Filed 1/3/23 P. v. Bracamonte CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JORDAN BRACAMONTE,

Defendant and Appellant.

E075734

(Super.Ct.No. BLF1500085)

OPINION

APPEAL from the Superior Court of Riverside County. Otis Sterling III, Judge. Affirmed in part; reversed in part and remanded with directions.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Julie L. Garland and Charles C. Ragland, Assistant Attorneys General, Michael Pulos, Seth M. Friedman and Melissa Mandel, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Jordan Bracamonte of second degree murder of a child and assault likely to produce great bodily injury on a child resulting in death. He pleaded guilty to various other charges of domestic violence, making criminal threats, and false imprisonment. The trial court sentenced him to 25 years to life, plus eight years four months in state prison. He appeals, contending the trial court erred prejudicially by admitting into evidence statements he made to the police that he claims were obtained involuntarily in violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. In addition, defendant argues he is entitled to a remand for the trial court to determine the appropriate sentence, under recent amendments to Penal Code[1] section 1170 (Stats. 2021, ch. 731, § 1.3, eff. Jan. 1, 2022), for his convictions on crimes that occurred when he was 19 or 20 years old.

Although defendant objected during his preliminary examination to the admission of his statements that he claims were involuntarily obtained, he did not renew that objection at trial. Therefore, he has forfeited his claim on appeal. And, because there is an obvious tactical reason why his trial counsel would not have objected at trial—his statements to the police were the only evidence to support his claim of accidental death and permitting those statements to be admitted allowed defendant to avoid testifying and subjecting himself to cross-examination—we cannot conclude on this appellate record that failure to object was the result of ineffective assistance of counsel. The People concede the recent amendments to section 1170 apply retroactively to defendant's

[1] All further statutory references are to the Penal Code unless otherwise indicated.

nonfinal judgment, and that he is entitled to a remand for the trial court to resentence him. We accept the People's concession and reverse the sentence and remand for resentencing. In all other respects, the judgment is affirmed.

I.

PROCEDURAL BACKGROUND

The People charged defendant with one count of first degree murder (§ 187, subd. (a), count 1), one count of assault by means of force likely to produce great bodily injury to a child under the age of eight years resulting in the child's death (§ 273ab, subd. (a), count 2), four counts of corporal injury on a spouse or cohabitant (§§ 273.5, subd. (a), 243, subd. (f)(10), counts 3, 4, 6 & 7), one count of making a criminal threat (§ 422, count 5), and one count of false imprisonment (§ 236, count 8).

During trial, defendant pleaded guilty to counts 3 through 8. A jury acquitted defendant on count 1 of first degree murder but found him guilty of the lesser included offense of second degree murder, and found him guilty on count 2 of assault with great bodily force.

The trial court sentenced defendant to state prison for 25 years to life plus a consecutive determinate term of eight years four months, as follows: (1) 15 years to life on count 1, stayed under section 654; (2) 25 years to life for count 2; (3) the upper term of four years on count 3; (4) one-third the middle term of three years for counts 4, 6 and 7 (for a total of three years); and one-third the middle term of two years for counts 5 and 8 (for a total of one year four months).

Defendant timely appealed.

II.

FACTS

Defendant does not challenge the sufficiency of the evidence to support his convictions. We must construe the facts in the light most favorable to the judgment. (*People v. Curl* (2009) 46 Cal.4th 339, 342, fn. 3.)

In late 2014, defendant moved in with his wife and their baby daughter, who were living in an apartment in Blythe. Although she feared him because of prior abuse, defendant's wife felt she had no choice but to let him move in. Defendant started abusing his wife, "[p]ractically every day," calling her names, belittling her for the way she kept up the apartment, and choking her and punching her in the head.

A few months later, defendant's wife invited M.P. and his two sons—the victim, who was 18 months old at the time, and his three-year-old brother—to move into the apartment. Although defendant did not abuse his wife when M.P. was around, he continued to abuse her and once left her face and ears bruised. However, defendant's wife and M.P. did not think defendant would abuse the children, including the victim, whom the defendant sometimes watched when his wife was at school and M.P. was at work.

On April 27, 2015 (a Monday), defendant and his wife were at the apartment with their daughter, a friend, and the victim. Defendant's wife and her friend were sitting outside while defendant bathed the victim. Defendant's wife checked on defendant and the victim a couple times to make sure everything was okay, but defendant told her to stop being nosey and to go away. He had never done anything like that before. A while

later, the friend went into the apartment and saw that the victim was asleep. Defendant said he was worried because the victim had fallen and hit his face on the side of the bathtub. And, when defendant was combing the victim's hair, his wife saw fresh bruising on the victim's face. She looked at him, and defendant said, "'I know what you are thinking. [H]e fell out of the tub.'"

When M.P. got home, he noticed the victim had a tender bump on the back of his head and a bruised cheek. To avoid conflict between defendant and M.P., defendant's wife lied and said the victim had fallen out of the bathtub while she was bathing him, and she briefly left him unsupervised. M.P. accepted this explanation, saying it seemed like something a toddler might do. Other than bruising on his face and maybe a bruise on his back, the victim seemed fine physically. But he was clingier and quieter than usual.

The next morning (a Tuesday), M.P. checked the victim and saw that the head injuries had not changed. The victim still had a bruise on his cheek and a bump on the back of his head. Before he left for work, M.P. prepared breakfast for the victim and woke defendant, who was sleeping on the downstairs couch, to let him know it was time for him to take care of the victim. The victim cried when M.P. was leaving, which was normal.

Later that morning, defendant's wife woke and heard defendant finishing his shower. Defendant came to the bedroom and got dressed. They both went downstairs where the victim was sitting on the couch in a slouched position with his eyes closed, apparently sleeping. A few minutes later, the victim started grunting and extending and

twisting his arms and legs. Although the victim had never experienced one before, defendant said the victim was having a seizure and it was not a big deal.

When she saw new bruises on the victim's face, defendant's wife called M.P. at work and he came home within a few minutes. By that time, the victim's "body was locked up," "his muscles and everything was tightened up and his eyes were rolling in the back of his head, and he was making grunting noises." M.P. and defendant took the victim to the hospital, which was about five minutes away. The victim's condition did not change on the way to the hospital. He was completely unresponsive, with his body locked, his eyes rolling in the back of his head, and he was making grunting sounds.

When they arrived at the hospital, the hospital staff immediately began treating the victim. He had extensive and darkening bruises on his face and head, and cuts on his lips and bruises on both ears, that were not present when M.P. left for work. The hospital staff observed bruising and a bump on the back of the victim's head. They told M.P. that something was seriously wrong.

M.P. told the hospital staff that the victim had fallen out of the bathtub the day before, but the explanation did not seem to fit the victim's injuries. When M.P. asked defendant what had happened, defendant said he did not know but that the victim "just fell into a seizure out of nowhere." Defendant went back to the apartment. When defendant returned to the hospital, M.P. once again asked him what had happened to the victim. Defendant gave the same response as before, then left the hospital for good.

Later, defendant and M.P. exchanged text messages. Defendant wrote that M.P.'s children "'are a handful.'" M.P. pressed defendant, and wrote, "'[i]f you have something

to tell me, tell me now.'" Defendant replied, "'I'm good. I didn't do anything. We didn't do anything, bro. Swear on my daughter.'" Defendant also wrote, "'Me and [my wife] today weren't even near him besides the morning. You were here but after you left, 15 minutes after I had woken up and went straight to [my wife] to be aware of him, because I was going to jump in the shower. We both went downstairs and [he] was sleeping, bro.'" "'But that is when the seizure happened, [a] few minutes after me and [my wife] sat on the couch to check his face.'"

Hospital staff called the police about the victim and officers with the Blythe Police Department responded and documented the victim's injuries. Later that day, a sergeant interviewed defendant at the police station. Before questioning, defendant was advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, and he waived those rights.

Defendant told the sergeant the victim was fine when arriving at the apartment the previous Saturday, and nothing of note occurred on Sunday either. Defendant said the victim fell out of the bathtub while his wife was bathing him the day before (Monday), and the victim received a "'small bruise and a little lump.'" After M.P. left for work that very morning (Tuesday), the victim ate his breakfast in front of the television and made a mess. Defendant took the food away, cleaned up the mess, and laid the victim down on the couch to sleep.

Defendant said he went upstairs and took a shower. When he was finished, he and his wife went downstairs. The victim was sleeping, and he "was fine. Perfectly fine." As he and his wife were chatting, the victim started grunting and stiffening his limbs, and

his mouth filled with saliva. Defendant thought the victim was only dreaming but, after a few minutes, he realized something was wrong. He did an Internet search and thought the victim might be having a seizure. Defendant told the sergeant that he did not want to take the victim to the hospital because he was worried M.P. would get in trouble, so they called M.P. instead. M.P. agreed the victim was having a seizure and said he was on his way home.

Defendant told the sergeant that he had decided to take the victim to the hospital anyway without waiting for M.P., but M.P. returned before he could leave. The two then took the victim to the hospital where they learned he had "a couple of bumps, one behind his head." After being there for about 15 minutes, defendant left the hospital, but he and his wife stayed in touch with M.P. by text message. They were later informed that the victim had a brain injury and was being flown to a hospital in San Diego. Defendant stayed at home until the police arrived.

When the sergeant said he knew defendant was lying about his wife having bathed the victim the day before, defendant admitted he had given the victim a bath. Defendant told the sergeant that the victim slipped while trying to get out of the bathtub and fell face first, and that he (defendant) took "full responsibility." He insisted "[n]othing else" had occurred that morning after M.P. left for work, and he had "no idea" what happened to the victim. When the sergeant said the victim's fall from the bathtub as described by defendant could not account for the victim's injuries, such as the extensive bruises and lumps on the back of the victim's head, defendant denied having seen or known about those injuries, and again stated he did not know what had happened. The sergeant probed

defendant a little more about the victim having fallen from the bathtub, and defendant said the bruising had worsened overnight and continued to worsen when the victim experienced the seizures that morning.

The sergeant then informed defendant that the victim had died, that the victim did not die from falling in the bathtub, and that this was defendant's "chance . . . to start bein' honest." Defendant now said that, after M.P. had left for work, he slept on the couch while the victim watched television. He woke up when the victim had "pooped all over" the couch. Defendant "grabbed" the victim, who "started crying." He then started dragging the victim upstairs by the hand to bathe him, but the victim resisted. Defendant said, "on my way upstairs—not—not all the way, like, couple of steps up, I was, like, ahead of him. He was, crying, he was kinda like diggin' himself, puttin' himself away. [I] [g]ot frustrated so I'm like, 'Okay, fine. You wanna be alone?' I'm like, 'You wanna throw a fit. Fine.' I let him go [and] he hit his head, but I—I thought he was gonna land on his butt . . . ." Defendant explained the victim "ended up falling on his butt, bounced and hit [the] back [of] his head."

Defendant told the sergeant that, after the victim fell, he grabbed the victim under his armpits and carried him upstairs and put him in the bathtub. While bathing the victim, a shower caddy somehow fell from the nail it was hanging from and hit the victim in the face, causing his mouth to bleed. The victim cried but quieted down. Defendant dried the victim off, dressed him, and took him downstairs and laid him on the couch. The victim was "dazed . . . from the hit" and, about 30 minutes later, he started having seizures.

Defendant admitted he has “a really bad temper” and that, “when I explode, I explode.” Defendant’s knuckles were visibly bruised and swollen, but he denied having gotten angry at the victim and denied that he ever struck or shook the victim. Defendant was arrested and, before he was taken to jail, he spoke briefly with his wife. He told her, “[The victim’s] dead. It was an accident.” When she asked, “Did you just flip?,” defendant responded, “No. I—I was on the stairs and I let him go and he hit his head. He bounced on his butt and hit his head.”

A postmortem examination of the victim revealed he had significant bleeding, swelling, and herniation in his brain and retinal hemorrhaging. Those severe injuries could not have resulted from a fall in the bathtub the day before he was taken to the hospital, because he would not have been able to walk, talk, or otherwise appear normal. Moreover, he could not have received such extensive injuries from a fall down the stairs or a falling shower caddy. Instead, the victim’s death was a homicide caused by abusive, blunt force trauma to the head.

III.

DISCUSSION

A. Defendant Did Not Object at Trial That His Statements to the Police Were Involuntarily Obtained, so He Forfeited His Claim That the Statements Were Erroneously Admitted.

Defendant argues his statements to the police were involuntarily made, and that admission of those coerced statements into evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The People

respond that defendant's statements were given after proper advisement under *Miranda v. Arizona*, *supra*, 384 U.S. 436, and that defendant was not coerced.

We do not decide whether defendant's statements to the police were involuntarily obtained. As the People contend, defendant did not object at trial to the admission of his statements to the police. Therefore, his claim on appeal that his statements were involuntarily made has been forfeited. (*People v. Tully* (2012) 54 Cal.4th 952, 992 ["[T]rial counsel never mustered evidence in support of an involuntariness claim and the trial court was never asked to undertake a voluntariness analysis. Accordingly, the argument is forfeited."]; *People v. Maury* (2003) 30 Cal.4th 342, 387-388 ["At trial, defendant failed to object to admission of his statements and raise the involuntariness claim on the constitutional grounds he now asserts. Thus, he has forfeited his claim on appeal."].)

That defendant earlier objected that his statements were involuntary, during his preliminary examination, did not preserve the claim for appeal. It is well settled that "[a] pretrial ruling on a claimed Fifth Amendment violation is subject to reconsideration by the trial court, and objection on Fifth Amendment grounds to the admissibility of evidence is waived if not made at trial when the evidence is offered." (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1005; accord, *People v. Crittenden* (1994) 9 Cal.4th 83, 126.)

Anticipating this court would find he forfeited his claim of error, defendant argues his trial attorney rendered ineffective assistance of counsel by not objecting to the admission of his statements into evidence on the grounds they were involuntarily made.

"In order to establish a claim for ineffective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that the defendant suffered prejudice as a result of such deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692 . . . .) To demonstrate deficient performance, defendant bears the burden of showing that counsel's performance """"fell below an objective standard of reasonableness . . . under prevailing professional norms."""" (*People v. Lopez* (2008) 42 Cal.4th 960, 966 . . . .) To demonstrate prejudice, defendant bears the burden of showing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. (*Ibid*.; *In re Harris* (1993) 5 Cal.4th 813, 833 . . . .)" (*People v. Mickel* (2016) 2 Cal.5th 181, 198.)

"'[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 985.) """Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" [Citation.] "[W]e accord great deference to counsel's tactical decisions" [citation], and . . . "courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight" [citation]. "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts."""
(*People v. Stanley* (2006) 39 Cal.4th 913, 954.)

We must indulge a "strong presumption" that trial counsel did not object "for tactical reasons rather than through sheer neglect." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 8.) And, when the trial record is silent as to the reason counsel did not object to the admission of evidence, we cannot find ineffective assistance of counsel on direct appeal "'unless there could be *no conceivable reason* for counsel's acts or omissions.'" (*People v. Johnsen* (2021) 10 Cal.5th 1116, 1165, italics added; accord, *People v. Lucas* (1995) 12 Cal.4th 415, 442 ["Reviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions."].) As our Supreme Court has noted several times, "rarely will an appellate record establish ineffective assistance of counsel." (*People v. Thompson* (2010) 49 Cal.4th 79, 122.) Whenever such is found, it is usually in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Snow* (2003) 30 Cal.4th 43, 111.)

In its brief, the People argue defendant's attorney had an obvious tactical reason for not objecting to the admission of defendant's statements to the police. Allowing those statements to be admitted gave defendant the opportunity to provide his side of the story—that the victim died from an accidental fall down the stairs—without the risk of taking the stand to testify and being subjected to cross-examination. And, the People argue the defense in this case of accidental death was entirely premised on defendant's statements to the police. We agree.

As one appellate court has stated, "it is conceivable that defense counsel may for tactical reasons waive a valid objection to introduction of the defendant's statements." (*U.S. v. Powe* (D.C. Cir. 1978) 591 F.2d 833, 842.) "If, for example, defendant's statements at the time of arrest are thought to be more exculpatory than incriminating, the defense may deliberately choose not to object, even though the statements may have been coerced." (*Id.* at p. 842, fn. 29.)

During closing argument, defense counsel argued the medical testimony from prosecution witnesses was "bias[ed]" and "arrogan[t]," the victim died from injuries he received during a "freak accident" by falling down the stairs, and that, at most, defendant was guilty of involuntary manslaughter. Yet, nobody testified they were present and witnessed the victim fall down the stairs (or in the bath, for that matter), and defendant's statements to the police were the *only evidence* to support his defense that the victim's death was the result of an accidental fall. His attorney could have rationally concluded that, overall, the statements were more exculpatory and favorable to defendant than incriminating, and that permitting the statements to be admitted, rather than having defendant testify, outweighed the fact that the statements were allegedly coerced. Because a rational, tactical reason existed for counsel to not object, we simply cannot conclude defendant's attorney rendered deficient representation.

B. *Defendant Is Entitled to a Resentencing Hearing Under Recent Amendments to Penal Code Section 1170.*

As indicated, the trial court sentenced defendant to a determinate term of eight years four months on counts 3 through 8, consisting of the upper term of four years on

count 3 and one-third the middle term for the remaining counts. At the time, section 1170 provided that a sentencing court had the discretion to determine an appropriate term that "best serves the interests of justice." (Former § 1170, subd. (b); Stats. 2020, ch. 29, § 14.) Effective January 1, 2022, Senate Bill No. 567 (2020-2021 Reg. Sess.) amended former section 1170, subdivision (b), to (1) establish a presumption that, absent certain circumstances, the middle term is appropriate, and (2) to establish a presumption that for offenses committed when the defendant was 26 years of age or younger (defined as a "youth"), the lower term is the appropriate one. (Stats. 2021, ch. 731, § 1.3, adding § 1170, subd. (b)(1), (2); Stats. 2021, ch. 695, § 4, adding § 1016.7; Stats. 2021, ch. 695, § 5.1, adding § 1170, subd. (b)(6)(B); see *People v. Flores* (2022) 73 Cal.App.5th 1032, 1038-1039.)

Defendant argues the offenses to which he pleaded guilty in counts 3 through 8 were committed when he was 19 and 20 years old, that the amendments to section 1170, subdivision (b), are ameliorative and apply retroactively to his nonfinal judgment, and that the sentence should be reversed and remanded for the trial court to resentence him and determine anew the appropriate sentence on those counts in conformity with the new law. The People concede defendant is entitled to a remand for resentencing. We accept the People's concession, and so order. (*People v. Flores*, *supra*, 73 Cal.App.5th at p. 1039 ["The People correctly concede the amended version of section 1170, subdivision (b) that became effective on January 1, 2022, applies retroactively in this case as an ameliorative change in the law applicable to all nonfinal convictions on appeal."].)

IV.

DISPOSITION

The judgment is reversed in part, and the matter is remanded for the trial court to resentence defendant under the amended version of Penal Code section 1170, subdivision (b). In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.