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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. ALEX GABRIEL RODRIGUEZ, Defendant and Appellant.	C051048 (Super. Ct. No. SF093292A)

Defendant was convicted by a jury of six counts of second degree robbery (Pen. Code, § 211), two counts of attempted second degree robbery (Pen. Code, § 664/211), possession of a controlled substance (Health & Saf. Code, § 11377), transportation of a controlled substance (Health & Saf. Code, § 11379), and possession of a controlled substance while armed with a firearm (Health & Saf. Code, § 11370.1, subd. (a)). He was sentenced to state prison for an aggregate term of 53 years. Defendant appeals claiming prosecutorial misconduct, ineffective

assistance of counsel, and sentencing error. We find no error and affirm the judgment.

FACTS AND PROCEEDINGS

The facts regarding the underlying offenses are generally undisputed. Between August 29 and September 9, 2004, defendant attempted eight robberies of small businesses in San Joaquin County, including several small food stores, a gas station, a fast food restaurant and a bar. In each instance, defendant was armed with a firearm. In six of the attempts, defendant was successful and fled with cash in amounts ranging from $30 to several thousand dollars. In one of the robberies, defendant discharged his firearm several times but did not hit anyone.

On September 14, 2004, police stopped defendant in a car and found in his possession nearly two ounces of methamphetamine and a glass smoking pipe. They also found two firearms, including the one used in the aforementioned robberies.

Defendant's photograph was selected by two of the robbery victims from a photographic lineup. Defendant was also interviewed by police and admitted the robberies.

The defense in this matter centered on negating defendant's intent to commit the robberies because of his excessive use of methamphetamine. Defendant's parents testified that defendant's personality changed significantly in the summer of 2004 because of drug use. He had become aggressive, lost weight, began talking to himself and would not listen to them.

Defendant also introduced the testimony of Dr. Douglas Tucker. Dr. Tucker provided expert testimony about the effects of methamphetamine use and opined that, at the time of the robberies, defendant was suffering from methamphetamine dependence and methamphetamine-induced psychotic disorder. According to Dr. Tucker, a person suffering from such disorder loses touch with reality and has delusions.

On rebuttal, the People presented evidence that, at the time of his arrest, defendant told an examining nurse he had no history of drug use and the nurse noted no symptoms of methamphetamine withdrawal. The arresting officer and the officer who interviewed defendant after his arrest both testified that defendant showed no signs of being under the influence of methamphetamine and no symptoms of methamphetamine withdrawal. Although defendant said at the interview that he was under the influence of methamphetamine, he described his condition as a "coffee-type high."

DISCUSSION

I

Prosecutorial Misconduct

Defendant contends the prosecutor engaged in misconduct during argument by misrepresenting the evidence presented at trial. He argues the prosecutor informed the jury he had asked the defense expert various questions and received certain responses, when the actual responses received were significantly

different. Defendant argues this misconduct severely undermined his sole defense of lack of intent.

"Improper remarks by a prosecutor can '"so infect[] the trial with unfairness as to make the resulting conviction a denial of due process."' [Citations.] Under state law, a prosecutor who uses deceptive or reprehensible methods to persuade either the court or the jury has committed misconduct, even if such action does not render the trial fundamentally unfair. [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 969.)

During cross-examination of Dr. Tucker, the prosecutor asked a number of questions intended to discredit his opinion that defendant had been suffering from methamphetamine-induced psychotic disorder during the crime spree. Those questions described a particular aspect of defendant's conduct during the robberies and asked if that conduct demonstrated defendant was suffering from psychosis. In most instances, Dr. Tucker responded that the conduct did not *necessarily* indicate psychosis. The following is an example:

"Q. So if someone wanted to rob somebody for money to pay off a dealer, that wouldn't be psychotic?

"A. Not necessarily.

"Q. He says there in the middle of the page, 'robbed Three Palms because he quote "needed money."'

"Again, the quote is your notes. Again that wouldn't be--that type of motive wouldn't be somebody who is psychotic, that alone?

"A. Correct. That doesn't appear to be a psychotic motive.

"Q. Okay. When he says two sentences down from that, 'I never thought I would get caught.' And the fact that it's consideration of some type of consequences, that is not someone who is necessarily exemplifying signs or symptoms of psychosis?

"A. Um, not necessarily, no."

During his opening argument, the prosecutor repeatedly informed the jury Dr. Tucker had responded that the conduct in question did not indicate psychosis, leaving out the qualifier "necessarily." For example, the prosecutor described his questioning of Dr. Tucker as follows:

"When Mr. Rodriguez told you that the gun gave him the idea of the robberies, was that someone who is psychotic?

"His answer was 'No.' And I asked him based on his notes did he tell you that 'I just wanted the money to buy the dope. I owe the dealer a lot.'

"I said, 'Motivation to sell--to buy more narcotics and that you own [*sic*] money for, to a dealer, is that someone who is psychotic?'

"And his answer was 'No.'

"When you say, 'I never thought I would get caught, is that someone who was psychotic?'

"The doctor said, 'No.' . . . "

Assuming the foregoing argument amounts to misconduct, defendant failed to object to it on the ground now asserted. After several minutes of such argument, defense counsel asked to

approach the bench, where a discussion among the court and counsel ensued. Thereafter, the prosecutor proceeded with his argument as before.

Following the conclusion of the prosecutor's argument, outside the presence of the jury, defense counsel put on the record the nature of the conference at the bench:

"MR. ORTIZ [defense counsel]: I want the record to reflect that I had requested to approach the bench during closing argument of Mr. Ott [the prosecutor]. And I expressed a concern that he represented to the jury that certain questions were posed to our expert Dr. Tucker, and that there were certain responses by Dr. Tucker to those questions.

"THE COURT: About what the defendant said to him during the interviews?

"MR. ORTIZ: That's correct. My recollection of Dr. Tucker's testimony was that some questions were asked but the extent to which Mr. Ott said there were questions, I think--I still believe were not asked of Dr. Tucker.

"THE COURT: All right.

"MR. OTT: Your honor, I specifically underlined the items that I asked Dr. Tucker about so that I would not ask him, or I would not argue at a later date those questions which he had not directly brought out in cross-examination.

"Now, if I paraphrased that in order to speed through the statements, I was reading it as best I recollect and what I was reading down there. But those were all the questions I asked Dr. Tucker.

“THE COURT: All right. Well, one thing I can say is that I know when the questions were being asked of Dr. Tucker, what the defendant said was assumed in the question. In other words, he wasn’t asked about the specifics of what the defendant said and then asked ‘Does that indicate psychotic mode or psychotic behavior?’ It was what was assumed in the question was what the defendant said. And then he was asked ‘Does that indicate psychotic behavior or psychotic mode,’ questions to that effect.

“So I don’t think that’s fatal, though. I think that’s a fair inference that those things were said to Dr. Tucker by the defendant. Although it could have been clearer in the cross-examination. But all those areas that were commented on in closing argument were addressed to Dr. Tucker in that fashion. And so that’s why I overruled the objection at the bench.

“Certainly there is a fair inference that can be drawn from the questions and answers that the defendant said those things. And that was the bases of the questions about whether or not that indicated a motive that was psychotic or behavior that was psychotic. So whether or not Dr. Tucker’s answers were exactly as articulated during the closing argument, I mentioned at the bench that might be another story. But that’s the reason for the Court’s ruling on that.

“Is there anything else that we need to talk about at this time?

“MR. ORTIZ: No.

“MR. OTT: No.”

It is clear from the foregoing that defendant's objection to the prosecutor's argument concerned whether the prosecutor was misrepresenting what questions had been asked of Dr. Tucker, not what answers had been given by Dr. Tucker. Even after the court's prompting about "whether or not Dr. Tucker's answers were exactly as articulated during closing argument," defendant did not object on that basis.

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) However, "[a] defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.] In addition, failure to request the jury be admonished does not forfeit the issue for appeal if '"an admonition would not have cured the harm caused by the misconduct."' [Citations.] Finally, the absence of a request for a curative admonition does not forfeit the issue for appeal if 'the court immediately overrules an objection to alleged prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request.' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820-821.)

Defendant does not contend the alleged misconduct could not have been cured by a timely objection and request for admonition. Instead, defendant contends his counsel's failure to assert an objection on the proper ground amounted to

ineffective assistance of counsel. We consider this claim in the next section. By failing to raise a timely objection on the ground now asserted, when the prosecutor could have altered his argument and the court could have provided an appropriate admonition, defendant has forfeited the issue for purposes of appeal.

II

Ineffective Assistance

Under both the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution, a criminal defendant has a right to the assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 [80 L.Ed.2d 674, 691-692]; *People v. Pope* (1979) 23 Cal.3d 412, 422.) This right "entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "To establish entitlement to relief for ineffective assistance of counsel the burden is on the defendant to show (1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288.)

Defendant cannot satisfy either prong of the foregoing test. In order to satisfy the first prong, the defendant must show counsel's performance "'"fell below an objective standard

of reasonableness . . . under prevailing professional norms."'" (*In re Avena* (1996) 12 Cal.4th 694, 721.) In evaluating a claim of deficient performance, "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance' [citations], and we accord great deference to counsel's tactical decisions. [Citations.] Were it otherwise, appellate courts would be required to engage in the '"perilous process"' of second-guessing counsel's trial strategy. [Citation.] Accordingly, a reviewing court will reverse a conviction on the ground of inadequate counsel 'only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission.'" (*People v. Frye*, *supra*, 18 Cal.4th at pp. 979-980.)

In the present matter, defendant did not object that the prosecutor was misrepresenting Dr. Tucker's answers even when prompted by the trial court. On the present record, we cannot say defendant had no tactical reason for this course of action. In his argument to the jury, defense counsel responded to the prosecutor's misrepresentation of the evidence. Defense counsel stated: "Mr. Ott characterizes certain questions posed as some sort of acknowledgement by Dr. Tucker that, in fact, the evidence shows to the contrary. You recall that testimony that was just a couple of days ago--and if there is any question about what he said, what the questions were, ask for a read back. We talked about 26 'no's' as far as whether that was indicia of psychosis. But there weren't 26 questions posed to him.

"What was asked of Dr. Tucker was taken in isolation, ignoring everything else that we know about this case. One fact, does this one fact indicate psychosis? The doctor said [*sic*] didn't say 'No absolutely.' He said, 'Based on that alone I can't say he was or he wasn't.'

"And then Mr. Ott went through various other questions. And the question was always the same: 'Based on this one fact alone, does that negate psychosis?'

"Doctors opinion was based on that one fact alone, 'I can't say one way or the other. I can't say whether he was psychotic or he wasn't.' And we went through the litany of questions."

When the prosecutor misstated Dr. Tucker's answers, defense counsel knew he had the facts on his side. He also knew he had a very difficult case, with a defendant who confessed to the robberies and whose only defense was inability to form the requisite intent for robbery. However, given that defendant brought a pillow case to each robbery to collect his loot, brought a handgun to use to intimidate the victims, cased one or more of the targets to determine the best time to commit the robberies, chose isolated targets, used a mask in some instances, used the beam from his firearm to blind the victims so they could not identify him, and lured one of his victims to a back room, this was going to be a hard sell to the jury. Therefore, a logical strategy would be to try and focus the jury on whether Dr. Tucker did or did not admit that certain factors were inconsistent with psychosis. With the facts on this issue in his favor, a reasonable attorney could conclude that if the

jury is focused on this issue, it might ignore the rest of the evidence and conclude defendant did suffer from a methamphetamine-induced psychotic disorder and therefore could not form the requisite intent for robbery.

Furthermore, defendant was not prejudiced by the prosecutor's argument. "'Prejudice is shown when 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*, *supra*, 12 Cal.4th at p. 721.)

As indicated above, defense counsel cleared up any misrepresentation of the evidence in his argument. Defense counsel also directed the jury to have the testimony re-read if it cannot remember what Dr. Tucker said. Furthermore, the jury was instructed that it must determine the facts from the evidence presented at trial and the statements of the attorneys during trial are not evidence. Absent a contrary indication in the record, we assume the jury followed the instructions given by the court. (*People v. Adcox* (1988) 47 Cal.3d 207, 253.) There is no reason to believe the jury would have been mislead by the prosecutor's argument.

III

Sentencing

The trial court imposed consecutive terms for each of the robberies and attempted robberies as well as the offense of

possessing a controlled substance while armed. The court gave as reasons that the crimes involved separate acts of violence, there were separate victims, the crimes were committed at different times and places, there was more than enough time between offenses for defendant to reflect on his conduct, two of the crimes involved particularly vulnerable victims, and the manner of carrying out the crimes indicated planning, sophistication and professionalism.

Defendant contends the imposition of consecutive terms based on the foregoing factual findings violated his Sixth Amendment right to trial by jury as recognized in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*), *Blakely v. Washington* (2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*), and *Cunningham v. California* (2007) 549 U.S. ___ [166 L.Ed.2d 856] (*Cunningham*).

In *Apprendi, supra,* 530 U.S. 466 [147 L.Ed.2d 435], the United States Supreme Court held 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." (*Id*. at p. 490 [147 L.Ed.2d at p. 455].)

In *Blakely*, the Supreme Court applied the rule of *Apprendi* to invalidate a state court sentence imposed on a defendant who pleaded guilty to kidnapping his estranged wife. The high court explained that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the*

defendant." (*Blakely, supra*, 542 U.S. at p. 303 [159 L.Ed.2d at p. 413].)

In *Cunningham,* the Supreme Court applied *Apprendi* and *Blakely* to California's determinate sentencing law and held that by "assign[ing] to the trial judge, not to the jury, authority to find the facts that expose a defendant to an elevated 'upper term' sentence," California's determinate sentencing law "violates a defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments." (*Cunningham, supra,* 549 U.S. at p. ___ [166 L.Ed.2d at p. 864], overruling on this point *People v. Black* (2005) 35 Cal.4th 1238, vacated in *Black v. California* (Feb. 20, 2007) ___ U.S. ___ [167 L.Ed.2d 36].)

The issue here is not aggravated terms but consecutive terms. By imposing the terms for the individual offenses consecutively rather than concurrently, defendant's aggregate sentence has been extended significantly.

Cunningham did not address whether the decision to run separate terms concurrently or consecutively must be made by the jury. Penal Code section 669 imposes that duty on the trial court. In most cases, this is a matter of the court's discretion. (*People v. Morris* (1971) 20 Cal.App.3d 659, 666, disapproved on other grounds in *People v. Duran* (1976) 16 Cal.3d 282, 292.) "While there is a statutory presumption in favor of the middle term as the sentence for an offense [citation], there is no comparable statutory presumption in favor of concurrent rather than consecutive sentences for multiple offenses except where consecutive sentencing is statutorily required. The trial

court is required to determine whether a sentence shall be consecutive or concurrent but is not required to presume in favor of concurrent sentencing." (*People v. Reeder* (1984) 152 Cal.App.3d 900, 923.) In other words, consecutive sentencing is within the "prescribed statutory maximum" (*Apprendi*, *supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455]) that may be imposed for the series of offenses committed by defendant.

Section 669 provides that when a trial court fails to determine whether multiple terms are to run concurrently or consecutively, they shall run concurrently. However, this does not create a presumption or other entitlement to concurrent sentencing. It merely provides for a default in the event the court neglects to perform its duty in this regard.

The trial court is required to state reasons for its sentencing choices, including a decision to impose consecutive sentences. (Cal. Rules of Court, rule 4.406(b)(5); *People v. Walker* (1978) 83 Cal.App.3d 619, 622.) This requirement serves a number of interests: "it is frequently essential to meaningful review; it acts as an inherent guard against careless decisions, insuring that the judge himself analyzes the problem and recognizes the grounds for his decision; and it aids in preserving public confidence in the decision-making process by helping to persuade the parties and the public that the decision-making is careful, reasoned, and equitable." (*People v. Martin* (1986) 42 Cal.3d 437, 449-450.) However, the requirement that reasons for a sentence choice be stated does

not create a presumption or entitlement to a particular result. (See *In re Podesto* (1976) 15 Cal.3d 921, 937.)

Therefore, entrusting to the trial court the decision whether to impose concurrent or consecutive sentences is not precluded by *Apprendi*, *Blakely*, or *Cunningham*. In this state, every person who commits multiple offenses knows that, if convicted, he or she runs the risk of receiving consecutive sentences without any further factual findings. While such a person has the right to the exercise of the court's discretion, the person does not have a legal right to concurrent sentencing. As the Supreme Court said in *Blakely*, "that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned." (*Blakely*, *supra*, 542 U.S. at p. 309 [159 L.Ed.2d at p. 417].)

Defendant's Sixth Amendment rights were not violated when the trial court imposed consecutive terms on the various offenses.

DISPOSITION

The judgment is affirmed.

HULL, J.

We concur:

SCOTLAND, P.J.

ROBIE, J.