Filed 1/9/13 P. v. McCaw CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL GARRETT MCCAW, Defendant and Appellant.	B236754 (Los Angeles County Super. Ct. No. GA082595)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jared D. Moses, Judge. Affirmed in part, reversed in part and remanded with directions.

Maureen L. Fox, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Marc A. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

The jury found defendant and appellant Michael Garrett McCaw not guilty of attempted murder (Pen. Code, §§ 187, subd. (a), 664)[1] but guilty of the lesser included offense of attempted voluntary manslaughter (§§ 192, 664). The jury also found true allegations that defendant used a deadly weapon (§ 12022, subd. (b)(1)) and inflicted great bodily injury (§12022.7, subd. (a)). Following a bench trial, the trial court found that defendant had suffered a prior strike under the three strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), a prior serious felony conviction (§ 667, subd. (a)), and defendant had served a prior prison term (§ 667.5, subd. (b)).

The trial court sentenced defendant to 21 years in state prison. It imposed the high term of five and one-half years, doubled to eleven years under the three strikes law. The trial court imposed an additional year for use of a deadly weapon, three years for inflicting great bodily injury, five years for the prior serious felony conviction, and one year for the prior prison term.

Defendant contends: (1) ineffective assistance of counsel; (2) improper exclusion of evidence; (3) prosecutorial misconduct; (4) instructional error; (5) cumulative error; (6) insufficient evidence; and (7) incorrect minute order.

The Attorney General concedes there was insufficient evidence to support the trial court's finding that defendant suffered a prior conviction for purposes of section 667, subdivision (a) and the three strikes law but contests the remaining claims.

We remand for a limited retrial to determine whether defendant's New York conviction for robbery constitutes a strike and a serious felony under California law and for the trial court to correct the minute order to accurately reflect its oral pronouncement. In all other respects, the judgment is affirmed.

---

[1] Unless otherwise indicated, all statutory references are to the Penal Code.

FACTS

On the night of January 24, 2011, defendant and his girlfriend, Jessie Eby, visited victim Tristan Hill in his hotel room at the Days Inn in Pasadena. Hill agreed to let them leave their belongings in his hotel room when they left. The next morning, defendant and Eby returned to Hill's room, where Hill was still in bed. Defendant stabbed Hill at least one time in the chest and also cut his arm. Defendant took his and Eby's belongings and left. Hill was taken to the hospital, where he was treated for life-threatening injuries, including a punctured lung and other injuries for three days.

Prior to the stabbing, defendant, Eby, and Hill lived on the street and in hotels in Pasadena. They saw each other occasionally. Defendant and Hill had no previous problems with each other. Defendant has a criminal record, having suffered convictions of attempted robbery in 1997, domestic violence in 2001, possession of narcotics for sale in 2007, assault in 2009, and giving false information to a police officer in 2009. Hill also has a criminal record, including a prior conviction for burglary. At the time of the stabbing, Hill was on probation under "Prop 36," with conditions that prohibited him from taking narcotics or associating with people who took narcotics, among other things.

There was little disagreement as to these facts. But as to the charged offense, the prosecution claimed that defendant attacked Hill with a knife, while defendant asserted he acted in self-defense.

Hill testified that defendant was unexpectedly in his hotel room when he woke up on the morning of January 25, 2011. Defendant told Hill that he and Eby had come to get their belongings. The door to his room was shut when they arrived. Hill repeatedly told them to leave, but defendant refused to go. Hill moved toward defendant. Defendant swung a knife at Hill, cutting him in the arm and ribs. Defendant stabbed Hill in the ribs a second time. Hill sought refuge in the bathroom, locking the door to fend off defendant. Hill heard defendant say something like, "I can't do it now" or "I can't murder him now." After defendant and Eby were gone, Hill sought help from the hotel staff and was then taken to the hospital.

Hill's testimony was replete with contradictions. He was inconsistent in describing many aspects of the incident and changed his story when defense counsel impeached him with previous statements made to police or in testimony at the preliminary hearing. Hill testified defendant and Eby told him they would come back for their things in about a week, but he testified on cross-examination that they said they would be back the same day. Defendant and Eby did not really give him money to store their belongings, but later he said they might have given him five dollars, and that they would give him more when they came back. They had not discussed how defendant and Eby would contact him, but on cross-examination, Hill stated they might have said they would call before coming to get their things.

When Hill was on the hospital gurney, he thought the person who stabbed him was named "Mike," and that police could likely find "Mike" in the area near the hotel. When police questioned him in the hospital, he said he'd given them a description earlier, but was not sure about the name of his assailant. He initially told police he thought the guy who stabbed him was named "Mike," but he was not sure of the name. About a month after the stabbing, he identified defendant as "the guy who stabbed [him]" in a photo six-pack and identified Eby as "Jen," "with [the] person who attacked me the following morning." On cross-examination, Hill confirmed that he had known defendant for at least a year prior to the stabbing and had hung out with and talked to him on more than one occasion. Hill knew for certain that it was defendant who attacked him, but he may have told police he did not know who stabbed him when they arrived at the hotel. He may have said he did not know who his attacker was when police asked him at the hospital and described the person as a Black male. At the preliminary hearing on March 29, 2011, he testified he initially told police he had no idea who stabbed him because it happened so fast. He met defendant and Eby for the first time on January 24, 2011.

No one used alcohol or narcotics in his room on January 24, 2011, but Hill drank alcohol sometime in the three days before the stabbing. He did not drink two bottles of vodka the night before the stabbing, although there were two empty vodka bottles in his

room the day he was stabbed; he drank the vodka over a three-week period before the stabbing. At the preliminary hearing, Hill testified that he drank two bottles of vodka on the night of January 24, 2011. The last time he used drugs was about six months before the stabbing. He told the District Attorney that he had used methamphetamine about seven days before the stabbing, which he said was the truth.

Dr. Aaron Lewis treated Hill at the hospital for a deep cut to the arm, which exposed tendons and a single life-threatening stab wound to the chest. Dr. Lewis and the trauma team inserted a chest tube into Hill's body to evacuate an air cavity caused by the chest wound. They sutured Hill's wounds. Hill tried to remove the chest tube and an IV. A blood panel showed amphetamine and methamphetamine in Hill's system. Dr. Lewis described Hill as noncommunicative, answering questions inappropriately, and exhibiting a "flat affect," lacking a display of typical emotion. Dr. Lewis looked at Hill's record and found a history of psychosis and drug abuse. Because he was uncooperative and had a history of psychosis, Hill was transferred to the psychiatric facility after his bodily injuries had been treated. He was there for about three weeks.

John Donovan, who worked at the Days Inn, heard people arguing loudly in Hill's room around 10:30 p.m. on January 24, 2011. He saw a couple of African American men and possibly a woman standing outside the door. Hill was inside the room with the door open. Donovan alerted the manager, who told the people they had to leave within ten minutes. The people dispersed about half an hour to an hour later. Donovan described Hill's habit of passing out in bed with the door open. Donovan told him that he needed to keep the door closed.

Donovan was in the lobby at around 8:30 a.m., when Hill came in, stabbed and bleeding. Donovan called 9-1-1. He had not heard any commotion that morning. Hotel phone records show that Hill received four calls that morning, at 7:57 a.m., 8:02 a.m., 8:04 a.m., and 8:45 a.m.

Detective Randall Ruelas responded to the scene on January 25, 2011. He described Hill's room as in disarray, with furniture turned over and blood spattered on the bed and walls and in the bathroom. He interviewed Hill at the hospital. "[Hill had] what

appeared to be puncture or stab wounds in his arm and chest area." Hill told him that someone burst into the room and stabbed him for unknown reasons. He said that it might have been an African American man wearing a hoodie. Detective Ruelas asked if Hill knew the person, but Hill did not appear to want to respond and was not cooperative. The detective conducted a second interview with Hill about three weeks later. Hill stated that he would cooperate fully but did not give any additional information. Hill did not offer that his attacker's name was "Mike" or that he knew his attacker.

At a third interview on February 22, 2011, Detective Ruelas showed Hill a photo six-pack including defendant and another six-pack including Eby. Hill picked out defendant and Eby and identified them as Mike and Jen. Hill said that defendant and Eby had come to his room at the Days Inn the night before the stabbing and been very insistent about leaving their bags in his room. They left their bags and said they would be back for them the next day. Hill left his door slightly open that night and awakened to defendant bursting into his room. Hill leapt from his bed yelling for defendant to "Get the fuck out of [his] room." Defendant pulled a large knife from his waistband and lunged at Hill, stabbing him in his upper left chest under his armpit. When defendant pulled the knife out, it cut Hill's left upper forearm, exposing the tendons. Defendant then lunged at Hill a second time, stabbing him in the chest again. Hill tried to pick up the phone to call for help, but defendant continued advancing. Hill grabbed a blanket to protect himself from further stabbing and went over the bed and into the bathroom. Defendant looked deranged, and Hill believed defendant would kill him if he did not make it into the bathroom. Hill started to close the bathroom door, but defendant grabbed the door handle. They wrestled with the door, but Hill was able to close and lock it. Hill said he heard defendant yell, "Shit, I can't kill him." Hill said that he knew defendant and Eby, and he offered to show Detective Ruelas where to find them. They went out and looked for defendant that night. Hill identified defendant, who was taken into custody. An arresting deputy recovered a knife from defendant, which Hill said was similar to the one used to stab him. Eby walked up as defendant was being detained, and Hill identified her as defendant's girlfriend.

Detective Ruelas interviewed Eby. She initially denied that she was present on the day Hill was stabbed and denied knowledge of the incident. After more questioning, Eby admitted that she had been at Hill's room with defendant but maintained she did not know Hill had been stabbed. Eby stated that when she and defendant got to Hill's room, the door was open. She went in first. Hill jumped out of bed and began yelling at her to get out. He pushed Eby several times in an attempt to get her out of the room. Eby went outside and told defendant what happened. Defendant went into Hill's room and started yelling at Hill. They yelled at each other, and she heard Hill yell for defendant to leave. Eby did not remember how long they argued, but when defendant came out, they ran from the scene. Detective Ruelas asked Eby if she had ever seen defendant carrying a knife, and she responded that she had not.

Eby knew Hill was a methamphetamine user. She and defendant hung out with Hill on occasion in hotel rooms, and they had purchased Target cards from him. She and defendant had been talking with Hill in his hotel room on the night of January 24, 2011. Hill agreed to keep their bags for them because they had no place to live, and they gave him $10 or $15. Defendant and Eby then went to the house of one of her friends to spend the night.

The next morning, defendant woke Eby up at around 6:00 or 7:00 a.m. Eby called Hill from defendant's cell phone to tell him they were coming over, and she thinks defendant called him too. When they got to Hill's room, the door was slightly ajar. They knocked, and then Eby opened the door and went in first. Hill got out of bed very fast, ran toward them, and yelled "Get the fuck out of my room." Eby was surprised since she had called Hill to say they were coming, and he had agreed they could come by. Eby left the room. She could not see what happened inside, but she heard Hill say "Get the fuck out of my room" repeatedly and defendant saying, "Just give us our bags and we'll go." She heard Hill yelling something. After a few minutes, defendant came out with their bags. She and defendant did not talk about what happened in the room. She did not suggest they should contact the police.

Several recordings of phone calls defendant made to Eby from jail were played for the jury. In a March 13, 2011 call, defendant chastised Eby for speaking to police even though he told her not to and giving them a statement that placed Eby and defendant at the scene. He said, "You placed us at the scene, man, you fucked us. . . ." He told Eby that if she was called to testify she should lie and start crying. She should say she only signed the statement because police coerced her. He told Eby that she should testify she and defendant had not been at the hotel. Then he said that if she had to testify, she should call defendant first so he could tell her what to say. Defendant said that he would probably tell her to say the police tricked her, but he might tell her not to go to court. Defendant told Eby to "put out an APB for [Hill]" and say that whoever found him or got his phone number would receive $100.

In a call on March 14, 2011, defendant told Eby to call Hill and disguise her voice to confirm that the phone number was his. She should then have someone else call Hill using a blocked phone number and claim to be Detective Ruelas. The person should warn Hill he would be charged with a crime if he testified untruthfully and tell Hill that if he was in the same position, he would just disappear and not go to court.

Eby denied that she made or received any calls from defendant. She also testified that police had altered her signed statement.

Defendant testified that Eby introduced him to Hill around October 2010, and that they had met a few times since. The first time he met Hill, he noticed that Hill had a large knife hanging on his wall. The knife made defendant a little uncomfortable, but he did not have any negative experiences with Hill. Defendant admitted that he sometimes carried a knife.

On January 24, 2011, Hill agreed defendant and Eby could leave their belongings in his room. Defendant did not sleep that night.

The next morning, defendant and Eby both called to tell Hill they were coming to get their things. Hill hung up on Eby twice. When they arrived, the door was open, which was not unusual. Eby went into the room. Hill told them loudly to leave several times. Defendant told him they had just come to get their things. Hill jumped out of bed,

and Eby ran from the room. He threw a blanket at defendant. Then Hill pulled out a knife, yelled for defendant to leave, and rushed at him. Defendant got the knife from Hill. He did not leave the room because he did not think he could leave safely. Eby was saying she was scared, and defendant thought that if Hill got him out of the way, Eby would be next. Hill came at defendant despite the fact that defendant was yelling at him to stay back. Defendant swung the knife at Hill to threaten him, but it cut Hill. Hill came toward defendant again, and defendant jabbed the knife at him. Hill jumped on the bed. As he did, defendant grabbed his things and left the room. When he came out, Eby asked if everything was alright, and he responded, "Yeah, I guess Hill is not a morning person." Defendant and Eby left. Soon afterward, defendant disposed of the knife. He bought a knife the day after the incident, because he was afraid Hill would attack him. That knife was in his possession when he was arrested.

Defendant denied banging on the bathroom door or saying, "I can't kill you." He never intended to assault Hill.

Defendant explained the phone calls to Eby from jail. He was mad at Eby for putting him at the scene, because he was afraid that just being present would get him arrested for attempted murder. He told her that he would tell her whether to attend the preliminary hearing because if her purpose was to lie, he did not want her to testify. He was not trying to keep Hill from testifying. He was trying to contact him to ask Hill why he was doing this and to tell him to tell the truth. He thought that the police might have had some leverage over Hill.

Hill's sister Lauren testified that Hill had violently assaulted her in October 2006. Hill pushed her during an argument. She slapped and kicked him, and he dragged her by her hair and choked her. She was able to call 9-1-1. She and Hill had very little contact between that incident and his stabbing.

Lauren told police that Hill was unpredictable and aggressive when he was using drugs. She had not known him to be violent when he was not using. Lauren did not know if Hill was using drugs the night before the stabbing.

DISCUSSION

I. Ineffective Assistance of Counsel for Failing to Submit Evidence of the Victim's Mental Deficits and Drug Abuse

Defendant argues that trial counsel rendered ineffective assistance by failing to present critically important evidence of Hill's mental deficits and drug abuse in the form of the expert witness testimony of Dr. Thomas Wallace, the physician who treated Hill for his mental condition after the stabbing. Specifically, defendant argues that Dr. Wallace would have testified that Hill attempted to drink from a urinal and would have educated the jury with respect to the interplay and possible effects of Hill's mental condition and drug abuse. Defendant argues this was vital evidence because it provided an explanation for why Hill would have continued to attack defendant despite the fact that Hill was unarmed. He contends this was not a strategic choice made by trial counsel but rather the product of inadvertence, as trial counsel himself specifically explained in the hearing on defendant's motion for new trial. Defendant asserts that although other evidence of Hill's mental condition was presented at trial, trial counsel failed to present the most important and persuasive evidence, thereby depriving the jury of information critical to defendant's argument that he acted in self-defense, and his position that Hill was an unreliable witness. Defendant alleges that without this evidence the jury would be unable to understand the full extent of Hill's mental issues, which provided the only explanation for why Hill, while unarmed, would continue to attack defendant, who was forced to use the knife to defend himself.

"To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings." (*People v.*

Cunningham (2001) 25 Cal.4th 926, 1003 (*Cunningham*), citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [(*Strickland*)]; *Williams v. Taylor* (2000) 529 U.S. 362, 391-394; *People v. Kraft* (2000) 23 Cal.4th 978, 1068.) "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' ([*Strickland*, *supra*, at p. 694]; *People v. Riel* (2000) 22 Cal.4th 1153, 1175.)" (*Cunningham*, *supra*, at p. 1003.) The Supreme Court has held that "[t]he performance component [of the analysis] need not be addressed first. 'If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' ([*Strickland*, *supra*, 466 U.S. at p. 697].)" (*Smith v. Robbins* (2000) 528 U.S. 259, 286, fn. 14.)

We need not address whether trial counsel's actions fell below an objective standard of reasonableness because we conclude defendant was not prejudiced. First, as the Attorney General highlights, defendant introduced strong evidence of Hill's mental condition, substance abuse, and propensity for violence through other means. Dr. Lewis stated that Hill was noncommunicative, answered questions inappropriately, and did not respond in a normal way emotionally. Dr. Lewis gave specific examples of this behavior, noting that when he asked Hill whether he had ever been hospitalized before, and if so, why, Hill answered, "Yes . . . because I am hungry." Hill would respond to a question by just looking at Dr. Lewis, and Hill's expression did not change when a question was first asked politely and then asked angrily. Dr. Lewis noted that at one point after his surgery, Hill attempted to leave the hospital despite having chest tubes in his body. After he was treated for his bodily injuries, Hill was transferred to the psychiatric ward because he had a "history of psychosis." Additionally, defendant and Eby both testified that they referred to Hill as "Schizo," because he appeared a bit schizophrenic and crazy. Hill admitted he was medicated for his psychiatric issues after the attack but had not been medicated prior to the attack. Hill's sister testified that he violently attacked her and described Hill as behaving aggressively when he was high or coming off of drugs. Hill's testimony revealed his inconsistency as a witness. He testified in contradictory terms with respect to whether he identified defendant as his assailant when police questioned

him at the hospital. He also testified that he had known defendant for about a year but said that he told the police he did not know who stabbed him initially. Hill's testimony concerning his drug and alcohol use in the week prior to the stabbing was contradictory as well. Detective Ruelas testified to Hill's inability to stick to a single version of events. A member of the hotel staff testified that he spoke with Hill because he passed out and left his hotel room door open on several occasions. The prosecution discussed Hill's problems and his propensity to lie at length in closing argument. Even the trial court stated that Hill's odd demeanor made him a very poor witness. Hill's mental issues were amply presented through the above evidence for the jury to consider in regard to defendant's claim of self-defense.

Moreover, the proffered evidence would not have affected the verdict. It is not disputed that defendant stabbed Hill in the chest, causing life-threatening injuries. Defendant left the scene without seeking aid for Hill or calling police, callously stating to Eby that Hill "was not a morning person." Defendant demonstrated a consciousness of guilt by destroying evidence, disposing of the knife he had used to stab Hill immediately after leaving the hotel. While in jail, defendant attempted to manipulate Eby's testimony on the witness stand, urging her to lie and cry, further showing a consciousness of guilt. Viewed against this evidence, there is not a reasonable probability that any additional evidence of Hill's mental illness and drug abuse would have led to a more favorable result.

II. Whether the Trial Court Abused its Discretion When it Excluded Critical Evidence of the Victim's Mental Illness

Defendant next argues the trial court abused its discretion when it excluded evidence that Hill attempted to drink from a urinal. In particular, trial counsel sought to introduce an "Application for 72-Hour Detention for Evaluation and Treatment" relating to Hill, which stated: "Patient has a history of mental illness and substance abuse. Patient has been exhibiting bizarre behaviors including attempting to drink from a urinal.

He is disoriented and is unable to provide any meaningful history. Oriented to name only. Attempted to leave hospital despite having chest tube in place." As in his first argument, defendant contends exclusion of this evidence undercut his ability to present the most vivid evidence of Hill's mental illness to support a theory of self-defense.

Evidence Code section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Evidence is probative if it "ha[s] a 'tendency in reason to prove or disprove any disputed fact' [citation] . . . ." (*People v. Prince* (2007) 40 Cal.4th 1179, 1237.) "'[U]ndue prejudice is that which "uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." [Citations.]' [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 61.) "'"In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." [Citation.]' [Citation.]" (*People v. Scott* (2011) 52 Cal.4th 452, 491.) A trial court's exercise of discretion in excluding evidence "'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) To justify reversal, the appellant must show that it is reasonably probable that he or she would have obtained a more favorable result absent the error. (*Poniktera v. Seiler* (2010) 181 Cal.App.4th 121, 142.)

Our review of the record demonstrates the trial court did not, in fact, exclude evidence that Hill tried to drink from a urinal, and there is no basis for defendant's claim of error. Prior to trial, counsel attempted to have medical records pertaining to Hill admitted into the record, including the document that stated Hill had tried to drink from a

urinal. The court preliminarily ruled that although the issue of Hill's mental problems was something that could and likely would be explored, such evidence must be presented through witness testimony and not through a large stack of medical records submitted to the jury, to avoid overwhelming and confusing the jurors. The court specifically stated that its ruling was not final but could be revisited as developments occurred. Just before trial, the parties again discussed the issue of Hill's mental illness, and the court ruled that Hill's mental health could be explored through cross-examination or through the testimony of an expert witness.

Trial counsel did not raise the specific issue of admitting documentary evidence of the urinal incident again until after the trial, at the hearing on the motion for new trial. Trial counsel expressed that he was under the belief that he was entirely prohibited from presenting this evidence. The trial court responded: "You know, the fact that you may have wanted to get into his drinking out of a toilet, under [Evidence Code section] 352, my feeling was I don't necessarily feel we need[ed] to get into that, but the door was wide open for you to put on a witness from the hospital to testify to their personal contact and personal observations. [¶] What I did not do is permit you to do is essentially dump a stack of documents in front of the jury . . . . You had to call a witness. [¶] . . . I would have let you do that. That's not the way you chose to proceed. You wanted to go through documents. [¶] And in my view, there's too many pages and there's no one to lay a foundation for those opinions, and it's too confusing to the jury. There has to be someone to testify and explain [the evidence]."

From the foregoing it is clear that, at most, the trial court reasonably limited the format in which the evidence of the urinal incident and other details of Hill's mental illness could be presented but did not foreclose the defense from presenting the information through alternate means. At no point prior to trial did the trial court state that evidence of the urinal incident could not be presented, and afterward, the trial court commented only that it did not see the incident as an area that the parties "necessarily

need[ed] to get into."[2] It was clear throughout the proceedings that defendant was permitted to present witnesses to testify with regard to Hill's mental problems and to their personal observations of his behavior.

Even if we were to assume the trial court excluded the evidence, defendant's contention fails, as any such exclusion was not an abuse of discretion. The voluminous evidence, without proper foundation, would have likely proved confusing to the jury. Introduction of the medical records required both foundation and explanation. Furthermore, evidence that Hill attempted to drink out of a hospital urinal after being injured and hospitalized is the type of information that would potentially elicit an inappropriate emotional response from the jurors. There were less repugnant forms of evidence available to the defense to establish evidence of Hill's mental illness.

Finally, defendant was not prejudiced. As discussed above, he was able to present ample evidence of Hill's mental illness, such that Hill's medical records would have been cumulative. (*Horn v. General Motors Corp*. (1976) 17 Cal.3d 359, 371 ["'the exclusion of evidence which has only a cumulative effect will not justify reversal on appeal. . . .' [Citations.]".) Moreover, in light of the evidence that defendant left the scene without concern for Hill, despite knowing that Hill was seriously injured, disposed of the knife he used to stab Hill, and attempted to tamper with witnesses, there is not a reasonable probability that any additional evidence of Hill's mental illness would have led to a more favorable result.

III. Whether the Prosecutor Engaged in Misconduct

Defendant argues the prosecutor engaged in misconduct in three ways. First, defendant claims the prosecutor argued defendant stabbed Hill in the chest twice, despite

---

[2] In the reply brief, defendant suggests the trial court must have ruled trial counsel could not present evidence of the urinal incident at an unreported sidebar conference. Defendant has provided no evidence to support this theory, and we do not consider it here.

knowing Hill's testimony that he had been stabbed twice was inconsistent with Dr. Lewis's testimony that Hill had been stabbed in the chest once. Because Hill was an unreliable witness, defendant contends the prosecutor should not have argued to the jury that the second stab wound evidenced defendant's intent to kill. Defendant also argues that the prosecutor misstated the testimony of Detective Ruelas to indicate that the detective had also observed two chest wounds, when in fact, that was not Detective Ruelas's testimony. Second, defendant contends the prosecutor argued Hill showed no signs of derangement in the hospital, although he knew Hill had attempted to drink from a urinal, and had moved to have that evidence excluded. Third, defendant contends the prosecutor attempted to shift the burden of proof to defendant by arguing to the jury that it need not believe Hill's statements beyond a reasonable doubt to convict defendant.

Defendant asserts that even if these instances of misconduct did not individually violate defendant's due process rights, their cumulative effect was prejudicial. Defendant contends that although these claims were not asserted at trial, they were not forfeited because it would have been futile and counterproductive to request the trial court admonish the jury. Alternately, defendant argues trial counsel rendered ineffective assistance by failing to object below, thereby forfeiting defendant's claims.

"'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*), overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Here, defendant concedes that trial counsel did not object to the prosecutor's statements at trial or request the jury be admonished. Instead, he alleges that forfeiture is excusable in his case because objection would have been futile and counterproductive. Objection may be considered futile and forfeiture excused in rare instances, such as when defense counsel has suffered "pervasive and corrosive prosecutorial misconduct that persisted throughout the trial [citation], . . . [and] a 'constant barrage' of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to

appropriate, well-founded objections." (*People v. Dykes* (2009) 46 Cal.4th 731, 775 [describing the circumstances warranting excusal of forfeiture in *Hill, supra*].) However, defendant has made no showing the prosecutor engaged in pervasive prejudicial prosecutorial misconduct that excuses trial counsel's failure to object, as we discuss below. We therefore hold that defendant has forfeited his claims. Assuming that defendant's claims were preserved for appeal, we further hold the prosecutor did not engage in misconduct.

"'"[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . ."' [Citation.]" (*People v. Ward* (2005) 36 Cal.4th 186, 215.) This latitude is not without bounds, however. "'[I]t is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. [Citation.]' [Citation.]" (*Hill, supra*, 17 Cal.4th at pp. 829-830.) Moreover, even an unintentional misstatement of the law may constitute misconduct "insofar as [the] statement[] could reasonably be interpreted as suggesting to the jury [that the prosecution] did not have the burden of proving every element of the crime[] charged beyond a reasonable doubt." (*Id.* at p. 831.) If an allegation of prosecutorial misconduct "'"focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." [Citation.]' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1263.) In deciding whether misconduct has occurred, we evaluate the prosecutor's comments "in the context of the argument as a whole." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) "'In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554.) "[E]ven otherwise prejudicial prosecutorial argument[s], when made within proper limits in

rebuttal to arguments of defense counsel, do not constitute misconduct." (*People v. McDaniel* (1976) 16 Cal.3d 156, 177 (*McDaniel*).)

A. *Hill's Wounds*

We take defendant's claims in order, beginning with his allegation that the prosecution engaged in misconduct by arguing to the jury that Hill was stabbed twice in the chest, despite knowing that this was not the case. As defendant acknowledges, the prosecution may rely on evidence despite having doubts about its truth. (*People v. Harrison* (2005) 35 Cal.4th 208, 242 (*Harrison*).) We conclude this is what happened here.

Contrary to defendant's argument, the prosecutor did not know for certain whether Hill was telling the truth in this case. Hill's testimony was inconsistent, and the prosecutor theorized that Hill lied when telling the truth would be detrimental to him, but the evidence was not conclusive that Hill was lying, or even misremembering, how many times he was stabbed. Our Supreme Court has held that even where the prosecution expresses serious doubts about a witness's veracity, as long as that doubt is based on evidence in the record, the testimony may be presented. (See, e.g., *Harrison*, *supra*, 35 Cal.4th at p. 242 [prosecutor could present evidence although he stated witness's testimony "'belie[d] common sense, belie[d] the truth, it belie[d] everything'" in a chambers discussion regarding admissibility of evidence]; *People v. Gordon* (1973) 10 Cal.3d 460, 472 [not misconduct to present testimony although the prosecutor told the jury it would be "'getting a half-truth story'" from the witness and that she was "not going to tell [the jury] the truth."].) In addition to Hill's testimony, the prosecutor presented a photograph showing two scars on Hill's chest. This physical evidence offered independent support for Hill's testimony. The defense did not specifically question any witness as to the provenance of the scars, which left their cause open to question.

Furthermore, we note that the defense does not argue the prosecution failed to disclose any additional evidence showing that Hill's statements were untrue, as is required when the prosecution has doubts about statements it presents. (See *Harrison*, *supra*, 35 Cal.4th at p. 243.) The defense was aware of, and had the opportunity to present, evidence of Hill's unreliability and the cause of his scars, and it did so. Dr. Lewis testified Hill suffered an injury to his arm, and one stab wound to the chest, which required the placement of chest tubes.

The defense makes much of Hill's contradictory testimony. It is true that because Dr. Lewis testified that Hill had only one chest wound, it would have been reasonable for the jury to infer that the second scar was caused by the insertion of a chest tube. However, it would also have been reasonable for the jury to infer that the scar was caused by a second stabbing, given Hill's testimony and the lack of definitive explanation for the scar. It was the jury's job to decide whose testimony to credit and which version of events was true, and we are not permitted to usurp the jury's role. (See *People v. Culver* (1973) 10 Cal.3d 542, 548.)

We further reject defendant's argument that the prosecutor mischaracterized the testimony of Detective Ruelas and defendant. The prosecution is permitted to rely on inferences and conclusions that can properly be drawn from the evidence. (*People v. Valdez* (2004) 32 Cal.4th 73, 134.) It is for the jury to decide whether those inferences and conclusions are, in fact, reasonable. (See *People v. Dennis* (1998) 17 Cal.4th 468, 522.) Here, Detective Ruelas testified that "Hill had what appeared to be puncture or stab wounds in his arm and chest area." A jury could reasonably infer that Detective Ruelas's general statement about Hill's "wounds" referred to more than one stab wound in the chest area as well as a wound or wounds to his arm. Similarly, the prosecutor's statement that defendant "said he took two swipes [at Hill]" is not inconsistent with defendant's testimony. Defendant testified that he first slashed at Hill and knew that he cut Hill, but did not know where. He stated that he also jabbed at Hill with the knife, but he did not know if it cut Hill because that was not what he was paying attention to. The prosecution is permitted to present the jury with the evidence in the light most favorable to its case.

B. *The Urinal Incident*

Defendant contends the prosecutor improperly argued Hill showed no signs of mania or derangement in the hospital. In rebuttal to defendant's closing argument, the prosecutor argued:

"Counsel brought up the fact that [Hill's] questioning or his interview with the doctors in the hospital was inappropriate. But I asked the doctor, "was he violent toward you? Was he aggressive towards you or any of the staff? And again, he was treated shortly after this apparent injury, this apparent assault, which counsel claims the victim was in a manic state—like, he was in a manic state. He was passive. He had a flat affect, meaning that he did not show emotion. And he was not violent or aggressive to any of the people who were treating him during his treatment. Doesn't sound like at that time he was under some sort of deranged—or acting manic."

Defendant's argument also fails. There was no competent evidence in the trial record that Hill tried to drink out of a urinal (at some unknown point after he was admitted to the hospital) and, as noted above, the trial court did not preclude the defense from presenting that evidence in proper form. The defense did not present any witness with personal knowledge of the event. The prosecutor did not act improperly. (*People v. Medina* (1995) 11 Cal.4th 694, 755 [arguing the absence of material evidence does not constitute prosecutorial misconduct].)

Moreover, "'arguments of counsel . . . must be judged in the context in which they are made. [Citations.]' [Citation.]" (See *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1224, fn. 21 (*Gonzalez*).) Viewing the argument as a whole, it is clear from the context that the point the prosecutor was trying to make was not that Hill failed to display any odd behavior or evidence of mental illness, but that Hill was not acting violently or aggressively following the incident. The prosecutor's use of the words "manic" and "deranged" may not have been medically precise, but in light of his other statements it is unlikely that the jury would believe he was arguing Hill had no mental problems. The statements as a whole indicate the prosecutor was arguing that Hill did not display a

propensity for violence right after the incident occurred. Evidence that Hill attempted to drink from a urinal would not undermine the argument that Hill was not acting combatively.

Finally, given the strength of the evidence that Hill had mental problems, including evidence submitted by the prosecution, there is not a reasonable likelihood that the jury would interpret the prosecutor to be arguing otherwise.

C. *The Burden of Proof*

Defendant's allegation that the prosecutor engaged in misconduct by arguing the jury was not required to believe Hill's testimony beyond a reasonable doubt to convict defendant is also without merit.

"The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523.) The prosecutor had no occasion to rely only on Hill's testimony to prove guilt. The record contains abundant corroborating evidence of Hill's testimony to show that defendant did not act in self defense. Because the corroborating evidence was crucial in establishing guilt, the prosecutor properly argued the Hill's testimony alone need not prove guilt. The jury instruction defining reasonable doubt requires the jury to consider all the evidence. (See CALJIC No. 2.20.) The jury was not required to find defendant's guilt beyond a reasonable doubt based only on Hill's testimony.

Again, the prosecutor's statements must be viewed in the context of the entire argument. (*Gonzalez, supra*, 51 Cal.3d at p. 1224, fn. 21.) "[E]ven otherwise prejudicial prosecutorial argument, when made within proper limits in rebuttal to arguments of defense counsel, do[es] not constitute misconduct." (*McDaniel, supra,* 16 Cal.3d at p. 177.) Here, the prosecutor was arguing his point in response to defendant's closing statement, which focused heavily on Hill's unreliability as a witness. He did not urge the jury to rely on Hill's testimony even if it had a reasonable doubt as to its truth. The

prosecutor agreed that Hill was unreliable, and instead urged the jury to rely on other evidence in the record.

Additionally, it is not reasonably likely that the jury understood the prosecutor's statements as lessening the burden of proof. The "beyond a reasonable doubt standard" was referred to numerous times in argument, and the jury was instructed that it must find each element of the crime true beyond a reasonable doubt under CALJIC No. 2.90. The jury is presumed to understand and follow the instructions of the trial court. (*People v. Archer* (1989) 215 Cal.App.3d 197, 204.) Absent some affirmative indication in the record to the contrary, we presume the jury followed the instructions given. (*People v. Holt* (1997) 15 Cal.4th 619, 662.)

D. *Cumulative Error*

Regardless of whether we consider the prosecutor's statements separately or cumulatively, we have not identified any error. (See *People v. Salcido* (2008) 44 Cal.4th 93, 156.) Having concluded there was no prosecutorial misconduct as alleged by defendant, we need not address his alternate position that trial counsel was incompetent for failing to object to the statements made by the prosecution during closing argument.

IV. Whether the Trial Court Erroneously Instructed the Jury on Attempted Voluntary Manslaughter

Defendant argues his due process and jury trial rights were violated because the jury was erroneously instructed on the mental state required for attempted voluntary manslaughter. Specifically, he contends the instructions given were contradictory and could have led the jury to believe that defendant could be convicted of attempted voluntary manslaughter even if he lacked the intent to kill.[3]

---

[3] The opening brief also states that counsel's failure to object to these instructions constitutes ineffective assistance of counsel, but defendant does not make any substantive

The trial court instructed the jury that under CALJIC No. 8.41:

"Every person who unlawfully attempts without malice aforethought to kill another human being is guilty of the crime of attempted voluntary manslaughter in violation of sections 664 and 192, subdivision (a) of the Penal Code, a crime.

"Voluntary manslaughter is the unlawful killing of a human being without malice aforethought.

"There is no malice aforethought if the attempted killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself or another person against imminent peril to life or great bodily injury.

"In order to prove this crime, each of the following elements must be proved:

"1. A direct but ineffectual act was done by one person towards killing another human being; and

"2. That person had the specific intent to kill the other person."

The trial court also gave CALJIC No 8.66, which lists the elements of attempted murder, and defines malice aforethought as "a specific intent to kill unlawfully another human being."

The jury was further instructed regarding the distinction between attempted murder and attempted voluntary manslaughter under CALJIC No. 8.50 as follows:

"The distinction between attempted murder and attempted voluntary manslaughter is that attempted murder requires malice while attempted voluntary manslaughter does not.

"When the attempted killing is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, or in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, the offense is attempted voluntary manslaughter. In that case, *even if an intent to kill exists*, the law is that malice, which is an essential element of murder, is absent.

---

argument in support of the claim and states that the reference to an ineffective assistance of counsel claim was inadvertent in the reply brief.

"To establish that an attempted killing is murder and not attempted voluntary manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of attempted murder and that the act which attempted to cause the death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury." (Emphasis added.)

Defendant contends that the combination of defining malice aforethought as the specific intent to unlawfully kill another human being under CALJIC No. 8.66 and defining attempted voluntary manslaughter as not requiring malice aforethought under CALJIC No. 8.41, conveyed to the jury that attempted voluntary manslaughter does not require a finding that the defendant had a specific intent to kill in order to convict him. He argues that the situation was made worse by the instruction in CALJIC No. 8.50, that "*even if an intent to kill exists,*" absent malice, the defendant cannot be convicted of attempted murder, because it implies that the lesser offense of attempted voluntary manslaughter will not always require specific intent to kill.

We review a claim of instructional error de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) "In conducting this review, we first ascertain the relevant law and then 'determine the meaning of the instructions in this regard.' [Citation.] [¶] The proper test for judging the adequacy of instructions is to decide whether the trial court 'fully and fairly instructed on the applicable law . . . .' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]"' [Citation.] 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

Preliminarily, we reject the prosecution's contention that defendant forfeited his claim by failing to object to the instruction at trial, because if the instruction had been given in error, defendant's substantial rights would have been implicated. (§ 1259;

People v. Franco (2009) 180 Cal.App.4th 713, 719 [failure to object to an instruction in the trial court waives any claim of error unless "the instruction was an incorrect statement of the law [citation], or . . . the instructional error affected the defendant's substantial rights"].) Nonetheless, defendant's argument fails because the trial court did not err in instructing the jury pursuant to CALJIC Nos. 8.41, 8.50, and 8.66.

Having reviewed the instructions as a whole, we conclude that the trial court fully and fairly instructed the jury as to the applicable law. "'Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. (§ 192.)' [Citation.] Generally, the intent to unlawfully kill constitutes malice. [Citations.] 'But a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a "sudden quarrel or heat of passion" (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations].' [Citation.] [H]eat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice that otherwise inheres* in such a homicide [citation] . . . . [Citation.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 153-154.)

Here, the trial court correctly instructed the jury under CALJIC No. 8.66, that malice aforethought is the specific intent to unlawfully kill another. It instructed the jury as to exceptions to the definition of malice under CALJIC No. 8.50, stating that "even if the specific intent to kill exists," the law is that malice is absent "when the attempted killing is done in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation, or in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury."[4] The jury was instructed that in such cases, the crime was attempted voluntary manslaughter (CALJIC No. 8.50), which

---

[4] The same information was also included in CALJIC No. 8.41.

does not require malice aforethought (CALJIC Nos. 8.41 & 8.66), although it does require intent to kill (CALJIC No. 8.41).

Taking the whole of the instructions to the jury together, we conclude it is not reasonably likely that the jurors misinterpreted the instructions given to mean that defendant could be convicted of attempted voluntary manslaughter even if he lacked the specific intent to kill Hill.

V. Whether the Errors Alleged are Cumulatively Prejudicial

Although we did not reach the issue of whether trial counsel rendered ineffective assistance in failing to submit further evidence of Hill's mental illness and drug abuse, we concluded that defendant was not prejudiced by that error. Otherwise, we have concluded that no errors occurred. Thus, defendant's assertion of cumulative prejudice necessarily fails.

VI. Whether there was Sufficient Evidence to Support the Finding that Defendant's New York Conviction Amounted to a Strike and Serious Felony

Defendant contends there was insufficient evidence that his New York conviction for third-degree attempted robbery in 1999 constituted a prior conviction for purposes of section 667, subdivision (a) and the three strikes law, because the New York conviction was not proved to contain all the elements of attempted robbery under California law. He argues that under California law the victim in a robbery must be the owner of the property at issue or someone standing in a special relationship with the owner, whereas under New York law a victim of a robbery may simply be "another person." (N.Y. Pen. Law, § 160.00.) He contends that under New York law a person who attempts to regain his own property may be convicted of attempted robbery and that a claim of right is no defense. Defendant asserts that because New York law has a broader definition of who may be a victim of attempted robbery, the statutes do not contain the same elements, and

the New York conviction cannot be considered a prior conviction within the meaning of section 667, subdivision (a) and the three strikes law.

The Attorney General concedes that the evidence was insufficient to establish the New York conviction was a prior conviction, but on different grounds. According to the Attorney General, robbery under California law requires that property be "taken from another person's possession and immediate presence" (CALCRIM No. 1600), whereas under New York law it is not required that the person robbed be in equally close physical proximity to the stolen property. We agree with the Attorney General's reasoning and remand for the limited purpose of retrial on the prior conviction allegations.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) Each element of a sentencing enhancement must also be proven beyond a reasonable doubt. (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) Where the defendant claims that the evidence was insufficient to sustain a finding that the prosecution has proven all elements of an enhancement, this court reviews the trial court's finding for substantial evidence. (*People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.) "In making this determination, we review the record in the light most favorable to the trial court's findings." (*Ibid*.)

Section 667, subdivision (a) requires that a five-year sentence be imposed for each prior conviction for "any offense committed in another jurisdiction which includes all of the elements of any serious felony" under California law. "To qualify as a serious felony, a conviction from another jurisdiction must involve conduct that would qualify as a serious felony in California." (*People v. Avery* (2002) 27 Cal.4th 49, 53; see § 1170.12, subd. (b)(2); see also § 667.5, subd. (f).) In determining whether an out-of-state prior conviction is a serious felony under the three strikes law, "'the trier of fact may consider the entire record of the proceedings leading to imposition of judgment on the prior conviction to determine whether the offense of which the defendant was previously convicted involved conduct which satisfies all the elements of the comparable California serious felony offense.' [Citation.] [¶] '"[W]hen the record does not disclose any of the

facts of the offense actually committed" [citation], a presumption arises that the prior conviction was for the least offense punishable [citation]. . . . [Citation.]' [Citation.]" (*People v. Zangari* (2001) 89 Cal.App.4th 1436, 1440.)

Both robbery and attempted robbery are strike offenses under California law. (§§ 1170.12, subd. (b)(1), 1192.7, subds. (c)(19), (c)(39).) However, California and New York define robbery differently. In California, "[r]obbery is the felonious taking of personal property in the possession of another, from his [or her] person or immediate presence, and against his [or her] will, accomplished by means of force or fear." (§ 211.) Thus, robbery is a form of aggravated larceny in which "the elements of larceny are intertwined with the aggravating elements to make up the more serious offense." (*People v. Gomez* (2008) 43 Cal.4th 249, 254.) "Larceny requires the taking of another's property, with the intent to steal and carry it away. [Citation.] 'Taking,' in turn, has two aspects: (1) achieving possession of the property, known as 'caption,' and (2) carrying the property away, or 'asportation.' [Citations.]" (*Id*. at pp. 254-255, fn. omitted.) "To elevate larceny to robbery, the taking must be accomplished by force or fear and the property must be taken from the victim or in his [or her] presence." (*Id*. at p. 254.)

In New York, robbery is defined as "forcible stealing." (N.Y. Pen. Law, § 160.00.) "A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of: [¶] 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or [¶] 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny." (*Ibid*.) The practice commentary following this provision points out that, unlike the California robbery statute, there is "no requirement that the defendant take the property 'from the person or in the presence of another,' as was required under the former [New York] Penal Law [§ 2120]. Accordingly, a culprit who meets his [or her] victim a few blocks from the victim's store, knocks the victim unconscious, and then enters the victim's store and steals property from the store may be guilty of robbery; similarly, a culprit who forces a

bank president to telephone his bank to direct an employee to take money from the safe and give it to an accomplice may be guilty of robbery." (Prac. Com. foll. N.Y. Pen. Law, § 160.00; see also *People v. Smith* (1992) 79 N.Y.2d 309, 314 ["the Commission determined that the proposed robbery statute was deficient in that it . . . contained a 'from the person or in the presence of' limitation which would exclude a variety of forcible thefts that were 'robberies in spirit'"].)

Due to the differences between the California and New York definitions of robbery, defendant's attempted robbery conviction in New York is a strike in California only if the evidence shows that defendant specifically intended to take property from the victim or in his or her presence and took a direct but ineffectual step toward doing so. (See *People v. Medina* (2007) 41 Cal.4th 685, 694-695 ["[a]n attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission."].) The prosecution concedes that the record—which consists of a document showing that defendant pled guilty to and was convicted of third degree attempted robbery in New York in 1999, and a jury instruction that sets out the elements of attempted robbery—contains no such evidence. Accordingly, we reverse the trial court's findings and remand the matter for a limited retrial on the prior conviction allegations. (See *Monge v. California* (1998) 524 U.S. 721, 734; see also *People v. Trujillo* (2006) 40 Cal.4th 165, 174.)[5]

VII. Whether the Minute Order Must Be Corrected

Finally, defendant argues that the minute order inaccurately reflects the judge's oral pronouncement at sentencing and must be corrected. We agree with defendant that

---

[5] We are skeptical of defendant's argument that the defense of "claim of right" is unavailable under New York law. (See *People v. Green* (2005) 5 N.Y.3d 538, 544 [in a robbery prosecution involving a particular chattel, "a good-faith claim that the chattel belonged to the taker, would, if believed by the jury, negate the element of larcenous intent"]; see also *People v. Reid* (1987) 69 N.Y.2d 469, 475-476.)

the minute order must be corrected to reflect the trial court's oral pronouncement that defendant was found to have suffered one prior strike under the three strikes law, one prior serious felony conviction, and one prior prison term, rather than simply stating that the priors were true beyond a reasonable doubt. Although, as the prosecution observes, both the abstract of judgment and the minute order are correct with respect to the term imposed, defendant is entitled to a dispositional order that accurately reflects the trial court's findings at the time of the hearing. (*People v. Morelos* (2008) 168 Cal.App.4th 758, 768 ["'Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls.' [Citations.]"].)

DISPOSITION

The matter is remanded to the trial court for limited retrial concerning the prior convictions allegation in connection with section 667, subdivision (a) and the three strikes law. We further direct the trial court to strike that portion of its September 29, 2011 sentencing minute order which states that, "the court finds the priors to be true beyond a reasonable doubt as fully reflected in the notes of the official court reporter," and to correct the minute order to reflect the trial court's oral pronouncement of judgment, in which it found defendant served only one prior prison term. In all other respects, the judgment is affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J. MOSK, J.