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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.

JORGE MONTES,

Defendant and Appellant.

B271178

(Los Angeles County
Super. Ct. No. GA096857)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Michael Villalobos, Judge. Affirmed.

Karen Hunter Bird, 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, Zee Rodriguez, Deputy Attorney General, for
Plaintiff and Respondent.

Defendant and appellant Jorge Montes challenges his convictions for criminal threats and battery on a cohabitant. He contends that the prosecutor committed misconduct by making improper statements during both opening statements and closing arguments. We affirm.

FACTS AND PROCEEDINGS BELOW

At about 3:00 a.m. on August 7, 2015, Anthony Lara, a police officer with the San Gabriel Police Department, responded to a call at the home where Montes lived with his mother and with D.G., who was Montes's girlfriend and the mother of his infant son. Montes answered the door, and Lara could see D.G. in the hallway holding the baby and appearing to be upset.

Lara testified that D.G. told him that while she and Montes were lying in bed that night, Montes asked her if she felt hands touching her from inside the mattress they were lying on. Both D.G. and Montes's mother testified that Montes has a history of methamphetamine addiction, and that this sometimes causes him to hallucinate.

According to Lara, D.G. told him that when she did not respond, Montes became angry. Montes got out of bed and began stabbing the mattress with a knife. D.G. asked him to stop for fear that he would wake up the baby, who was sleeping in the same bedroom, but this made Montes even angrier.

Lara testified that D.G. told him that Montes then grabbed her by the arm and pulled her out of bed, telling her that there were men outside watching him. D.G. then left the room to change clothes so that she could leave, but when she came back to get the baby, Montes would not let her come back into the bedroom. Montes pushed her away and hit her on the arm twice as she tried to re-enter. According to Lara, D.G. told him that Montes then said, " 'Bitch, I want to hit you in the face so bad, but I don't want to get

in trouble.’ ” D.G. told the officer that she hit Montes several times in self-defense while trying to get back into the bedroom. Montes eventually let D.G. into the bedroom, at which point she picked up the baby and went out again. Montes told D.G. that if she left, he would find her and kill her. D.G. told Lara that she was too afraid to leave, so she stayed in the house and tried to calm Montes down until the police arrived. Later that night, D.G. provided the police with a written statement of what had happened. Lara testified that he saw bruises on D.G.’s arm consistent with the story she told him.

Lara later entered the bedroom, where he found that the bed was “messed up,” with several slash marks and cuts along its side. The officer found a large military-style knife on the floor beside the bed. He also discovered several pieces of ammunition of different calibers on the moldings of the doors, which Montes claimed were there for decoration, and a box of shotgun shells. Lara conducted a records check and determined that Montes had previously been convicted of a felony, and that he was therefore prohibited from possessing ammunition.

Lara also testified that he spoke with Montes’s mother, who lived in the house with Montes and D.G. She told the officer that she awoke to the sound of Montes fighting with D.G. She then went back inside her own bedroom because she did not want to get involved.

Another San Gabriel Police Officer, Gilbert Lee, testified that he photographed D.G. approximately four days after the incident with Montes. The photographs showed dark bruises on D.G.’s forearm. According to Lee, the pattern of bruises was consistent with D.G.’s statement that Montes struck her twice on the arm and grabbed her by the arm.

An information filed December 2, 2015, charged Montes with one count of criminal threats, in violation of Penal Code, section 422, subdivision (a),¹ one count of possession of ammunition by a felon, in violation of section 30305, subdivision (a)(1), and one count of battery of a cohabitant, in violation of section 243, subdivision (e)(1).

At trial, D.G. denied making many of the statements Lara attributed to her. D.G. testified that she was angry at Montes because he had recently told her that he wanted to get back together with his ex-wife. She said that because of her anger, she lied to the police when she said that Montes grabbed her by the arm, and that Montes said he felt hands underneath the mattress. She also claimed that she lied to the police about Montes hitting her because she wanted to get Montes arrested. According to D.G.'s trial testimony, she was the one who began hitting Montes, and Montes closed the bedroom door on her to stop her from hitting him. When the door was closed, D.G. then threw herself against the door. D.G. testified that Montes left the bedroom and was on his way out of the house when the police arrived.

The jury found Montes guilty on all three counts. The trial court sentenced him to two years imprisonment. The sentence consisted of the mid-term of two years for criminal threats, a concurrent sentence of two years for possession of ammunition, and a concurrent sentence of 201 days for battery of a cohabitant.

¹ Unless otherwise specified, subsequent statutory references are to the Penal Code.

DISCUSSION

Montes contends that the prosecutor erred² by making improper statements during the opening statement and closing argument. On one of these occasions, Montes's attorney failed to preserve this argument by objecting, and Montes claims that this constituted ineffective assistance of counsel. We do not decide whether the statements constituted prosecutorial error because any error was not prejudicial.

“The applicable federal and state standards regarding prosecutorial [error] are well established. “ ‘A prosecutor’s . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct “so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.” ’ ” [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial [error] under state law only if it involves “ ‘the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.’ ” [Citation.] ” (*Hill, supra*, 17 Cal.4th at p. 819.) Although a prosecutor has wide latitude to argue her case and “may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience” (*ibid.*), it is error for a prosecutor to mischaracterize the evidence in a case. (*Id.* at p. 823.)

² Montes describes the prosecutor's actions as prosecutorial misconduct. Because “the term prosecutorial ‘misconduct’ is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind,” we follow our Supreme Court in referring to the transgression as prosecutorial error. (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1 (*Hill*).)

Furthermore, a “ ‘prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] As the United States Supreme Court has explained, the prosecutor represents “a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” (*Berger v. United States* (1935) 295 U.S. 78, 88 . . .)’ ” (*Hill, supra*, 17 Cal.4th at p. 820.) A prosecutor may commit error by “ ‘appeal[ing] to the jury to view the crime through the eyes of the victim.’ ” (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1344.)

Montes contends that the prosecutor erred in this case in two respects. First, Montes alleges that the prosecutor stated facts not in evidence. Prior to the beginning of the trial, the prosecutor informed the court that she did not intend to call an expert witness to testify as to the behavior of victims of domestic violence. Indeed, she did not call any such expert during trial. Nevertheless, both in her opening statement and in closing arguments, the prosecutor made statements that, according to Montes, reflected expert knowledge of the way domestic violence victims behave. During opening statements, the prosecutor stated as follows: “*As often as domestic violence victims do*, [D.G.] was desirous of prosecution the night when it happened, and she [later] changed her mind and blamed everything on herself wanting the defendant back.” (*Italics added.*) Montes’s attorney did not object. The prosecutor made a similar statement in closing arguments. The prosecutor recounted some of the statements D.G. made at trial, saying that D.G. “told you she punched herself with her left fist to the right-upper arm and bruised herself. She said she punched herself five times, approximately.” The prosecutor then

concluded, “[t]hat’s a typical story told by domestic violence victims.” This time, Montes’s counsel did object, but the trial court overruled the objection.

Montes also alleges a second form of prosecutorial error, arguing that the prosecutor made a statement that failed to maintain impartiality and urged the jury to view the events from the victim’s perspective. During her opening statement, the prosecutor urged the jury as follows: “I want you at the end of the presentation of all the evidence to be [D.G.’s] voice.” Montes’s counsel did not object to this statement.

We need not decide whether any of these statements constituted prosecutorial error because even if they did, Montes has not shown that he suffered prejudice as a result. In order to obtain a reversal of his conviction for prosecutorial error, state law requires a defendant to show that it is reasonably probable that he would have obtained a better outcome if not for the prosecutorial error. (See *People v. Strickland* (1974) 11 Cal.3d 946, 955.) If the defendant’s attorney failed to object to the alleged misconduct, a similar standard of prejudice applies in order for the defendant to obtain relief for ineffective assistance of counsel. The defendant must show that “there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’” (In re Avena (1996) 12 Cal.4th 694, 721.)

In this case, there is no reasonable probability that Montes would have obtained a better outcome if not for the prosecutor’s statements. There were strong reasons for the jury to believe that D.G. was telling the truth in the account she gave on the night of the attack, and was lying when she testified in court. The physical evidence in the case was consistent with her first account. Police found holes in the mattress where the couple slept, and a large

knife next to the bed. This was consistent with D.G.'s initial statement that Montes stabbed the mattress repeatedly with a knife. In her trial testimony, D.G. did not explain how the holes appeared in the mattress. The shape of the bruises on D.G.'s arm four days after the attack was also consistent with her initial story, when she said Montes had grabbed her roughly by the arm. In addition to the physical evidence, the jury was also in a position to watch D.G. testify and evaluate her credibility. The prosecutor's statements regarding the way victims of domestic violence often behave were unimportant in comparison with all this evidence.

Similarly, the prosecutor's comment encouraging the jurors to "be [D.G.'s] voice" did not prejudice Montes. Even if the prosecutor improperly encouraged the jury to view the case from the victim's perspective, the comment was so mild and isolated that it could not have made a difference in the outcome of the case. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1344.)

Montes argues that the prosecutor's conduct was not merely error under state law, but rose to the level of a federal Constitutional violation. He contends that the errors were so egregious that they infected the trial with unfairness, and that in consequence, the prosecutor's conduct violated his right to a fair trial. (See *Hill*, *supra*, 17 Cal.4th at p. 819.) We disagree. Montes has alleged only three instances of misstatements by the prosecutor. Even if all of these constituted error, they were not sufficiently severe or pervasive to infect the entire trial with unfairness.

DISPOSITION

The judgment of the trial court is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

LUI, J.