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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALBERTO CORNEJO, Defendant and Appellant.	B285901 (Los Angeles County Super. Ct. No. BA449726)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Craig Richman and Leslie A. Swain, Judges. Conditionally reversed and remanded with directions.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Alberto Cornejo was convicted on two counts of lewd conduct (counts 1 and 2) upon a young girl, RD. The jury was unable to reach a verdict on four other counts of sexual molestation: a third count of lewd conduct involving RD (count 6), two counts of committing lewd conduct upon another young girl, AC (counts 3 and 4), and one count of oral copulation of RD (count 5). These four counts were later dismissed.

On appeal from the judgment of conviction on counts 1 and 2, Cornejo contends the trial court committed *Marsden* error (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) by not conducting a hearing on his second *Marsden* request. Cornejo also contends the trial court committed instructional error in giving the wrong unanimity instruction in light of the multiple charged acts involving two different young girls, and failing to instruct the jury not to base its decision on merely counting the number of witnesses on both sides. Finally, Cornejo contends reversal is required because of prosecutorial misconduct during the prosecutor's cross-examination of Cornejo and closing rebuttal argument.

We agree that the trial court erred in not conducting a *Marsden* hearing, but conclude Cornejo's other arguments are not well-founded. Accordingly, we conditionally reverse and remand for further proceedings.[1]

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[1] The parties agree that the trial court miscalculated Cornejo's presentence custody credits. We order that the abstract of judgment be amended on remand to reflect the correct number of presentence custody credits.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Charges*

In a six-count information, Cornejo was charged with three counts of lewd conduct upon RD, a child under 14 years of age (Pen. Code, § 288, subd. (a), counts 1, 2 & 6)[2] and one count of oral copulation of RD, a child 10 years of age or younger (Pen. Code, § 288.7, subd. (b), count 5). Cornejo was also charged with two counts of committing lewd conduct upon AC, a child under 14 years of age (counts 3 & 4). A multiple victim enhancement was also alleged (Pen. Code, § 667.61, subds. (b) & (e)(4)).

2. *Trial Evidence*

RD, the daughter of Cornejo's girlfriend, testified that he sexually molested her on the following four separate occasions in 2014 when she was 10 years old: (1) RD was sleeping in the car, and Cornejo reached under her clothing and touched her vagina, awakening her; (2) RD was riding in the car, and Cornejo parked, pulled down her pajama pants and licked her vagina; (3) RD entered the kitchen, and Cornejo had his pants down. He grabbed RD and rubbed his penis against her vagina and buttocks; and (4) RD was asleep in bed, and Cornejo entered her room naked and touched her breasts and vagina, awakening her.

AC, Cornejo's daughter, testified that when she was approximately six years old, he touched her chest and vagina on

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[2] Count 6 originally charged sodomy, but it was dismissed under Penal Code section 1118.1 and replaced prior to jury deliberations with the lesser included offense of lewd conduct upon a child.

three to five occasions. AC specifically recalled that Cornejo touched the inner part of her thigh on October 17, 2012.

Cornejo testified in his defense and denied he sexually molested either girl at any time.

3. *Verdict and Sentencing*

The jury found Cornejo guilty of committing lewd conduct upon RD as charged in counts 1 and 2. The jury informed the trial court it was hopelessly deadlocked on counts 3 through 6. The court declared a mistrial as to those counts, which were later dismissed. Cornejo was sentenced to serve eight years in prison.[3] Cornejo filed a timely appeal.

DISCUSSION

A. The Trial Court's Failure To Conduct A Second *Marsden* Hearing Was Reversible Error

1. Relevant Proceedings

At a pretrial hearing on June 30, 2017, Cornejo expressed dissatisfaction with his appointed counsel, deputy public defender Aaron Jansen (Jansen), and the trial court held a *Marsden* hearing. At that hearing, Cornejo complained Jansen had not met with him or returned his telephone calls. Cornejo said he had spoken to Jansen once or twice "over the television." Cornejo did not feel Jansen supported or communicated with him. Cornejo told the trial court that he was withholding potentially exculpatory information from Jansen because he did not trust Jansen. The court denied the *Marsden* motion.

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[3] The true finding of the multiple victim enhancement apparently was dismissed.

The case was assigned to a different court for trial. On July 14, 2017, during a recess from jury selection, Cornejo asked the trial court, "I requested, if the court can give me mercy, that I can have another public defender." The trial court replied, "No. You're in trial and I also know Mr. Jansen very well. I've known him for many years. I know he is an outstanding attorney and I think he's doing a fine job for you. When we have more time and you want to make a formal *Marsden* motion, you can, but I'm not going to be able to do it right now." Cornejo said, "I respect—" The court added, "I think you already made a *Marsden* motion; isn't that correct?" Cornejo replied, "I respect your request and I don't want the judge feeling I'm, because of your job, I don't want to get my disadvantage." The court stated, "I promise you, I'll do my very best to give you a fair trial. [¶] For now, let's bring the jurors in, please."

2. Governing Law

" 'The law governing a *Marsden* motion "is well settled. 'When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.' " ' " (*People v. Jackson* (2009) 45 Cal.4th 662, 682.) "In *Marsden*, [the Supreme Court] held it was error to deny the defendant the opportunity to explain the basis for his claim because a trial court that 'denies a motion for substitution of attorneys solely on the basis of [its] courtroom observations, despite a defendant's offer to relate specific instances of misconduct, abuses the exercise of [its] discretion to determine the competency of the attorney.' " (*People v. Sanchez* (2011) 53 Cal.4th 80, 87.) " '[A] proper and formal' *Marsden*

motion is not required—the defendant need only clearly indicate to the trial court 'in some manner' that he or she is requesting the discharge and replacement of the appointed counsel.' " (*People v. Armijo* (2017) 10 Cal.App.5th 1171, 1178 (*Armijo*).) "[O]nce the defendant clearly indicates to the trial court a request for the discharge and replacement of appointed counsel, the court must hold a hearing to allow the defendant to explain the basis for the request." (*Id.* at p. 1179.)

Simply put, a trial court cannot exercise its discretion whether to grant a *Marsden* motion without knowing the defendant's reasons for requesting a different attorney. (*Marsden*, *supra*, 2 Cal.3d at p. 123.) As our Supreme Court recognized in *Marsden*, the basis for a defendant's belief that his or her counsel is providing adequate assistance may not be "apparent to the trial judge from observations within the four corners of the courtroom." (*Ibid.*) Failure to conduct such a hearing "is legal error that compels reversal of the defendant's conviction unless the record shows beyond a reasonable doubt that the error was harmless." (*Armijo*, *supra*, 10 Cal.App.5th at p. 1179, citing *Marsden*, *supra*, 2 Cal.3d at p. 126.)

3. Cornejo Did Not Abandon His Second *Marsden* Request

The People do not dispute that Cornejo's request for "another public defender" alerted the trial court to his right to a *Marsden* hearing. Instead, the People maintain Cornejo abandoned his *Marsden* request when the trial court put off the hearing and Cornejo did not renew his request at a later date. We disagree because the People's argument does not fairly reflect the record.

To be sure, a defendant can be found to have abandoned his *Marsden* request by affirmatively withdrawing it (*People v. Padilla* (1995) 11 Cal.4th 891, 927, overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1), failing to renew his pre-sentencing *Marsden* request in spite of the trial court's invitation to provide additional reasons at a later hearing for substituting counsel (*People v. Vera* (2004) 122 Cal.App.4th 970, 976-977, 981-982), or proceeding to trial without reminding the trial court of a previously scheduled *Marsden* hearing that the trial court inadvertently failed to conduct (*People v. Jones* (2012) 210 Cal.App.4th 355, 362).

By contrast, in response to Cornejo's *Marsden* request, the trial court stated, "No" and lauded the abilities of Cornejo's current appointed counsel, Jansen. The trial court then agreed to conduct a *Marsden* hearing at some future time on the condition that Cornejo make "a formal *Marsden* motion." Lastly, the trial court noted that Cornejo had already made a *Marsden* request. Taken together, the trial court's comments reasonably conveyed to Cornejo either that (1) his *Marsden* request was summarily denied, (2) it had to made by a "formal motion," or (3) it would probably be denied in any event because Jansen was an "outstanding attorney" and Cornejo had already made an unsuccessful *Marsden* request.

As set forth above, a trial court's duty to hold a *Marsden* hearing is not triggered by a formal motion, but rather by the defendant's clear indication of the desire for a substitute attorney, as occurred here. (*Armijo*, *supra*, 10 Cal.App.5th at p. 1178.) As previously noted, the People do not contest that Cornejo adequately informed the trial court of his *Marsden* request.

Further, "a judge cannot base his [or her] disposition of a request for substitution of counsel on his or her own confidence in the current attorney and observations of that attorney's previous demonstrations of courtroom skill." (*People v. Hill* (1983) 148 Cal.App.3d 744, 753; see also *Marsden*, *supra*, 2 Cal.3d at p. 124.) Although a defendant's history of repeatedly and unsuccessfully seeking substitute counsel can be a factor in determining the merits of a *Marsden* request, it should not be the basis for denying a hearing in the first place. (See *People v. Horton* (1995) 11 Cal.4th 1068, 1111; *People v. Williams* (1990) 220 Cal.App.3d 1165, 1170.)

Of particular significance is Cornejo's response to the trial court's comments regarding his *Marsden* request. Cornejo said he "respected" the court's decision, adding that he did not "want the judge feeling I'm, because of your job, I don't want to get my disadvantage." Cornejo's response suggests that he mistakenly believed that by renewing his *Marsden* request he would place himself at a "disadvantage" before the court. Indeed, the court was prompted to assure Cornejo that he would receive a fair trial.

Under the circumstances, we do not to find Cornejo abandoned his *Marsden* request. The trial court erred in failing to conduct a second *Marsden* hearing.

4. Given the Absence of a Hearing, We Cannot Determine Whether the Trial Court's Error Was Not Harmless Beyond a Reasonable Doubt

As previously set forth, denial of the opportunity to explain the grounds for a *Marsden* request compels reversal unless the record shows beyond a reasonable doubt that the error was harmless. The People argue that it is Cornejo's burden to show prejudicial error. This argument misses the point.

In the absence of any *Marsden* hearing, reversal is required precisely because there is no record from which to make this determination. As the *Marsden* court recognized, the trial court's failure to give defendant the opportunity to "establish the incompetence of his counsel" denied defendant "a fair trial." (*Marsden*, *supra*, 2 Cal.3d at p. 126.) Absent such an opportunity, the *Marsden* court wrote, "[w]e cannot conclude beyond a reasonable doubt that this denial of the effective assistance of counsel did not contribute to the defendant's conviction." (*Ibid*.)

Similarly here, on the silent record before us, we cannot conclude the trial court's failure to hear Cornejo's *Marsden* request was not prejudicial. It is entirely possible Cornejo would not have been able to demonstrate inadequate representation or the existence of an irreconcilable conflict particularly given Cornejo's unsuccessful prior *Marsden* motion only two weeks earlier. Nonetheless, "we 'cannot speculate upon the basis of a silent record that the trial court, after listening to defendant's reasons, would decide the appointment of new counsel was unnecessary.' " (*Armijo*, *supra*, 10 Cal.App.5th at p. 1183.)

Given the absence of a record from which to determine prejudice, the remedy is conditionally to reverse the judgment of conviction and remand to the trial court for further proceedings. If the trial court denies Cornejo's *Marsden* request, then it shall reinstate the judgment. If it grants the *Marsden* request, then it shall appoint new counsel to assist Cornejo and entertain any such applications as newly appointed counsel may make. (See *People v. Ivans* (1992) 2 Cal.App.4th 1654, 1666-1668 [conditional reversal of judgment posttrial for failure to hold *Marsden* hearing]; *People v. Olivencia* (1988) 204 Cal.App.3d

1391, 1400-1402, citing *People v. Minor* (1980) 104 Cal.App.3d 194, 200; *Armijo*, *supra*, 10 Cal.App.5th at pp. 1183-1184.)

B. The Trial Court Properly Instructed the Jury on Unanimity with CALCRIM No. 3501

Cornejo contends the trial court erred in instructing the jury with CALCRIM No. 3501 on the obligation to arrive at a unanimous verdict with respect to the counts involving RD. We disagree.

Cornejo makes three arguments. First, the trial court failed to distinguish between the "specific" testimony of RD underlying counts 1, 2, 5, and 6 and the "generic" testimony of AC underlying counts 3 and 4. Cornejo asserts that in addition to giving CALCRIM No. 3501, the trial court should have given CALCRIM No. 3500 because the latter instruction required the jury to agree unanimously on which of the specific acts RD described were committed by defendant.

Second, because the information and the prosecutor's closing arguments did not detail which acts involving RD were charged as to counts 1 and 2, Cornejo contends the jury could have convicted Cornejo on both counts without unanimous agreement on which acts served as the basis for those counts. Instead, the jury could have simply agreed that he had committed at least two of the acts involving RD. Finally, in a related third argument, Cornejo asserts that for the same reasons, the jury may have based its verdicts on counts 1 and 2 on the same act described by RD, rather than on two separate acts.

None of these arguments demonstrates reversible error. As to the first argument, CALCRIM No. 3501 properly instructed the jury on the unanimity requirement as to specific and generic

testimony. With respect to Cornejo's second and third arguments, the jury's verdict and the record demonstrate that the jury was neither confused nor misled by the instruction, and defendant's third argument is also contrary to case law.

1. Cornejo Has Not Forfeited His Claim of Instructional Error Despite His Failure to Object to the Unanimity Instruction in the Trial Court

It is undisputed that defense counsel did not object to the trial court's giving CALCRIM No. 3501 as to the counts involving RD. The People argue that Cornejo therefore forfeited challenging the trial court's failure to give CALCRIM No. 3500 regarding those counts.

Even in the absence of objection below, an appellate court may address instructional error that affects a defendant's substantial rights. (Pen. Code, § 1259.) The instruction at issue here impacted Cornejo's right to a unanimous jury under the California Constitution. Accordingly, we exercise our discretion to review Cornejo's contention that the trial court gave the wrong unanimity instruction regarding the counts involving RD. (*People v. Ngo* (2014) 225 Cal.App.4th 126, 149 [unanimity instruction reviewable under Pen. Code, § 1259 even absent objection below]; *People v. Fernandez* (2013) 216 Cal.App.4th 540, 555 [raising instructional error only posttrial and on appeal did not constitute forfeiture].)

2. Governing Law and Standard of Review

A criminal defendant's right to a jury trial includes the right to a unanimous verdict, including unanimous agreement on the act constituting the offense charged. (Cal. Const., art. I, § 16;

People v. Russo (2001) 25 Cal.4th 1124, 1132 (*Russo*).) "[C]ases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act." (*Russo*, *supra*, 25 Cal.4th at p. 1132.) "This requirement of unanimity as to the criminal act 'is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed.' [Citation.] . . . 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count.' " (*Ibid.*)

The two unanimity instructions at issue in this case are CALCRIM No. 3500, the standard unanimity instruction, and modified CALCRIM No. 3501.

CALCRIM No. 3500, which was not given in this case, states: "The defendant is charged with _____ <*insert description of alleged offense*> [in Count __] [sometime during the period of _____ to _____]. [¶] The People have presented evidence of more than one act to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed."

Historically, child molestation cases have presented difficult issues regarding how properly to instruct a jury on the constitutional requirement of a unanimous verdict. This is especially true where a child testifies to a number of similar but

undifferentiated acts of molestation during a particular time period, e.g., "an act of intercourse 'once a month for three years.' " (*People v. Jones* (1990) 51 Cal.3d 294, 314 (*Jones*).) To safeguard the constitutional requirement of unanimity, our Supreme Court directed, "In a case in which the evidence indicates the jurors might disagree as to the particular act defendant committed, the standard unanimity instruction should be given. [Citation.] But when there is no reasonable likelihood of juror disagreement as to particular acts, and the only question is whether or not the defendant in fact committed all of them, the jury should be given a modified unanimity instruction which, in addition to allowing a conviction if the jurors unanimously agree on specific acts, also allows a conviction if the jury unanimously agrees the defendant committed all the acts described by the victim. [¶] . . . [B]ecause credibility is usually the 'true issue' in these cases, 'the jury either will believe the child's testimony that the consistent, repetitive pattern of acts occurred or disbelieve it. In either event, a defendant will have his unanimous jury verdict [citation] and the prosecution will have proven beyond a reasonable doubt that the defendant committed a specific act, for if the jury believes the defendant committed all the acts it necessarily believes he committed each specific act [citations].' "
(*Id.* at pp. 321-322.)

In light of the *Jones* decision, the Judicial Council adopted CALCRIM No. 3501,[4] which was given in this case as follows: "The defendant is charged with Lewd Acts involving [AC] in Counts 3 and 4 sometime during the period of January 1, 2010 to

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[4] Judicial Council of California Criminal Jury Instructions (September 2018 supp.) Bench Note to CALCRIM No. 3501, p. 2408.

January 1, 2012. The defendant is also charged with Lewd Acts and Oral Copulation [involving RD] in Counts 1, 2, 5 and 6 sometime during the period of January 1, 2013 through May 7, 2015. [¶] The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless: [¶] 1. You all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed for each offense; [¶] OR [¶] 2. You all agree that the People have proved that the defendant committed all the acts alleged to have occurred during this time period and have proved that the defendant committed at least the number of offenses charged."

Thus, CALCRIM No. 3501 "is an alternative instruction to CALCRIM No. 3500. CALCRIM No. 3501 affords two different approaches for the jury to reach the required unanimity. The first is the same as that set forth in CALCRIM No. 3500: agreement as to the acts constituting each offense. But unanimity may also be found under CALCRIM No. 3501 if the jury agrees 'that the People have proved that the defendant committed all the acts alleged to have occurred during this time period [and have proved that the defendant committed at least the number of offenses charged].' " (*People v. Fernandez*, *supra*, 216 Cal.App.4th at p. 556.)

We review the failure to give the proper unanimity instruction de novo. (*People v. Hernandez* (2013) 217 Cal.App.4th 559, 568.) "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an

impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.) " '[A]ny theoretical possibility of confusion [may be] diminished by the parties' closing arguments.' " (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled in part on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) Although the parties acknowledge there is a split of authority on the standard of prejudice for giving an erroneous unanimity instruction,[5] we will assume the more exacting harmless beyond a reasonable doubt standard applies. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

3. The Trial Court Did Not Prejudicially Err By Instructing Solely With CALCRIM No. 3501

a. The trial court properly instructed on unanimity with CALCRIM No. 3501 because the two alternatives gave proper instruction of specific evidence as to RD and generic evidence as to AC.

In his first argument, Cornejo appears to be contending that because RD's testimony was not generic, the trial court should have given CALCRIM No. 3500 as a separate instruction

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[5] Appellate courts are divided as to the standard of prejudice to apply to the failure to give a unanimity instruction. (Compare *People v. Vargas* (2001) 91 Cal.App.4th 506, 561-562 [applying state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836]; *People v. Smith* (2005) 132 Cal.App.4th 1537, 1545 [applying federal constitutional standard of *Chapman v. California* (1967) 386 U.S. 18, 24]; see also *People v. Hernandez*, *supra*, 217 Cal.App.4th 559, 576-577 [discussing the split of authority and citing cases].)

to avoid confusing the jurors about their unanimity obligation. We conclude to have given CALCRIM No. 3500 and CALCRIM No. 3501 would certainly have confused the jury because CALCRIM No. 3500 is included in the first numbered paragraph in CALCRIM No. 3501. Indeed, because CALCRIM No. 3500 was part of CALCRIM No. 3501, had Cornejo requested that it be given separately, the trial court would most likely have properly declined it as duplicative. (*People v. Brown* (2003) 31 Cal.4th 518, 564 [the general rule is that a trial court may reject a proffered instruction if it is duplicative].)

On the other hand, if Cornejo is arguing that to avoid jury confusion, a limiting or pinpoint instruction should have been given to ensure the jury applied the first part of CALCRIM No. 3501 to the counts involving RD and the second part of CALCRIM No. 3500 to the counts involving AC, there is no authority to support this claim, as Cornejo himself acknowledges.

A trial court has the duty to instruct "on general principles of law that are closely and openly connected with the facts presented at trial" and that are necessary for a jury's understanding of the case. (*People v. Ervin* (2000) 22 Cal.4th 48, 90.) Here, RD's testimony related separate and specific incidents of sexual molestation and, with the exception of one incident of sexual molestation, AC's testimony was generic. By giving the jury CALCRIM No. 3501 which addresses both specific and generic sexual molestation testimony, the trial court satisfied its duty to instruct on unanimity based upon the evidence. (See *People v. Fernandez*, *supra*, 216 Cal.App.4th at p. 556 [jury properly instructed with CALCRIM No. 3501 where testimony

recounted both specific and generic instances of sexual molestation].)

b. Any error in instructing the jury with CALCRIM No. 3501 was harmless beyond a reasonable doubt based on the prosecutor's argument, the jury's verdict, and the jury's inability to reach a verdict on two of the counts involving RD.

Cornejo contends the jury's inability to reach a verdict as to two of the counts involving RD demonstrates that it could have convicted Cornejo on counts 1 and 2 without unanimously agreeing on which acts against RD Cornejo committed. Accordingly, he argues the trial court's failure to give CALCRIM No. 3500 in addition to CALCRIM No. 3501 was prejudicial error. The record reveals otherwise.

The record shows the jury unanimously agreed upon the two different acts underlying counts 1 and 2. In closing argument, the prosecutor separately discussed each of the four acts of sexual molestation against RD that the People were contending Cornejo had committed. The prosecutor informed the jury that RD's account of Cornejo licking her vagina after pulling down her pajama pants in the car was proof of oral copulation, as charged in count 5.[6] Additionally, the prosecutor argued, the latter act and the other three acts of sexual molestation each constituted lewd conduct as charged in counts 1, 2, and 6.

The first part of CALCRIM No. 3501, which incorporates the standard unanimity instruction of CALCRIM No. 3500,

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[6] The prosecutor did not address the unanimity instruction during closing argument.

expressly required jurors unanimously to agree that Cornejo committed at least one of these acts and unanimously to agree which act Cornejo committed for each offense. The inclusion of CALCRIM No. 3515 which instructs jurors to consider each count separately and return separate verdicts for each count reinforced the unanimity requirement for each count.

Because the jury deadlocked on count 5—oral copulation—it is reasonable to infer the jurors did not all agree beyond a reasonable doubt that Cornejo licked RD's vagina which was the basis for count 5 and one of the counts of lewd conduct. It is also reasonable to infer that the jurors disagreed on whether Cornejo committed one other charged act of lewd conduct, which resulted in the jurors being unable to reach a verdict on count 6.

The verdicts on counts 1 and 2 reasonably demonstrate the jury unanimously agreed that Cornejo committed the remaining two acts of lewd conduct upon RD, as opposed to convicting him without unanimously agreeing on which two of four acts Cornejo committed. (See *People v. Milosavljevic* (2010) 183 Cal.App.4th 640, 650 (*Milosavljevic*) [jurors presumably understood from CALCRIM No. 3501 that they were required to all agree on an act the defendant committed for each offense to find him guilty on each offense].)

The verdict also shows the jury was not misled by CALCRIM No. 3501's alternative unanimity instruction in numbered paragraph 2 regarding generic testimony. The alternative instruction informed jurors that they must unanimously agree that the People proved Cornejo committed all the acts alleged to have occurred during the alleged time period, and that he committed at least the number of offenses (here, four) charged. The jurors did not unanimously agree that the

prosecutor had proved beyond a reasonable doubt that Cornejo had committed *all* four of the acts described by RD and at least the number of offenses charged. This runs counter to Cornejo's claim that it is reasonably likely that jurors disagreed on which of the alleged acts supported convictions on counts 1 and 2, but they all agreed there were two such acts.

Nor are we persuaded by Cornejo's argument that CALCRIM No. 3501 enabled the jury to convict Cornejo on counts 1 and 2 based on agreeing solely on one act. The Fourth District rejected this argument in *Milosavljevic*. There, the jury convicted the defendant on 38 counts of rape and related offenses involving multiple victims. Among the defendant's contentions on appeal was that the jurors could have understood CALCRIM No. 3501's alternative unanimity instruction to authorize them to convict him on all counts if they unanimously agreed on one act alleged in only one count. (*Milosavljevic*, *supra*, 183 Cal.App.4th at p. 648.) In rejecting this claim, the appellate court explained, "[C]onstruing the parts of that instruction as a whole, the jurors presumably understood the court's unanimity instruction required them to all agree on an act he committed for each offense for a guilty finding on that offense. It is not reasonably likely the jurors interpreted that instruction to allow them to find [defendant] guilty of all the listed counts based solely on one unanimous finding that he committed an act regarding one count or victim." (*Id.* at p. 650, italics omitted.) The *Milosavljevic* court's reasoning applies with equal force here. In sum, we conclude that the trial court's failure to give CALCRIM No. 3500 in addition to CALCRIM No. 3501 was not only proper, but also, could not have been prejudicial.

C. The Trial Court's Failure To Instruct With CALCRIM No. 302 Was Not Prejudicial Error

The People concede the trial court should have instructed with CALCRIM No. 302 because there was conflicting testimony at trial. (*People v. Cleveland* (2004) 32 Cal.4th 704, 751 [instruction should be given in every criminal case with conflicting evidence].) We agree but we conclude that the instructional error was harmless.

1. Governing Law and Standard of Review

CALCRIM No. 302 states: "If you determine there is a conflict in the evidence, you must decide what evidence, if any, to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point."

Failure to instruct on CALCRIM No. 302 requires reversal if it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 679.) In applying this standard, we consider the entire record and the totality of the instructions given by the trial court. (*People v. Snead* (1993) 20 Cal.App.4th 1088, 1097 (*Snead*), overruled on other grounds in *People v. Letner and Tobin* (2010) 50 Cal. 4th 99, 181.)

2. Other Standard Instructions Provided the Jury with Sufficient Guidance

Cornejo argues the failure to instruct with CALCRIM No. 302 was prejudicial error. In *Snead*, the court found a similar failure to instruct with CALJIC No. 2.22, CALCRIM No. 302's predecessor, was not prejudicial. The *Snead* court determined the trial court had instructed the jury with other standard instructions providing guidance to the jury in its consideration and evaluation of the evidence. (*Snead*, *supra*, 20 Cal.App.4th at p. 1097.)

Here, as in *Snead,* the trial court provided instructions on reasonable doubt (CALCRIM No. 220), evidence (CALCRIM No. 222), direct and circumstantial evidence: defined (CALCRIM No. 223), circumstantial evidence: sufficiency of the evidence (CALCRIM No. 224), single witness testimony (CALCRIM No. 301), limited purpose evidence (CALCRIM No. 303), and lay witness opinion (CALCRIM No. 333).

In addition, the trial court instructed with CALCRIM No. 226, which provides in part: "Do not automatically reject testimony just because of inconsistencies or conflicts. Consider whether the differences are important or not. People sometimes honestly forget things or make mistakes about what they remember. Also, two people may witness the same event yet see or hear it differently." The court further instructed with CALCRIM No. 301, which provides, "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence."

Nonetheless, Cornejo contends these instructions did not cure the error because none of them advised the jury not to count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. Cornejo asserts the trial "evidence pitted the prosecution's four witnesses against the defense's sole witness, i.e. [Cornejo] himself" and "[p]eople tend to be swayed into believing a point of fact by the more people there are making it."

While none of the instructions told the jury that the number of witnesses itself is not a determining factor, the prosecutor did not argue that the jury could base its decision on counting the number of witnesses on each side. Nor did the prosecutor argue that more witnesses supported rather than opposed conviction. Further, the harmless nature of the error is demonstrated by the jury's failure to reach a verdict on the counts involving AC, in which there were three prosecution witnesses to the defense's single witness, Cornejo, and its failure to reach a verdict on two counts and finding of guilty on two counts involving RD in which there was a single prosecution witness to the defense's single witness. Under these circumstances, it is not reasonably probable that a more favorable verdict to Cornejo would have been reached had CALCRIM No. 302 been given.

D. There Was No Prosecutorial Misconduct

Cornejo contends the prosecutor twice committed misconduct—once while cross-examining Cornejo and once during closing argument. We agree with the People that Cornejo has forfeited the first contention on appeal by failing to object at trial. (*People v. Cole* (2004) 33 Cal.4th 1158, 1201.) Nonetheless,

because Cornejo has also raised an ineffective assistance of counsel claim, we address both contentions.

1. Governing Law and Standard of Review

Prosecutorial misconduct can violate federal or state guarantees of due process. Federal due process is denied if the conduct " ' "comprises a pattern . . . 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' " (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).) Due process under state law is denied " ' " 'only if [the prosecutor's conduct] involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.' " ' " (*Samayoa*, *supra*, 15 Cal.4th at p. 841; see also *People v. Adams* (2014) 60 Cal.4th 541, 568.) These standards must be considered against the backdrop that " '[a] prosecutor is given wide latitude to vigorously argue his or her case and to make fair comment upon the evidence.' " (*People v. Dykes* (2009) 46 Cal.4th 731, 768.) Prosecutorial misconduct will not result in reversal of a conviction unless it is reasonably probable that an outcome more favorable to the defendant would have been obtained in the absence of the misconduct. (*People v. Milner* (1988) 45 Cal.3d 227, 245, overruled on another ground in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.)

2. Alleged Misconduct During Cross-Examination

a. Relevant proceedings

Cornejo testified on cross-examination that AC's mother testified falsely that Cornejo had molested their daughter in order to benefit herself and he could not believe his daughter would accuse him of something he did not do. Cornejo's testimony underscored his theory throughout trial, that AC's mother influenced AC to testify falsely.

Most of the prosecutor's cross-examination of Cornejo concerned his recorded telephone conversations with AC's mother while he was in custody.[7] Cornejo testified that when he asked for forgiveness in one conversation, he was apologizing for his infidelity and failure to pay attention to his family. Cornejo insisted he was not referring to having molested AC and thus did not confess to having done so. The prosecutor's questioning focused on challenging that claim. Toward the end of her cross-examination, the following exchange occurred:

"[Prosecutor:] Sir, so in sum, what we can take away from your testimony today is that [RD] is lying—"

"[Defense counsel:] Objection—

"[Prosecutor:] —Is that right?

"[Defense counsel:] —Improper question—

"The Court: Sustained.

"[Defense counsel:] —Misconduct.

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[7] Audio recordings of these telephone conversations were played for the jury. We reviewed the transcripts of these telephone conversations, which are part of the record on appeal.

"[Prosecutor:] Sir, your contention is that [RD] lied to us on the stand; is that right?

"[Defense counsel:] Objection.

"The Court: Sustained.

"[Prosecutor:] Sir, is [RD] lying?

"[Defense counsel:] Objection, it's for the jury to decide.

"The Court: Sustained."

b. The "is RD lying" questions were not prosecutorial misconduct

Cornejo argues the prosecutor committed misconduct by not only posing a question that was argumentative, but also by ignoring the trial court's rulings sustaining defense objections and asking the question two more times.

"[W]ere they lying" questions are not categorically proper or improper. (*People v. Chatman* (2006) 38 Cal.4th 344, 381-382 (*Chatman*). These questions may be proper when "defendant who is a percipient witness to the events at issue has personal knowledge whether other witnesses who describe those events are testifying truthfully and accurately. As a result, he might also be able to provide insight on whether witnesses whose testimony differs from his own are intentionally lying or are merely mistaken." (*Id*. at p. 382.) But when argumentative or designed to elicit irrelevant lay opinion or speculative testimony, "were they lying" questions are improper. (*Id*. at pp. 381-382, 384.) "An argumentative question is a speech to the jury masquerading as a question. The questioner is not seeking to elicit relevant testimony. Often it is apparent that the questioner does not even expect an answer. The question may, indeed, be unanswerable." (*Id.* at p. 384.) Thus, there "is a difference between asking a witness whether, in his opinion, another is

lying and asking that witness whether he knows of a reason why another would be motivated to lie. (*Id.* at p. 381.)

The prosecutor's inquiry into whether RD was lying was not simply rhetorical. In addition to denying each alleged act involving RD, Cornejo testified about his own observations about the events involving him and RD. For example, he testified that RD, her sister, and another young girl would often ride in the car with him. RD was always "well-dressed" and had never fallen asleep in the car. Cornejo explained that RD's testimony that he molested her when she was asleep in her bed made him "feel bad," because he habitually checked on RD and her sister "to see if they were okay," before joining their mother in bed. Cornejo's testimony thus gave the jury a noncriminal explanation for why he was in the children's bedroom at night. Cornejo's answers on direct examination also showed that he knew RD well. Accordingly, a question about RD's veracity may have elicited from Cornejo insight into why the jury should accept his testimony as more reliable than RD's description of her interactions with Cornejo. We observe that during trial, Cornejo made a similar effort to discredit AC when he testified AC's mother had caused AC to testify falsely against him. (*Chatman*, *supra*, 38 Cal.4th at p. 382.)

We observe the tenor of the prosecutor's cross-examination and her repeated failure to heed the trial court's rulings may suggest the prosecutor's questions were closer to the line separating argumentative from proper. Nonetheless, while the continued questions about RD's veracity may have shown disrespect to the trial court's rulings, they did not amount to prosecutorial misconduct. The three questions were asked in quick succession following a lengthy cross-examination about

Cornejo's recorded telephone conversations concerning his daughter AC, not RD. Cornejo never answered these limited questions. On this record, we cannot conclude the prosecutor's questions comprised "a pattern of conduct so egregious" or "a reprehensible method" of jury persuasion that denied Cornejo due process.

3. Alleged Misconduct During Closing Argument

a. Relevant proceedings

During closing argument, defense counsel explained to the jury the meaning of the reasonable doubt standard of proof: "It means that you have to have an abiding conviction, and abiding comes from the Latin abode, which means you have to live with it. You have to be confident. You have to live with your decision a year from now, five years from now, ten years from now, 20 years from now. You have to be able to look back and say you know what, I'm convinced I made the right decision, even looking back on the time." Counsel then argued that among other factors casting doubt on the alleged sexual molestation of AC, was the vagueness of her testimony, her extreme youth when the alleged acts occurred, and her mother's insistence that AC admit that the molestation had occurred when AC expressed uncertainty.

The prosecutor began her rebuttal argument by stating: "So counsel is right. You do have to abide by a decision, and a year from now when you're thinking back on this case, will you want to say well, you know, I acquitted the guy. I walked a child molester out the door because a six-year-old didn't know the exact dates that her father had touched her. You will have to live

with that decision, and I don't think you want to do something like that." Cornejo contends these statements constituted prosecutorial misconduct.

b. Stating "you will have to live with that decision" was not prosecutorial misconduct

When a claim of prosecutorial misconduct focuses upon remarks that the prosecutor made before the jury, "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Samayoa*, *supra*, 15 Cal.4th at p. 841.) Cornejo contends the prosecutor committed misconduct by improperly appealing to the jury's emotions and fears when she argued the jurors would have live with their decision to acquit him of sexual molestation based on AC's testimony.

In support of his claim, Cornejo primarily relies on *People v. Sanchez* (2014) 228 Cal.App.4th 1517 (*Sanchez*), in which the prosecutor argued that the defendant "hope[s] that one of you" will be "gullible enough," "naïve enough," and "hoodwinked" by the defense arguments so that he "can go home and have a good laugh at your expense." (*Id.* at pp. 1522-1523, italics omitted.) The appellate court concluded the prosecutor committed misconduct because his comments were designed to offend and intimidate the potential holdout juror who doubted defendant's guilt, and thus could have had a "chilling effect on the jury's deliberative process." (*Id.* at pp. 1530-1531.) Additionally, Cornejo contends the prosecutor's statements improperly shifted the burden of proof. (Citing *People v. Woods* (2006) 146 Cal.App.4th 106, 112, "[A] prosecutor may not suggest

that 'a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence.' ".)

We conclude the prosecutor's statements were not misconduct and were not likely to be misapplied by the jury. Arguments of counsel, like jury instructions, " 'must be judged in the context in which they are made.' " (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21.) Made at the outset of her rebuttal argument, the prosecutor's clear intent was to counter immediately defense counsel's statements to the effect that jurors would have to live with a guilty verdict. Unlike in *Sanchez*, the prosecutor's statements were not designed to intimidate potential juror holdouts, but were instead a response to defense counsel's very own argument. Further, the prosecutor's statements were brief, followed by a much longer rebuttal argument in which she reviewed the evidence and urged the jury to consider the evidence. Lastly, the statements were limited to the counts involving AC on which the jury failed to reach a decision.

We do not agree that the prosecutor's statements shifted the burden of proof. Having reviewed the entire record, including the parties' arguments and the trial court's instructions, we conclude there was no reasonable likelihood that the jurors construed the prosecutor's statements during rebuttal argument to shift the burden of proof to defendant. The instructions are particularly significant because " '[t]he crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' " (*People v. Delgado* (1993) 5 Cal.4th 312, 331.)

Here, the jurors were preinstructed on reasonable doubt and, as already noted, also instructed with CALCRIM No. 220 on reasonable doubt after closing argument. The trial court

instructed the jurors they must follow the law as instructed, rather than consider any comments by the attorneys that conflicted with the trial court's instructions (CALCRIM No. 200). The trial court further instructed that nothing the attorneys said, including their questions and opening and closing arguments, was evidence (CALCRIM No. 222). These admonishments were sufficient to thwart any potential confusion raised by the prosecutor's statements. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1157.)

Although we reject Cornejo's claims of prosecutorial misconduct, that does not mean we condone the prosecutor's contumacious behavior in this case. To be sure, emotions can run high among counsel in the trial arena, and trial courts typically give counsel wide latitude in trying cases. (See *People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) In order to enforce its rulings and maintain the integrity of the proceedings, a trial court is uniquely positioned to address an attorney's contumacious behavior. That being said, we are compelled to observe that litigation zeal does not excuse here the prosecutor's disregard of the trial court's evidentiary rulings. " 'It is the duty of every member of the bar to "maintain the respect due to the courts" and to "abstain from all offensive personality." [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state.' " (*Hill*, *supra*, 17 Cal.4th at pp. 819-820.) Prosecutors who engage in such rude and unprofessional behavior demean the office they hold and the People in whose name they serve. (See *id.* at p. 820.)

DISPOSITION

The judgment is reversed and the cause is remanded with the following directions: (1) the trial court shall hold a hearing on Cornejo's *Marsden* request; (2) if Cornejo prevails, the court shall appoint new counsel to assist him and shall entertain such applications as newly appointed counsel may make; and (3) if the *Marsden* request is denied, the trial court shall reinstate the judgment and amend the abstract of judgment to award Cornejo 385 days of presentence custody credits.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.