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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,
Plaintiff and Respondent,
v.
JIMMY GARCIA,
Defendant and Appellant.

A102595
(San Francisco County
Super. Ct. No. 187064)

Jimmy Garcia appeals from his conviction of second degree robbery following a jury trial. He contends that the prosecutor committed misconduct. He has also filed a supplemental brief arguing that there was *Blakely* error in the sentencing proceedings. (*Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531] (*Blakely*).) We find no error and affirm.

BACKGROUND

On June 12, 2002, San Francisco Police Officer Kevin Lyons and three other officers were working on a robbery abatement project in the Tenderloin district. Lyons was the decoy, dressed in dirty clothing, with \$42 in marked currency sticking out of his breast pocket.¹ He staggered up Jones Street as if inebriated, and stopped on the corner of Golden Gate Avenue, near St. Anthony's dining room where several people were

¹ The money recovered from defendant was not the money in the police photocopy produced at the trial. Officer Laflin explained that he had photocopied four sets of marked funds and mistakenly brought the wrong photocopy to court. He was able to identify the mark police had placed on the funds recovered from defendant.

gathered. When he stopped, defendant came up from behind him and grabbed him so he could not move his arms. Defendant let go and pushed Lyons in the back, causing him to stumble. Lyons looked down and saw that the money was gone.

Officer Ross Laflin was observing from an elevated position in a building. He saw defendant approach Lyons, place his arms around Lyons in a “bear hug” and proceed down Golden Gate Avenue with money in his hand. Officers followed defendant and arrested him. They recovered \$42 in marked bills from defendant’s pants pocket.

Defendant was charged with one count of second degree robbery. The information also alleged three prior prison terms pursuant to Penal Code section 667.5, subdivision (b). At the trial, the police officers involved in the robbery abatement detail testified. Defendant produced no witnesses. The jury found defendant guilty of second degree robbery on February 20, 2003. The court dismissed the prior prison term allegations because the prosecutor was not ready to proceed.

On April 25, 2003, the court sentenced defendant to the aggravated term of five years in prison, concurrent to defendant’s sentence for a parole violation. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant contends that the prosecutor committed misconduct by exposing his rap sheet to the jury, and that combined with arguing that the police were protecting society and that defendant was playing on the jury’s sympathy for the homeless and indigent, the misconduct is prejudicial. We find no misconduct.

“The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

The issue regarding defendant's rap sheet surfaced during defense counsel's cross-examination of Officer Laflin. Defense counsel repeatedly asked the officer who got credit for the arrest. The officer responded: "We don't take credit for these arrests." Counsel asked who got credit when multiple officers are involved in an arrest. Laflin responded it was probably the officer whose name appeared on the arrest card. Counsel pressed the point again, asking for details about the arrest card, and again asked who got credit for the arrest and whose statistics would reflect the arrest. Laflin responded: "It would be the officer's name who appears on the booking card, and then that star number—we have star numbers in San Francisco—that star number would go on that defendant's rap sheet."

When the prosecutor reexamined Officer Laflin, she asked whose star number was attached to defendant's case. When Laflin did not know, defense counsel stipulated that defendant's rap sheet contained the star numbers of two officers. Defense counsel subsequently objected to reference to the rap sheet and claimed that the prosecutor took the rap sheet out of her file and "flash[ed] it at the jurors" The court ruled that the defense opened the door to the statements about the rap sheet and denied the defense motion for a mistrial.²

"Since defendant is responsible for the introduction of the evidence, he cannot complain on appeal that its admission was error." (*People v. Moran* (1970) 1 Cal.3d 755, 762.) The trial court witnessed the prosecutor's actions at the time of the incident. The court stated: "From my viewpoint up here . . . I did not observe a flashing of the [rap] sheet." In addition, the prosecutor did not make any reference to the defendant's lengthy prior record in front of the jury. The fact that a rap sheet existed might have related only to this arrest. Defendant has shown no misconduct.

² After his conviction, defendant filed a motion for new trial arguing that the prosecutor engaged in misconduct by exposing his rap sheet to the jury. He attached a declaration from a legal intern stating that the jury foreperson told her that appellant's rap sheet was not discussed by the jurors, but was a factor during his deliberations. The court properly ruled the declaration inadmissible and determined there was no prejudicial misconduct.

Defendant notes two other incidents that he claims added to the prejudice generated by the rap sheet reference. He argues that the prosecutor improperly argued that the police were intrepid in protecting society from predators and that defendant was trying to play on juror sympathy for the homeless.

“[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.” (*People v. Lewis* (1990) 50 Cal.3d 262, 283.) The defense strategy was to denigrate the police for expending resources on such minor crimes. By arguing that the police were properly carrying out their duties, the prosecutor was countering the defense argument. There was no improper appeal to the jury to function as the conscience of the community. (See, e.g., *U.S. v. Beasley* (11th Cir. 1993) 2 F.3d 1551, 1559-1560 [improper for prosecutor to make repeated references to jury as a participant in the war on drugs]; see also *United States v. Bascaro* (11th Cir. 1984) 742 F.2d 1335, 1354 [“prosecutorial appeals for the jury to act as ‘the conscience of the community’ are not impermissible, unless calculated to inflame”].)

The prosecutor did not impermissibly demean defendant. “A prosecutor may argue vigorously and include opprobrious epithets and forceful language when warranted by the evidence. [Citations.]” (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074.) Colorful name calling is not misconduct when tied to the facts and made to counter a defense claim of lack of intent. (*People v. Hines* (1997) 15 Cal.4th 997, 1062 [prosecutor calling defendant a “predator” and “arrogant, cold, and malicious” was fair comment on the evidence].)

Defense counsel made several references to St. Anthony’s dining room and argued that the police purposely targeted “a soup kitchen” where they knew a large number of poor people would be present. The prosecutor countered by arguing that defendant did not come from St. Anthony’s and the only reason the defense was emphasizing the location was to play on the sympathy of the jurors. She argued that defendant was “sitting there with that sad expression on his face” to make the jurors believe he was too

“pathetic” to rob anyone. These comments are not impermissible epithets, but were tied to the evidence and related to the defense argument.

After reviewing the record on appeal, including the alleged acts of misconduct, we conclude that none of the questioned acts require reversal of defendant’s conviction.

There Was No *Blakely* Error

Defendant argues that contrary to the holding in *Blakely, supra*, 542 U.S. ___ [124 S.Ct. 2531], the trial court impermissibly sentenced him to the aggravated term based on facts that were not found true by a jury or admitted by defendant.

The court based the aggravated sentence on defendant’s recidivism, including his numerous prior convictions, three prior separate prison terms, being on parole at the time of the crime, and unsatisfactory prior performance on probation and parole. In *Blakely*, the United States Supreme Court reaffirmed the rule of *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), that “ ‘[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.’ ” (*Blakely, supra*, 542 U.S. ___ [124 S.Ct. 2531, 2533] italics added.)

“The language . . . in *Apprendi*, ‘[o]ther than the fact of a prior conviction,’ refers broadly to recidivism enhancements which include section 667.5 prior prison term allegations.” (*People v. Thomas* (2001) 91 Cal.App.4th 212, 223.) In this case, the court’s reference to defendant’s prior convictions, parole status and poor performance on probation and parole all pertained to defendant’s recidivism. If we were to assume that *Blakely* applies to the California determinate sentencing scheme, facts relating to recidivism are included within the exception to the rule of *Apprendi*. The trial court properly relied on defendant’s recidivism in imposing the aggravated term.

CONCLUSION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Stein, J.

Swager, J.