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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RANDOLPH DAVID MARTINEZ, Defendant and Appellant.	B233433 (Los Angeles County Super. Ct. No. MA049542)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie C. LaForteza, Judge. Affirmed.

Jonathan P. Fly, under appointment by the Court of Appeal, for Defendant and Appellant. for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Margaret E. Maxwell and Mark Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant Randolph David Martinez of petty theft with prior theft convictions (Pen. Code, § 666)[1] (count 2).[2] Defendant admitted having suffered two prior convictions for purposes of count 2 and serving custodial time for both offenses. He admitted having suffered one prior serious or violent felony conviction within the meaning of sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d) and having suffered eight prior convictions within the meaning of section 667.5, subdivision (b).

After denying defendant's *Romero* motion,[3] the trial court sentenced defendant to seven years in state prison. The sentence consisted of the high term of three years, doubled to six years because of the strike, plus one year pursuant to section 667.5, subdivision (b). The trial court exercised its discretion and struck the remaining enhancements under section 667.5, subdivision (b).

Defendant appeals on the grounds that: (1) reversal is required because the prosecutor argued facts outside the record; (2) the prosecutor committed misconduct by arguing that reasonable doubt was a lesser standard of proof; and (3) defendant suffered cumulative prejudice.

FACTS

Prosecution Evidence

On June 26, 2010, Jonathan Henriquez worked in loss prevention at the Vallarta market in Lancaster, California. The Vallarta market has a north entrance door, which is close to the beer section, and a south entrance door. Around 5:40 p.m., Henriquez was in the security office observing the store through the monitors and a window. Henriquez observed defendant select a case of beer, walk to one of the registers, and pay with his

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

2 The jury acquitted defendant of burglary as charged in count 1.

3 *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

debit card. Henriquez identified People's exhibit No. 2 as a receipt bearing defendant's name for an 18-pack of beer. Henriquez saw defendant leave the store through the north entrance and re-enter the store within a very short period of time. He was not carrying anything. Defendant went directly to the beer section and selected another case of beer. At that point, Henriquez went downstairs to the market floor and observed defendant as he walked through the produce area to the meat area. Henriquez never lost sight of defendant.

Defendant placed the case of beer he was carrying on top of a beverage island. Henriquez saw defendant retrieve the receipt from his pants pocket and slip the receipt of the first purchase under the handle of the case of beer he had been carrying. Defendant then walked to a restaurant area approximately 15 feet away and ordered some hot food. Henriquez walked by the beverage island to determine whether the receipt tucked in the case of beer was for the correct quantity of beer or whether it was for the previous purchase of an 18 pack. Henriquez testified that the receipt was for the previous purchase.

Henriquez saw defendant pay for and obtain his food and then walk to the island area and pick up the case of beer, which held 30 cans of beer. Defendant then left the store through the south exit, passing a cash register on the way.

Outside the store, Henriquez and a uniformed security guard, Christian Lopez, confronted defendant. Henriquez identified himself and told defendant why he was being stopped. Defendant was handcuffed, and Henriquez and Lopez walked defendant to the security office. Henriquez called the sheriff and generated a report. Defendant did not protest being stopped or handcuffed, nor did he try to provide an explanation. Inside the office, defendant was breathing heavily and sweating a lot. When Henriquez asked defendant what was wrong with him, defendant replied that he had had a few beers.

Los Angeles County Deputy Sheriff Diego Andrade and his partner, Deputy Sherman, arrived at the Vallarta Supermarket and spoke with Jonathan Henriquez around 7:00 p.m. Based on his training and experience, Deputy Andrade did not believe

defendant was under the influence of alcohol. He had none of the symptoms, such as staggering, odor, or eyes that were glassy, watery, or bloodshot. Defendant told the deputy he had consumed a large amount of alcohol and he could not remember what he did inside the store. Deputy Andrade did not conduct any field sobriety tests. At the hospital, blood was not drawn from defendant because he was not arrested for driving under the influence.

Defense Evidence

Nora Chaplin, defendant's girlfriend, knew him to be gainfully employed on June 25, 2010. Defendant had been employed since 2007. They lived together in defendant's home. On the day of his arrest, defendant had been drinking beer from the time he got up until they left for Lancaster to visit Chaplin's sister. Defendant continued drinking at Chaplin's sister's house, and he drank "stronger stuff." Chaplin knew defendant was intoxicated. She believed he had consumed five to 10 beers during the day.

Chaplin and defendant went to Vallarta market to buy beer and meat. Chaplin said she entered the store with defendant. They got the beer, paid for it, and left. They realized they had forgotten the meat, and Chaplin took the beer while defendant went back inside the market. Chaplin said she knew defendant paid for the beer because she saw a receipt in his hand. He handed her the receipt with the beer. When defendant did not return, Chaplin entered the store to look for him. She left the beer and the receipt in the car. After describing defendant to someone at the customer service desk, she was told that he had been arrested and officers were coming to get him. Because Chaplin was "in a tizzy" when she learned of defendant's arrest, she left the store and went to her sister's house to tell her what was going on. They called the sheriff.

Although Chaplin testified that the receipt was in the car, when shown People's exhibit No. 2, the receipt for the beer, Chaplin said that she guessed she did not have the receipt. She did not remember.

DISCUSSION

I. Prosecutorial Argument Regarding Police Report

A. Defendant's Argument

Defendant contends the prosecutor committed misconduct during closing argument by referring to stricken testimony and facts not in evidence. The trial court erred in failing to remedy the misconduct. The error was prejudicial and requires reversal. Because the error impinged upon defendant's ability to cross-examine and violated his Sixth Amendment right of confrontation and his federal due process rights, respondent bears the burden of proving the error was harmless beyond a reasonable doubt.

B. Proceedings Below

Defense counsel elicited on cross-examination of Henriquez that he did not write in his report that defendant placed the receipt for 18 cans of beer inside the box with 30 cans of beer. On redirect examination, the prosecutor asked Henriquez if he was interviewed by some officers that day and whether he told the officers that defendant did, in fact, tuck the receipt into the 30-pack. The trial court sustained defense counsel's objection on hearsay grounds. The trial court granted the defense motion to strike.

At the prosecution's request, a sidebar conference was held. Defense counsel stated that he had never asked Henriquez whether he told anyone about the receipt being stuffed into the box—he had only asked Henriquez whether he had put that information in his report. Defense counsel did not believe there was an exception to the hearsay rule for what Henriquez said to somebody else outside of court. The trial court ruled that the prosecutor was eliciting hearsay and again sustained the defense objection. The prosecutor asked if he could do research and revisit the issue, and the court granted permission. The prosecutor rested without returning to the issue.

During argument, the prosecutor stated that defendant took the receipt out of his pocket and stuffed it in the top of the box where there is a breakaway handle. The defense did not object. A little later, the prosecutor showed the jury an illustration of the

cardboard box and said "that is where the loss-prevention officer said he struck [*sic*] his receipt . . . ." The defense objected to "facts not in evidence." The trial court admonished the jury to rely on their own recollection of the evidence, stating, "At this point, there is no evidence of the 18-pack, although there may have been evidence that there is a slit in the 18-pack." The prosecutor went on to say, "So when I asked the loss-prevention officer—I asked him, 'Where did he stick it in?'" He said, "In the slot right above where there is a breakaway for the handle."

Later, the prosecutor argued, "Mr. Hovsepyan [defense counsel] is going to come up here and say he stuck the receipt inside the carton, but he didn't write that on the report. That is true. But then I asked him, 'Did you tell the officer the whole story, everything that happened?' And what did he say? 'Yes, I did.' The funny thing about the law, we have what is called 'impeachment.' That is something I like to call somebody out on something." The prosecutor explained the term "impeachment" to the jury. He then stated, "So why didn't Mr. Hovsepyan impeach the loss-prevention officer with Officer Andrade?" The prosecutor proceeded to argue that defense counsel should have questioned Deputy Andrade about whether Henriquez told him he saw defendant put a receipt in the beer carton, adding, "But when Mr. Hovsepyan comes up here and says, 'Don't believe him,' have him explain to you why he didn't ask the officer that. Because defense counsel has the report." The prosecutor stated that defense counsel knew there was nothing different between Henriquez's story in court and what was reported that day. Defense counsel made no objections.

In his closing argument, defense counsel said that Henriquez wrote a report about the case, and counsel asked him about his report. Henriquez apparently omitted in his report the fact that there was a receipt stuck under the handle. Without that fact, the jury would likely have thought that defendant merely put the beer down, paid for his food, and walked out with the beer, negligently forgetting to pay for it. Defense counsel asserted that the latter scenario was a stronger argument. Counsel stated, "Mr. Henriquez . . . sat down and, in his own handwriting, wrote this report. You're not going to have this

because it's not in evidence. He wrote this report." He derided Henriquez's explanation that he ran out of space. Later he argued, "All I know is that the man—the only man who says all of this happened did not place it in his own report; an important fact, very important fact. Doesn't have it in his report."

In his closing argument, the prosecutor again posed the question as to why defense counsel did not ask the officer about Henriquez seeing a receipt in the carton. He asserted that counsel did not ask because he knew the answer, stating, "because if—if Mr. Henriquez did not tell Officer Andrade that, that would have been the first question he would have asked. He has the police report." Defense counsel objected, stating "I object as prosecutorial error in this situation, facts not in evidence." The trial court called a sidebar, where defense counsel stated, "The court had initially ruled that Mr. Montalban [the prosecutor] cannot ask the witness whether he told the deputy these—that specific information about the—the receipt being placed in the box. And now Mr. Montalban is arguing that. Basically, he's going around the court's order and arguing to the jury that he did tell the deputy that." According to counsel, the prosecutor had violated the court's ruling. The prosecutor replied that he did not believe that was the court's ruling. He stated that the court's ruling was based on hearsay, but his argument was under the rubric of calling all logical witnesses.

The trial court did not remember its ruling—only that it limited the People in examination of the witness in this subject area. The court stated, "What the court is concerned with, I understand People are trying to argue that the defense can call logical witnesses. It is on the verge of almost shifting the burden of proof on the defense. That is what the court is concerned about at this point. Whether or not Mr. Montalban can call witnesses or cross-examine in a certain way, it depends on what Mr. Hovsepyan wants to do. The court is concerned about that shifting of the burden. What I'll do is I'm going to overrule the objection, but I'm going to give a limiting instruction that the defense has no burden of proof. Any comment on that, Mr. Hovsepyan?" Counsel had no comment.

The trial court told the jury, "Ladies and Gentlemen, before we begin, I want to remind all of you that the burden of proof lies solely with the prosecution. The defense has no burden of proof. So the burden of proof to prove the defendant is guilty on both counts, counts 1 and 2, lies solely with the prosecution."

The prosecutor did not refer to the police report again. He merely stated that Henriquez "totally told the officer the story. That is what he said." The prosecutor did comment that, "Mr. Hovsepyan, tells you, 'don't believe Mr. Henriquez because he didn't write it in the report.' All right. We're talking about a person who works at the Vallarta as a loss-prevention officer. He's not trained as an officer, not trained to write reports."

C. Relevant Authority

"The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . 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.'"' [Citations.] 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.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor 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. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Even if a defendant shows that prosecutorial misconduct occurred, reversal is not required unless the defendant can demonstrate that a result more favorable to him would have occurred absent the misconduct or with a curative admonition. (*People v. Arias* (1996) 13 Cal.4th 92, 161.)

D. Analysis

Respondent argues (in addition to forfeiture) that the prosecutor was entitled to comment on the failure to question a witness on a particular point and that the prosecutor argued reasonable inferences from facts in the record. In his reply brief, defendant rejects respondent's arguments regarding the "failure to [call] logical witnesses" and "reasonable inferences" justifications and asserts that the real issue is the "prosecutor's disregard for the court's ruling on the admissibility of hearsay evidence." Defendant argues that the prosecutor referred to excluded hearsay statements allegedly contained in an inadmissible police report.

The record shows that the prosecutor asked Henriquez on redirect if he, the testifying witness, told the responding officers that the defendant tucked the receipt into the 30-pack of beer. The trial court ruled that Henriquez's own statement was hearsay, preventing Henriquez from testifying that he told the officers this. The question was stricken. In the subsequent sidebar, the prosecutor stated, "Your Honor, clearly the reason that the defense counsel brought [Henriquez's report] up is to establish that he never really witnessed this. He didn't write in the report. He did, in fact, make a report of it." The trial court stated, "Well, you can inquire into that area." Later, the trial court stated, "You can ask him why he didn't." When he continued questioning, the prosecutor asked Henriquez if he spoke with the officers. Henriquez said he did. The prosecutor asked, "And you reported what happened to the officers?" Henriquez responded, "Correct."

As we see from the record, the prosecutor at first said in his opening argument that Henriquez testified that he *did* tell the officer the whole story—everything that happened. This was not in defiance of the court order. The prosecutor then went into the lack of defense impeachment of Henriquez, referring to the specific issue of the tucked-in receipt. The first time that the prosecutor stated that defense counsel should explain why he did not try to impeach Henriquez by means of asking the officer about the receipt "because defense counsel has the report," there was no objection. Therefore, defendant

has forfeited his objection to this report reference on appeal. Moreover, the prosecutor continued on this theme without objection, as follows: "If you think anything of the loss-prevention officer's story here in court was different than anything reported that day, you don't think Mr. Hovsepyan wouldn't ask it? Because Mr. Hovsepyan knows there is nothing different. [¶] He told the officer that story. He put the receipt in the carton. That is the way it is. That is the reason he didn't. [¶] The reason I called the officer, he can call out the loss-prevention officer. 'He told you. You wrote the report. Did he ever tell you that?' [¶] 'No.' [¶] That is all you have to do. That is what Mr. Hovsepyan has to do when he come up here, ask you not to believe the loss-prevention officer." Any objection to any of this argument in the prosecutor's opening argument was forfeited. (*People v. Samayoa, supra,* 15 Cal.4th at p. 841.)

In the prosecutor's rebuttal argument, defense counsel objected when the prosecutor stated, "[defense counsel] didn't [question Deputy Andrade about the police report] because he knows the answer. Because if—if Mr. Henriquez did not tell Officer Andrade that, that would have been the first question he would have asked. He has the police report." At this point defense counsel objected on the ground of "facts not in evidence." At sidebar, defense counsel argued that the prosecutor was "going around the court's order." The trial court, however, did not remember its ruling. Its only concern was that this argument tended toward shifting the burden of proof to the defense. The trial court stated it would overrule the objection but instruct the jury immediately that the prosecution had the burden of proof. When asked if he had a comment, defense counsel responded, "No, your Honor."

Defense counsel objected to the police report reference but failed to request a curative admonition on the grounds upon which he made his objection. We do not consider the issue forfeited, however, since the trial court told counsel it was going to overrule the objection. "'[T]he absence of a request for a curative admonition does not forfeit the issue for appeal if "the court immediately overrules an objection to alleged

prosecutorial misconduct [and as a consequence] the defendant has no opportunity to make such a request." [Citations.]'" (*People v. Redd* (2010) 48 Cal.4th 691, 745.)

Although the prosecutor committed misconduct by alluding in his argument to the contents of the police report, which was not in evidence, we conclude that any such misconduct was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) [harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) [reasonable probability the error did not affect the outcome].) We disagree with defendant's assertion that it is reasonably likely the jury considered the probable contents of the inadmissible police report when reaching its verdict.

As our Supreme Court has explained, a claim of prejudice "'is substantially undercut . . . by similar evidence in the record which is not challenged.'" (*People v. Blacksher* (2011) 52 Cal.4th 769, 829.) The jury had clearly heard properly admitted evidence that Henriquez told the police the whole story. That story necessarily included, according to Henriquez's own testimony, the fact that he saw the receipt for the 18-pack inside the handle of the 30-pack. To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. (*People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) Here, there was nothing erroneous to infer, and "[s]imilar, unchallenged evidence necessarily relegated the challenged statement to a minor, cumulative role, if any, in the jury's deliberations." (See *People v. Dennis* (1998) 17 Cal.4th 468, 531; *People v. Noguera* (1992) 4 Cal.4th 599, 627.)

Furthermore, the prosecution's remarks must be considered in the context of the argument as a whole; words and phrases should not be singled out and analyzed without reference to the entirety of the prosecution's argument. (*People v. Dennis*, *supra*, 17 Cal.4th at p. 522; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 182 [a response invited by the defense argument, although not an excuse for prosecutorial misconduct, helps place the prosecutor's remarks in the context of the entire trial].) We will not lightly infer that the jury drew the most damaging meaning from the prosecution's

statements. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153, disapproved on another point in *People v. Rundle* (2008) 43 Cal.4th 76, 151.)

Even assuming the reference to the police report somehow constituted a denial of the right to confrontation and to cross-examine, we do not believe the reference influenced the verdict. In *People v. Bell* (1989) 49 Cal.3d 502 (*Bell*), for example, egregious misconduct by a prosecutor was found not to affect the verdict, even if the misconduct were treated as a denial of the defendant's right of confrontation and cross-examination. (*Id*. at p. 534.) In *Bell*, where the defendant was accused of robbery-murder, the parties stipulated that the prosecution would not call a witness who had seen the defendant with a gun before the crimes. (*Id*. at p. 531.) Yet, in cross-examining the defense expert, the prosecutor read the informant's statement from the police report and continued reading even after the defense objected. (*Id*. at pp. 531-532.) The *Bell* court believed the prosecutor had deliberately attempted to put inadmissible and prejudicial evidence before the jury. (*Id*. at p. 532.) But the court was satisfied beyond a reasonable doubt that, under the circumstances, reversal was not required. (*Id*. at p. 534.) In the instant case, similar circumstances—including other evidence of the same fact and adequate admonishment by the trial court—lead to the same conclusion.

The prosecutor in *Bell* returned to the police report in argument, stating that defense counsel deliberately did not ask a detective questions about his police report in order to prevent the prosecutor from bringing out certain things the reports contained. (*Bell, supra,* 49 Cal.3d at p. 536.) The *Bell* court was "satisfied that the trial court's admonitions and instructions were sufficient to offset any impact that conduct might otherwise have had on the verdicts." (*Id*. at pp. 540-541.) In addition, the court found no prejudicial cumulative effect from the instances of misconduct it addressed as well as those that were forfeited. (*Id*. at p. 542.)

In the instant case, as well, the jury was properly instructed that the statements of attorneys were not evidence, and that it must decide the facts based upon the evidence adduced at trial, and from no other source. (CALCRIM No. 222.) We assume the jurors

followed the court's instructions. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1413.) In addition, the trial court promptly admonished the jury that the defense was not required to ask the questions the prosecutor said were lacking, since the prosecution had the burden of proof. We believe that the trial court's admonitions and instructions were sufficient to offset any impact the prosecutor's argument might otherwise have had on the verdicts. It is very unlikely that the jury disregarded both the court's admonition and its instructions, and speculated that there was additional evidence of defendant's guilt in the police report.

Finally, the evidence of defendant's guilt of petty theft, at a minimum, was substantial. The jury was instructed that, in order to prove defendant guilty of petty theft, the People had to show that he took possession of property owned by someone else; that he took the property without the owner's consent; and that, when he took the property, he intended to deprive the owner of it permanently. (CALCRIM No. 1800.) Defendant appeared nervous and was looking around as he paid for the 18-pack of beer. He re-entered the store immediately after exiting with the 18-pack and handing it over to Chaplin, but with the receipt for the 18-pack on his person. He picked up a 30-pack and took it over to another part of the store. Whether or not he put the receipt in the handle, he then walked right out of the store with 30 cans of beer. He claimed afterwards that he simply forgot to pay for that heavy case of beer. He did not protest or question his detention outside the store or his handcuffing. Deputy Andrade saw no signs that defendant was intoxicated, especially to the degree he would have been had he been drinking beer all day in addition to hard liquor, as claimed by Chaplin. The jury clearly did not believe defendant's story.

We conclude defendant suffered no prejudice from the prosecutor's mention of the police report, and the prosecutor's comments did not result in the denial of defendant's right to a fair trial.

II. Prosecutorial Argument Regarding Reasonable Doubt

A. Defendant's Argument

Defendant contends that the prosecutor, in arguing to the jury, misrepresented the reasonable doubt standard and directed the jury to use a standard other than reasonable doubt in reaching its verdict. Because there is a reasonable likelihood that the jury applied a reduced standard of proof, he maintains, the proceedings violated the Fifth and Fourteenth Amendments of the federal Constitution.

B. Proceedings Below

At the beginning of opening argument, in discussing circumstantial evidence to show specific intent, the prosecutor stated, "Specific intent crimes, you actually have to figure out the specific intent of the defendant. What was he trying to do? Unfortunately, we're not to the age where we have the machines where we can hook up to his brain and figure out what he was doing. The way you're allowed to do it is circumstantial evidence. *You can look at everything and determine 'Yeah, he probably did it' or 'No, he didn't.'* You have to use the circumstances. That is where we tell you you have to use your common sense. *We can't determine what is actually 100 percent in the defendant's mind. You have to use the totality of the circumstances."*[4] (Italics added.) Defense counsel made no objection to these remarks.

Later, the prosecutor argued extensively about what he anticipated defense counsel would present on burdens of proof, stating, "*Defense counsel is going to come up here, and he's going to say, 'A reasonable doubt is the highest standard of law,' which it is not. The highest is beyond all doubt.* There is no way we can prove all doubt. We can't put a machine to the defendant's head and figure out all doubt. He's going to come here and say, 'More than civil, more than when they're trying to take your kids away.' But I'm

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[4] We italicize those portions of the prosecutor's comments of which defendant complains. We quote larger portions of the argument in order to place the comments in context.

not even sure why he would raise that if beyond a reasonable doubt is the same standard throughout all crimes. Every law has different types of protections. If we're talking about family law court, those are different protections, different proceedings. You go through different functions. If somebody is going to take actions to take your kids away, those are different proceedings. Assign a caseworker on it, hearings, interviews, investigations. That has nothing to do with the criminal law. This is beyond a reasonable doubt. You know that this standard applies if somebody jaywalks or if somebody commits murder. It is the same for everyone. If he raises all these other types of different burdens of proof, let him explain to you why that is relevant. We're here on a criminal trial. The same—the same reasonable doubt applies to petty theft as it does to murder. If we were here for murder, it is the same. Same standard. That doesn't change." (Italics added.) Defense counsel did not object to these comments.

In rebuttal argument, in response to the defense discussion of the different burdens of proof, the prosecutor stated, "Now, [defense counsel] did indicate that I was incorrect, that reasonable doubt is the highest standard. *Well, I'll actually show you that the law does provide for a higher standard. And that is something that [defense counsel] did not read to you in the same instruction.* He did read to you the top part of the instruction here. He read all of this (indicating). But kind of conveniently, he stops. "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true." However, it stops right there. "The evidence need not eliminate all possible doubt—" that is a higher standard. It goes on. "—because everything in life is open to some possible or imaginary doubt. That is the highest standard. It's right in the jury instruction. I'm not making this up. *When [defense counsel] says there is no higher standard, it is. It is all possible doubt.* It is doubt here [*sic*] to reasonable doubt. That is what the standard is." Defense counsel did not object to these remarks.

C. Forfeiture

As stated previously, "[a]s a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the

defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]" (*People v. Samayoa*, *supra*, 15 Cal.4th at p. 841.) The record shows that defendant failed to raise any objection to the remarks of which he complains on appeal and failed to request a curative admonition, if he indeed believed the prosecutor was committing misconduct. Defendant has not established that an objection would have been futile or that an admonition would not have cured the misconduct. (*People v. Panah* (2005) 35 Cal.4th 395, 462.) Since an admonition could have cured the harm, if any, he forfeited his right to appellate review by failing to make a contemporaneous objection.

D. Analysis

Once again, we examine the prosecutor's statements in the context of the whole argument. In addition, we consider all of the instructions in order to determine whether there is a reasonable likelihood the jury construed or applied the statement in an objectionable way. (*People v. Morales* (2001) 25 Cal.4th 34, 44.) With respect to the argument regarding the reasonable doubt standard in particular, "we cannot focus exclusively on a few erroneous words . . . and then reverse the conviction unless it is 'reasonably likely' that the jury applied the erroneous standard described or implied by those few words." (*Chalmers v. Mitchell* (2d Cir. 1996) F.3d 1262, 1267.) In this case, both parties devoted a considerable amount of time to the reasonable doubt standard. The prosecutor seems to have anticipated the defense argument and wished to make a preemptive strike in order to avoid any confusion the defense argument might engender. Read in the context of the entire argument, we find no reasonable likelihood that the jury understood the prosecutor's unnecessary explanation that reasonable doubt did not mean the elimination of all possible doubt resulted in lessening the People's burden of proof. In addition, defense counsel gave the jury a clear explanation of the reasonable doubt standard of proof.

Moreover, it is the court's instructions that "are determinative in their statement of law, and we presume the jury treated the court's instructions as statements of law, and the

prosecutor's comments as words spoken by an advocate in an attempt to persuade." (*People v. Sanchez* (1995) 12 Cal.4th 1, 70, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421; *Boyde v. California* (1990) 494 U.S. 370, 384-385.) "Juries are warned in advance that counsel's remarks are mere argument, missteps can be challenged when they occur, and juries generally understand that counsel's assertions are the 'statements of advocates.' Thus, argument should 'not be judged as having the same force as an instruction from the court. . . .'" (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21; *Boyde v. California*, at pp. 384-385.) Any improper argument here was dispelled by the court's proper instructions on the concept of reasonable doubt. In addition, the court informed the jury that what the attorneys said was not evidence and that, in case of conflicts, the jury must follow the law as given by the court. (CALCRIM Nos. 200, 220.) Despite defendant's claim that the prosecutor's argument obfuscated the trial court's instruction, it is presumed the jury followed the trial court's reasonable doubt instruction, which was the only standard of proof on which it was instructed. (*People v. Leonard*, *supra*, 40 Cal.4th at p. 1413.) The jury was not misled.

Even were we to assume, therefore, that the prosecutor committed misconduct, prejudice is lacking under either the state law (see *Watson*, *supra*, 46 Cal.2d at p. 836) or the federal constitutional standard of review (see *Chapman*, *supra*, 386 U.S. at p. 24). The jury was properly informed about the prosecutor's burden. As previously noted, moreover, the evidence was strong that defendant committed, at minimum, a petty theft.

III. Cumulative Prejudice

Defendant argues that, considered together, the two instances of prosecutorial misconduct created a "negative synergistic" effect, citing *People v. Hill* (1998) 17 Cal.4th 800, 847. He contends that a new trial is warranted. We have concluded that defendant suffered no prejudice from the prosecutor's arguments. The two arguments put together do not signify that a negative dynamic affected the jury's verdict, and reversal is therefore not required. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) We believe

defendant received a fair trial. He was not entitled to a perfect one. (*People v. Cain* (1995) 10 Cal.4th 1, 82.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, P. J.
BOREN

We concur:

_____, J.
DOI TODD

_____, J.
CHAVEZ