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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.

MANUEL CHUSON MANUEL,

Defendant and Appellant.

A127030

(Solano County  
Super. Ct. No. VCR201342)

Defendant was convicted of exhibiting a deadly weapon after he pointed a gun at his neighbor. Defendant contends the prosecutor committed misconduct and the trial court erred in failing to give a particular portion of a jury instruction. We affirm.

**I. BACKGROUND**

Defendant was charged in an amended information filed August 13, 2009, with assault with a deadly weapon (Pen. Code, § 245, subd. (b)) and exhibiting a deadly weapon (Pen. Code, § 417, subd. (b)(1)).

At trial, the victim, Mario Alvarez, testified he lived across the street from defendant. On the day in question, Alvarez and his young son were playing with a soccer ball in his front yard, kicking the ball and hitting it with an aluminum baseball bat. While they were playing, defendant emerged from his garage and began behaving strangely enough to attract Alvarez's attention. At one point, defendant went into his garage, came out holding something behind his back, and sat in his car, which was parked on the street in front of his house.

Disturbed, Alvarez sent his son into the house, put the baseball bat inside his garage, and walked across the street toward defendant's car. When he was about "three or four feet" from defendant's car, standing on the sidewalk in front of defendant's house, Alvarez asked defendant, "Is there a problem or something?" Defendant, who was "really mad," swore at Alvarez, told him to "get . . . off my property," and raised a gun, pointing it at Alvarez. Alvarez backed across the street to his home and phoned police.

A responding police officer testified he and other officers questioned defendant at his home. Defendant told them he had retrieved his gun from safekeeping in the garage because he felt threatened by Alvarez. When asked to explain why he felt threatened, defendant gave conflicting accounts, effectively admitting he grabbed the gun and sat in the car before Alvarez approached him.

Defendant's wife testified she was afraid of Alvarez for two reasons. First, Alvarez's dog rushed at her once as she was getting out of her car. When her son approached, the dog left without harming her. Second, one night Alvarez was having a party in the driveway of his house. Two males whom she believed to be party guests were standing in front of defendant's house, and as defendant's wife walked up her driveway the two looked over at her, and one commented, "I could kill." Defendant's wife said she associated the two men with Alvarez because "I know—they're not—they all look Hispanic and in front of their house." She thought one of the men was an adult son of Alvarez, although she was not certain.

The prosecutor's first question to defendant's wife on cross-examination was whether she and her husband "had a conversation . . . that touched on the fact that your neighbors are Hispanic." There was no objection, and she admitted there had been such a conversation. Later, the prosecutor also asked her whether "your husband ever had any sort of counseling or anything for any mental health issues." Defense counsel objected on relevance grounds. After the court sustained the objection, the prosecutor dropped the matter.

Defendant testified he was afraid of Alvarez for four reasons. First, Alvarez once had a party, and some of the guests got drunk and laid down on defendant's lawn.

Defendant believed Alvarez had the ability to control the guests but chose not to. The second and third reasons were the incidents related to him by his wife. Finally, defendant once found a dead kitten on the ground next to his car. As defendant and his son picked up the cat, defendant noticed Alvarez was inside his garage, laughing. Defendant was also concerned Alvarez might have committed a crime in the past because of “the way he looks.” The prosecutor asked defendant what he meant by this comment on cross-examination, without getting a clear answer.

Defendant requested a jury instruction on the elements of self-defense, CALCRIM No. 3470. The instruction includes several paragraphs of optional language allowing its adaptation to the circumstances of the individual case. The court declined to give the portions of the instruction reading: “If you find that the defendant received a threat from someone else that (he/she) reasonably associated with \_\_\_\_\_ *<insert name of victim>*, you may consider that threat in deciding whether the defendant was justified in acting in (self-defense/ [or] defense of another)” and “Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.” (CALCRIM No. 3470.) When the court was unpersuaded by defense counsel’s argument that these portions were justified by the words overheard by defendant’s wife, counsel appeared to accede to the omission, saying, “Right. Okay.”

During his closing argument, defendant’s attorney accused the prosecutor of attempting to “interject race into this issue, try to intimate that [defendant] and his wife are racists.” Defense counsel argued there was no evidence race played a role in the incident and scolded the prosecutor. During rebuttal argument, the prosecutor explained, “The reason that I bring up things like racialism is not because there’s no other reason for it, other than just finding out why did this person act that way, what would explain this unreasonable behavior? And I didn’t say it, but the defendant is the one who said on the stand, ‘Well, I’m not expert in criminals, but he just looks a certain way.’ [¶] . . . I never argued in my argument that either he or his wife are racists.”

Defendant was acquitted of the assault charge but convicted of exhibiting a deadly weapon. He was placed on probation.

## II. DISCUSSION

Defendant contends the prosecutor committed misconduct when he raised the issues of Alvarez's race and defendant's mental health, and the court erred by not delivering the portions of CALCRIM No. 3470 addressing threats from another.

### A. *Prosecutorial Misconduct*

“ ‘Under the federal Constitution, a prosecutor's behavior deprives a defendant of his rights “when it comprises a pattern of conduct ‘so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.’ ” ’ ” (*People v. Foster* (2010) 50 Cal.4th 1301, 1350.) “ ‘Under California law, 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 it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted.’ ” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 169.)

“ “ ‘[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. [Citation.]’ ” [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm. [Citation.]’ ” (*People v. Foster, supra*, 50 Cal.4th at p. 1350.)

There was no objection on grounds of prosecutorial misconduct to any of the purported misconduct, and there is no reason to believe an objection would have been futile or an admonition would not have cured the harm. Any error on this ground therefore has been waived.

Regardless of waiver, we find no prosecutorial misconduct. The prosecutor merely asked whether the couple had ever discussed Alvarez's being Hispanic. The question was a response to defendant's wife's comment that she associated the men who spoke about killing with Alvarez because they “look Hispanic.” Given the apparently

unprovoked nature of the crime and the wife's unsolicited reference to Alvarez's presumed ethnicity, the prosecutor was justified in inquiring to the very limited extent of this single question. The question about defendant's mental health, while likely irrelevant, was subject to an immediate objection, and the court subsequently instructed the jury to disregard questions to which an objection was sustained. Neither question was sufficiently unfair or improper as to rise to the level of prosecutorial misconduct.

Nor were the questions likely to have influenced the outcome of the trial. The evidence supporting the single charge of which defendant was convicted was very strong, and the questions would have had little or no impact on the jury's weighing of the evidence on defendant's claim of self-defense.

The prosecutor did not raise the issue of race in his closing argument. His comments were made in rebuttal, only as a response to defense counsel's accusation that he had injected the issue of race into the trial. Given this charge, there was nothing improper in the prosecutor's limited remarks, and it is not likely they influenced the outcome of the trial.<sup>1</sup>

### **B. Jury Instruction**

We find no error in the court's refusal to give that portion of CALCRIM No. 3470 regarding threat by another. CALCRIM No. 3470 is a correct statement of the law of self-defense. (*People v. Adams* (2009) 176 Cal.App.4th 946, 953–954.) In order to justify the giving of the particular portion of CALCRIM No. 3470 dealing with threat, defendant was required to provide substantial evidence of the elements of the defense—that he received a threat from Alvarez or someone else he reasonably associated with Alvarez. (See, e.g., *People v. Mentch* (2008) 45 Cal.4th 274, 288.) There was no evidence defendant was threatened by anyone, let alone by Alvarez or someone associated with him. The man overheard by defendant's wife merely said he “could kill.”

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<sup>1</sup> Because the prosecutor did not commit misconduct and his actions were not prejudicial, defense counsel's failure to object did not constitute ineffective assistance of counsel. (See, e.g., *People v. Cowan* (2010) 50 Cal.4th 401, 493, fn. 31 [ineffective assistance must be prejudicial].)

Without further context or information, that is not a threat. Yet even if it was a threat, it was not directed at any person in particular, let alone at defendant. Further, there was no basis for believing the threat came from Alvarez. Even assuming the speaker was Alvarez's son, and therefore was "associated" with Alvarez, there was no evidence suggesting the statement expressed Alvarez's intention or was made on behalf of or at the instigation of Alvarez. In short, there was no evidentiary basis for giving the portion of the instruction concerning threat by another.

Defendant cites *People v. Minifie* (1996) 13 Cal.4th 1055, but in that case the third party threats were made directly against the defendant and were accompanied by evidence the persons making the threats and the victim were part of a group having a reputation for violence. (*Id.* at pp. 1061–1062.) Such evidence was absent here.

There being no error in the court's refusal to give that portion of the instruction regarding threat by another, defense counsel's failure to lodge an objection to the refusal did not constitute ineffective assistance of counsel.

Because we find no error, there is no basis for defendant's claim of cumulative prejudice.

### **III. DISPOSITION**

The judgment of the trial court is affirmed.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Dondero, J.