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Court of Appeal, Second District,
Division 8.

The PEOPLE, Plaintiff and Respondent,

v.

Randy PURCELL, Defendant and Appellant.

No. B220077.
(Los Angeles County Super. Ct. No. VA073043).
July 14, 2011.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert J. Perry, Judge. Affirmed.
Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Susan S. Kim, Deputy Attorneys General, for Plaintiff and Respondent.

RUBIN, J.

*1 Randy Purcell appeals from the judgment following two trials which resulted in his conviction for burglary, robbery, and felony murder. We affirm.

FACTS AND PROCEEDINGS

In accord with the usual rules on appeal, we state the facts in the manner most favorable to the judgment. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Appellant Randy Purcell rented a room in the house of Hawaiian Gardens gang member Ruben Baltazar. On July 24, 2002, appellant and Baltazar went to the home of Tommy Willis intending to rob Willis; appellant and Willis were acquainted through work and appellant knew Willis kept several hundred dollars in cash at home. During the robbery, Willis was shot dead; in appellant's later trial for murder, two of Baltazar's gang associates testified appellant told them a few hours after the shooting that appellant accidentally shot Willis while Willis and Baltazar struggled. Before fleeing from the crime scene, appellant and Baltazar took money and a video camera. Later that evening, Baltazar ordered appellant to return to Willis's house with Baltazar's gang associates to clean up the crime scene and steal some more of the valuables, including a telephone answering machine and safe, that he and appellant had left behind. The next day, Los Angeles County sheriff's deputies found Willis's body. He had suffered one gunshot wound to his face below his left eye, and a second wound to the back of his neck.

The People filed an information in August 2003 charging appellant and Baltazar with murder, burglary, and robbery. Appellant pleaded not guilty. The court severed appellant's trial from Baltazar's. A jury convicted appellant of robbery and burglary, but deadlocked on the murder count. The court declared a mistrial and the People retried the murder count. A second jury convicted appellant of first degree felony

murder during the commission or attempted commission of burglary and of robbery. The court sentenced appellant to state prison for life without possibility of parole plus one year. This appeal followed.

DISCUSSION

1. Exclusion of Expert Testimony on Police Interrogation Techniques

A. *Summary*

Appellant's recounting of Willis's murder changed over several interviews with sheriff's investigators and at trial. In a nutshell, appellant initially told investigators he went to Willis's home with Baltazar not to rob Willis, but instead to bid on a carpentry job. As appellant and Willis discussed appellant's cost estimate for the job, Baltazar became angry with Willis and shot him. After several interviews by investigators, appellant changed his story, however, and confessed that he shot Willis. But, by the time of trial, he recanted his confession on the ground he had falsely admitted shooting Willis because he feared Baltazar's gang associates would hurt him or his family if he continued to accuse Baltazar of killing Willis. At trial appellant revived his original accusation that Baltazar shot Willis when he became angry with Willis over the carpentry project.

B. *Several Interviews, Several Accounts*

*2 Sheriff's investigators first interviewed appellant on August 13, 2002, following his arrest on a charge unrelated to these proceedings. He told investigators that Baltazar shot Willis in anger when Willis complained that appellant's bid for a carpentry project was too high. Appellant testified at trial that he told investigators he feared gang members might retaliate against him or his family because he was cooperating with investigators. According to appellant, investigators assured him they would protect him in return for his cooperation.

Continuing to cooperate, two weeks later on August 28, 2002, appellant joined investigators in a crime-scene walk through of Willis's home. Appellant testified at trial that while waiting at the sheriff's station before the walk-through, a Hawaiian Gardens gang member warned appellant he “better not be snitchin” to investigators. During the walk-through, appellant stood by his accusation that Baltazar shot Willis in anger over Willis's complaining about appellant's bid.

Sheriff's investigators again interviewed appellant on September 17, 2002. Appellant testified that his girlfriend informed him before the interview that Baltazar was threatening he would “handle it the gangster way” if appellant spoke to investigators about the crime. Appellant also testified that investigators told him they could not protect him and his family unless he told them Willis had been shot during a bungled robbery. Claiming gang members' threats frightened him, appellant asked to meet with investigators on September 17 and for the first time admitted some measure of criminal culpability. During the meeting, appellant told investigators that Baltazar had shot Willis during a “robbery gone bad” or “home invasion” planned by Baltazar and appellant.

Three days later on September 20, appellant changed yet again what he told investigators and for the first time confessed to being the shooter. Appellant testified at trial that a gang associate of Baltazar sat next to appellant on a sheriff's department bus on the morning of the 20th. According to appellant, the gang member threatened appellant's family unless appellant accepted responsibility for shooting Willis. Consequently, appellant telephoned investigators to tell them he wanted to talk. During that talk, he told investigators that he, not Baltazar, had shot Willis when Willis resisted during the robbery.

C. *Trial Recantation and Expert Testimony*

At trial, appellant recanted his confession. He returned to his original description of the murder as Baltazar shooting Willis in anger at Willis's complaints about the cost of appellant's proposed carpentry work. He testified he falsely confessed to shooting Willis in order to ensure his family's safety. In support of his recantation, appellant offered the testimony of Dr. Mark Costanzo, an expert in police interrogation techniques and false confessions. Dr. Costanzo was prepared to opine for the jury that sheriff's investigators

had used two techniques likely to induce a false confession: telling appellant he had failed a "fake" lie detector test, and promising him leniency if he told investigators the truth. The trial court excluded Dr. Costanzo's testimony in both trials. The court's reasons differed in each trial.

a. First Trial

*3 The court excluded Dr. Costanzo's testimony in the first trial as a sanction for Dr. Costanzo's discovery violation. The People had moved to exclude Dr. Costanzo's testimony as irrelevant because appellant had not alleged investigators had coerced his confession, nor had he moved to suppress his confession as involuntary. During an Evidence Code section 402 hearing on the admissibility of Costanzo's testimony, Costanzo revealed he had not turned over to the prosecution (or the defense) his handwritten notes from his jailhouse interview of appellant a year and a half earlier. (See Pen.Code, § 1054.3, subd. (a)(1) [defendant obligated to give prosecution "reports or statements" of defense experts].) Costanzo testified:

"[Witness:] I took notes but I did not write a report on [the interview]. [Court:] You have your notes? [Witness:] I might. They are handwritten notes. [Court:] How long have you been doing this, testifying in criminal courts? [Witness:] Approximately two years. [Court:] And you make it a point to come in and testify and they are usually serious cases, aren't they, somebody has been killed or serious injuries or something—[Witness:] Often they are. [Court:] Okay. And you took notes of an interview with a defendant and you did not turn them over? [Witness:] Ah, no, I did not. [Court:] All right. I'm not going to let him testify. That's a failure of discovery. [¶] All right. Let's resume this trial. [Witness:] Am I excused? [Court:] You are excused, sir. [¶] I also want to state for the record I found him incredible. But my reason for not allowing him to testify is for obvious failure of discovery."

The court's sua sponte exclusion of Dr. Costanzo's testimony for a discovery violation did not reach the merits of the People's motion that the testimony was irrelevant.

b. Second Trial

The court excluded Dr. Costanzo's testimony from the second trial because it deemed his opinion unhelpful for the jury's understanding of appellant's defense that he falsely confessed to protect his family and himself from gang retaliation. The court explained:

"I just don't think that [Dr. Costanzo] adds anything in the case.... Now that I've heard the testimony [from the first trial], this is not a normal case where these confession experts come in and say that the police did this and the police did that and they coerced a false confession. The defense, as I understand it, is that [appellant] got himself in deep with some gang members and the gang members coerced him into taking the blame or taking the rap for the killing and I do not think that Dr. Costanzo and his testimony—and he has testified before me in other trials—is appropriate in this case."

c. No Reversible Error in Either Trial

Appellant contends the court's exclusion of Dr. Costanzo's testimony requires reversal. We disagree because the court did not abuse its discretion by excluding his testimony. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1205 [exclusion of expert testimony reviewed for abuse of discretion].) Although many laypeople may find false confessions inconceivable other than under circumstances of physical duress, false confessions sometimes occur from non-physically coercive police interrogation. (*People v. Page* (1991) 2 Cal.App.4th 161, 183–184, 187 & fn. 15; *U.S. v. Hall* (7th Cir.1996) 93 F.3d 1337, 1344–1345.) Expert testimony about police interrogation techniques may help jurors understand how non-coercive police interrogation could induce an innocent defendant to falsely confess to a crime the defendant did not commit. "[I]t is hard to imagine anything more difficult to explain to a lay jury [than a false confession]. After all, people do not just confess to crimes they did not commit, do they? Well, it turns out they sometimes do. Among the hundreds of persons exonerated of serious crimes through DNA testing are numerous individuals who earlier confessed." (*Lunbery v. Hornbeak* (9th Cir.2010) 605 F.3d 754, 763 (conc. opn. of Hawkins, J.).)

*4 Expert testimony about false confessions thus can help a jury in the right case. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [expert testimony must "relate to a subject sufficiently beyond common experience" that its admission assists trier of fact] .) But just as one does not need a weatherman to know which way the wind blows, one does not need an expert to know that gang members' physical threats against a defendant or his family might induce an innocent defendant to falsely confess to a crime the defendant did not commit. Here, appellant claimed he falsely confessed to shooting Willis because Hawaiian Gardens gang members had threatened him and his family, and sheriff's investigators promised protection only if he admitted culpability. Lay juror's common experience allows them to understand someone might falsely confess to save himself or his family from physical injury; the average person does not need an expert to explain why a false confession might occur under those circumstances. (See *People v. Ramos, supra,* 121 Cal .App.4th at pp. 1204–1205 [no need for expert testimony about police interrogation and false confessions where defendant claimed false confession induced by purportedly improper promises of leniency because lay jury could understand how promise of leniency might lead to false confession]; *People v. Son* (2000) 79 Cal.App.4th 224, 241 [because defendant's "testimonial admission that his confession ... was false and made only because [police] assertedly promised that [defendant] would serve no more than one year in custody [was] a matter easily understood by a layperson without expertise[,] expert evidence bearing on other potential reasons for false confessions was unnecessary."].) Accordingly, the court did not err in excluding Dr. Costanzo's testimony. [FN1]

FN1. Appellant contends the court erred in excluding Dr. Costanzo's testimony from the first trial as a discovery sanction for the doctor not turning his notes over to the prosecution. Appellant contends the error was two-fold because, first, the notes were undiscoverable attorney-client communications and, second, a court may exclude evidence as a discovery sanction only as a last resort for willful discovery abuse when other sanctions have failed. (Pen.Code, § 1054.5, subd. (c)) ["The court may prohibit the testimony of a witness ... only if all other sanctions have been exhausted."]; *People v. Jackson* (1993) 15 Cal.App.4th 1197, 1203.) Regardless of whether the court erred by excluding Dr. Costanzo's testimony for his failure to produce his notes to the prosecution when no motion for sanctions was pending before the court, we conclude the error was harmless because Dr. Costanzo's testimony was nevertheless properly excluded as improper expert testimony, as we have stated in our discussion of the trial court's ruling at the second trial.

Appellant contends Dr. Costanzo's exclusion from testifying violated appellant's right to due process and a fair trial because it prevented him from putting on his defense. Not so. Appellant's defense was that he falsely confessed to killing Willis from fear of gang retaliation. The court's exclusion of Dr. Costanzo barred appellant from offering unnecessary, and thus irrelevant, expert testimony in support of that defense. The court did not, however, deny appellant the right to offer evidence that gang threats led him to falsely confess and to argue that defense to the jury.

2. Instruction on Duration of Robbery and Burglary

The court declared a mistrial after appellant's first jury convicted him of robbery and burglary but could not reach a verdict on the murder charge. Following the mistrial, the People retried appellant for murder. The People pursued a murder conviction under two theories: malice aforethought, which is not at issue in this appeal, and aiding and abetting felony murder in which the predicate felonies were burglary and robbery.

In the second trial, the court instructed the jury on general principles governing felony murder. One of those principles dictated that felony murder occurred only if appellant was aiding and abetting burglary or robbery at the moment Willis was fatally shot. The court instructed the jury:

*5 "If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of robbery or burglary, all persons, who [aid and abet the robbery or burglary ...] are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental. [¶] Before a nonkiller may be found guilty of murder pursuant to the felony murder rule, there must be a ... temporal relationship between the underlying felony or felonies and the act resulting in death.... [¶] In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been

jointly engaged in the commission of the robbery or burglary at the time the fatal wound was inflicted....” (CALJIC 8.27.) [FN2]

FN2. Compare *People v. Pulido* (1997) 15 Cal.4th 713, 716 [“If one person, acting alone, kills in the perpetration of a robbery, and another person thereafter aids and abets the robber in the asportation and securing of the property taken,” the second person is not guilty of felony murder]; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1016 [“Under the felony-murder rule, ‘the evidence must establish that the defendant harbored the felonious intent either prior to or during the commission of the acts which resulted in the victim's death....’ “].)

Although the second trial did not retry appellant's convictions for burglary and robbery, the court instructed the second jury on the duration of robbery and burglary. The court instructed that a robbery continues until the perpetrator reaches a place of temporary safety. The court stated: “The commission of the crime of robbery is not confined to a fixed place or a limited period of time and continues so long as the stolen property is being carried away to a place of temporary safety.” (CALJIC 9.40.1.) The court also instructed that a burglary continues until the perpetrator leaves the dwelling: “In order for an accused to be guilty of burglary as an aider and abettor, he must have knowledge of the perpetrator's unlawful purpose and must have formed the intent to commit, encourage or facilitate commission of the crime before the perpetrator's final departure from the structure.” (CALJIC 14.54.)

Appellant contends the court erred by instructing on the duration of robbery (CALJIC 9.40.1) and burglary (CALJIC 14.54) because the instructions extended the time during which his participation in burglary and robbery put him at risk of committing felony murder. He correctly notes that guilt for felony murder required him to be aiding and abetting the robbery or burglary when Willis was fatally shot; he was not guilty of felony murder if he formed a felonious intent only after Willis was shot. (See Use Note for CALJIC 9.40.1 [“Do not use for felony-murder purposes.”]; CALCRIM 1702 [“Use Note” for robbery duration instruction directs court not to use with felony murder].) Appellant notes substantial, albeit disputed, evidence existed that he went to Willis's home to give Willis an estimate for carpentry work, and that appellant joined in the robbery and burglary only after Baltazar killed Willis. In support of his characterization of the evidence, he notes that the first jury failed to reach a verdict on the murder charge. The first jury's stumbling block appears to have been whether appellant went to Willis's house intending to bid on a job or rob Willis—a difficulty the first jury's foreman coined as “job or rob” when the trial court canvassed the jury after jurors declared they could not reach a verdict on the murder charge. The foreman told the court, “There are a couple of people who cannot get past the intent to rob versus job. They think the intent was do a job rather than rob.”

*6 Although the court erred instructing on the duration of burglary and robbery because it ran the risk of changing the temporal rules for aiding and abetting felony murder, we find the error was harmless in light of the court's instructions in their entirety.[FN3] “ ‘ “ ‘[T]he correctness of jury instructions is determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ “ ‘ “ (*People v. Smithey* (1999) 20 Cal.4th 936, 963–964.) Here, the court instructed the jury that appellant needed to be aiding and abetting the robbery or burglary when the fatal shot was fired. It instructed on the point most explicitly with CALJIC 8.27, telling the jury “In order to be guilty of murder, as an aider and abettor to a felony murder, the accused and the killer must have been jointly engaged in the commission of the robbery or burglary at the time the fatal wound was inflicted.” The court reinforced its instruction on the necessary temporal link between the killing and another felony with CALJIC No. 8.81.17, stating that to find the special circumstance allegations to be true (a finding the jury did in fact make), the People must prove that the “murder was committed while the defendant was engaged in or was an accomplice in the commission of a robbery or burglary....” Moreover, whatever difficulties plagued the first jury's deliberations, the second jury presumptively saw the evidence differently as guided by the prosecutor's framing of the evidence when it convicted appellant of murder. The prosecutor argued consistently throughout the second trial that appellant went to Willis's house intending to burgle and rob Willis. In closing argument, the prosecutor told the jury it should convict appellant of felony murder because “There's the burglary that [appellant] committed when he went in with Mr. Baltazar and killed Tommy Willis. That's also when he went in to rob the victim, Mr. Willis ... The felony murder is based on

the first entering when Mr. Willis gets killed." At no point during argument did the prosecution muddy its theory of the case by suggesting appellant formed his felonious intent after he and Baltazar entered the house and Willis was shot. (*People v. Young* (2005) 34 Cal.4th 1149, 1202 ["The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury. [Citations.]") Given that the court instructed the jury that appellant's guilt for felony murder required that he be aiding and abetting burglary or robbery when Willis was shot, and the prosecutor's unwavering theory that appellant entered Willis's home with a felonious intent, we find no reasonable likelihood that the jury relied on the court's error in instructing on the duration of burglary and robbery to convict appellant of felony murder for aiding and abetting a felony after the shooting.[FN4]

FN3. Appellant contends we measure the prejudicial harm of the court's error under the *Chapman* standard. Although the Attorney General does not defend the court's duration instructions, the Attorney General argues it does not matter whether the standard set by *Chapman* (reversal unless error harmless beyond a reasonable doubt) or *Watson* (reversal only if reasonable probability error affected the outcome) for assessing prejudicial error applies. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836.) We find the error harmless under both standards.

FN4. We also observe that because the first jury found appellant guilty of burglary when he entered Willis's home the first time, it necessarily found appellant had the intent to commit larceny, for that was the state of mind necessary to convict for burglary. (Pen.Code, § 459; *People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The first jury necessarily must have rejected appellant's "I only went to the house to give an estimate" defense.

3. Prosecutorial Misconduct

*7 Appellant contends the prosecutor committed several acts of misconduct by disparaging defense counsel and suggesting counsel had assisted appellant in committing perjury. (See e.g. *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154 disapproved on another point by *People v. Doolin* (2009) 45 Cal.4th 390, 421 fn. 22 [prosecutor must not attack counsel's integrity with baseless accusation that defense counsel fabricated evidence]; *People v. Sandoval* (1992) 4 Cal.4th 155, 183 ["improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case"]; *People v.. Bain* (1971) 5 Cal.3d 839, 847 ["unsupported implication by the prosecutor that defense counsel fabricated a defense constitutes misconduct"].)

In the first trial, the prosecutor argued to the jury in closing "And let's not forget how well rehearsed [appellant] was on that stand. Brilliant. I don't know if it was his doing or the defense attorney's doing—[Defense counsel]: Objection, your Honor, that's prosecutorial error." The court overruled the objection. Several minutes later, the prosecutor stated: "Reasons why you know [appellant] is not telling you the truth. Once again, he's so well rehearsed when he's on the stand. [Defense counsel]: Objection, your Honor. The Court: Overruled." And again a few minutes later the prosecutor argued to the jury: "The juror's duty is to consider only what's in the box. The tapes, any documents, the testimony of the witnesses, the credibility of the witnesses, the photos, and the elements of the crime. [¶] Everything else, public opinion, public feeling—we should have one up there for [defense counsel's] feelings. [Defense counsel]: Objection, your Honor. Prosecutorial error. The Court: Overruled." In the second trial, the prosecutor argued to the jury: "Why do you know that [appellant] is not telling the truth? He seems well-rehearsed. [Defense counsel]: Objection, your Honor, to well rehearsed. It's prosecutorial error and I'd like the jury to be admonished. The Court: Overruled."

Appellant construes the foregoing arguments as the prosecutor suggesting defense counsel assisted appellant in committing perjury. We do not understand the prosecutor as offering that suggestion. Prosecutorial misconduct occurs when a prosecutor's conduct infects a trial with unfairness, or involves deceptive or reprehensible methods. " 'A prosecutor's rude and intemperate behavior violates the federal Constitution 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." [Citation.] 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. Gionis* (1995) 9 Cal.4th 1196, 1214–1215.) Here, the prosecutor's references to appellant's testimony being "rehearsed" can be fairly understood as comments upon appellant's testimonial demeanor and its reflection on his credibility. A witness may appear to be, for example, composed, nervous, evasive, or, as the prosecutor argued here, rehearsed, but such characterizations of appellant's demeanor do not amount to misconduct. (See *People v. Wilson* (2005) 36 Cal.4th 309, 338["[T]he prosecution's assertion that defendant was lying and its description of the defense strategy were not misconduct. The prosecution may properly refer to a defendant as a 'liar' if it is a reasonable inference based on the evidence. [Citation.]".) As for the prosecutor's argument that it was defense counsel's "doing" that appellant appeared (at least in the prosecutor's eyes) rehearsed, we do not reasonably understand the prosecutor's suggestion that appellant may have benefitted from pretrial preparation with defense counsel as the equivalent of arguing that defense counsel suborned perjury. (See *Wilson* at pp. 338–339 [" ' "To observe that an experienced defense counsel will attempt to 'twist' and 'poke' at the prosecution's case does not amount to a personal attack on counsel's integrity." ' "]; *People v. Zambrano, supra,* 41 Cal.4th at p. 1154 disapproved on another point by *People v. Doolin, supra,* 45 Cal.4th at p. 421 fn. 22 [prosecutor may comment on counsel's trial tactics and arguments]; but see *People v. Sandoval, supra,* 4 Cal.4th at p. 183 ["improper for the prosecutor to imply that defense counsel has fabricated evidence or otherwise to portray defense counsel as the villain in the case"]; *People v. Thomas* (1992) 2 Cal.4th 489, 537 ["such locutions as 'coached testimony' are to be avoided when there is no evidence of 'coaching,' "].) We find no prosecutorial misconduct.

DISPOSITION

*8 The judgment is affirmed.

WE CONCUR: BIGELOW, P.J., and GRIMES, J.

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