach until a defendant has been arrested or a charging document has been filed." (*People v. Cowan* (2010) 50 Cal.4th 401, 430.) Where, as here, a criminal defendant complains of a delay between the crime and his or her arrest, "the defendant is not without recourse if the delay is unjustified and prejudicial." (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) "[T]he right of due process protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through the dimming of memories, the death or disappearance of witnesses, and the loss or destruction of material physical evidence." (*People v. Martinez* (2000) 22 Cal.4th 750, 767.) Accordingly, prearrest delay may constitute a denial of the right to a fair trial and to due process of law.

A defendant seeking to dismiss a charge based on a delay between the commission of a crime and his or her arrest, "must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay." (*People v. Catlin* (2001) 26 Cal.4th 81, 107.) Prejudice from pre-arrest delay is not presumed. (*People v. Nelson, supra,* 43 Cal.4th at p. 1250.) To avoid criminal charges on this basis, the defendant "must affirmatively show prejudice." (*Id.*; *People v. Martinez, supra,* 22 Cal.4th at p. 767.) As one Court of Appeal explained, the trial court is required to balance the prejudice to the defendant against the prosecution's justification

for the delay "only if the defendant has shown actual prejudice. (*Scherling* [*v. Superior Court* (1978)] 22 Cal.3d [493,] at pp.505-507 . . . .) The reason is simple: 'If defendant fails to show prejudice, the court need not inquire into the justification for the delay since there is nothing to "'weigh" such justification against.' (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 910.)" (*Craft v. Superior Court* (2006) 140 Cal.App.4th 1533, 1541.)

"We review for abuse of discretion a trial court's ruling on a motion to dismiss for prejudicial prearrest delay (*People v. Morris* [(1988)] 46 Cal.3d [1,] at p. 38 . . .), and defer to any underlying factual findings if substantial evidence supports them (cf. *People v. Hill* (1984) 37 Cal.3d 491, 499 [concerning right to speedy trial])." (*People v. Cowan, supra,* 50 Cal.4th at p. 431.)

Appellant contends he was prejudiced by the lengthy pre-arrest delay. First, the most important witness, Marcellous, was a young boy when Aquil was injured, but a teenager by the time of trial. Appellant lost the ability to cross-examine the five-year old Marcellous and the jury could not evaluate his credibility as a child witness rather than as a teenager. Second, witnesses' memories faded in the intervening years. Brasher testified that he could not remember anything about 2001, including whether and when Goods and her children lived with him in Lancaster. Various witnesses also had difficulty remembering when Aquil went to stay with appellant. That fact was crucial to the defense because it argued Aquil's injuries were caused by shaken baby syndrome rather than by a beating. If Aquil was in his mother's custody in the weeks before December 13, his mother or Brasher could have been responsible for Aquil's injuries. Finally, physical evidence was lost in the intervening years. The investigating police officer showed DMV photographs of appellant and Brasher to Dr. DeLilly and his staff. One staff member identified appellant from the photographs as the person who brought Aquil to the office on December 13. Those photographs, however, were lost at some point before trial.

The trial court found that none of these circumstances amounted to prejudice and therefore denied appellant's motion to dismiss. That decision was not an

abuse of discretion. As the trial court noted, the witnesses' faded memories were as likely to help the defense as they were to hurt it because none of the witnesses could provide detailed testimony about the events leading up to Aquil's injuries. This left the jury with evidence that Aquil may have gone to stay with appellant in October 2001, but may also have lived with his mother until the week before Thanksgiving that year. In either event, Aquil was living with appellant on December 13, the day he was dropped off at Dr. DeLilly's office. The jury also knew Marcellous was a small child when Aquil was injured; it was capable of taking that fact into account when evaluating the credibility of his testimony about the beating. Similarly, even though Brasher feigned his amnesia about 2001, his testimony was of no help to the prosecution. It may even have strengthened the defense because the jury learned that Brasher had a severe substance abuse problem in 2001 and a prior felony conviction for inflicting corporal injury on a spouse or cohabitant.

Finally, the missing DMV photographs do not amount to actual prejudice in light of the other evidence establishing appellant's identity as the man who bought Aquil to Dr. DeLilly's office. In addition to the photographic identification, a staff member testified that the man who brought Aquil to the doctor had a tattoo on his neck. Only appellant matches that description. Goods corroborated that description by identifying appellant's handwriting on the patient log, rather than Brasher's. Finally, of course, Marcellous testified that it was appellant who beat Aquil and who drove Aquil to the doctor's office, not Brasher. In light of this evidence, the trial court acted within its sound discretion when it concluded appellant was not actually prejudiced by the fact that the jury could not view the DMV photographs used to identify appellant.

Speedy Trial

The right to a speedy trial under the California Constitution attaches when a felony complaint is filed against the defendant. (*People v. Martinez, supra*, 22 Cal.4th at p. 754.) As our Supreme Court explained in *Martinez,* "Under the state Constitution's speedy trial right, . . . no presumption of prejudice arises from delay after the filing of a complaint and before arrest or formal accusation by indictment or information [citation];

rather, in this situation a defendant seeking dismissal must affirmatively demonstrate prejudice [citation]." (*Id.* at p. 755.) Unless the pre-arrest delay violates a statutory speedy trial provision, "a showing of specific prejudice is required to establish a violation of our state Constitution's speedy trial right." (*Id.* at p. 756; see, e.g., §§ 1381, et seq.) Appellant does not contend that any of his statutory speedy trial rights were violated. Consequently, his contention that the pre-arrest delay violated his state Constitutional speedy trial right fails for the same reason that his due process claim failed: appellant has not demonstrated any actual prejudice caused by the delay.

Instruction on Flight

The trial court instructed the jury, in terms of CALCRIM No. 372, "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." Appellant contends the trial court erred because no substantial evidence supports the instruction and that his trial counsel was ineffective for failing to object to it. He is incorrect on both counts.

An instruction on flight is generally appropriate where "the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." (*People v. Ray* (1996) 13 Cal.4th 313, 345.) The evidence need not show the defendant physically ran away or that he reached some remote location. Instead, it need only show movement by the defendant with a purpose to avoid being seen or arrested. (*People v. Smithey* (1999) 20 Cal.4th 936, 982.)

We note that appellant forfeited appellate review of this contention by failing to object to the instruction in the trial court. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Had review not been forfeited, we would reject appellant's contention because the instruction was supported by substantial evidence. The evidence at trial did not show whether appellant fled from the house where the beating occurred. It did, however, demonstrate that appellant took Aquil to Dr. DeLilly's office, signed the patient

log using the name of his step-brother, and then left without explaining himself or leaving accurate contact information. After dropping off Aquil, appellant did not visit him in the hospital or even call Nicole Goods to inquire about his condition. A jury could reasonably infer that appellant used a false name and then left Dr. DeLilly's office to avoid being arrested for beating Aquil. The instruction on flight was properly given. We reject appellant's ineffective assistance of counsel claim for the same reason: counsel had no duty to object to a jury instruction that was supported by substantial evidence. (*People v. Kelly* (1992) 1 Cal.4th 495, 540.)

Prosecutorial Misconduct

Appellant contends numerous statements by the prosecutor amounted to prosecutorial misconduct. We conclude the claims are both forfeited and without merit.

As our Supreme Court has explained: "Under the federal Constitution, a prosecutor commits reversible misconduct only if the conduct infects the trial with such ' " unfairness as to make the resulting conviction a denial of due process." ' (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . .) By contrast, our state law requires reversal when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court of the jury' (*People v. Price* (1991) 1 Cal.4th 324, 447 . . .) and ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct" ' (*People v. Wallace* [(2008)] 44 Cal.4th [1032,] at p. 1071 . . .). To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm. (*People v. Tafoya* [(2007)] 42 Cal.4th 147, 176.)" (*People v. Davis* (2009) 46 Cal.4th 539, 612; see also *People v. Valdez* (2004) 32 Cal.4th 73, 122.)

Comments on delay in prosecution.

Appellant first contends the prosecutor appealed to the passions and prejudices of the jury when he stated in his closing argument, "I'm sure you heard the saying that justice sometimes moves slow. Well, its time, Ladies and Gentlemen for the defendant to be held accountable for his actions back in 2001." The prosecutor made

other references to the delay in bringing appellant to trial and argued, "It's time. It's time to hold [appellant] accountable." Appellant contends the comments amounted to misconduct because they implied appellant was responsible for the delay between Aquil's injuries and the trial date.

Appellant did not object to these statements at trial and has, therefore, forfeited appellate review of their propriety. (*People v. Davis, supra*, 46 Cal.4th at p. 612.) Had the claim been preserved for review, we would reject it. When a claim of prosecutorial misconduct focuses on comments made by a prosecutor to a jury, "we determine whether there was a reasonable likelihood the jury construed or applied the remarks in an objectionable fashion." (*People v. Brady, supra,* 50 Cal.4th at p. 584.) There was no such likelihood here. First, the jury was instructed that counsel's comments are not evidence, and it is presumed to have followed that instruction. (*People v. Butler* (2009) 46 Cal.4th 847, 873.) Moreover, the prosecutor did not expressly blame appellant for the delay or imply that he hid from law enforcement. Instead, we understand the prosecutor to have been commenting more generally that a lengthy delay had occurred and it was time for this case to be resolved. The comments were brief and not inflammatory. They did not invite the jury to base its verdict on passion or prejudice, and instead urged the jury to end the case by reaching a verdict. There is no likelihood the jury could have applied the comments in an objectionable fashion.

Factual misstatement.

Appellant next contends the prosecutor committed misconduct by misstating a crucial fact. In his rebuttal argument, the prosecutor told the jury, "The whole idea there was no swelling, that's what this whole case is about. There was swelling. That brain was swelling so much that they had to go in there and they had to drill a hole in his head to try to relieve the pressure. . . . [Dr. Deakers] did say there was swelling to the brain, the cerebral adema that we talked about . . . and that was caused by blunt force trauma." Appellant contends this argument misstated the evidence because Aquil's medical records did not document any swelling to Aquil's forehead or scalp.

There was no misconduct. Two physicians testified about Aquil's injuries. Dr. Deakers testified that, among other injuries, Aquil suffered from "cerebral adema," or "swelling of the brain[.]" This swelling could, in Dr. Deakers' opinion, have been caused by trauma, such as being hit on the head with a hard object. Dr. Bronson testified that Aquil's injuries were more consistent with shaken baby syndrome than with blunt force trauma because there was no evidence of swelling to his forehead or scalp. These two expert witnesses offered different explanations for Aquil's injuries. In effect, the prosecutor's rebuttal argument urged the jury to credit Dr. Deakers' opinion rather than Dr. Bronson's. The argument did not misstate Dr. Deaker's testimony and therefore was not misconduct. (*People v. Seaton* (2001) 26 Cal.4th 598, 663.)

Improper questioning .

Appellant contends the prosecutor committed misconduct when he asked Nichole Goods, "And did you see [Marcellous and Aquil] again one week prior to the 13th [of December]?" He contends this was a leading question, intentionally asked in bad faith for the purpose of insinuating prejudicial matter that would not otherwise be admissible. (See, e.g., *People v. Bell* (1989) 49 Cal.3d 502, 532; *People v. Pitts* (1990) 223 Cal.App.3d 606, 734.) We disagree. The question was not leading because it did not suggest the answer; Goods could have answered either "yes," or "no." (*People v. Williams* (1997) 16 Cal.4th 635, 672.) Even if it had been a leading question, we can perceive no resulting prejudice to appellant. In the defense case, appellant's grandmother

contradicted Goods by testifying that she was not present at the party where she claimed to have seen the children.

Appellant contends the prosecutor badgered Kenneth Brasher, who testified that he could not remember anything about 2001, including any facts about the children or Aquil's injuries. We reject the contention for the same reason: even if the prosecutor badgered Brasher, appellant was not prejudiced. Brasher maintained that he could not recall anything. Defense counsel used that testimony to his advantage by highlighting Brasher's illegal drug use and prior conviction for inflicting corporal injury on a spouse or cohabitant. The prosecutor's questioning only made Brasher seem more unsympathetic and unreliable. Appellant, who sought to blame Brasher for Aquil's injuries, was not prejudiced by that circumstance.

Vouching.

Finally, appellant contends the prosecutor improperly vouched for Marcellous' credibility. In his closing argument, defense counsel argued Marcellous' testimony about appellant beating Aquil was inconsistent with the medical evidence and could not be trusted. Defense counsel also suggested Marcellous might have been coached because the detectives who first interviewed him did not video tape or otherwise record the interview. As a consequence, it was impossible to know what questions Marcellous was asked or how certain he was of his answers. The prosecutor responded in his rebuttal argument: "[Marcellous] wasn't up here lying. Nothing -- nothing on the record would indicate that he was coached to say what he had to share with you. Everything on the record supports the fact that he's told the police, every time he's been talked to, the same thing he's told you on the stand. [¶] . . . .
[¶] . . . . [¶] Counsel just can't ignore Marcellous' testimony. You can't ignore Marcellous' testimony because that boy has been strong. He's been strong for his brother. He told the truth when he talked to the police. He's maintained the truth, and he told you the truth."

Appellant forfeited review of this claim by failing to object to the argument in the trial court. (*People v. Davis, supra*, 46 Cal.4th at p. 612.) We would reject it in

any event. "Prosecutorial assurances, *based on the record*, regarding the apparent honesty or reliability of prosecution witnesses, cannot be characterized as improper 'vouching,' which usually involves an attempt to bolster a witness by reference to facts outside the record." (*People v. Medina* (1995) 11 cal.4th 694, 757, emphasis removed.) The prosecutor's comments here were based on Marcellous' testimony. He urged the jury to credit Marcellous' description of the events because that description had remained consistent from the time of his first interview with police. The prosecutor made a fair comment on the witness' credibility and did not refer to facts outside the record. As a consequence, his argument did not constitute vouching and was not misconduct.

Cumulative Prejudice.

Appellant urges us to conclude the cumulative effect of these incidents of prosecutorial misconduct was prejudicial and rendered his trial fundamentally unfair. Because we conclude the prosecutor did not commit misconduct, there is no prejudice to accumulate. (*People v. Williams* (2013) 58 Cal.4th 197, 291; *People v. Smithey* (1999) 20 Cal.4th 936, 1018.)

Conclusion

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Dennis L. Landin, Judge

Superior Court County of Los Angeles

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

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