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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. ROGELIO RODRIGUEZ, JR., Defendant and Appellant.	B279557 (Los Angeles County Super. Ct. No. YA093033)

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

Janet Uson, 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, Senior Assistant Attorney General, Steven E. Mercer, Supervising Deputy Attorney General, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Rogelio Rodriguez appeals from the judgment following a jury trial in which he was convicted of one count of first degree residential burglary in violation of Penal Code section 459.[1] Rodriguez admitted to a prior "strike" conviction, which was also alleged as a serious felony prior conviction under section 667, subdivision (a), and four prior convictions under section 667.5, subdivision (b). The trial court sentenced him to 14 years in prison. The sentence consisted of the base term of 4 years, doubled to 8 years for the prior strike conviction under section 1170.12, subdivision (b); plus 5 years for a prior serious felony conviction under section 667, subdivision (a)(1); plus 1 year for a prior prison term enhancement under section 667.5, subdivision (b).

Rodriguez claims that: (1) a testifying officer's reference to Rodriguez's possible parole status violated his due process rights; (2) the evidence at trial was insufficient to support the verdict; (3) the prosecutor committed prejudicial misconduct during closing arguments by misstating the burden of proof and indirectly commenting on Rodriguez's decision not to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 [85 S.Ct. 1229] (*Griffin*); (4) Rodriguez's trial counsel was ineffective in failing to object to the prosecutor's arguments; and (5) Rodriguez did not knowingly and voluntarily waive his constitutional rights in admitting to his prior convictions and was not adequately advised of the penal consequences of those prior convictions. We find no prejudicial error and therefore affirm.

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[1] Subsequent undesignated statutory references are to the Penal Code.

FACTUAL BACKGROUND

1. *The Prosecution's Evidence*

a. *Evidence of the burglary*

Huan Nguyen lives with his wife and three children in a one-story house in Torrance. Sometime late in the night of July 31, 2015, or in the early morning hours of August 1, 2015, Huan left his house with his family for a vacation at Lake Tahoe.[2] Before leaving, Huan closed and locked the windows and doors to the house and locked the front, side, and back gates to his yard.

Huan's niece lives close to Huan. Around 4:30 p.m. on August 1, 2015, she passed by Huan's house on her way home from a youth retreat and saw that the side gate to the house was open. She texted her cousin, Huan's daughter, telling her that the side gate was open and asking if anyone was staying at the house. Huan's daughter replied that no one was staying at the house.

Hoan Nguyen is Huan's sister. Around 4:30 p.m. on August 1, 2015, she received a telephone call from Huan telling her that their niece had seen the side gate to his house open and asking Hoan to check on the house. She did so, and saw that the side gate was open. She went through the side gate and saw that the wooden back door to the house was also open. The screen door in front of the wooden back door was closed but unlocked. Hoan went back outside to the street and called 911.

Torrance police officers Sandoval and Camacho arrived at Huan's residence about 4:45 p.m. Before responding to the call to

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[2] For clarity, we refer to family members by their first names. No disrespect is intended.

go to the residence, Sandoval had been assisting another Torrance police officer, Anthony Fontanez, in detaining a suspect about a block away. The suspect was defendant, Rodriguez.

After arriving at Huan's house, the officers went inside to secure it. They saw that one of the windows on the east side of the house was damaged. Sandoval noticed a pry mark on the window frame.

The officers took Hoan into the house, and she observed that the master bedroom was in disarray. A wooden block next to the air conditioning unit in the window was knocked out. Sandoval noticed a jewelry box flipped over on the bed. Hoan saw that a brown diaper bag with a "Winnie the Pooh" design was missing from its usual location. Hoan often used the bag when baby-sitting her niece. Sandoval called to request a forensic identification expert.

Meanwhile, Fontanez was aware that Sandoval had responded to a report of a possible burglary at a residence nearby. After Fontanez had detained Rodriguez and recovered some items of property from him, Fontanez drove to Huan's residence to determine if any of the property Fontanez had recovered from Rodriguez was related to the burglary. One of the items of property that Fontanez had obtained from Rodriguez was a brown diaper bag, which Hoan identified as the diaper bag belonging to Huan.

Huan drove home from Lake Tahoe. When he arrived home, he noticed that the diaper bag along with some passport photographs and jewelry worth about $40,000 was missing. A few days later he identified the diaper bag, passport photos, jewelry, and other items at the police station as belongings that had been taken from his house.

A police forensic identification specialist examined Huan's house for items that might contain latent fingerprints or a source of DNA evidence. She did not find any items for DNA collection. She also did not find any latent fingerprints. However, she did find a print that appeared consistent with a glove pattern. On cross-examination, she admitted that the inside of gloves is a possible location for skin cells that could be tested for DNA, and that she was never provided with a pair of gloves for testing.

b. *Rodriguez's detention and arrest*

Fontanez has been a police officer for about 14 years. On August 1, 2015, Fontanez was patrolling a residential area around Crenshaw Boulevard and Artesia Boulevard in Torrance. There had been several residential burglaries in that area in the past.

About 4:27 in the afternoon Fontanez saw a person he later identified as Rodriguez walking about three houses away from Huan's residence. Fontanez noticed Rodriguez because Rodriguez was walking in an alley with a brown bag over his shoulder and he did not appear to be school-aged. Rodriguez started running when he saw Fontanez's patrol car. Fontanez drove his patrol car into the alley and parked, where he again saw Rodriguez.

Fontanez got out of his car and asked Rodriguez why he was running from the police vehicle. Rodriguez did not reply and continued walking. Rodriguez appeared to be sweating, nervous and out of breath. Fontanez asked Rodriguez to stop. Instead of stopping, Rodriguez started sprinting away toward some houses and out of view. Fontanez made a radio call reporting that a suspect was fleeing.

Fontanez then heard from several people living in nearby residences that they had seen a person "jumping" through their yards heading north. Fontanez headed north and positioned his vehicle. The driver of a vehicle heading in the same direction told Fontanez that there was a person hiding at his residence. Fontanez went to that location, where he found Rodriguez hiding behind a pile of wood. Fontanez waited for other officers to arrive, and they detained Rodriguez.

When the officers detained Rodriguez, he no longer had the brown bag. Fontanez therefore retraced Rodriguez's apparent path from where Fontanez had lost sight of him. He found the brown bag that Rodriguez had been carrying in a trash can. He saw that it was a diaper bag. The bag contained several boxes and containers with jewelry as well as a pair of gloves. He took the property to Huan's residence, where Hoan identified the bag. Fontanez then arrested Rodriguez and booked the property that he had obtained from Rodriguez into evidence.

2. *The Defense Case*

Rodriguez did not testify and the defense did not put on any evidence. In closing argument, defense counsel emphasized the absence of direct evidence placing Rodriguez at the scene of the burglary. He also argued that the police could have tested the gloves recovered from Rodriguez for DNA evidence but chose not to do so.

DISCUSSION

1. *The Officer's References to Rodriguez's Possible Parole Status Did Not Deprive Rodriguez of a Fair Trial*

a. *Fontanez's testimony*

During Fontanez's testimony, the prosecutor asked him, "What did you arrest [Rodriguez] for?" Fontanez answered, "I arrested him for probable cause burglary, possession of burglary tools, obstruction. I'm not sure if we got a parole violation on him at that time."

At the conclusion of Fontanez's direct testimony, Rodriguez's counsel asked for a side bar conference. He told the trial court that he "didn't want to stop during all the questions and highlight the issue for the jury any more, but the officer referred to booking my client on a parole violation, which creates a whole set of problems that should have been considered before he testified. The officer has been doing this for 13 years, he knows better than to do that. It has put me in a very awkward position to put it mildly."

The trial court observed, "I might have expected an objection at the time, but there was not one." The court noted that the officer was answering the question that was asked, "which probably should not have been asked of him." The court characterized the officer's reference to a parole violation as "speculation on among a litany of other offenses with which the defendant was not charged." The court concluded that the comment was not "unduly prejudicial to the defendant in light of the fact the officer said he didn't know whether that was something that was applicable to the defendant or not." While the court expressed the view that a curative instruction "would

probably just unduly highlight" the testimony, the court also stated that it would "be happy to consider one" if Rodriguez wished. After some additional colloquy in which the prosecutor explained that she had not intended to elicit the testimony referring to parole, the trial court stopped proceedings for the day and suggested that they discuss the issue further the next day.

The next morning Rodriguez moved for a mistrial based on Fontanez's testimony. Rodriguez's counsel told the court that he was not requesting a curative instruction because he did not want to "highlight the issue again for the jury."

The court denied the mistrial motion "for the reasons that I stated yesterday in light of the officer's statement." The court explained that the officer's statement "was sufficiently vague and fleeting that I—first of all, I would be surprised if any of the jurors focused on it at all. And in addition, it was stated not in absolute terms about the defendant having been on parole, being on parole, but it was stated as sort of vague, thinking out loud, if you will, inquiry about, I'm not sure if we got any parole violation on him, at that time." With respect to the issue of an instruction, the court stated that it did not disagree that "in light of the vague and fleeting nature a curative instruction would just draw additional attention to it, and particularly in light of the fact that you're not requesting one, I will not give one."

Rodriguez then cross-examined Fontanez. During the redirect examination, the prosecutor asked Fontanez about Rodriguez's height and weight, which were listed in the police report. When Fontanez answered, the prosecutor followed up by asking Fontanez where he had obtained that information to put in the report. Fontanez stated that Rodriguez "had a file in our local system."

Rodriguez immediately requested a side bar. During the side bar conference, the prosecutor explained that she elicited the testimony to show that Rodriguez was small enough to fit through the window in Huan's house, and that she had expected Fontanez to say that he obtained the height and weight figures from Rodriguez's driver's license. The trial court suggested that they discuss an appropriate curative instruction at the conclusion of Fontanez's testimony, although, "Honestly, I'm not sure what they can be instructed on that's not going to make it worse."

After testimony had concluded, Rodriguez's counsel renewed his mistrial motion, stating, "I don't believe there's a curative instruction that does not make the situation worse for my client at this point." The court again denied the mistrial motion. The court observed that Fontanez had simply "responded to the question that was asked of him" by referring to a "file." The court stated that, if "the officer had blurted out something about parole, then the court would have much greater concern." The court concluded that the reference to a "file" was "vague enough that it doesn't justify a mistrial."

b. ***The trial court's denial of Rodriguez's mistrial motions did not violate Rodriguez's due process rights***

A trial court's denial of a motion for mistrial is reviewed for abuse of discretion. (*People v. Lewis* (2008) 43 Cal.4th 415, 501 (*Lewis*).) Such a motion should be granted only when the possibility of a fair trial has been irreparably damaged. (*People v. Panah* (2005) 35 Cal.4th 395, 444.) " ' "Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion

in ruling on mistrial motions." ' " (*People v. Lucero* (2000) 23 Cal.4th 692, 714.)

The trial court did not abuse its discretion here. First, as the trial court noted, the two objectionable statements by Fontanez did not clearly refer to a prior conviction. Fontanez's first comment was that he was "not sure" if the police had a parole violation on Rodriguez "at that time." The statement communicated uncertainty. While jurors might have speculated that the phrase "at that time" meant the police became aware of a violation at some *other* time, that meaning was far from certain. The trial court, which was in the best position to evaluate the impact of the statement, characterized it as "vague and fleeting."

Fontanez's second comment was also unclear. The reference to a police "file" might have suggested a criminal history, but it could also have referred to some other kind of file. The trial court reasonably concluded that the statement was too vague to justify a mistrial. The record shows that the court acted within its discretion in concluding that Fontanez's two brief and ambiguous comments were not unduly prejudicial. (See *Lewis, supra,* 43 Cal.4th at pp. 501–502 [sheriff deputy's unsolicited testimony that " 'ex cons' " were in an apartment when a search warrant was executed did not clearly refer to the defendant and "likely was inconsequential" when compared to the strong evidence of guilt].)

Second, even a clear reference to a prior conviction is not prejudicial " 'in the light of a record which points convincingly to guilt.' " (*People v. Rolon* (1967) 66 Cal.2d 690, 693–694, quoting *People v. Stinson* (1963) 214 Cal.App.2d 476, 482.) In *Stinson,* the court held that reversal was not required despite a testifying officer's reference to the defendant's "parole officer." (*Stinson,* at

pp. 479–481.) Although the reference was improper, the evidence "point[ed] emphatically to defendant's guilt." (*Id.* at p. 482.) The police had found a stolen television and radio in the car that the defendant was driving, and the explanations for how the defendant had acquired the property were contradictory and "wildly fantastic." (*Id.* at pp. 478, 482.) The court concluded that the "prosecution evidence, though circumstantial, was tight and strong." (*Id.* at p. 482.)

Similarly, here, the prosecution's evidence was circumstantial but strong. Rodriguez was observed about three houses away from a burglarized house in the possession of a distinctive bag that was later identified as stolen from the house and that contained valuables taken from the house. Rodriguez discarded the bag after running from a police officer. Rodriguez was apprehended while trying to avoid detection behind a pile of wood in a backyard. Prints at the scene of the burglary were consistent with a burglar who used gloves, and gloves were found in the bag that Rodriguez abandoned. This evidence pointed "convincingly to guilt," and Fontanez's vague references to Rodriguez's possible parole status therefore do not require reversal.

2. *The Evidence Supports the Jury's Verdict*

In considering a challenge to the sufficiency of the evidence, an appellate court must " 'review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " (*People v. Avila* (2009) 46 Cal.4th 680, 701, quoting *People v. Lindberg* (2008) 45 Cal.4th 1, 27.) In conducting such a review,

the court " 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Avila,* at p. 701, quoting *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard of review applies whether direct or circumstantial evidence is involved. (*Avila*, at p. 701.)

To establish that Rodriguez committed burglary of the first degree, the prosecution was required to prove that he entered an inhabited dwelling with the intent to commit larceny or any felony. (§§ 459, 460.) Rodriguez emphasizes the absence of direct or physical evidence from Huan's residence showing that Rodriguez was inside. But such evidence was not necessary for conviction. Proof that Rodriguez was in possession of stolen property along with slight additional corroborating evidence is sufficient to support the verdict. (*People v. Mendoza* (2000) 24 Cal.4th 130, 176 (*Mendoza*) [when a defendant "is found in possession of property stolen in a burglary shortly after the burglary occurred, the corroborating evidence of the defendant's acts, conduct, or declarations tending to show his guilt need only be slight to sustain the burglary convictions"].)

As discussed above, the evidence showed that Rodriquez was seen several houses away from Huan's residence while in possession of items stolen from the residence, along with gloves that the jury could reasonably have concluded were used in the burglary. When confronted by a police officer, he fled and discarded the stolen property. He was apprehended while trying to hide.

Thus, in addition to Rodriguez's possession of the stolen property, the evidence here showed: (1) proximity to the burglary; (2) possession of items that might have been used to commit the burglary; and (3) consciousness of guilt displayed by

running and hiding from the police. That was sufficient corroborating evidence to sustain the conviction. (See *Mendoza, supra,* 24 Cal.4th at p. 176 [evidence that the defendant possessed property taken from businesses in Chinatown the same morning as the burglaries along with the defendant's statement that he had " 'been to Chinatown' " to explain where he obtained the property was sufficient to deny a motion for acquittal]; *People v. Smithey* (1999) 20 Cal.4th 936, 982–983 [flight alone is not sufficient to establish guilt, but may be considered as evidence of consciousness of guilt].)

3. *Rodriguez Forfeited His Prosecutorial Misconduct Claim by Failing to Object to the Prosecutor's Challenged Statements*

Rodriguez argues that three portions of the prosecutor's closing argument constituted misconduct. First, he claims that the prosecutor's use of a hypothetical example to illustrate the concept of circumstantial evidence improperly diluted the prosecution's burden of proof by suggesting that the jury could convict based only on a reasonable conclusion from the evidence rather than on proof beyond a reasonable doubt. Second, he contends that the prosecutor improperly suggested that Rodriguez had an obligation to introduce evidence when she argued that Rodriguez could have tested for DNA on the gloves that the police found in the bag he discarded. Third, he claims that the prosecutor impermissibly commented on Rodriguez's decision not to testify when she argued that Rodriguez's counsel failed to offer any explanation for why Rodriguez ran from Officer Fontanez.

Rodriguez did not object to the challenged statements at trial. " '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.' " (*People v. Winbush* (2017) 2 Cal.5th 402, 481 [by failing to object, the defendant forfeited his claim that the prosecutor committed misconduct in closing argument]; *People v. Williams* (2017) 7 Cal.App.5th 644, 686 (*Williams*) [defendant's failure to object forfeited his claim that the prosecutor's closing argument diluted the reasonable doubt standard].) Rodriguez therefore forfeited his misconduct claim.

4. *The Lack of Objection to the Prosecutor's Challenged Arguments Did Not Amount to Ineffective Assistance of Counsel and Did Not Prejudice Rodriguez*

Rodriguez argues that, despite the lack of objection at trial, the prosecutor's statements during closing argument warrant reversal because his trial counsel's failure to object to those statements constituted ineffective assistance of counsel. To prevail on that claim, Rodriguez must show "by a preponderance of the evidence that (1) counsel's performance was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694.) Unless Rodriguez shows otherwise, we must presume that his trial counsel's performance fell within the wide range of professional competence and that his counsel's conduct can be explained as trial strategy. (*Centeno,* at pp. 674–675.) When the appellate record does not provide any explanation for why trial counsel acted as he or she did, an appellant must show that there was " 'no conceivable tactical

purpose' " for counsel's conduct. (*Id.* at p. 675, quoting *People v. Lewis* (2001) 25 Cal.4th 610, 675.)

" 'The choice of when to object is inherently a matter of trial tactics not ordinarily reviewable on appeal.' " (*People v. Riel* (2000) 22 Cal.4th 1153, 1197, quoting *People v. Frierson* (1991) 53 Cal.3d 730, 749.) Because the decision whether to object to a prosecutor's comments during closing argument is highly tactical, " 'a mere failure to object to evidence or argument seldom establishes counsel's incompetence.' " (*Centeno, supra,* 60 Cal.4th at p. 675, quoting *People v. Ghent* (1987) 43 Cal.3d 739, 772; *Williams, supra,* 7 Cal.App.5th at p. 686.)

a. *The prosecutor's challenged statements were not clearly objectionable*

Rodriguez claims that the prosecutor's challenged arguments "were not difficult to recognize as improper." We disagree. Rodriguez's trial counsel could reasonably have decided that the arguments were permissible, or at least that the trial court would likely overrule an objection to them.

i. *The prosecutor's example illustrating circumstantial evidence*

During her closing argument, the prosecutor read a portion of the trial court's instruction on circumstantial evidence, including the statement that "circumstantial evidence does not directly prove a fact to be decided, but is evidence of another fact or group of facts from which you may logically and reasonably conclude the truth of the fact in question." She then told a story that she had first used during jury voir dire concerning her niece. The gist of the story was that one does not need to see a child spill juice to deduce that the child is responsible for the spill. She explained, "I'm babysitting my niece, we're playing Barbies at my

house, I give her a cup of juice because she's thirsty, and I hear my phone ringing in my bedroom, so I tell her, you know, stay right there. I go into my room, get my phone, come back out, and I see, you know, the stain on the carpet, the stain on her dress, she has a sad face, and she has a half cup of juice left."

The prosecutor explained that this story is an example of circumstantial evidence. Referring back to her use of the story during voir dire, she stated that one juror had concluded from these hypothetical facts that her niece had "spilled the juice," and several other jurors had agreed "that was the reasonable conclusion. And that it was unreasonable to think that an alien came in and, you know, spilled the juice, right? So circumstantial evidence can prove a case as long as it's reasonable, right? You make the reasonable conclusion."

During rebuttal argument, the prosecutor returned to this story in response to an argument by Rodriguez's counsel that involved altering the hypothetical. She said that "at the end of the day, I just want you to look at just the evidence in this case. Don't look at something else outside. . . . The defense attorney was trying to use my niece example and say that she went outside and probably something happened outside. That's not what the facts are that I gave you, right? I'm giving you the evidence. I want you to stick within the evidence and come to a reasonable conclusion, and all of this evidence points towards his guilt."

Rodriguez argues that the effect of this story was to suggest that the jury could find guilt beyond a reasonable doubt simply by reaching a "reasonable conclusion" from the evidence. We disagree.

The prosecutor's statements must be considered in context. (*People v. Lopez* (2008) 42 Cal.4th 960, 971 (*Lopez*); *People v. Mincey* (1992) 2 Cal.4th 408, 446.) The prosecutor initially told her spilled juice story in the context of explaining circumstantial evidence, not the reasonable doubt standard. The prosecutor's focus on the *reasonableness* of the conclusion that the jury should reach was consistent with the requirement explained in the jury instructions that the jury should accept only reasonable conclusions from circumstantial evidence.[3] Her niece story was itself consistent with this requirement. The story illustrated that the *only* reasonable conclusion from the hypothetical facts was that the niece spilled the juice, not that someone else magically appeared and caused the spill to occur.

While the prosecutor's brief rebuttal comments on the story did not again expressly refer to the circumstantial evidence standard, that was the initial purpose of her example. Her reiteration of the requirement that the jury's conclusion be

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[3] The trial court instructed that "[b]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt. Also, before you may rely on circumstantial evidence to find the defendant guilty you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty. If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable."

reasonable was likely understood by all concerned as a reference to the instruction that the jury had already heard explaining that the jury "must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty." In any event, her argument was not a clearly objectionable misstatement of the reasonable doubt standard.

Rodriguez cites *Centeno* for the proposition that a prosecutor commits misconduct by arguing that a reasonable conclusion is sufficient to satisfy the prosecution's burden of proof. In that case the prosecutor directly addressed the proof necessary for conviction under the reasonable doubt standard. The prosecutor used an example of proof beyond a reasonable doubt that our Supreme Court found both irrelevant and highly misleading. The example employed a graphic outline of California and suggested that the jury in a hypothetical criminal trial would have no reasonable doubt that the outline depicted the state of California, despite some misleading and inaccurate evidence about locations within the state. The court concluded that this type of example using an "iconic image" was a "flawed way to demonstrate the process of proving guilt beyond a reasonable doubt." (*Centeno*, *supra*, 60 Cal.4th at p. 669.) Such an image necessarily draws on the jurors' own knowledge rather than the evidence and is "immediately recognizable and irrefutable." (*Ibid.*)

Along with this improper graphic example of reasonable doubt, the prosecutor in *Centeno* argued that the jury's decision " 'has to be based on reason. It has to be a reasonable account.' " (*Centeno, supra,* 60 Cal.4th at p. 671.) The prosecutor argued that the defendant's theories in that case were not reasonable and that " 'what is reasonable' " is that the defendant is " 'good

for it.' " (*Id.* at p. 672.) The court concluded that the prosecutor's argument "left the jury with the impression that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Ibid.*) In discussing the defendant's ineffective assistance of counsel claim, the court also concluded that "the problems with the prosecutor's argument were not difficult to discern." (*Id.* at p. 675.)

Here, unlike in *Centeno*, the prosecutor's discussion of the need to draw a reasonable conclusion from the evidence did not purport to explain the reasonable doubt standard. Nor did it accompany a misleading graphic example of that standard. Unlike in *Centeno,* the possibility that a juror or jurors would misconstrue the prosecutor's story illustrating the concept of circumstantial evidence as an example of the *reasonable doubt* standard was not readily apparent. Trial counsel's failure to object therefore did not violate "prevailing professional norms." (*Centeno, supra,* 60 Cal.4th at p. 674.)

ii. *The prosecutor's argument concerning DNA testing*

As mentioned above, the prosecution's forensic specialist, Carrie Harris, testified during trial that she did not find any items at the scene of the burglary that could have been used to collect and test DNA. Rodriguez's counsel discussed that testimony during his closing argument. He stated that Harris "said there was no blood, no saliva, or semen recovered, so there was nothing to test as far as D.N.A. Except that's not entirely true." He then pointed out that gloves were recovered, and referred to Harris's testimony that "sweat or skin cells could have shown up on the gloves which would have provided touch D.N.A." He argued that "unfortunately she wasn't given a chance to test

those to see if there had been any. That would have been physical evidence that could have either linked or excluded Mr. Rodriguez from being involved if you assumed the gloves were used in the burglary."

After emphasizing that "the defense[ ] doesn't have to prove anything," Rodriguez's counsel went on to argue that "[t]he gloves were in the possession of the Torrance Police Department from August 1st of 2015. We're now at September 1, 2016. We're about 13 months later, and they could have tested them, and they could have had results. We don't."

In her rebuttal, the prosecutor argued that the defense also had an opportunity to test the gloves. "[W]hen the defense makes a discovery request, they can also test and look at the evidence. . . . So if they wanted to show you that it wasn't the defendant, they themselves could have tested the gloves. A year has gone by, and they haven't tested the gloves either. Why is that? Probably because the defendant is guilty. . . . [I]f the defense wanted to show you that the client was—that the defendant was innocent, he would have tested the evidence himself, right? And he didn't."

Rodriguez argues that the prosecutor's statements impermissibly shifted the burden of proof to Rodriguez by suggesting that he had a duty to produce evidence that would prove his innocence. We disagree.

As Rodriguez recognizes, "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) The

prosecutor's comments here fall in the former category. The prosecutor did not suggest that Rodriguez had an *obligation* to test the gloves to prove his innocence; she simply pointed out that he had an equal opportunity to do so and chose not to. Considered in context, the prosecutor's statements were even less likely to mislead, as they responded to Rodriguez's argument that the prosecution failed to test the gloves and that the defense had no obligation to produce any evidence. Rodriguez's trial counsel could reasonably have concluded that the prosecutor's argument was a permissible comment on the lack of evidence rather than an impermissible description of the burden of proof.

iii. *The prosecutor's argument concerning the lack of an explanation for why Rodriquez ran from the police*

During her initial closing argument, the prosecutor emphasized the evidence that Rodriquez ran several times from Fontanez and discussed the jury instruction on flight as evidence of a consciousness of guilt.[4] Then, during her rebuttal argument, the prosecutor stated: "The defense attorney got up here and never answered my question. Why did he run? Why did he run the first time? And he didn't run towards the officer. He wasn't bee-lining it towards the officer. He was running towards the officer's direction, but turned into this street and stood by this

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[4] The trial court gave an instruction based on CALCRIM No. 372: "If the defendant fled or tried to flee immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

residence, right? The officer testified that he was running this way and came over here. Why was he running? He doesn't answer that. And then when the officer asked him casually, why are you running? Does the defendant answer that question for you? No. He continues to run. He doesn't—the defense doesn't explain why the defendant continued to run. Why was the defendant hiding? Why did the defendant throw away the diaper bag? All these answers—all these questions are unanswered by the defense attorney. Why? Because the defendant is guilty."

Rodriguez argues that the prosecutor's rebuttal statements amounted to an improper comment on his decision not to testify. Rodriguez acknowledges that the prosecution may permissibly comment on the defense's failure to introduce material evidence. However, Rodriguez cites the principle that a prosecutor can violate a defendant's Fifth Amendment privilege against self-incrimination by arguing "to the jury that certain testimony or evidence is uncontradicted, if such contradiction or denial could be provided *only* by the defendant, who therefore would be required to take the witness stand." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1339, citing *Griffin*, *supra*, 380 U.S. 609.)

The prosecutor's statements here did constitute a comment on Rodriguez's failure to testify. They referred to the lack of an explanation of Rodriguez's flight in two contexts: First, Rodriguez's failure to answer Fontanez's question at the scene about why he was running; and second, the failure of the "defense attorney" and the "defense" to explain why Rodriguez ran.

The first context did not violate *Griffin*. A prosecutor's comment on a defendant's pre-arrest silence does not violate the defendant's Fifth Amendment privilege, at least when the defendant does not expressly invoke the privilege. (See *Salinas*

v. Texas (2013) __U.S. __, __ [133 S.Ct. 2174, 2180–2181] (plur. opn. of Alito, J.).)

The second context also did not amount to a *Griffin* violation, as the statements referred to the lack of an explanation by the defense *attorney* or the defense *generally*, not Rodriguez's personal failure to deny guilt. In *People v. Vargas* (1973) 9 Cal.3d 470, 475–476, our Supreme Court distinguished between a prosecutor's permissible comment about the lack of an *explanation* of the prosecution's evidence, which could have been provided by other witnesses, and an impermissible comment about the lack of a *denial*, which "connotes a personal response by the accused himself." (*Id.* at p. 476.) The prosecutor's comments here concerning the lack of an explanation for Rodriguez's flight fell within the first category.

If there had been some explanation for Rodriguez's flight other than consciousness of guilt, there is no reason to assume that Rodriguez himself was the only possible witness who could have provided testimony relevant to that explanation. For example, if the circumstances had cast doubt on whether Rodriguez recognized Fontanez as a police officer, or suggested that Fontanez was threatening Rodriguez, Rodriguez's counsel could have brought those circumstances to light through cross-examination of Fontanez. The prosecutor's comments did not obviously refer to Rodriguez's decision not to testify, and Rodriguez's counsel therefore did not depart from professional norms in failing to object to those comments as *Griffin* error.

b. *There were possible tactical reasons for Rodriguez's trial counsel to decide not to object*

Trial counsel's failure to object to *proper* argument by a prosecutor of course does not amount to ineffective assistance of

counsel. (*Lopez*, *supra,* 42 Cal.4th at p. 968.) Fairly interpreted in the context of the prosecutor's entire argument, the prosecutor's challenged statements here did not inaccurately describe the prosecution's burden of proof or unfairly comment on Rodriguez's decision not to testify. Counsel's failure to object therefore did not constitute ineffective assistance.

Moreover, even if he thought that the prosecutor's statements could be misconstrued, Rodriguez's trial counsel could have made a reasonable tactical decision not to object. With respect to the prosecutor's initial use of her niece story, Rodriguez's trial counsel might have decided that adapting and explaining the story in his own argument would be a more effective response than an objection. He did in fact use the example in his closing argument, and also explained both the reasonable doubt standard and the lack of any obligation for Rodriquez to introduce any evidence.

Rodriguez's trial counsel also could have made a tactical decision not to object during the prosecutor's rebuttal argument. An objection during argument, particularly if overruled, can seem defensive and may project to the jury a concern that the challenged statement was particularly important or damaging. Futile objections can also simply annoy the jury. In light of the lack of a clear misstatement of the law in the prosecutor's challenged statements, there was a reasonable possibility here that the trial court would overrule an objection. Moreover, even a successful objection and a resulting admonition from the court can focus the jury on a prosecutor's argument in ways that are not helpful. (*People v. Harris* (2008) 43 Cal.4th 1269, 1290.) In light of these possible concerns, we cannot say that there was " ' " 'no conceivable tactical purpose' " ' " for counsel's failure to

object. (*Centeno, supra,* 60 Cal.4th at p. 675, quoting *People v. Lewis*, *supra*, 25 Cal.4th at p. 675.)

c. The record does not show prejudice

Even if the prosecutor's challenged statements could have been misinterpreted by jurors, Rodriguez has not shown prejudice because the jury was properly instructed on the pertinent legal issues.

" 'When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for "[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." ' " (*Centeno, supra,* 60 Cal.4th at p. 676, quoting *People v. Osband* (1996) 13 Cal.4th 622, 717; see *Williams, supra,* 7 Cal.App.5th at p. 686 [presuming that the jury followed the "proper instructions defining reasonable doubt"].)

In *Centeno,* the court concluded that the trial court's correct instructions were not sufficient to cure the prosecutor's misleading use of the incomplete map of California to explain the reasonable doubt standard. (*Centeno, supra,* 60 Cal.4th at p. 676.) However, the court reached this conclusion primarily because "[t]here was no reason for the jury to reject the prosecutor's hypothetical." (*Ibid.*) The example did not "directly contradict the trial court's instruction of proof beyond a reasonable doubt, but instead purported to illustrate that standard." (*Ibid.*) The court added that "[t]he prosecutor introduced further confusion by suggesting that it was 'reasonable' to believe that defendant was guilty," but did not state that this "further confusion" by itself was incurable by a proper instruction. (*Ibid.*)

Here, unlike in *Centeno,* there is no reason to believe that the prosecutor's argument caused the jury to disregard the trial court's correct instructions on reasonable doubt. The prosecutor's challenged statements in the context of her niece story did not "purport[ ] to illustrate" the reasonable doubt standard. (*Centeno, supra,* 60 Cal.4th at p. 676.) Nor did the prosecutor suggest that a reasonable conclusion from the evidence was sufficient to satisfy that standard. Rather, she made the challenged statements in the context of explaining circumstantial evidence. We do not presume that the jury confused the two concepts, but rather presume that the jury followed the court's proper instructions on each.

Moreover, unlike *Centeno,* this was not a close case. (*Centeno, supra,* 60 Cal.4th at p. 677.) The circumstantial evidence against Rodriguez was strong. In view of the strength of the evidence and the trial court's proper instructions on reasonable doubt, there was not a "reasonable probability that the prosecutor's argument caused one or more jurors to convict [Rodriguez] based on a lesser standard than proof beyond a reasonable doubt." (*Id.* at p. 677.)

5. *Rodriguez's Claim That He Was Not Properly Advised of His Rights and of the Consequences of Admitting to His Prior Convictions Does Not Require Resentencing*

The information against Rodriguez alleged a prior strike conviction, which it also described as a prior serious felony under section 667, subdivision (a)(1). The information also alleged four prior prison term convictions under section 667.5, subdivision (b). Rodriguez requested, and the trial court ordered, that trial on the prior convictions be bifurcated.

During trial, Rodriguez's counsel advised the court that Rodriguez wished to "waive jury trial" on the "strike priors." The trial court then advised Rodriguez that, on his "strike prior conviction," he had the right to a jury trial; the right to present witnesses and confront and cross-examine any witnesses against him; and the right to "be represented by counsel and remain silent during that jury trial on the prior strike conviction." The court also advised Rodriguez that he would be "subject to the provisions of Penal Code section 667(b) through (j) and Penal Code section 1170.12" for his prior conviction for burglary in the first degree on November 15, 2010. Rodriguez waived his rights and admitted the conviction.

Later in the trial, the court advised the parties that it needed to "retake, if you will, the admission to the priors because I noted after we did that before when the jury came in, that I neglected to get him to admit the prison priors on page two [of the information]. So I'm just going to do it all over again pursuant to the prior waiver that the court accepted that it's a defendant's right to a trial by jury." The court then again obtained Rodriguez's admission to the November 15, 2010 conviction as a prior strike, and also obtained his admission to the four prior convictions alleged on page 2 of the information. The court did not advise Rodriguez of the sentencing consequences of those four prior convictions. The court also did not advise Rodriguez that his admission to the November 15, 2010 conviction would result in a five-year sentencing enhancement pursuant to section 667, subdivision (a).

Rodriguez argues that the true findings on the prior convictions must be reversed because the trial court did not obtain a knowing and voluntary waiver of Rodriguez's

constitutional rights with respect to proof of those convictions, and did not adequately advise Rodriguez of the sentencing consequences of admitting the convictions. We agree that the trial court did not fully advise Rodriguez as required by law, but we conclude that the error was harmless.

In obtaining an admission to the truth of a prior conviction that subjects a defendant to increased punishment, a trial court must "exercise a comparable solicitude" toward the protection of the defendant's constitutional rights as it employs in accepting a guilty plea. (*In re Yurko* (1974) 10 Cal.3d 857, 863 (*Yurko*).) This means that the court must "inform the defendant of three constitutional rights—the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers—and solicit a personal waiver of each." (*People v. Cross* (2015) 61 Cal.4th 164, 170 (*Cross*).) In addition, our Supreme Court has established a " 'judicially declared rule of criminal procedure' that an accused, before admitting a prior conviction allegation, must be advised of the precise increase in the prison term that might be imposed, the effect on parole eligibility, and the possibility of being adjudged a habitual criminal." (*Cross,* at pp. 170–171, quoting *Yurko*, at p. 864.)

The trial court here advised Rodriguez of his constitutional rights in accepting his admission to the prior strike. However, in obtaining Rodriguez's admission to the four prior convictions on the second page of the information the court simply referred to the "prior waiver that the court accepted that it's a defendant's right to a trial by jury." Thus, the court did not expressly advise Rodriguez again of his right to confront witnesses and his right to remain silent with respect to the additional four prior convictions.

Although the second advisement was incomplete, the error was harmless. An error in failing to advise a defendant of his or her constitutional rights under *Yurko* is not reversible per se. "Instead, the test for reversal is whether 'the record affirmatively shows that the [admission] is voluntary and intelligent under the totality of the circumstances.' " (*Cross, supra,* 61 Cal.4th at p. 171, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1175.) In applying the totality of the circumstances test, "a reviewing court must 'review[ ] the whole record, instead of just the record of the plea colloquy.' " (*Cross,* at pp. 179–180, quoting *People v. Mosby* (2004) 33 Cal.4th 353, 361.) Moreover, a defendant's previous experience in the criminal justice system is relevant to his knowledge and sophistication concerning his legal rights. (*Cross*, at p. 180; *Mosby*, at p. 365.)

Here, not only did Rodriguez have extensive prior experience with the criminal justice system, but he was fully advised of his constitutional rights in this case when the trial court accepted his initial admission of the prior strike. In later accepting his admission to the additional four convictions "pursuant to the prior waiver," the trial court referred to its prior admonition. Under these circumstances, review of the entire record shows that Rodriguez admitted the prior convictions pursuant to a knowing and voluntary waiver of his constitutional rights.

The trial court also failed to advise Rodriguez of all the sentencing consequences of his prior convictions. Review of this error requires a somewhat different approach. Because the failure to explain the sentencing consequences of prior convictions concerns a judicially declared rule of criminal procedure rather than a constitutional mandate, " 'an uninformed

waiver based on the failure of the court to advise an accused of the consequences of an admission constitutes error which requires that the admission be set aside only if the error is prejudicial to the accused.' " (*People v. Walker* (1991) 54 Cal.3d 1013, 1022–1023, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183, quoting *In re Ronald E.* (1977) 19 Cal.3d 315, 321.) To show prejudice, an appellant must demonstrate that it is reasonably probable that he would not have entered the plea or admission if he had known of the consequences. (*Walker,* at p. 1023.) Moreover, a trial court's error in failing to advise a defendant of the consequences of a plea or admission is waived if a timely objection is not made in the trial court. (*Villalobos,* at p. 182; *People v. Jones* (2009) 178 Cal.App.4th 853, 858.)

As respondent points out, neither Rodriguez nor his counsel expressed any surprise at the sentencing hearing concerning the sentence the trial court imposed based upon Rodriguez's admissions to the prior convictions. Rodriguez did not object to the sentence on the ground that he was not advised of the consequences of his admissions, even though the consequences were described in the prosecution's sentencing memorandum filed prior to the sentencing hearing. Under these circumstances, the trial court's error does not require reversal.[5]

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[5] Respondent argues harmless error rather than waiver, but the result is the same no matter which analysis is used. Rodriguez's failure to object to the sentence in the trial court on the ground that the court failed to advise him of the consequences of admitting to the prior convictions both constitutes waiver and also shows that he was aware of those consequences, undermining any argument that he would not have admitted the priors if the advice had been given.

Rodriguez relies on *Cross*, *supra*, 61 Cal.4th 164, in arguing that the trial court committed prejudicial error in accepting Rodriguez's admission to his prior convictions both by (1) failing to advise Rodriguez about his constitutional rights and (2) failing to advise Rodriguez about the penal consequences of admitting those convictions. However, *Cross* is inapposite on both points.

First, unlike here, the trial court in *Cross* did not advise the defendant *at all* with respect to the constitutional rights he was giving up by agreeing to a prior conviction. (*Cross*, *supra*, 61 Cal.4th at pp. 168, 180.) Second, the court in *Cross* did not hold that the trial court's failure to advise the defendant about the penal consequences of his prior conviction required reversal. Indeed, for purposes of its holding the court assumed that a reference in the complaint to the relevant sentencing provision was sufficient to advise the defendant of the consequences of the prior conviction. (See *id.* at p. 180 ["Even if the complaint's express mention of 'Section 273.5([f])(1) of the Penal Code' was sufficient to put Cross on notice of the penal consequences of his stipulation, nothing in the record affirmatively shows that Cross was aware of his right to a fair determination of the truth of the prior conviction allegation"].)

We therefore conclude that Rodriguez's admissions to the truth of his prior convictions were knowing and voluntary, and that the trial court did not commit reversible error in failing to advise Rodriguez of all the penal consequences of those prior convictions.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.