Filed 2/25/05 P. v. Fierro CA2/1

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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. OSCAR GERARDO FIERRO, Defendant and Appellant.	B175263 (Los Angeles County Super. Ct. No. BA255605)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anita H. Dymant, Judge. Affirmed.

Russell Fong, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Alan D. Tate, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Oscar Gerardo Fierro appeals from a judgment of conviction entered after a jury found him guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). The trial court sentenced defendant to state prison for the low term of two years. On appeal, defendant claims evidentiary error and prosecutorial misconduct. We reject these claims and affirm the judgment.

FACTS

When defendant arrived at his family's home in East Los Angeles at about 7:30 p.m. on October 25, 2003, he appeared to be intoxicated and angry. Because of this, his father, Gerardo Fierro (Mr. Fierro) asked him to leave the house about 10 minutes later. Defendant called his father a "punk" and said, "Why don't you get me out, you think you're bad." Mr. Fierro pushed defendant, who responded by striking him several times. Mr. Fierro went to the telephone to call the police, but defendant went to the extension telephone in another room and pushed the buttons on it, preventing Mr. Fierro's call from going through.

Mr. Fierro ran outside. Defendant came running out behind him, holding a pair of scissors over his head. He yelled, "I am going to kill you. I am going to come back and burn your cars." Mr. Fierro yelled to Mrs. Fierro, who was standing nearby talking to a neighbor, "Call the police." When defendant came up to him, Mr. Fierro pushed him. Defendant pushed his father and made a stabbing motion with the scissors. Mr. Fierro fell to the ground and blacked out. Defendant ran away.

Mr. Fierro was treated at the scene by paramedics, taken to the hospital, examined and released. When he returned home, the front door was ajar, and defendant was sleeping on the couch. Mr. Fierro left the house and called the Sheriff's Department. Sheriff's deputies arrived and took defendant into custody. Defendant's sister gave the deputies the pair of scissors defendant used in the attack on his father.

CONTENTIONS

Defendant contends the trial court erred in admitting Mr. Fierro's extrajudicial statements to sheriff's deputies as prior inconsistent statements absent a finding that Mr. Fierro was being evasive or deceptive in his testimony. We find no error.

Defendant further contends the trial court erred in not finding prosecutorial misconduct when the prosecutor attacked defense counsel's personal integrity. We disagree.

DISCUSSION

Prior Inconsistent Statement

Mr. Fierro testified that he still loved defendant and did not want to testify against him. He testified that he did not smell any liquor on defendant's breath when defendant came home. He did not remember telling the sheriff's deputies that he believed defendant was under the influence of alcohol. He did not remember spending time with defendant before the attack or whether they talked to each other. He did not remember anything defendant said to him other than that defendant called him a "punk."

Los Angeles County Deputy Sheriff Alfred Galvan testified that he spoke to Mr. Fierro at the emergency room. Over defendant's hearsay objection, Deputy Galvan testified that Mr. Fierro stated that defendant told him, "I am going to kill you. I am going to come back and burn your cars." The trial court admitted this testimony under the prior inconsistent statement exception to the hearsay rule.

Deputy Rodney Gutierrez testified that he spoke to Mr. Fierro at the Fierro home shortly after midnight on October 26, 2003. Mr. Fierro related what had occurred earlier. Over defendant's hearsay objection, Deputy Gutierrez testified that Mr. Fierro stated that, when he told defendant to leave the house, defendant told him, "Why don't you get me out, you think you're bad." The trial court admitted this testimony as a prior inconsistent

statement, noting that "if the jury believes that the father is intentionally not remembering, then they can find that it's inconsistent."

The trial court later instructed the jury pursuant to a modified version of CALJIC No. 2.13: "Evidence that at some other time a witness made a statement that is inconsistent or consistent with the witness'[s] testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on that former occasion. [¶] If you disbelieve a witness's testimony that he no longer remembers a certain event, that testimony is inconsistent with a prior statement or statements by the witness describing that event."

A hearsay statement is admissible as a prior inconsistent statement "if the statement is inconsistent with [the witness's] testimony at the hearing." (Evid. Code, § 1235.) "The 'fundamental requirement' of section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony. [Citation.] Normally, the testimony of a witness that he or she does not remember an event is not inconsistent with that witness's prior statement describing the event. [Citation.] However, courts do not apply this rule mechanically. 'Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness' prior statement [citation], and the same principle governs the case of the forgetful witness.' [Citation.] When a witness's claim of lack of memory amounts to deliberate evasion, inconsistency is implied. [Citation.] As long as there is a reasonable basis in the record for concluding that the witness's 'I don't remember' statements are evasive and untruthful, admission of his or her statements is proper. [Citation.]" (*People v. Johnson* (1992) 3 Cal.4th 1183, 1219-1220.)

Mr. Fierro "was obviously a reluctant witness, and [his] trial testimony was peppered with protestations that [he] had no clear recall of [his] conversations with defendant or the [sheriff's deputies]." (*People v. Arias* (1996) 13 Cal.4th 92, 152.) "The record supports the court's implied finding that [Mr. Fierro's] claimed memory loss was a deliberate evasion." (*People v. Ervin* (2000) 22 Cal.4th 48, 85; see *People v. Tewksbury* (1976) 15 Cal.3d 953, 966, fn. 13.) The trial court's admission of his statements to the

sheriff's deputies as prior inconsistent statements thus was proper. (*People v. Johnson*, *supra*, 3 Cal.4th at pp. 1219-1220.)

Prosecutorial Misconduct

During closing argument, the prosecutor stated: "Now, it's interesting. [Defense c]ounsel got up here and started—first she wants to argue, well, they didn't prove to you that these scissors were used, that they are a deadly weapon. And then she . . . argues, besides, an assault didn't even occur. Kind of like, 'Gee, if you're smart enough to see through my first argument, I will give you a backup argument.'" At this point, defense counsel objected that the prosecutor's argument was improper. The trial court overruled the objection. The prosecutor then focused on the evidence concerning the scissors.

It is prosecutorial misconduct "'to portray defense counsel as the villain in the case. . . . Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom.'" (*People v. Sandoval* (1992) 4 Cal.4th 155, 183-184.) However, while it is misconduct to imply "that defense counsel sought to deceive the jury," it is not misconduct to "urg[e] the jury not to be misled by defense evidence." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302.)

In *People v. Cummings*, *supra*, the court held the prosecutor's accusation that the defense was attempting to hide the truth and use of an "'ink from the octopus'" metaphor was not misconduct; in context it was certain the jury would understand it to be nothing more than an urging that the jury not be misled by defense evidence. (4 Cal.4th at p. 1302.) In *People v. Breaux* (1991) 1 Cal.4th 281, "the prosecutor compared the trial with a law school tactics class where students are taught 'that if you don't have the law on your side, argue the facts. If you don't have the facts on your side, argue the law. If you don't have either one of those things on your side, try to create some sort of a confusion with regard to the case because any confusion at all is to the benefit of the defense.'" (At p. 305.) The court was "persuaded that, in context, the prosecutor could only have been understood as cautioning the jury to rely on the

evidence introduced at trial and not as impugning the integrity of defense counsel"; thus, the argument was not misconduct. (*Id*. at p. 306.) Similarly, the prosecutor's comments in *People v. Bell* (1989) 49 Cal.3d 502, 538 that "it was defense counsel's job to confuse the jury and throw sand in its eyes to prevent it from returning a verdict" and to """focus on areas which tend to confuse""" were not considered to be misconduct. (*Breaux*, *supra*, at p. 306.) They were merely a reminder to the jury not to be distracted from the relevant evidence, not a suggestion defense counsel was presenting a dishonest defense. (*Ibid*.)

This prosecutor's argument in the instant case is indistinguishable from those in *Cummings*, *Breaux* and *Bell.* It is clear, in context, the prosecutor was not attacking defense counsel's integrity but was urging the jury to see through her arguments and focus on the evidence. As such, it was not misconduct, and the trial court did not err in overruling defendant's objection. (*People v. Breaux*, *supra*, 1 Cal.4th at p. 306.)[1]

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[1] Inasmuch as we reject defendant's claims of evidentiary error and prosecutorial misconduct, we need not address his claim of prejudice from cumulative error.

The judgment is affirmed.

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SPENCER, P.J.

I concur:

SUZUKAWA, J.*

I concur in the judgment only:

VOGEL, J.

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.