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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. TYRONE DEPREE JOHNSON Defendant and Appellant.	B222848 (Los Angeles County Super. Ct. No. LA057984)

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

William L. Heyman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Tyrone Johnson appeals from his conviction for assault and battery, contending the trial court erred in denying his motions to strike the jury panel, precluding a defense witness, and failing to instruct sua sponte on self-defense. He also contends his constitutional rights were violated by several acts of prosecutorial misconduct and he received ineffective assistance of counsel. We affirm.

BACKGROUND

Johnson owned Fathead Apparel, a company that embellished articles of clothing with silkscreen and crystal designs. Fathead employed Israel Serrano Rodriguez (Serrano) and his cousin Elmer Amaya at its factory, where their duties included applying crystal designs to items of clothing. Occasionally, Serrano and Amaya would make mistakes with the designs or otherwise damage articles they worked on. Sometimes Fathead took no action regarding damaged articles, but other times it deducted the cost of the articles from Serrano's or Amaya's paycheck. On several occasions, Serrano and Amaya would smuggle damaged articles out of the factory in order to conceal the damage and avoid having the cost of the item deducted from their pay.

On January 2, 2008, Fathead's office manager telephoned Johnson and told him Serrano and Amaya were suspected of stealing from the factory. Johnson arrived with two other men at the factory, where they met a fourth man. The four separated and restrained Serrano and Amaya, then beat them severely, at times with a one- to two-foot-long piece of wood that eventually broke during the attack.

After the attack, the perpetrators drove Serrano to within a block of a fire station, where they released him. He walked to the fire station, where he was bandaged, and was then taken by ambulance to a hospital, where he received 15 stitches to close a wound on his forehead. Amaya stumbled home, where he fainted. He was taken by ambulance to a hospital and underwent surgery to reset his dislocated jaw and close wounds near his eye and on the back of his head.

On January 11, 2008, police discovered several bloodstains at the Fathead factory. They interviewed Johnson and one of the other assailants, noting that neither showed any sign of having been injured during the attack.

Johnson was tried along with two codefendants. At trial, Serrano and Amaya identified Johnson as one of their assailants.

Johnson testified in his own defense. He maintained that he separated Serrano and Amaya in part because he wanted to see what each would say about the other. When his back was turned, Serrano hit him on the back of the neck with a piece of wood. Johnson took the piece of wood from Serrano and hit him with it. They fought for two or three minutes, the fight ending when Serrano fell and hit his head on a table. Johnson stated that during the fight he received a busted lip, a bloody nose and several scrapes. Carlos Richardson, one of the men who had accompanied Johnson to the factory, testified that Amaya attacked the men who had accompanied him to another room but was injured in turn when he hit his head first on a door hinge and then a printer.

The jury found Johnson guilty of two counts of assault by means likely to produce great bodily injury in violation of Penal Code section 245, subdivision (a)(1) and two counts of battery with serious bodily injury in violation of Penal Code section 243, subdivision (d). The trial court sentenced him to a total term of six years in state prison.

Johnson appealed.

DISCUSSION

Johnson contends the court erroneously denied his motion to dismiss the jury panel, excluded the testimony of a defense witness, and failed to instruct the jury that the prosecution had the burden of proving lack of self-defense. He also contends several acts of misconduct by the prosecutor violated his constitutional rights.

1. Motion to Dismiss the Venire: Juror Taint

During voir dire, the trial court told Johnson to be mindful that some of the jurors appeared to be uncomfortable that, due to the size of the courtroom, they sat only a few feet away from him. Johnson was offended by the observation, saying, "I'm a big black dude, and it intimidates people, and it really threw me for a loop." The trial court told Johnson there was nothing they could do about the close proximity and that he had done nothing wrong and need not change his personal behavior.

On the second day of voir dire, a codefendant's trial counsel informed the trial court that Juror No. 21 told defendants that Jurors No. 2 and No. 13 had prejudged their guilt. When the trial court examined Juror No. 21 outside the presence of other members of the jury pool, she reported that in a conversation among herself, Juror No. 2 and Juror No. 13, Juror No. 2 had speculated that of the three defendants, Johnson was the "leader" and would be found guilty. Juror No. 13 agreed with Juror No. 2 that all three defendants were guilty. Juror No. 2 also stated that one of the defense attorneys had represented her brother-in-law and had failed to achieve a favorable result. Juror No. 21 reported that she and "a bunch" of other prospective jurors had discussed the case in the hallway over the last two days, many speculating about what they could say to get out of jury service.

The examination of Juror No. 21 continued the next day. She reported that Juror No. 58 had also voiced an opinion about the merits of the case, and Juror No. 62 or No. 65 may also have prejudged the evidence.

When the court examined other prospective jurors individually, Juror No. 2 stated that neither she nor Juror No. 13 had ever expressed to anyone a belief that any of the defendants were guilty. Juror No. 13 also denied engaging in any conversation or forming any opinion about defendants' guilt. Juror No. 58 denied engaging in any conversation with other prospective jurors about the merits of the case. Neither Juror No. 62 nor Juror No. 65 were individually examined.

The trial court denied defendants' motion to discharge the entire venire, stating that Juror 21's "lack of credibility was amazing." Jurors No. 2 and No. 21 were excused for cause during voir dire. Juror No. 13 became a member of the jury but was excused for cause before opening statements after she complained that the defendants made her uncomfortable.

The trial court repeatedly admonished the jury regarding the presumption of innocence, and each juror indicated he or she could judge the case impartially.

Johnson contends the circumstances of this case give rise to a reasonable inference that the jury was tainted. The courtroom was small, several jurors were uncomfortable about being in Johnson's presence, and Juror No. 2 "may have spoken with other

members of the jury panel" about the three defendants' guilt and the ineffectiveness of one of the defense attorneys, "thereby prejudicing other jury panel members against the defense trial attorneys and the defendants in general."

"[T]he trial court possesses broad discretion to determine whether or not possible bias or prejudice against the defendant has contaminated the entire venire to such an extreme that its discharge is required." (*People v. Medina* (1990) 51 Cal.3d 870, 889.) But such a drastic remedy "should be reserved for the most serious occasions of demonstrated bias or prejudice, where interrogation and removal of the offending venirepersons would be insufficient protection for the defendant." (*Ibid.*) On review, we defer to the trial court because it was in a position to assess the demeanor of the prospective jurors and the panel as a whole. (*People v. Thornton* (2007) 41 Cal.4th 391, 414.)

The record does not support Johnson's claim that the entire panel was tainted. None of the prospective jurors implicated during the bias hearing actually served on Johnson's jury, and each person selected for the jury affirmed his or her ability to be fair and impartial. The trial court admonished the prospective jurors at the beginning of voir dire that they must not infer that defendants were guilty and later gave all the required instructions on the presumption of innocence and the burden of proof. All of the jurors who expressed a contrary view were excused, and there is nothing in the record to suggest that the remaining jurors disregarded the trial court's admonishments and, instead, chose to believe the dismissed jurors' biased opinions. We find no abuse of discretion.

2. Motion to Dismiss the Venire: Judicial Error

In voir dire, during a line of questioning regarding the presumption of innocence, the trial court posed the following hypothetical to the jury panel: "If there were to be no facts presented in this case, I can guarantee you, all of us would not have been able to meet each other. [The prosecutor] would have a better place and something more interesting to do than to say, 'Judge, I have no witnesses, I have no evidence but I like the idea of wearing a tie into your courtroom.' . . . [¶] If I told you, 'Okay all 64 of you . . .

run in to the small room called the jury room and you have to decide the case right now.' All of you are sitting there saying, 'Wait a minute we haven't heard any evidence.' Correct. You have to reach a verdict right now. There's only one verdict you could possibly, if you understand the presumption of innocence, only one verdict you can reach by following the law. Not guilty."

Defense counsel moved to dismiss the venire on the ground that the trial court had implied to the prospective jurors that the evidence suggested defendants were guilty. The motion was denied.

Johnson contends the venire should have been dismissed because the trial court gave the jury the impression that the prosecutor had substantial evidence of guilt in this case. We disagree.

"[I]t is judicial misconduct for a judge to display bias against the defense case or in favor of the prosecution during voir dire" (*People v. Fatone* (1985) 165 Cal.App.3d 1164, 1169), but we conclude the trial judge's admittedly clumsy hypothetical did not preclude Johnson from obtaining a fair and impartial jury. True, the court did, at the outset of the hypothetical, imply that the prosecutor thought he possessed evidence of Johnson's guilt. But in doing so it was merely stating the obvious, and no reasonable prospective juror would have taken the implication to mean that the court thought defendant guilty, especially given that the entire point of the hypothetical was that the jurors must respect the presumption of innocence.

(The People's suggestion that Johnson forfeited the claim of error because his objection during trial to the court's comments did not come until 22 pages—in the reporter's transcript—after the comments were made, is rejected.)

3. Motion to Dismiss the Venire: Prosecutorial Misconduct

During voir dire, the prosecutor said to the jury panel, "[C]an anyone think of an example, particularly here in Los Angeles, where we see street justice being a huge, huge problem? And I'll give you a hint and it starts with the letter 'G'." [¶] . . . [¶] "[I]t's a problem in here because—" The prosecutor was cut off by an objection by defense

counsel. The court sustained the objection and admonished the jury that "[t]here is no gang involved in this case."

Back in front of the jury, the prosecutor said, "Now, street justice, for example, let's say it is Mr. Costco, who is the owner. But let's say the man or the woman on top is going to be the person to stop that person. [¶] Now, still let's say that Mr. Costco takes it a step further, and he isn't going to just stop this person for loss prevention. He runs out, grabs the person and starts pummeling." The prosecutor was again interrupted by an objection, which was sustained. The court admonished the prospective jurors that it would give them instructions and there would be no instruction on street justice.

Shortly thereafter, the prosecutor posed a hypothetical about someone being beaten for having mugged someone three days ago, suggested the situation is "like street justice," and asked the panel if they thought street justice was acceptable. Defense counsel again objected, and the objection was sustained.

Defense counsel moved to dismiss the venire on the ground that the prosecution was attempting to "indoctrinate" the jury and get it to prejudge the facts. The motion was denied.

Johnson contends the prosecutor's reference to gangs, when it is undisputed no gang is involved in this case, and his repeated references to street justice constituted misconduct, tainted the jury pool, and deprived him of a fair trial. We disagree.

"[A] prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and when it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action '"so infected the trial with unfairness as to make the resulting conviction a denial of due process."' [Citation.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 157, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th

390, 421.) "[W]hen the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Johnson was 42 years old at the time of trial and the owner of a successful clothing business. Nothing in the record suggests the jury believed he was the member of a street gang or that gang membership was in any way relevant to this case. Nothing suggests the prosecutor's fleeting references to street justice inflamed the jury against the practice or resulted in any sort of prejudice.

4. Motion for Mistrial: Prosecutor Misconduct

On the fourth day of trial, the prosecutor spoke with another deputy district attorney outside the courthouse during lunch. Although they did not discuss the instant case, the trial judge's name was mentioned and they discussed events that occurred in a different trial before the judge. After the discussion, the prosecutor noticed that prospective Juror No. 25 was within earshot. The prosecutor asked a security guard to ask Juror No. 25 if he had overheard the conversation. Juror No. 25 replied that he had not.

On the sixth day of trial, defense counsel elicited from Amaya that he had hired a civil attorney to file a civil lawsuit against Johnson. The prosecutor attempted to follow up on the line of questioning, but was cut short by a defense objection when he asked whether the civil attorney was hired to represent Amaya in any criminal proceeding against him. When the court sustained the objection, the prosecutor said, "So I can't ask whether he hired him in any way even though defense on cross asked him if he was scared about—." The prosecutor was again cut off, and a sidebar discussion ensued, during which defense counsel moved for a mistrial, which was denied.

On the eighth day of trial, during cross-examination of Johnson, the prosecutor asked Johnson if his clothing designs "accurately depict[ed] how [he] celebrated the gangster lifestyle." The defense objected to the question and moved for a mistrial. The trial court sustained the objection, denied the motion for a mistrial, and admonished the

jury, "early on in jury selection I told you, there's absolutely no issue of gang activity in this case. It remains as that. There's no instance, no issue of gang activity in this case."

Johnson contends these instances of prosecutorial misconduct infected the trial with such unfairness as to deprive him of due process under the Fourteenth Amendment. We disagree.

We review a ruling denying a motion for mistrial for abuse of discretion. (*People v. McLain* (1988) 46 Cal.3d 97, 113.) Here, the prosecution committed no misconduct. Nothing in the record suggests that the prosecutor discussed improper matters with another deputy district attorney, knew Juror No. 25 was within earshot of the discussion, or behaved improperly once he discovered that fact. It was not misconduct to attempt to discern why a victim had hired an attorney—at worst the prosecutor was guilty of asking an irrelevant question. We are perplexed by the prosecutor's repeated references to gangs and the "gangster" lifestyle, given the admitted absence of gang evidence in the record. We do not condone the comments, but because they were isolated and fleeting, we conclude they did not rise to the level of misconduct. Even if they did, the court's response was sufficient to cure any possible prejudice. Finally, it was undisputed that Juror No. 25 did not overhear the prosecutor's conversation with another deputy district attorney; the reference to the victim's having hired an attorney was ambiguous at best; and the prosecutor's reference to gangster lifestyle was brief, involved a relatively insignificant matter, and was immediately curtailed. We cannot conclude that admonitions to the jury were incapable of curing any purported harm. On the contrary, the admonition regarding lack of gang involvement in the case was sufficient to prevent any appreciable harm.

5. Exclusion of a Defense Witness

On the eighth day of trial, after defendants had rested, Johnson informed the trial court a recently discovered defense witness offered to testify as to the extent of Johnson's injuries following the attack. The court observed that the evidence was untimely and cumulative, as two witnesses and Johnson himself had already testified as to injuries received during the fight. The court precluded the witness.

Johnson contends he was precluded from presenting a complete defense. We disagree.

Both sides in a criminal case must reveal their witnesses at least 30 days before trial. (See Pen. Code, § 1054 et seq.) Penal Code section 1054.3, subdivision (a), requires that the defendant (and his or her attorney) disclose to the prosecution the "names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons . . . ." This requirement applies to "'all witnesses [a party] reasonably anticipates it is likely to call. . . .' [Citation.]" (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 376, fn. 11, superseded by statute on other grounds as stated in *Bowens v. Superior Court* (1991) 1 Cal.4th 36, 39.) In addition, Penal Code section 1054.7 provides in relevant part that the disclosure of witness names and addresses "be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred." Section 1054.5, subdivision (b), provides in part that "[u]pon a showing that a party has not complied with [the disclosure requirements] . . . , a court may make any order necessary to enforce the provisions of this chapter, including . . . prohibiting the testimony of a witness . . . . Further, the court may advise the jury of any failure or refusal to disclose and of any untimely disclosure."

"The court may prohibit the testimony of a witness pursuant to subdivision (b) [of Penal Code section 1054.5] only if all other sanctions have been exhausted." (Pen. Code, § 1054.5, subd. (c).)

We review the trial court's rulings on these matters for abuse of discretion. (*People v. Superior Court* (*Mitchell*) (2010) 184 Cal.App.4th 451, 459.) A trial court exceeds its jurisdiction in precluding witness testimony as a discovery sanction when it fails to exhaust other sanctions first. (*Ibid*.)

The trial court properly excluded the testimony of Johnson's late-discovered witness. At trial, Johnson's counsel represented that the witness would testify regarding Johnson's injuries after the attack. But Julie Stevenson, Fathead's office manager, had already testified that after the attack Johnson's nose was bleeding, he had a fat lip and a cut on his lip, and he suffered pain in his neck and had a swollen lip for a few days thereafter. Kermit Richardson, a Fathead employee, had testified he suffered injuries as a result of the incident. And Johnson testified to his own injuries.

A trial court has discretion to limit cumulative testimony. (Evid. Code, § 352.) We cannot conclude the trial court abused its discretion by excluding cumulative evidence regarding Johnson's injuries.

6. Self-Defense Instruction

CALJIC No. 9.00 provides in pertinent part that to prove assault the prosecution must prove that defendant "willfully [and unlawfully] committed an act which by its nature would probably and directly result in the application of physical force on another person." When it gave both this instruction and similar instructions on battery (CALJIC Nos. 9.12, 16.140), the court omitted the bracketed phrase "and unlawfully." Johnson did not ask for the instruction.

CALJIC No. 9.00 ends with the following optional bracketed paragraph: "[A willful application of physical force upon the person of another is not unlawful when done in lawful [self-defense] [or] [defense of others]. The People have the burden to prove that the application of physical force was not in lawful [self-defense] [defense of others]. If you have a reasonable doubt that the application of physical force was unlawful, you must find the defendant not guilty.]" The trial court did not give this bracketed instruction. Johnson did not ask for the instruction.

Johnson contends the court erred by failing to instruct the jury sua sponte that the prosecution had the burden of proving beyond a reasonable doubt that he did not act in lawful self defense. The contention is meritless.

At trial, Johnson's defense as to the Serrano attack was that he acted in self-defense. His defense regarding the attack on Amaya was that he never touched Amaya except to help him up after other Fathead employees attacked him.

No crime is committed by a person who commits the act charged through misfortune or by accident, "when it appears that there was no evil design, intention, or culpable negligence." (Pen. Code, § 26.) Perfect or "[t]raditional self-defense applies where the defendant believes he or she is facing an imminent and unlawful threat of death or great bodily injury, and believes the acts which cause the victim's death [or injury] are necessary to avert the threat, and these beliefs are objectively reasonable. [Citation.]" (*People v. Curtis* (1994) 30 Cal.App.4th 1337, 1357.)

"In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) But a defendant cannot complain for the first time on appeal "'that an instruction correct in law and responsive to the evidence was too general or incomplete.' [Citations.] Defendant's failure to either object to the proposed instruction or request that the omitted language be given to the jury forfeits his claim on appeal." (*People v. Valdez* (2004) 32 Cal.4th 73, 113.)

We independently review the trial court's failure to instruct on defenses. (*People v. Waidla* (2000) 22 Cal.4th 690, 733.)

Because Johnson did not object to the instructions when they were given, he cannot do so now.

The claim fails on the merits as well. The trial court gave standard jury instructions on self defense pursuant to CALJIC Numbers 5.30, 5.31, 5.50, 5.51, 5.52, 5.53, 5.54, 5.55 and 5.56. CALJIC No. 5.30 provides that it "is lawful for a person who is being assaulted to defend [himself] . . . from attack." CALJIC No. 5.50 provides that a "person threatened with an attack that justifies the exercise of the right of self-defense need not retreat." The court thus fully instructed the jury on Johnson's self-defense theory, and further instructions would have been superfluous. Any error in failing to give

the bracketed instructions was not prejudicial, as self-defense principles were repeatedly brought to the jury's attention through the other instructions.

7. Ineffective Assistance of Counsel

Johnson contends his counsel provided ineffective assistance by (1) failing to interview or call witnesses, (2) failing to meet with Johnson or prepare for trial, and (3) failing to object when a juror made a reference regarding Johnson and his codefendants that "the gang's all here" on the day of sentencing.

A claim that counsel was ineffective requires a showing by a preponderance of the evidence of objectively unreasonable performance by counsel and a reasonable probability that but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) The defendant must overcome presumptions that counsel was effective and that "'the challenged action "might be considered sound trial strategy."'" (*Ibid.*) To prevail on an ineffective assistance claim on appeal, "'"the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission."'" (*People v. Majors* (1998) 18 Cal.4th 385, 403.) "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697; accord, *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

Johnson argued at his sentencing hearing that he had several additional witnesses who would have testified as to his good character at trial but he was unable to bring the witnesses to defense counsel's attention due to counsel's unavailability. The trial court rejected the argument.

On appeal, Johnson contends "it was not until trial was underway that [he] was able to get defense counsel's attention long enough for defense counsel to speak with" the witnesses. We reject the argument outright, as Johnson fails to explain why he could not have brought the witnesses to defense counsel's attention. In any event, as explained by the trial court, even if defense counsel knew of the witnesses he would have had good

reason not to call them. Johnson had been arrested for assault and battery in 2006, for criminal threats in 2002 and for grand theft in 1999. If the defense had called the character witnesses, the trial court explained, the prosecutor would have impeached their testimony by bringing Johnson's arrest record to the jury's attention.

Johnson fails to explain how the record discloses lack of a rational tactical purpose for defense counsel's purported failure to call the requested witnesses or bring to the judge's attention an ambiguous remark made by a juror on the last day of trial.

It does not appear Johnson's counsel provided ineffective assistance. Nor is it reasonably probable a different result would have been achieved had Johnson's counsel done any or all of the things Johnson now argues he should have done. Accordingly, we reject Johnson's ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.