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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIOT JACKSON,

Defendant and Appellant.

B282687

(Los Angeles County
Super. Ct. No. MA070073)

APPEAL from a judgment of the Superior Court of Los Angeles County, Christopher G. Estes, Judge. Affirmed.

Jerome McGuire, 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, Susan Sullivan Pithey, Supervising Deputy Attorney General, Mary Sanchez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Elliot Jackson (defendant) of assault with a deadly weapon and battery causing serious bodily injury. The jury found true allegations that defendant personally inflicted great bodily injury in the commission of the assault and used a deadly weapon in the commission of the battery. The evidence at trial established defendant attacked the victim, Victor Kelly (Kelly), with a crowbar, causing Kelly to sustain cuts, bruises, and a fractured bone in his hand. We are asked to decide whether reversal of defendant's convictions is warranted because (1) the trial court erred in denying defendant's motion for new trial contending the prosecution committed misconduct during closing argument, (2) the prosecution failed to comply with its discovery obligations, and (3) hearsay and unduly prejudicial testimony was improperly admitted.

I. BACKGROUND

A. *The Charges Against Defendant*

The Los Angeles County District Attorney charged defendant with two crimes: (1) assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1)¹ (count 1) and (2) battery with serious bodily injury in violation of section 243, subdivision (d) (count 2). The information further alleged defendant inflicted great bodily injury on Kelly in committing count 1 (§ 12022.7, subd. (a)) and personally used a deadly weapon in committing count 2 (§ 12022, subd. (b)(1)).

¹ Undesignated statutory references that follow are to the Penal Code.

B. Trial

The prosecution presented testimony from four witnesses at trial: Kelly; Anntonette Robinson (Robinson), a close friend of Kelly's who witnessed the incident and who was in an on-and-off relationship with defendant; Alexandra Dejean (Dejean), who lived and had a child with defendant; and Los Angeles County Sheriff's Deputy Taylor Landgren (Deputy Landgren), the investigating officer. Defendant did not present a defense case.

1. Kelly's testimony

Kelly spent two nights at Robinson's residence in early December 2016. After the first night, he encountered defendant and the two engaged in some small talk. Kelly had met defendant once or twice before and had never had a disagreement with him. Kelly and Robinson both slept in Robinson's bed on the second night of Kelly's stay because there were other people on the couch. The two were not romantically involved, though they had been in the past.

The next morning, Kelly was awakened around 7:15 a.m. by the sound of the bedroom door slamming open. Kelly heard Robinson telling him to get out of the way. He opened his eyes, reflexively put his left hand in front of his face, and felt something hit him. He immediately felt pain and throbbing in his hand. Kelly then saw defendant swinging a crowbar and started rolling around on the bed, trying to get out of the way and absorbing the blows.

Kelly estimated defendant hit him with the crowbar two or three times in the head and two to four times in his back and shoulders. Kelly eventually caught the crowbar and gained control of it, after which defendant began hitting Kelly in the

head with his fists. Kelly got up from the bed and defendant jumped on his back and tried to choke him. Kelly escaped the choke hold and put some distance between him and defendant.

After a few seconds of awkward silence, Kelly and Robinson both told defendant he was “tripping.” When Kelly moved to put on his shoes, he noticed his head was bleeding. Kelly asked defendant (in rather vague fashion) whether defendant “recall[ed] himself trying to kill somebody.” Defendant responded, “I told her that,” while looking at Robinson.

Once the crowbar attack had ended and Kelly noticed he was bleeding, Kelly asked Robinson to call the police. Kelly’s question “shook” Robinson, and she did not comply. Kelly walked toward the bed to pick up his phone and heard defendant ask if Kelly was “serious.” Kelly called the police, and defendant vanished.²

Kelly waited in the driveway until an ambulance and sheriff’s deputies arrived. Kelly spoke to Deputy Landgren outside Robinson’s residence. During their conversation, Kelly gave Deputy Landgren as much information as he could, told him he was concerned about his hand, and said “clearly my hand is broken.” Kelly believed his hand was broken because “you could

² The prosecution played an audio recording of Kelly’s call to 911 during Kelly’s testimony. Kelly told the 911 operator “[s]omeone just tried to kill me,” adding he had been attacked with a crowbar. Kelly agreed it was fair to say he sounded pretty calm on the recording and explained he was able to stay calm because this was not the first attempt on his life. Kelly clarified there had been three prior attempts, none of which involved defendant.

just look at it and tell.” Specifically, Kelly saw a “serious” knot right below his knuckle.

Kelly was transported to the hospital, and hospital personnel bandaged his head and put his left hand in a splint. Kelly reported that by the time he arrived at the hospital, the pain in his left hand had increased dramatically. He received a referral to an orthopedic surgeon, from whom he sought treatment the next day. He later underwent hand surgery, which left him with a four-inch long scar.³ Kelly had no issues with his left hand prior to defendant’s attack, but as of his testimony at trial, Kelly was no longer able to make a tight fist with that hand.

2. *Robinson’s testimony*

Robinson’s version of events was markedly different. According to her, she was in a bathroom when the altercation between Kelly and defendant began. She testified she had last seen Kelly on the bed, and she claimed she became aware of defendant’s presence in her room when she heard two voices talking.⁴

³ Kelly also had an inch-long scar on his head where defendant hit him with the crowbar.

⁴ Robinson initially testified she stopped dating defendant a few years prior to the charged crime. The prosecution confronted Robinson with audio recordings of two jail calls between her and defendant (which took place while he was in pretrial custody) that revealed they were still romantically involved. During one of those calls, defendant told Robinson, “I am in here because of the way I feel about you.” The parties also stipulated that an additional call included an explicit sexual conversation. After

When Robinson came out of the bathroom, she saw Kelly and defendant throwing punches. Robinson screamed at them to stop and tried to break up the fight. The two men eventually stopped fighting and left the room. Kelly later returned, talking on his cell phone, and then the police arrived. Robinson did not remember Kelly asking her to call the police, and she testified she never saw either man with a crowbar.

3. Deputy Landgren's testimony

Deputy Landgren spoke to Kelly outside Robinson's residence and took a statement from him. During their conversation, he noticed a cut above Kelly's eye. Deputy Landgren's report of the incident did not mention an injury to Kelly's hand. Deputy Landgren did not search Robinson's residence because the individuals he encountered there would not consent to a search.

After Kelly was taken to the hospital, Deputy Landgren located defendant at the house where he lived with Dejean (the mother of his child), which was approximately five minutes away from Robinson's residence. Dejean was with defendant when Deputy Landgren arrived. Deputy Landgren did not recall seeing any injuries on defendant. He searched defendant's vehicle but did not find a crowbar. Deputy Landgren requested to search the house, but Dejean declined, and he did not press the matter.

being confronted with the calls, Robinson admitted she and defendant had been in an on-and-off relationship during the two years leading up to the altercation between defendant and Kelly.

While at the residence, Deputy Landgren spoke to Dejean.⁵ During that conversation, Dejean said defendant left the house around 7:00 a.m. that morning after telling her he needed to do something. She also said defendant had returned at about 7:30 a.m. (i.e., fifteen minutes after the crowbar attack that occurred at approximately 7:15 a.m., according to Kelly). Dejean told Deputy Landgren that defendant appeared upset when he returned but he would not say what happened when she asked.

Deputy Landgren took defendant into custody in Dejean's presence. Before being transported away from the scene, defendant yelled "don't tell them anything" to Dejean. Defendant also told Dejean he was "sorry" after the deputy placed defendant in his police vehicle.

4. *Medical records*

Without objection by the defense, the prosecution introduced in evidence Kelly's medical records from his hospital visit occasioned by defendant's attack. The records indicated,

⁵ Dejean's statements to Deputy Landgren were admitted at trial pursuant to Evidence Code section 1235, which permitted the jury to consider the statements both as impeachment and for the truth of the matters stated. (Evid. Code, § 1235; *People v. Strickland* (1974) 11 Cal.3d 946, 954.) During her trial testimony, Dejean claimed defendant brought her coffee from Starbucks on the morning in question and she and defendant were drinking coffee when a deputy arrived at their residence. Dejean maintained she did not recall details of her conversation with Deputy Landgren. She did acknowledge she recalled asking defendant what happened after he was put in the police vehicle, but she said he responded, "I'll call you" (not that he was sorry).

among other things, that Kelly had swelling and a laceration on his left hand, which, he reported, left him unable to move his pinky finger. Assessment of the hand injury by hospital personnel, which included a hand x-ray, concluded Kelly suffered a fracture of the left second metacarpal bone. Kelly's hospital discharge paperwork described the injury in the following terms: "You have a fracture of a bone in your hand. [¶] Your fracture is in a metacarpal bone. These bones make up the palm of the hand. [¶] A fracture is a break in a bone. It means the same thing as saying a 'broken bone.' In general, fractures heal in about 6-8 weeks." The discharge paperwork additionally informed Kelly that "[m]ost fractures can be managed with a splint or cast, but some need surgery for the best alignment and fracture correction. The orthopedic provider will help decide on this."

5. *Closing argument*

During closing argument, the prosecution argued, among other things, that Kelly's injuries were consistent with being attacked by a crowbar. Defense counsel disputed this in her closing argument and argued Kelly's injuries were instead consistent with being in a fistfight and punching defendant. As discussed in more detail *post*, the prosecutor argued in rebuttal that the jury should reject this contention because the injury to a bone in the palm of Kelly's hand was consistent with something striking his hand, not a fistfight. There was no contemporaneous objection to the prosecution's rebuttal argument.

C. Verdicts, the Motion for New Trial, and Sentencing

The jury found defendant guilty on both charged counts: assault with a deadly weapon and battery causing serious bodily injury. The jury further found true the allegations that defendant had personally inflicted great bodily injury on Kelly and personally used a deadly weapon (described on the verdict form as a “crowbar”).

Prior to sentencing, defendant filed a motion for new trial. The motion prepared by defense counsel argued only that the jury’s verdict was contrary to the evidence. Counsel also submitted, however, a two-page document written by defendant objecting to the prosecutor’s rebuttal argument regarding Kelly’s injuries. At the hearing on the new trial motion, defense counsel argued the prosecutor’s rebuttal argument concerning the likely injury one would sustain by punching another person was misconduct because it was unsupported by any evidence.

The trial court denied the motion for new trial. In rejecting the prosecutorial misconduct contention, the trial court found that even if the prosecution’s argument was misconduct, the argument was not prejudicial because it was not reasonably probable a result more favorable to the defendant would have occurred had the prosecutor refrained from making the argument.

The trial court sentenced defendant to a total of 14 years in prison, comprised of the three-year, mid-term penalty for assault with a deadly weapon, which was then doubled pursuant to the Three Strikes law, enhanced by three years for the great bodily injury allegation (§ 12022.7), and further enhanced by five years

for the prior serious felony allegation (§ 667, subd. (a)(1)).⁶ The trial court stayed the sentence on the battery conviction pursuant to section 654.

II. DISCUSSION

We reject each of defendant's four arguments for reversal. First, we hold defendant's claim that the prosecution committed misconduct during its rebuttal argument is forfeited and meritless in any event—the prosecution's argument was a fair response to the defense closing and predicated on reasonable inferences from the evidence introduced at trial. Second, we hold the prosecution did not violate its discovery obligations by not obtaining and producing to the defense, prior to the day of Kelly's testimony, information regarding Kelly's hand surgery. The prosecution was not aware Kelly had received subsequent medical treatment before Kelly testified, and the prosecution did not have a duty to seek out, obtain, and disclose that information. Third, we hold defendant forfeited his contention that Kelly's testimony regarding his hand surgery was hearsay by failing to object, and we conclude on the merits, in any event, that the testimony was not hearsay—it was Kelly's own hand, after all, and he was entitled to testify from personal experience that he had surgery. Fourth, we reject defendant's contention that portions of Kelly's testimony in which Kelly characterized the incident as an attempt on his life were unduly prejudicial;

⁶ Defendant waived his right to a trial regarding a prior felony robbery conviction and admitted he sustained the conviction.

defendant's arguments in this regard are both forfeited by the absence of a contemporaneous objection and meritless.

A. The Trial Court Properly Denied Defendant's Motion for New Trial Arguing Prosecutorial Misconduct

1. Additional background

During closing argument, the defense argued Kelly's injuries were not consistent with being hit by a crowbar but were, instead, consistent with punching defendant. Defense counsel noted Kelly had "swelling and a laceration" on his left hand and was "unable to move [his] pinky" after the incident. She stated "the location of this is very important because it is on the back of his palm On the back of his hand. And where is it across? His knuckles." Defense counsel then argued, "Mr. Kelly broke his hand when he was punching back. When he was punching back, he broke his hand, and that's how he sustained the fracture, and that's why you see these notes right here about the swelling and the laceration"

In rebuttal, the prosecution responded as follows:

"Now, the main issue here is whether or not there was a crowbar that was used and whether Mr. Jackson used it to attack Mr. Kelly, and [defendant's counsel] talked about the injuries as being more consistent with somebody punching; right? And the thing is that that actually doesn't make any sense because when you go through the medical records, nothing in the medical records say that the injury is to the knuckles. When you punch somebody, you punch them with that part of your hand, the front part of your fist; right?"

“If you are going to have injury to your knuckles, it is going to be on your knuckles. But when you read the medical records, and I will draw your attention to where it says Page 5 of 41, it says that it is a metacarpal fracture. It is of the metacarpal bone. And these bones make up the palm of your hand, not your knuckles. These bones here that make up the palm of your hand.

“Now, if you are going to punch somebody and if you break your hand from punching somebody, you are going to break your fingers. You are going to hurt your knuckles. The palm of your hand, the back of your hand here, this injury is consistent with something striking that hand. All right? And his injury is consistent with his version of events where he is protecting his face and he is rolling around. Okay?

“Now, the injury there also required the surgery. What kind of a punch is going to break this part of your hand, require surgery, and not leave a mark on the person you punched?

“Deputy Landgren said that he didn’t observe any injuries, no swelling, no nothing on Mr. Jackson. All right? The only person injured is Mr. Kelly, and his injury, the only reasonable conclusion is that his injury was the result of being struck by a hard object.”

2. *Analysis*

Both defendant and the Attorney General agree we should review the trial court's denial of the motion for new trial de novo, citing *People v. Ault* (2004) 33 Cal.4th 1250. Even under that non-deferential standard, defendant's argument for reversal fails.

a. forfeiture

A reviewing court generally will not review a claim of prosecutorial misconduct unless the defendant makes a contemporaneous objection and requests that the jury be admonished regarding the improper argument. (*People v. Perez* (2018) 4 Cal.5th 421, 450 ["To avoid forfeiture of a claim of prosecutorial misconduct, a defendant must object and request an admonition"]; see also *People v. Adams* (2014) 60 Cal.4th 541, 577 [forfeiture rule applies to prosecutorial misconduct claim raised only in a post-verdict motion for new trial].) Though defense counsel argued misconduct in moving for a new trial, she made no contemporaneous objection that would have alerted the trial court to the issue before the jury returned its verdicts. Defendant does not argue, nor is it true, that an objection and admonition would have been futile under the circumstances, and defendant's prosecutorial misconduct claim is therefore forfeited.

b. ineffective assistance of counsel

Defendant argues reversal is nevertheless warranted because the forfeiture is attributable to his trial attorney's constitutionally deficient assistance. To succeed on a claim of ineffective assistance of counsel, a defendant must show both that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance resulted in

prejudice—i.e., a reasonable probability of a more favorable outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) If the record on direct appeal sheds insufficient light on a challenged action or omission by counsel, we will not conclude the action or omission is attributable to ineffective assistance of counsel unless there could be no conceivable legitimate reason for counsel’s acts or omissions. (*People v. Weaver* (2001) 26 Cal.4th 876, 926 (*Weaver*); *People v. Earp* (1999) 20 Cal.4th 826, 896 (*Earp*).)

Defendant’s ineffective assistance of counsel argument fails for the most fundamental of reasons: the prosecution’s rebuttal argument, as we will briefly explain, was not misconduct. Defendant cannot demonstrate prejudice from the absence of an objection to proper argument. (*People v. Bradley* (2012) 208 Cal.App.4th 64, 90 [“Failure to raise a meritless objection is not ineffective assistance of counsel”] (*Bradley*).)

“The standards governing review of misconduct claims are settled. ‘A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such “unfairness as to make the resulting conviction a denial of due process.”’ [Citations.] Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.’ [Citation.]” (*People v. Williams* (2013) 56 Cal.4th 630, 671 (*Williams*).) Prosecutorial misconduct under the federal Constitution requires reversal of a defendant’s conviction unless a reviewing court finds it harmless beyond a reasonable doubt. (*People v. Cook* (2006) 39 Cal.4th 566, 608; see also *Chapman v. California* (1967) 386 U.S. 18, 24.) Prosecutorial misconduct

under state law requires reversal when a reviewing court finds that it is reasonably probable the result of a defendant's trial would have been more favorable absent the misconduct. (*People v. Martinez* (2010) 47 Cal.4th 911, 955 (*Martinez*); see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) When a claim of misconduct is based on the prosecutor's comments 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.] (*Williams, supra*, at p. 671.)

Prosecutors are afforded wide latitude to draw inferences from the evidence presented at trial. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) Likewise, they are permitted to make "a wide range of descriptive comment" on the evidence and may vigorously argue that reasonable inferences or deductions should be drawn therefrom. (*Martinez, supra*, 47 Cal.4th at p. 957.) Prosecutors also may state matters that are common knowledge or are drawn from common experience (*People v. Wharton* (1991) 53 Cal.3d 522, 567), and they are permitted to fairly respond in rebuttal to arguments made by defense counsel (*People v. Reyes* (2016) 246 Cal.App.4th 62, 74). This wide latitude, of course, will not excuse mischaracterizations of the evidence or misstatements of fact, whether deliberate or mistaken. (*Hill, supra*, at p. 823.)

The prosecution's argument here was a fair response to defense counsel's closing argument and consisted of permissible inferences from the evidence presented regarding Kelly's injury. Those inferences were properly grounded in the witness testimony at trial and Kelly's medical records that were admitted without objection. (That is obvious just by focusing on what the prosecution actually said to the jury, e.g., "But when you read the

medical records, and I will draw your attention to where it says”) The evidence demonstrated Kelly had a broken bone in the back of his left hand, which was also swollen and lacerated. The evidence did not indicate Kelly had broken or otherwise injured any other part of his hand, including his knuckles or his fingers.

We are unpersuaded by defendant’s contention that the jury would have understood the prosecution’s argument to consist of “accurate statements of medical fact.” The prosecutor did not portray them as such, imply that they were, or imply that he possessed any advanced medical knowledge. Rather, the prosecutor explained his interpretation of the evidence. It was for the jury to determine the reasonableness of that proposed interpretation, and nothing the prosecutor said usurped that function or improperly invited the jury to reach conclusions based on anything other than its view of the evidence at trial. (*People v. Farmer* (1989) 47 Cal.3d 888, 923 “[C]ounsel have a right to present to the jury their views on the deductions or inferences that the facts warrant. Their reasoning may be faulty, but this is a matter for the jury to decide”), overruled on another ground in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; accord, *People v. Smith* (2003) 30 Cal.4th 581, 617 [whether inferences a prosecutor draws are reasonable is for jury to decide].)

B. Kelly’s Testimony Regarding Surgery on His Hand

1. Additional background

When asked about the treatment he received at the hospital for his injuries, Kelly testified he had received bandages for his head but “the main treatment that he . . . [got] was for my broken hand.” Defendant’s counsel objected and moved to strike

the testimony on hearsay grounds. The court sustained the objection and struck the testimony regarding Kelly's hand. The prosecutor then asked Kelly if he obtained follow up treatment for any of his injuries. Kelly testified he received a referral to an orthopedic surgeon. When the prosecutor asked him what kind of treatment he received, defendant's counsel requested a sidebar. The sidebar discussion was not reported.

Following the sidebar, Kelly testified he could no longer make a tight fist; he had a four-inch scar on his left hand, which was the result of surgery he underwent; and he had no problems with the hand prior to the altercation with defendant. Defense counsel did not object to any of that testimony.

The trial court addressed what occurred during the unreported sidebar discussion later in the proceedings, outside the presence of the jury. The court noted defense counsel stated during the sidebar that she had not been provided discovery regarding Kelly's ongoing medical treatment, and the court invited the parties to be heard on that issue.

Defense counsel stated she had not been aware of any follow-up treatment Kelly had received, had not been provided with any medical records, and had not been aware Kelly had surgery until she heard him so testify. Defense counsel maintained any further inquiry on the topic of medical treatment would be a discovery violation and objected to further questioning.

In response, the prosecutor explained he had a brief conversation with Kelly before entering the courtroom that morning and noticed a mark on Kelly's hand. He asked Kelly if the mark was related to this incident, and Kelly said yes. The prosecutor obtained no further information prior to Kelly's

testimony. He only knew that Kelly must have had follow-up treatment because he had the mark.

The trial court noted that, based on the sidebar discussion, the court had asked the prosecutor to move on and not get into further areas of treatment given the absence of discovery. The court stated it was inclined stick with that ruling. When Kelly's testimony resumed, there was no further questioning regarding the treatment of his injuries.

2. *Analysis*

Section 1054.1 requires the prosecution to disclose certain categories of evidence to the defense, including "[t]he names and addresses of the persons the prosecutor intends to call as witnesses at trial," "relevant real evidence seized or obtained as part of the investigation," and "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial." (§ 1054.1, subds. (a), (c), (f).) This last category encompasses unrecorded oral statements made to counsel by a witness that counsel intends to call at trial. (*Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 166-168.)

Defendant argues the prosecution did not comply with its discovery obligations because it did not obtain records of Kelly's surgery and disclose them to the defense. The thrust of defendant's argument seems to be that the prosecution had a duty to obtain such records notwithstanding the prosecutor's undisputed representation that he was unaware Kelly had received any further treatment until Kelly testified. We hold no such duty existed under the circumstances.

While the “prosecutorial obligation to disclose relevant materials in the possession of the prosecution” requires the prosecution to disclose materials within its possession or control and information readily available to the prosecution but not accessible to the defense, the prosecution “has no *general duty* to seek out, obtain, and disclose all evidence that might be beneficial to the defense. [Citation.]” (*People v. Sanchez* (1998) 62 Cal.App.4th 460, 474.) The facts in *Sanchez* are illustrative. In that case, a prosecution witness mentioned on cross-examination that she had in her possession certain relevant charts she had not given to the police. (*Id.* at p. 471.) The witness and others subsequently provided the charts to the prosecutor, who then provided copies to defense counsel. (*Id.* at p. 472.) The defendants moved for dismissal or sanctions. In holding the trial court properly denied the motion, the appellate court concluded the prosecution “had no duty to discover the existence of, or to seek or obtain, additional [evidence] not provided to the police by the victims.” (*Id.* at p. 474.) Similarly, here, the prosecution had no affirmative duty to seek out any possible existing records of additional medical treatment Kelly may have received when Kelly did not reveal he underwent such treatment until he testified at trial.

Defendant’s reliance on *In re Littlefield* (1993) 5 Cal.4th 122 (*Littlefield*) to argue the contrary is unavailing. The court in *Littlefield* held the defense was obligated to provide the prosecution with the names and addresses of prospective witnesses pursuant to statutory reciprocal discovery obligations. (*Id.* at p. 137.) The court also reiterated the principle that the prosecutorial obligation to disclose materials includes information “within the possession or control” of the prosecution,

including information “reasonably accessible” to it. (*Id.* at p. 135.) The court further explained information “reasonably accessible” to the prosecution included information in the possession of agencies that are part of the criminal justice system. (*Ibid.*) *Littlefield* is inapposite here because there was no evidence that an agency in the criminal justice system had possession of records reflecting Kelly’s subsequent surgery. The prosecution was not obligated to go looking for such records.

To the extent defendant contends the prosecution did not live up to its discovery obligations by failing to disclose the substance of its conversation with Kelly immediately before calling him as a witness, the argument is unconvincing. The record reflects the conversation between Kelly and the prosecution occurred mere hours prior to his testimony at trial, and the only fact that Kelly revealed was that the visible scar on his hand was related to the crowbar attack. Kelly did not tell the prosecutor he had surgery or make any other statements to the prosecutor on this topic. While section 1054.1 requires disclosure of information that “becomes known to, or comes into the possession of, a party within 30 days of trial” to occur “immediately” (§ 1054.7), the prosecutor only learned the information the morning of Kelly’s testimony and the information concerned only a physical feature visible to anyone who saw Kelly’s hand—a feature that the defense could certainly infer was related to the charged crime. Even assuming the prosecution had a duty to inform the defense about the new information in that small window of time (but see *People v. Salazar* (2005) 35 Cal.4th 1031, 1049 [“If the material evidence is in a defendant’s possession or is available to a defendant through the exercise of due diligence, then, at least as far as evidence is concerned, the

defendant has all that is necessary to ensure a fair trial . . .”)), the absence of a disclosure to the defense cannot have prejudiced defendant.⁷

3. *Hearsay*

Defendant argues Kelly’s testimony that he had undergone surgery to repair injuries to his hand was inadmissible hearsay. Defendant contends Kelly’s knowledge of his treatment came from oral statements made by medical personnel or documentation given to Kelly in relation to his treatment.

Defendant’s claim is forfeited for failure to contemporaneously object. (See, e.g., *People v. Dykes* (2009) 46 Cal.4th 731, 756 (*Dykes*).) Defendant contends otherwise, arguing an objection would have been futile; he believes it is likely the trial court informed defense counsel at the unreported sidebar that it would allow Kelly’s testimony about his surgery. That speculation cannot avoid application of the forfeiture doctrine. Though the sidebar discussion was unreported, the trial court later explained on the record that it had addressed discovery issues regarding Kelly’s further treatment at sidebar.

Defendant’s alternative ineffective assistance argument is also unpersuasive, and for the same general reason we have already rejected his previous ineffective assistance of counsel claim: any hearsay objection would have been meritless and

⁷ So far as the record reveals, defendant made no request for a continuance to further prepare to cross-examine Kelly about his medical treatment. Instead, defendant simply asked that the court preclude further testimony on the topic, and the court agreed.

defendant cannot have been prejudiced by the absence of a meritless objection. (*Bradley, supra*, 208 Cal.App.4th at p. 90; see also *People v. Williams* (1997) 16 Cal.4th 153, 215 [“Whether to object to inadmissible evidence is a tactical decision . . . accorded substantial deference . . . , [and] failure to object seldom establishes counsel’s incompetence”], internal quotation marks and citation omitted.) Kelly’s testimony concerning the surgery on his own hand obviously came from personal experience: he received emergency treatment with discharge instructions (admitted without objection) that stated he may need surgery, he apparently consulted a surgeon and consented to a procedure, and he was left with a four-inch scar on his hand as a result. That he may have been sedated or unconscious for the actual procedure does not establish his knowledge he had surgery must have come from a source other than his own personal experience.

Furthermore, the asserted hearsay testimony was unimportant to the verdict obtained. (*People v. Landau* (2016) 246 Cal.App.4th 850, 866.) The determination of whether defendant attacked Kelly with a crowbar or just with his fists turned on whether the jury found Kelly or Robinson’s testimony credible, not whether Kelly required surgery to repair his broken bone. Likewise, the determination of whether Kelly had suffered “great bodily injury” and “serious bodily injury” was similarly not dependent on whether Kelly had surgery. The medical records in evidence established the bone in Kelly’s hand was broken and the jury could reasonably find that a broken bone constitutes “serious” or “great” bodily injury. (§ 243, subd. (f)(4) [serious bodily injury is “a serious impairment of physical condition, including, but not limited to . . . protracted loss or impairment of

function of any bodily member. . .”]; *People v. Wallace* (1993) 14 Cal.App.4th 651, 665 [lack of feeling in victim’s finger for two months was sufficient to support finding of great bodily injury].) In addition, Kelly testified without objection that defendant’s attack left him unable to make a tight fist with his left hand more than three months after the incident, and the jury could have relied on that testimony to conclude he suffered a prolonged impairment of bodily function that constitutes “serious” and “great” bodily injury.

C. Kelly’s Testimony Regarding Prior Attempts on His Life and His Exchange with Defendant

Defendant challenges a portion of Kelly’s testimony in which (1) Kelly testified that, after defendant stopped hitting him with the crowbar, Kelly asked him if “he recall[ed] himself trying to kill somebody”; (2) Kelly testified defendant responded by saying, “I told her that” while looking at Robinson; and (3) Kelly testified “this isn’t the first attempt on my life” in response to a question regarding how he sounded calm during his call with the 911 operator.

Defendant generally argues the challenged statements were prejudicial, characterizing them as too ambiguous and unclear to be relevant, highly prejudicial, and perhaps, likely to be used as improper character and propensity evidence. Regardless of the specific legal grounds on which defendant contends the statements should have been excluded (he does not say), the argument is forfeited because no contemporaneous

objection to the challenged portions of Kelly's testimony was made during trial.⁸ (See, e.g., *Dykes*, *supra*, 46 Cal.4th at p. 756.)

In his reply brief, defendant belatedly asserts that if we find he forfeited his challenge to this testimony, the forfeiture is attributable to ineffective assistance of counsel. The ineffective assistance argument again fails. The record is silent on counsel's reasons for declining to object, defendant makes no effort to establish there could be no satisfactory explanation for withholding an objection (*Weaver*, *supra*, 26 Cal.4th at p. 926; *Earp*, *supra*, 20 Cal.4th at p. 896), and we can readily conceive of reasons defense counsel would have chosen not to object. Here are three: (1) defense counsel could have reasonably believed an Evidence Code section 352 objection to Kelly's testimony regarding prior attempts on his life would have been overruled because the testimony was relevant to Kelly's demeanor on the 911 phone call and was not unduly prejudicial because it did not implicate defendant in the prior attempts, (2) defense counsel could have refrained from objecting to Kelly's testimony regarding defendant's response to Kelly's question because it was a party admission under Evidence Code section 1220 and probative of his motivation for the assault, and (3) defense counsel may have desired, more generally, to avoid drawing the

⁸ The only objection defendant raised to any of the testimony was a hearsay objection to a question regarding what Kelly said to defendant after the altercation—an objection the trial court overruled. Because defendant does not argue the trial court abused its discretion in so ruling, we need not address the propriety of that ruling. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1338, fn. 19.)

jury's attention to any of the testimony by objecting (see, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 206).

D. Cumulative Error

Defendant contends the asserted errors at trial combined to create a miscarriage of justice requiring reversal of his conviction. We have rejected all of defendant's contentions of error and the cumulative error claim accordingly fails.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.