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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TRAVIS NEAL ELLIOTT, Defendant and Appellant.	A123711 (Contra Costa County Super. Ct. No. 050717116)

Defendant Travis Neal Elliott appeals a judgment entered upon a jury verdict finding him guilty of first degree murder, and finding true an allegation that he personally used a sledge hammer, a deadly and dangerous weapon, in the commission of the offense. (Pen. Code, §§ 187, 12022, subd. (b)(1.) The trial court found true various prior conviction and prison term allegations. Defendant was sentenced to a total term of 31 years to life in prison.

Defendant contends that the trial court allowed the jury to hear inadmissible evidence, that it erred by denying his motion for a mistrial, and that he received ineffective assistance of counsel. We affirm.

I. BACKGROUND

A. The Killing and Investigation

Defendant lived with his stepfather, Irvin Scales, and Michelle Thompson, a family friend, in Pittsburg.[1]

Thompson returned home around 10:00 o'clock on the evening of March 4, 2005. She checked on Scales and saw that he was asleep in his bed, snoring, with the light and television on. She went to her own room. Defendant called her to come out into the garage, and she joined him and had a conversation. Defendant's conversation tended to "jump around." Thompson could smell alcohol on him, and saw that his eyes were droopy and somewhat red. Thompson returned to her room, got into bed, and watched television.

While Thompson was watching television, defendant knocked on her door and asked her through the closed door to give him a ride to an area known for drug sales. She refused, and suggested he ask his father.[2] Defendant said his father would not let him use the car. Thompson had previously given defendant a ride to an area known for drug use; on that occasion, he left the car, went inside somewhere, and returned a minute or two later.

Thompson heard defendant ask Scales if he could use the car. Scales refused, saying defendant had not put gas in the car the last time he had used it. Scales's tone was firm but not angry. Defendant was using a normal, pleasant tone of voice, and did not sound angry, although his tone became somewhat frustrated when Scales continued to refuse.

Defendant again asked Thompson through her door for a ride, and she refused. Thompson heard defendant's voice in the living room, apparently either talking to

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[1] Defendant's mother, Hazel Scales, was staying with an elderly relative who needed care.

[2] In an interview with a police officer later that night, Thompson said she went with defendant to the door of Scales's room, and saw him lying in his bed in the same position he had been earlier, snoring. She then went back to her own room as defendant entered Scales's room.

himself or speaking on the phone. She then heard footsteps going from the living room to Scales's bedroom, then "ruffling" noises from Scales's room as if someone was shuffling paper. She did not hear any angry voices or sounds of a struggle. She then heard a door close and a vehicle speed out of the driveway.

Thompson got up and opened her bedroom door. She saw that Scales's bedroom door was closed, although he usually left it open. She heard a dripping sound, opened Scales's bedroom door, tapped Scales on the shoulder, and saw that he had blood on his nose and mouth.

Afraid defendant would return, Thompson went to the home of relatives, who called the police when she told them what had happened. When Thompson returned to the house shortly afterwards, police cars were already there.

The first officers on the scene had received a call from dispatch at 12:48 a.m. on March 5. When they arrived, they found Scales lying on his bed in a pool of blood. He had no pulse. The television set in his bedroom was on. Blood was found in various places in the house, including Scales's bedroom door, defendant's bedroom door, and the back screen door.

Scales had died of extensive blunt force head injury, consistent with injuries caused by a sledge hammer. Death would have occurred almost immediately after the blows. From the pattern of blood on the bed, it appeared that he had been lying on his side when most of the blows fell, and that he had then been rolled over onto his back. Two sets of keys and a wallet were found under his pillow.

In the early hours of the morning of March 5, defendant was found driving alone in Scales's pickup truck and was brought to the Pittsburg Police Department. He saw Officer Ernie Ferraro, and asked if he was "Pittsburg." Ferraro said he was a Pittsburg police officer, and defendant asked if he had been to the house. Ferraro said he had not, and defendant said, "Well, it was an accident." Defendant was wearing white clothing, and had bloodstains on his pant leg, sweatshirt, and shoe.

One of the stains on defendant's pant leg was in a shape similar to that of a sledge hammer found outside the house. The sledge hammer had blood and hair on it. A

silhouette on a nearby dirt patch suggested the sledge hammer had been lying there earlier.

DNA testing excluded defendant as the source of the blood on the clothes and sledge hammer. The DNA profile on the sledge hammer and clothing matched that of Scales.

A blood sample taken from defendant at 4:00 o'clock on the morning of March 5—more than three hours after police had been dispatched to the scene of the killing—showed the presence of cocaine, probably ingested within two or three hours of the blood draw, or at approximately 1:00 o'clock in the morning.

B. Testimony About Defendant's History

Defendant's half sister, Shanelle Scales Preston, testified that defendant had lived away from the family home starting in 1994 or 1995, and returned in August 2004. During the time he was away, Scales would visit him nearly every month, and Preston also visited him, though not as frequently. At one point defendant left the family home again and lived somewhere else for two or three months. When he returned in January 2005, he appeared to be frustrated or upset.

Preston also recalled an occasion in January 2005, in which defendant had borrowed Scales's truck and exchanged it for drugs. Scales later recovered the truck.

Vickie Johnson, who was Scales's niece, testified that a couple of days before Scales was killed, defendant came to her house and tried to sell her brand-new shirts, with the tags still on them. Scales was upset when Johnson told him about the incident, because he had just taken defendant shopping for clothes. Based on defendant's behavior, Johnson believed he was using drugs, and that he was trying to sell the shirts for drugs.

The day before Scales's death, he spoke with Johnson on the telephone. Scales was crying, and said defendant was not acting like himself and that Scales was afraid to be with him.

On cross-examination, Johnson testified that she had become aware that defendant owed money to drug dealers. According to Johnson, defendant had been selling drugs;

however, rather than selling the drugs, he would use them himself, and as a result he owed money to other drug dealers. Defense counsel asked when defendant had owed the money, and Johnson answered, "This was before Travis went to prison he owed money."

C. Evidence Regarding Transfer of Title to House

Earlier on the day of March 4, 2005, Preston and her then-fiancé, Damon Preston,[3] visited her parents at their house. They had been discussing transferring title of the family home into Preston's name, because Scales had health problems and was afraid that he and Hazel might lose the house if he had to go into a convalescent home. Scales also wanted to promote Preston's future financial security. Preston had not been involved in any conversations with defendant about the proposed transaction. Scales and Hazel signed paperwork to transfer title that day. Preston would be paying substantially less than the fair market value of the house. Damon later took defendant to buy a bottle of brandy.[4]

Defendant was in the house when the paperwork was being filled out. Papers were on the dining room table, which was next to the kitchen. Defendant was in the kitchen preparing food, then went into his bedroom. Defendant did not ask Preston any questions about what the others were doing.

Damon later told a detective that defendant had asked what he, Preston, and her parents were doing and what the paperwork was, and he told defendant he should take that question up with his parents. However, at trial Damon testified—as did Preston—that defendant seemed unconcerned about the paperwork.

Called as a defense witness, Preston testified that her parents had wanted defendant's name to be on the house's title as well, but that he could not qualify for the necessary loan because he was not working.

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[3] Because Preston shares the same name as Damon, to whom she was married at the time of trial, we shall refer to Damon by his first name. For the same reason, we shall refer to Scales's wife by her first name, Hazel. We intend no disrespect.

[4] A half-full bottle of brandy was later found in defendant's bedroom.

II. DISCUSSION

A. Admission of Evidence of Transfer of Title

Defendant contends the evidence that Scales and Hazel transferred title of their house to Preston should not have been admitted to show his motive to kill Scales, that it was more prejudicial than probative (Evid. Code, § 352), and that its admission violated his federal constitutional right to due process. He argues the evidence was speculative because nothing showed that he knew that the papers being signed had the effect of transferring title to Preston, thereby divesting him of any interest he might have had in the property in the future. Nor, he points out, is there any evidence that he would in fact have stood to inherit the house in any case. Defendant contends that he was prejudiced because the evidence created an inference that his motive to kill Scales arose during the afternoon of March 4, apparently before he began drinking and showed signs of being under the influence of alcohol, and that the jury could have concluded his premeditation likewise began during this time.

A trial court has broad discretion in determining the admissibility of evidence. "The exercise of discretion is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

We see no abuse of discretion here. Defendant rightly points out that speculation is not evidence. (*People v. Waidla* (2000) 22 Cal.4th 690, 735.) However, the jury could rationally conclude from the evidence that defendant was aware documents were being signed, that he asked Damon about the papers, that Damon advised defendant to speak with Scales and Hazel about the matter, and that defendant was concerned about the transaction. We agree that the evidence that the transfer of title formed part of defendant's motive was not strong; however, there is no reason to conclude the jury would give it undue weight. Bearing in mind the trial court's broad discretion, we cannot conclude this was error.

In any case, even if the evidence should not have been admitted, we see no possibility that defendant was prejudiced. Defendant argues that without the evidence suggesting his motive to kill Scales arose earlier in the day, the jury would have been less likely to conclude he had premeditated, and might well have convicted him of second degree rather than first degree murder. On the facts of this case, we reject this contention. This is not a case of a killer picking up a heavy object near at hand in an "unpremeditated explosion of violence." (See *People v. Prince* (2007) 40 Cal.4th 1179, 1266 [no error in failing to instruct on lesser offense of second degree murder in absence of evidence that defendant happened upon victims and rashly decided to kill them in an "unpremeditated explosion of violence"].) The evidence showed that defendant asked Scales if he could use his truck, that Scales refused, and that neither sounded angry, although defendant began to sound frustrated as Scales continued to refuse. After making a final attempt to get Thompson to drive him to an area known for drug dealing, defendant went outside, got a sledge hammer, went to Scales's room, and delivered several blows to his head, one of them severe enough to cause death within seconds. The evidence indicates he then retrieved the keys to Scales's truck—apparently by moving his body aside—went outside, discarding the sledge hammer near where it had originally lain, and drove the truck away. The level of cocaine in his system several hours later suggested he ingested cocaine after killing Scales.

At trial, the defense did not take the position that defendant had not acted with premeditation, but argued that someone else had entered the house and killed Scales, possibly in connection with defendant's drug debts. Moreover, in his closing argument, the prosecutor argued that although there was an element of anger in defendant's motive, the primary motive he had to kill Scales was his desire to get the truck, and that his deliberation was shown by the facts that he spent time talking in the living room after Scales refused to let him use the truck, went outside, got the sledge hammer, approached

Scales without warning, struck him repeatedly, retrieved the keys, and put the weapon back.[5]

Based on both the evidence and the position taken by the prosecutor, we are satisfied that defendant's actions in going outside for the sledge hammer and returning to Scales's bedroom to strike him with it formed the basis for the jury's conclusion that he had premeditated before killing Scales, and that this conclusion would have been the same even if it had not heard the evidence of the transfer of title.[6]

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[5] The prosecutor argued in closing about deliberation and premeditation as follows: "To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice. And, having in mind the consequences, he decides to and does kill. [¶] For reasons that I'm going to go into in more detail as I go along, I suggest to you that the voice that [Thompson] heard after the defendant asked for a ride the second time when he's out in the living room and he's talking, he was deliberating. He was talking to himself. And what he's talking about is his angst over the prospect of not getting the truck. [¶] You don't have to accept that, by the way, or come to the conclusion, because of course you know what he did right after that, don't you? *He had to go someplace and he had to think about it. And where he had to go was outside to get the sledge hammer. He had to choose his weapon. Go find it, retrieve it, return, approach without warning, and strike*. And then, as I'm going to discuss in a few moment, strike again. [¶] . . . [¶] Then put the hammer down, and very soon roll the body over, take the keys, short order, retrieve the hammer, put the hammer back very close to where it was." The prosecutor argued that the crime was not one of passion, and said, "And he has every intention of doing it. And he has a very good what? Reason. [¶] *It wasn't just anger. There's an element of that, certainly, but it's because he wanted the truck, and Dad wouldn't give it to him. So he was gonna get those keys no matter what*. And he chose the best mechanism to do it. He chose. *He made a decision, that process of decision-making that included retrieving the weapon that would enable him to get what he wanted is deliberation. That's why the crime here is murder of the first degree*." (Italics added.)

[6] The Attorney General also argues that although defendant objected to the evidence on the ground it was speculative, he did not object on the specific ground that it was inadmissible under Evidence Code section 352 or that its admission violated his constitutional rights, and thereby forfeited those contentions. In response, defendant argues that these objections were properly preserved, but that if they were forfeited, his counsel rendered ineffective assistance in failing to raise them below. To prevail on a claim of ineffective assistance of counsel, a defendant must show not only that his counsel's performance was deficient, but also that "counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's

B. Denial of Motion for Mistrial

The prosecutor sought to introduce evidence of defendant's prior incarceration, arguing that the evidence at trial would show Scales did not trust defendant, which he contended was the reason Scales and his wife signed the house over to Preston, and that the prior incarceration was relevant to explain the relationship between defendant and Scales. Defendant objected to any evidence of his incarceration. The trial court proposed informing the jury that six months before the killing, defendant had been living in a facility for a nonviolent offense. In doing so, the court said that if one of the witnesses mentioned something about a custodial setting, it would be "a problem," and that if the jury were told defendant had been in prison for ten years before the killing, "there would be a problem and that they would have a hard time dealing with that."

As has been described, at trial Johnson testified on cross-examination that defendant owed money to drug dealers because he had used the drugs he was supposed to be selling.[7] Defense counsel asked when defendant owed the money, and Johnson said it had happened before defendant went to prison.

Outside the presence of the jury, defendant moved for a mistrial, and the trial court denied the motion. The prosecutor acknowledged he had not told Johnson not to mention defendant's imprisonment, and noted that his direct examination had been limited to events that occurred the week before the killing. At the suggestion of defense counsel, the trial court then told the jury that defendant had been in prison from 1995 until 2004 for the crime of sale of cocaine, which was a nonviolent offense. The court also directed

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failings, defendant would have obtained a more favorable result. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541 (*Dennis*).) If defendant has not shown that counsel's actions were prejudicial, the reviewing court may reject the claim on that ground without deciding whether counsel's representation was deficient. (*People v. Mayfield* (1997) 14 Cal.4th 668, 784.) We have already concluded both that the challenged evidence was admissible and that defendant did not suffer prejudice from its admission. Accordingly, whether or not defense counsel preserved for appeal all possible grounds for objections to the challenged evidence, our conclusion would be the same.

[7] Defendant's theory at trial was that Scales was killed by someone else, possibly someone connected with defendant's drug use.

the jury "not to consider the fact of the defendant's prior incarceration for any reason other than to put Ms. Johnson's testimony in perspective when she's talking about the dates at issue and her knowledge of the drug debts owed and when they were owed."

Defendant contends the prosecutor committed misconduct by failing to tell Johnson not to mention defendant's prison term, that the trial court erred by denying his motion for a mistrial, that his trial counsel rendered ineffective assistance by proposing that the trial court make the statement to the jury, and that the limiting instruction was insufficient because it only instructed the jury to consider the *incarceration*—rather than his *conviction*—for a limited purpose. According to defendant, if the jury had not heard that he had served time for selling cocaine, a crime of moral turpitude (*People v. Vera* (1999) 69 Cal.App.4th 1100, 1103), it might not have concluded he premeditated Scales's murder, and might well have convicted him of only second degree murder.

" 'A trial court should grant a mistrial only when a party's chances of receiving a fair trial have been irreparably damaged, and we use the deferential abuse of discretion standard to review a trial court ruling denying a mistrial.' [Citation.]" (*People v. Williams* (2006) 40 Cal.4th 287, 323.) While a witness's volunteered statement may, in some circumstances, cause incurable prejudice, it is proper to deny a motion for a mistrial where the prejudice is dispelled by the court's admonition. (*People v. Ledesma* (2006) 39 Cal.4th 641, 683; *People v. Wharton* (1991) 53 Cal.3d 522, 565.)

We see no possibility that Johnson's statement affected the result of the trial. First, the evidence showed defendant had a history of drug use, and defendant himself elicited testimony from Johnson that defendant had previously sold drugs, that he had debts to drug dealers, and that drug dealers might use violence in order to collect their debts, evidence that supported his defense that the killing was the work of someone connected with his drug history. There is no reason to conclude that the news that defendant had served time for selling drugs would have made the jury more likely to conclude he premeditated before killing Scales.

Moreover, any prejudice that might have existed was cured by the limiting instruction. A jury is presumed to understand and follow the court's instructions.

(*People v. Holt* (1997) 15 Cal.4th 619, 662.) We recognize that the trial court directed the jury only to consider defendant's *incarceration* for the limited purpose of putting into perspective Johnson's testimony about the debts that were owed and their timing. However, the evidence in question referred only to defendant serving time in prison for selling cocaine. No reasonable jury would have concluded it could consider defendant's *incarceration* only for a limited purpose but the underlying *conviction* for any other purpose, such as to show his propensity to commit bad acts. In the circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

For the same reasons, we reject defendant's contention that his counsel rendered ineffective assistance in proposing that the trial court inform the jury that he went prison from 1995 to 2004 for selling cocaine. As we have explained, to prevail on such a claim, defendant must show not only that his counsel's performance was deficient, but also that he was prejudiced, that is, that there is a reasonable probability he would have obtained a more favorable result but for counsel's failings. (*Dennis*, *supra*, 17 Cal.4th at pp. 540-541.) We have already concluded defendant did not suffer prejudice, and we reject his claim on that ground.

Finally, defendant has not shown the judgment should be reversed because the prosecutor committed misconduct in not telling Johnson not to mention his incarceration. "To constitute a violation under the federal Constitution, prosecutorial misconduct must 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' [Citations.] 'But 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 court or the jury.' [Citation.]" (*People v. Valdez* (2004) 32 Cal.4th 73, 122 (*Valdez*).) Moreover, "the federal Constitution does not require (and the state Constitution does not permit) the reversal of a criminal conviction unless the misconduct deprived defendant of a fair trial or resulted in a miscarriage of justice." (*People v. Hinton* (2006) 37 Cal.4th 839, 865.)

We see no " 'deceptive or reprehensible methods' " here. (*Valdez*, *supra*, 32 Cal.4th at p. 122.) The prosecutor did not elicit the testimony about defendant's

incarceration; rather, his examination of Johnson was limited to events in the days preceding the killing, and he did not question her about defendant's history of selling drugs. In any case, as we have already concluded, any prejudice that might have existed was cured by the limiting instruction. Defendant was not deprived of a fair trial, and there was no miscarriage of justice.

Defendant also contends the errors he complains of caused cumulative prejudice. We find no cumulative error, and are satisfied that defendant suffered no prejudice.

III. DISPOSITION

The judgment is affirmed.

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RIVERA, J.

We concur:

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RUVOLO, P.J.

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REARDON, J.