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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. STEVE CHAVEZ, Defendant and Appellant.	B235949 (Los Angeles County Super. Ct. No. TA110847)
In re STEVE CHAVEZ, On Habeas Corpus.	B241224

APPEAL from a judgment of the Superior Court of Los Angeles County. Paul A. Bacigalupo, Judge. Reversed with directions.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Paul A. Bacigalupo, Judge. Writ denied as moot.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

Steve Chavez appeals from the judgment after a jury found him guilty of first degree murder, assault with a firearm and second degree robbery and found that he was sane when he committed these crimes. In an accompanying petition for a writ of habeas corpus Chavez contends his trial counsel was negligent in failing to properly object to prosecutorial misconduct during closing argument. We affirm the judgment insofar as it finds Chavez guilty of the charges against him but reverse the judgment as to sanity and penalty on the ground that evidentiary errors prejudicially affected the verdict and remand the cause to the trial court to retry the issue of sanity. This disposition renders the petition for habeas corpus moot.

I. THE GUILT PHASE

A. Facts and Proceedings

Johanna Carranza testified as follows.

On the evening of February 15, 2010, Carranza and her fiancé, Carlos Diaz, planned to go out to dinner. Carranza was in her truck waiting for Diaz to move his car and join her when she heard gunshots from behind the truck and saw Diaz get out of his car and run into the house. Diaz's friend, Chavez, was running after Diaz holding a gun.

Carranza followed the men into the house. She found Chavez standing in the dining room still holding the gun. He looked "kind of like confused of where to go." Chavez went into the bedroom and looked under the mattress and behind the door mumbling something that Carranza could not understand. Diaz then entered the bedroom and started wrestling Chavez for the gun. Carranza joined in the struggle. All three had their hands on the gun and it went off. As they continued to grapple over the gun it went off a second time. This time a bullet struck Diaz who fell to his knees. Kneeling on the floor, Diaz told Chavez that "he loved him like a brother[.]" Chavez responded, "'I love you too,' pointed the gun, and shot him . . . [in] his head." Diaz died a short time later.

After the shooting Chavez ran down the driveway and Carranza, who had been grazed by one of the shots, called 911.

Robert Jackson, who lived across the street from Diaz and Carranza, testified that he saw Chavez sitting on a nearby bridge at approximately 1:00 p.m. on the day of the shooting. Chavez was making a circular motion with the index finger of his right hand. Later that day Jackson was sitting on his porch when he saw Chavez running up the street toward Diaz and take a shot at him. Diaz ran into his house and Chavez followed him. Jackson heard more gunshots and saw Chavez come out of the house. Chavez was "stumbling and dropping bullets in the street." Jackson and Chavez looked each other in the eye and then Chavez "went on up the street."

As Chavez proceeded from Diaz's house, he encountered Ricardo Valencia riding a bicycle. Chavez pointed his gun at Valencia and demanded the bicycle. Valencia gave it to him and Chavez rode away.

Chavez was apprehended in Phoenix Arizona a week later on a charge of car theft. When he was arrested he told the Phoenix police that he was wanted for "murder" in California.

Chavez testified in support of his defense of imperfect self-defense. He admitted that he shot Diaz who had been his close friend for approximately 11 years. He told the jury that he thought Diaz wanted to shoot him because: "I had got shot recently . . . and I wasn't sure who did it, you know, and . . . I would be hearing people behind the fence [of his home] saying that they were going to kill me and stuff." For the past three years Chavez had heard people behind the fence "talking like they were gonna kill me." For example, Chavez heard voices saying: "'Look, we can go and get him right now. . . . We got a gun. We should go get him right now. . . . He won't even know who it was.'" Chavez also heard gunshots on the other side of the fence. On several occasions Chavez called Diaz's cell phone to tell him what the voices were saying and he could hear Diaz's phone ringing behind the fence. Diaz told Chavez the voices worked for him. At first Chavez thought Diaz was joking but later he changed his mind. Chavez began to believe Diaz was involved with the voices when Diaz told him that once he had drugged him and he didn't know it. Approximately a year before the shooting Diaz told Chavez:

"I'm your worst enemy, and you don't even know it[.]" Diaz also said there had been times when he spit and put feces in Chavez's food.

Five days before the shooting Chavez stole an unloaded gun from his uncle and loaded it. He said he armed himself for protection because someone had shot at him two months earlier. On the day of the shooting he waited on the bridge for a couple of hours for Diaz to come home from work. Chavez told the jury that he shot Diaz because: "I was in fear for my life." Asked to elaborate, Chavez stated that he and Diaz "weren't really getting along at that time" and when he saw Diaz get out of his car with "his hands down by his waist . . . I panicked." Chavez said he knew that Diaz had a gun and when he saw Diaz with his hands by his waist: "I wasn't sure what he was doing, you know, if he was reaching for a gun or what."

Chavez also testified that after the shooting he stole the bicycle and rode it to the Metroline where he took a train to Long Beach. In Long Beach he stole a car and drove it to Arizona. He fled the scene, he stated, because he was afraid that if he was seen with a gun he would be shot by the police or by gang members in his neighborhood.

Trial was bifurcated on the issues of guilt and sanity. In her rebuttal closing argument in the guilt phase the prosecutor told the jury: "We don't prosecute innocent people." Defense counsel immediately objected to that remark and the court sustained the objection. Counsel did not ask the court to admonish the jury with respect to the prosecutor's remark.

The jury rejected Chavez's claim of imperfect self-defense and found him guilty of first degree murder, assault with a firearm and second degree robbery and found true the firearm use enhancements. The court sentenced Chavez to a total prison term of 56 years to life.

B. Discussion

Chavez seeks reversal of his murder conviction on the grounds of the prosecutor's misconduct in her closing argument and his counsel's failure to make a proper objection to the misconduct. We agree that the prosecutor's comment, "We don't prosecute

innocent people," was improper. (See 5 Witkin, Cal. Crim. Law (3d ed. 2000) Criminal Trial, § 585, pp. 835-837.) We also agree that in most cases such claim is preserved for appeal only if the defendant objects and requests an admonition. (*People v. Blacksher* (2011) 52 Cal.4th 769, 829.)

Here, defense counsel objected to the prosecutor's statement and the court sustained the objection but counsel did not seek an admonition. We conclude, however, that it is not reasonably probable that the prosecutor's improper statement would have changed the outcome of the guilt phase of the trial.

Chavez admitted that he saw Diaz with "his hands down by his waist" and panicked. He knew that Diaz had a gun but "wasn't sure what [Diaz] was doing, you know, if he was reaching for a gun or what." Thus, by his own testimony, he was at least guilty of manslaughter and therefore not an innocent person. The prosecutor's remark therefore could not have prejudiced him.

II. THE SANITY PHASE

A. Facts and Proceedings

At the sanity phase of the trial the parties stipulated that the jury could consider the evidence from the guilt phase.

It was undisputed that Chavez suffered from schizophrenia and that his mental illness was manifested by delusions, paranoia and hallucinations. Three psychiatrists called by the defense so testified. (The prosecution did not present any expert testimony on the issue of sanity.) Family and friends testified that Chavez had been hearing voices and seeing ghosts from the time he was 10 or 11 years old up to the time he shot Diaz. Chavez's mother testified that when he was a child he talked about seeing things and hearing voices in his head, but she could not afford to seek help for him.

The three psychiatrists agreed that Chavez's mental impairment caused him to not understand that killing Diaz was morally wrong at the time of the killing.

Dr. Gordon Plotkin testified that in his opinion on the day of the shooting Chavez was schizophrenic; he did not "understand whether it was right or wrong to shoot Carlos

Diaz" and that this lack of understanding also caused Chavez to shoot Carranza. The court, however, did not permit Dr. Plotkin to answer defense counsel's question whether Chavez was insane at the time that he stole the bicycle. The court ruled that an expert could not testify as to the ultimate question of sanity. Defense counsel did not thereafter ask this witness or the other psychiatric witnesses whether Chavez was insane at any time during the shooting or escape.

In closing argument the prosecutor told the jury it should find that Chavez was not insane if he knew that killing Diaz was morally or legally wrong. Defense counsel did not object nor did the court correct the prosecutor at that time.

During Dr. Rothberg's testimony the prosecutor attempted to draw a contrast between Chavez's behavior—fleeing the scene of the crimes—and the behavior of Mark David Chapman, the man who shot John Lennon. The prosecutor stated as a fact that, after killing Lennon, Chapman sat down and read a book until the police arrived. The prosecutor asked Rothberg whether Chapman's behavior—remaining on the scene reading—"would show someone who wasn't aware of what he was doing was wrong and try to avoid capture . . . ?" Chavez objected "on relevance grounds" that it was "outside the scope of this proceeding what famous people did. It has no bearing on evidence in this case pertaining to my client." The court overruled this objection on the ground that the prosecutor was "allowed to test [Rothberg's] theories and knowledge."

B. Discussion

The court erred in its ruling on both evidentiary issues discussed above.

The parallel the prosecutor attempted to draw between the man who killed John Lennon and the defendant in this case was irrelevant. What one killer did after shooting his victim has nothing to do with Chavez's conduct or state of mind in this case.

More importantly, the court erred in not allowing Dr. Plotkin to answer this question: "[I]n your opinion, [Chavez] was not legally insane for purposes of the robbery; correct?" The prosecutor objected to the question on the ground that Chavez's sanity was an ultimate fact for the jury to determine and therefore was an improper

subject for an expert opinion. The court agreed and sustained the objection. Chavez contends the ruling was error and the opinion should have been admitted. We agree with Chavez. Although the opinion was the ultimate issue to be decided by the jury, it was nonetheless a proper subject for expert opinion. (*People v. Kelly* (1992) 1 Cal.4th 495, 539, fn. 10 ["When the prosecution asked ultimate questions under the *M'Naghten* test, the court properly allowed them over defense objection"].)[1] Further, the prosecutor misstated the definition of insanity. (See *People v. Coddington* (2000) 23 Cal.4th 529, 608 ["wrong," as used in the definition of insanity, is not limited to legal wrong but also encompasses moral wrong, and a defendant who cannot distinguish between moral right and wrong is insane even if he understands his act is unlawful].)

These errors taken together were prejudicial. Although counsel did not follow up his questioning of Dr. Plotkin regarding the bicycle theft with a question about Chavez's sanity at the time of the killing, once the court ruled that an expert could not testify to the ultimate issue of sanity, it would have been futile to continue this line of questioning. Further, it is apparent from the psychiatrists' testimony, and considering the definition of insanity, that all three experts would have opined that Chavez was insane at the time of the shooting. We acknowledge that each expert testified to opinions on underlying facts, which, if taken together, supported insanity. Nonetheless three expert opinions that Chavez was insane would have constituted powerful evidence in favor of a finding of insanity, especially in light of the failure of the prosecution to call an expert to testify otherwise. Further, the prosecutor's misstatement of the definition of insanity could well have confused the jury. Although the "John Lennon" error standing alone would not require reversal, it did add to the prejudice. Thus it is reasonably probable that the errors contributed to the jury's finding that Chavez was not insane at the time of the shooting.

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[1] Legal insanity under the *M'Naghten* test is established when "the mental illness is manifested in delusions which render the individual incapable either of knowing the nature and character of his act, or of understanding that it is wrong . . . ." (*People v. Skinner* (1985) 39 Cal.3d 765, 782.)

DISPOSITION

The judgment is reversed. The case is remanded for a new trial solely on the question of defendant's sanity. The verdicts from the guilt trial remain in full force and effect pending the outcome of the sanity trial. If defendant is found sane the court shall reinstate the judgment as to sanity and penalty. If the defendant is found not sane the court shall proceed in accordance with law.

The petition for writ of habeas corpus is denied as moot.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.