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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDDIE RICHARD MORENO,<br><br>Defendant and Appellant. | B260796<br><br>(Los Angeles County<br>Super. Ct. No. LA075919) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas Rubinson, Judge. Affirmed.

Kevin Smith, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

After Eddie Richard Moreno and his cousin Javier Moreno were arrested in connection with a residential burglary (Pen. Code, § 459), Javier[1] provided a written statement admitting he and Eddie had committed the burglary; Eddie denied his presence at the scene. Both were charged with the crime, and Javier pled guilty before trial. When the prosecutor called him to testify, Javier denied Eddie's presence at the burglary. When confronted with his prior statement, Javier confirmed the details of the burglary but said he had lied about Eddie's involvement. The jury found Eddie guilty as charged, and the trial court sentenced him to state prison for a term of two years. (*Id.*, § 461, subd. (a).)

Eddie appeals, claiming he received ineffective assistance of counsel because his attorney failed to object to the admission of Javier's out-of-court statements and to the prosecutor's closing argument. Because these arguments are meritless, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On October 23, 2013, at about 10:30 a.m., Eddie and Javier were sitting in front of their grandfather's house in Pacoima when two of Eddie's acquaintances (Jose and Darwin) walked up and asked for a ride. The four got into the grandfather's green Chevy Astro van and drove off. Jose and Darwin had a plan to break into a house in the neighborhood where Jose used to live to steal electronics. Javier was nervous about the idea, but they agreed he would drive to the house and wait in the van, while Eddie, Jose and Darwin went inside. The three planned to knock on the front door and if no one answered, find a way in from the backyard.

Following Jose's directions, Javier pulled up in front of a house on Kittridge Avenue in Reseda (Kittridge house) and waited in the van. Eddie, Jose, and Darwin got

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[1] Because appellant and his cousin share the same last name, we refer to them by their first names.

out to see if anyone was inside and returned a minute later. Javier was nervous because he saw men working at the house across the street, but Jose called out in Spanish to ask if they knew who lived at the Kittridge house.

One of the men, Rafael Balcazar, responded to Jose's question and stated that he did not know. He saw the green Chevy van make a U-turn and drive off before returning again. Balcazar watched as three men wearing white t-shirts and blue or black shorts got out of the van and went around the side of the Kittridge house; another man stayed in the driver's seat of the van. Then Balcazar heard the sounds of glass breaking and a door being forced. He called 9-1-1 and provided the van's license plate number. Through the front door and the "big window" at the front of the Kittridge house, he could see the men were moving around inside. After less than five minutes, the three men came back out, with each man carrying "backpacks and shoes and more stuff." They got back in the van and left.

Javier drove toward his grandfather's house but stopped on the way for the men to divide the stolen property. Eddie and Javier kept a laptop, an iPad, two iPods, a watch and a man's belt. Jose and Darwin kept a Sony Playstation, controllers and video games and some cash. Javier then dropped off Jose and Darwin at a park nearby, before he and Eddie continued on to their grandfather's house. When Javier and Eddie arrived there, Eddie put the laptop and iPad in his BMW parked in the driveway.

Meanwhile, the police arrived at the scene of the burglary within about 10 minutes and spoke with Balcazar. Officers found two doors open at the back of the Kittridge house; one had been kicked in. Inside, several rooms had been ransacked and drawers were left open. After tracing the license plate number from the green Chevy van to Eddie and Javier's grandfather, Officer Nicholas Williams and his partner, both of whom were in plain clothes, drove in an unmarked car to the grandfather's house and parked in a location where they could conduct surveillance of the house without being noticed. They observed the green Chevy van was parked in front of the grandfather's house and that two men, later identified as Eddie and Javier, were talking with two other men in the front yard. All were wearing white t-shirts, and some were wearing dark shorts. Eddie

subsequently got in the driver's seat of his BMW with Javier in the passenger seat, and they drove off. Officer Williams and his partner followed Eddie and Javier until another police officer in a marked police vehicle pulled over the BMW and detained Eddie and Javier. Officer Williams and his partner drove back to the grandfather's house and detained the two men who the officers had seen speaking with Eddie and Javier in the front yard.

A police officer transported Balcazar to Eddie and Javier's location for a field show-up identification. Balcazar separately identified Eddie and Javier, indicating he was certain Eddie was one of the men who had entered the house and that he had seen both men in the van.[2]

After Eddie and Javier were arrested, Eddie voluntarily waived his *Miranda*[3] rights and agreed to speak with the police. Initially he stated that he had bought the laptop and iPad from craigslist.com. When asked for the seller's contact information, Eddie said he did not remember. He then changed his story. He stated that two men riding in his grandfather's van had approached him while he and Javier were sitting on the front porch and asked if he wanted to buy the laptop and iPad. He said he agreed but did not remember how much he had paid; the police had not said the laptop and iPad were stolen, but Eddie then said he "didn't know that he bought stolen stuff." He denied he had been present at the Kittridge house during the burglary.

After voluntarily waiving his *Miranda* rights, Javier gave an oral statement describing his involvement in the burglary and also describing the involvement of Eddie, Jose, and Darwin. He stated that he and Eddie agreed to drive Javier and Darwin in the Chevy van, that Eddie, Jose, and Darwin planned how they would carry out the burglary while en route to the Kittridge house, and that Eddie, Jose, and Darwin got out of the van

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[2] Balcazar was also brought to the grandfather's house to identify the two men being detained by Officer Williams. Balcazar did not identify either of these two men as being at the site of the burglary.

[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

and went inside the Kittridge house while Javier waited in the van. Javier also stated that he saw Eddie carrying a bag with multiple electronic items.

Javier also handwrote and signed a statement, describing his and Eddie's involvement in the burglary, adding he had a "bad conscious [*sic*] about everything" and "deeply apologize[d]." After writing his statement, Javier told police that additional stolen property was inside Eddie's grandfather's house and also told the police where to find it.

After obtaining consent from the grandfather to search the Chevy Astro van, Officer Williams and his partner found items that had been stolen from the Kittridge house, including Louis Vuitton luggage, cash, and a wallet. Officers searched Eddie's BMW and found a laptop computer and an iPad under the passenger-side floorboard that had also been stolen from the Kittridge house.

Both Eddie and Javier were charged with first degree residential burglary. (Pen. Code, § 459.) Approximately eight months before Eddie's trial, Javier pled guilty to first degree residential burglary and received a "two-year deal with half."

During trial, the People presented evidence of the facts summarized above.[4] When the prosecution called Javier in its case-in-chief, Javier initially testified that he was intoxicated and did not remember the events on the day of the burglary, did not remember speaking to police on that day, and did not remember providing a written statement. The prosecutor received permission from the trial court to treat Javier as a hostile witness. Thereafter, the prosecutor showed Javier the statement implicating Eddie that Javier had written on the day of his arrest. Javier initially claimed he did not recall writing the statement but subsequently admitted that he had written and signed the statement. Javier testified that "everything" in his handwritten statement was true except that he "lied on the part where Eddie was there, which he wasn't." He testified he had

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[4] The burglary victim identified all of the recovered property as his own or his ex-girlfriend's.

said Eddie was involved because the officer who interviewed him kept saying he already knew Eddie was there.

The prosecutor also went over Javier's oral statement to Officer Williams, asking Javier to confirm details he provided in the oral statement. Javier confirmed that he told Officer Williams that he drove Jose, Darwin, and Eddie to a house in Jose's old neighborhood, that Eddie, Jose, and Darwin planned to break into a house, that he waited in a van while they burglarized the house, and they subsequently divided the proceeds before returning with Eddie to his grandfather's house. However, Javier testified that his prior statement to Officer Williams implicating Eddie was false. He testified that only he, Jose, and Darwin committed the burglary, entered the house, and divided the burglary proceeds. Further, Javier testified that he put the stolen items in Eddie's BMW because Eddie was going to give Javier a ride to sell the stolen items.

During cross-examination by defense counsel, Javier testified that Officer Williams told him to write on Javier's out-of-court written statement that Eddie was involved in the burglary and also testified Officer Williams "just kept on putting stuff in my head, saying, 'I know Eddie was involved.'"

The prosecution then called Officer Williams, who testified that Javier described the involvement that he, Eddie, Jose, and Darwin each had in the burglary, including that he drove the three men in the Chevy Astro van to the Kittridge house, that he stayed in the van while Eddie, Jose and Darwin entered and burglarized the Kittridge house, that Eddie carried a bag with "multiple electronic items," and that all four of the men divided the stolen property. Officer Williams also testified that Javier never stated that Eddie was not involved in the burglary.

Eddie did not testify in his own defense.

The jury found Eddie guilty as charged.

The trial court sentenced him to state prison for the low term of two years. (Pen. Code, § 461, subd. (a).)

Eddie filed a timely appeal.

## DISCUSSION

Eddie argues he received ineffective assistance of defense counsel because of his attorney's failures to object to (1) the admission of Javier's oral and handwritten out-of-court statements to police as inadmissible hearsay; and (2) the prosecutor's misconduct in closing argument, forfeiting these meritorious issues on appeal.[5] We conclude, however, that defense counsel's conduct fell within a wide range of reasonable professional assistance and, in any event, was not prejudicial.

### A. *Controlling Legal Principles*

To establish a Sixth Amendment claim for ineffective assistance of counsel, a defendant must show (1) his trial counsel's performance was objectively deficient and (2) the deficiency was so prejudicial it is reasonably probable it produced the unfavorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *People v. Johnson* (2015) 60 Cal.4th 966, 979-980.) Under the *Strickland* standard, "a court must indulge a strong presumption that [defense] counsel's conduct falls within the wide range of reasonable professional assistance." (*Strickland*, *supra*, at p. 689.) Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. (*Id*. at p. 690.) "'[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective

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[5] Eddie is correct that the failure to object to the introduction of out-of-court statements as being inadmissible hearsay and objectionable arguments made in closing ordinarily forfeits such claims of error on appeal. (See Evid. Code, § 353, subd. (a); *People v. Williams* (2013) 56 Cal.4th 630, 671 ["'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.'"]; *People v. Alexander* (2010) 49 Cal.4th 846, 908 [because he failed to object to testimony at trial, the defendant forfeited claim on appeal the testimony was inadmissible hearsay].)

assistance.' [Citation.]" (*People v. Carrasco* (2014) 59 Cal.4th 924, 985; accord, *People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

"To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation." (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

B. *The Failure to Object to Javier's Out-of-Court Statements as Hearsay Did Not Constitute Ineffective Assistance*

In his opening brief, Eddie argues that, although Javier's statements "presumably could be used solely to impeach Javier, which would have required a limiting instruction, they should not have been permitted as direct evidence of Eddie's participation" in the burglary because they constituted inadmissible hearsay (Evid. Code, § 1200),[6] and "notoriously unreliable and self-serving" statements implicating alleged accomplices do not fall under any recognized exception to the hearsay rule.[7]

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[6] Evidence Code section 1200 provides: "(a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. [¶] (b) Except as provided by law, hearsay evidence is inadmissible. [¶] (c) This section shall be known and may be cited as the hearsay rule."

[7] In his opening brief, Eddie concedes "the *Aranda-Bruton* rule [(*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476])] did not require exclusion of [Javier's] prior out-of-court statements . . . on Confrontation Clause grounds" because Javier testified at trial, but maintains these cases support his hearsay argument. """*Aranda* and *Bruton* stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculpates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination, even if a limiting instruction is given.' [Citation.]" [Citation.]'" (*People v. Capistrano* (2014) 59 Cal.4th 830, 869; see *California v. Green* (1970) 399 U.S. 149, 163 & fn. 15 [90 S.Ct. 1930, 26 L.Ed.2d 489] [emphasizing the error in *Bruton* arose because the declarant did not testify at trial; whether admission of the statement would violate hearsay rules was a "wholly separate question"].) (Before *Bruton*, in *People v. Aranda*, *supra*, at pp. 528-530, the California

Eddie ignores the hearsay exception for prior inconsistent statements (Evid. Code, § 1235). This statute provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code s]ection 770 [authorizing the admission of extrinsic evidence of a prior statement if the witness is given the opportunity to explain or deny the prior statement during testimony]."[8] Eddie does not dispute that Javier's out-of-court statements to police were inconsistent with his trial testimony; to the contrary, he argues Javier "partially recanted" those prior statements and "steadfastly insisted that Eddie was *not* present at the residence and did not participate in the burglary." It is also undisputed that Javier was asked directly about the content of his prior statements during his trial testimony and had the opportunity to address the inconsistency. (Evid. Code, § 770, subd. (a).) Therefore, under Evidence Code section 1235, Javier's prior inconsistent statements were admissible both to impeach the credibility of his contrary trial testimony and for the truth of his earlier statements to police. (*People v. McKinnon* (2011) 52 Cal.4th 610, 672; *People v. Alexander*, *supra*, 49 Cal.4th at pp. 908-909; see also CALCRIM No. 318.)

In his reply brief, Eddie argues Evidence Code section 1235 does not apply here as Javier's prior statements "should have been barred as unreliable hearsay testimony by an accomplice or co-defendant under the *Aranda-Bruton* rule . . . ." As a matter of state law,

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Supreme Court had reached a similar conclusion on nonconstitutional grounds. (*Id.* at p. 530, fn. omitted ["the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement [Pen. Code, §] 1098" joint trials for jointly charged defendants].)) As we will discuss, Eddie conflates the federal constitutional confrontation and state hearsay issues and mischaracterizes the state of the applicable law.

[8] Consistent with Evidence Code section 1235 (and without objection), the jury was instructed: "You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: [¶] 1. To evaluate whether the witness's testimony in court is believable; [¶] AND [¶] 2. As evidence that the information in those earlier statements is true." (CALCRIM No. 318 [prior statements as evidence].)

he argues, "the *Aranda-Bruton* rule, as modified by *Nelson v. O'Neil* (1971) 402 U.S. 622, 629-630 [91 S.Ct. 1723, 29 L.Ed.2d 222], and Proposition 8 (Cal. Const. Art. 1, § 28), remains good law to bar as hearsay the introduction of prior out-of-court statements of an accomplice or co-defendant" because "the *Aranda-Bruton* rule is more narrowly focused on testimony by accomplices or codefendants in criminal cases" while Evidence Code section 1235 applies more "generally" in civil and criminal cases. Citing *People v. Boyd* (1990) 222 Cal.App.3d 541 (*Boyd*) (and earlier cases), Eddie argues California courts "have continued to apply the *Aranda-Bruton* rule to exclude prior statements from an accomplice or co-defendant *even where that witness takes the stand and is subject to examination.*" He is mistaken.

In *Boyd*, *supra*, 222 Cal.App.3d 541, the court recognized that *prior* California courts had concluded "*Aranda* is violated whether or not the declarant testifies at trial." (*Id.* at p. 561.) In contrast to *Aranda*, however, in *Nelson v. O'Neil*, *supra*, 402 U.S. 622, the United States Supreme Court had confirmed: "The Constitution as construed in *Bruton* . . . is violated *only* where the out-of-court hearsay statement is that of a declarant who is unavailable at the trial for 'full and effective' cross-examination." (*Id.* at p. 627, citing *California v. Green*, *supra*, 399 U.S. at p. 162.) "[W]here a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments." (*Nelson*, *supra*, at pp. 629-630; *Boyd*, *supra*, at p. 562 ["*Bruton*, by its own terms and as refined by *O'Neil*, requires exclusion of evidence only when the defendant who makes the inculpatory extrajudicial statement does not testify."].) Because both defendants had testified and were cross-examined at trial, the *Boyd* case did not present *Bruton* error. (*Boyd*, *supra*, at p. 562.)

The *Boyd* court then considered "whether the *Aranda* rule was abrogated by Proposition 8,"[9] and determined that, "to the extent *Aranda* duplicates the protections available under the federal Constitution, as defined in *Bruton* and *O'Neil*, the *Aranda* rule survives the passage of Proposition 8. The California rule is now coextensive with the federal rule." (*Boyd*, *supra*, 222 Cal.App.3d at p. 563; accord, *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 43 ["the *Aranda* rule is coextensive with that of *Bruton*"].) However, "to the extent *Aranda* required exclusion of inculpatory extrajudicial statements of codefendants, even when the codefendant testified and was available for cross-examination at trial, *Aranda* was abrogated by Proposition 8. There is no federal constitutional basis for requiring exclusion of a codefendant's statements when the codefendant testifies at trial and is subject to cross-examination." (*Boyd*, *supra*, at p. 562; accord, *People v. Coffman and Marlow*, *supra*, at p. 43; *People v. Fletcher*, *supra*, 13 Cal.4th at p. 465.)

Stated simply, "[t]he *Aranda/Bruton* rule addresses a specific issue that arises at *joint* trials when the prosecution seeks to admit the out-of-court statement of a *nontestifying* defendant that incriminates a *codefendant*." (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 869, italics added.) Because Javier was neither a codefendant nor on trial himself and because he testified and was available for cross-examination at Eddie's trial, the *Aranda-Bruton* rule does not apply in this case. (*People v. Williams*, *supra*, 56 Cal.4th at pp. 667-668 [as the defendant's accomplices were charged with first degree murder and pleaded guilty to second degree murder, *Bruton* and its progeny are

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[9] The "'truth-in-evidence' provision of Proposition 8 (Cal. Const., art. I, § 28, subd. (d))" states: "'Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.' [Citation.]" (*People v. Fletcher* (1996) 13 Cal.4th 451, 465 & fn. 3.)

"inapplicable, because these cases involve the use of out-of-court statements by un-cross-examined codefendants to incriminate a defendant at a joint trial"]; *People v. Richardson* (2008) 43 Cal.4th 959, 1007 [rejecting claim of *Aranda-Bruton* violation as inapplicable both because the declarant (1) was neither a codefendant nor on trial and (2) testified at the defendant's trial and was available for cross-examination].)

As the United States Supreme Court observed nearly 50 years ago in upholding the constitutionality of Evidence Code section 1235, California "permit[s] the substantive use of prior inconsistent statements on the theory that the usual dangers of hearsay are largely nonexistent where the witness testifies at trial." (*California v. Green*, *supra*, 399 U.S. at p. 155 ["'The whole purpose of the Hearsay rule has been already satisfied [because] the witness is present and subject to cross-examination [and] there is ample opportunity to test him as to the basis for his former statement.'"].) "[H]earsay rules and the Confrontation Clause are generally designed to protect similar values" (although the "'overlap'" is not complete) (*ibid*.), and the "modification of a [S]tate's hearsay rules to create new exceptions for the admission of evidence against a defendant[] will often raise questions of compatibility with the defendant's constitutional right to confrontation" (*id.* at p. 156), but "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories" (*id.* at p. 164).[10]

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[10] Confrontation serves three purposes: (1) ensuring reliability by means of an oath, (2) exposing the witness to cross-examination, the "'greatest legal engine ever invented for the discovery of truth'"; and (3) permitting the trier of fact to weigh the witness's demeanor. (*California v. Green*, *supra*, 399 U.S. at p. 158, fn. omitted.) The *Green* court recognized that "the out-of-court statement may have been made under circumstances subject to none of these protections," but noted, if the witness either admits he or she made the prior statement, "or if there is other evidence to show the statement is his [or hers], the danger of faulty reproduction is negligible." (*Ibid*.) In addition, the court found, although contemporaneous cross-examination may be preferable, "the inability to cross-examine the witness at the time he [or she] made [the] prior statement cannot easily

Citing a number of cases including *Bruton v. United States*, *supra*, 391 U.S. 123, the *Green* court emphasized that "none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial." (*California v. Green*, *supra*, 399 U.S. at p. 161 ["The concern of most of our cases has been focused on precisely the opposite situation — situations where statements have been admitted in the absence of the declarant and without any chance to cross-examine him [or her] at trial . . . through application of a number of traditional 'exceptions' to the hearsay rule, which permit the introduction of evidence despite the absence of the declarant . . . ."].)

Forty years later, in *Crawford v. Washington* (2004) 541 U.S. 36, 59 [124 S.Ct. 1354, 158 L.Ed.2d 177], footnote 9, although it expressly precluded the use of many types of "testimonial hearsay" previously admitted in criminal trials under state rules of evidence, the United States Supreme Court expressly reaffirmed its decision in *Green*: "[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. [(]See *California v. Green*, [*supra*,] 399 U.S. [at p.] 162 . . .).[)]"[11] (Accord, *People v. Richardson*, *supra*, 43 Cal.4th at p. 1006 [""""The receipt in evidence of a prior inconsistent statement does not violate the confrontation clauses of the federal and state

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be shown to be of crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial." (*Id*. at p. 159.) The presence of the witness on the stand at trial responding to questions satisfies the final purpose of the confrontation right, allowing the jury to evaluate the witness's demeanor and, to some extent at least, his or her credibility. (*Ibid*.)

[11] Because Javier testified and was cross-examined at trial, Eddie's reliance on cases in which the declarant did not testify such as *Lilly v. Virginia* (1999) 527 U.S. 116, 128 [19 S.Ct. 1887, 144 L.Ed.2d 117] ["because the use of an accomplice's confession 'creates a special, and vital, need for *cross-examination*,' a prosecutor desiring to offer such evidence must comply with *Bruton*" (first italics added)] and *People v. Miranda* (2000) 23 Cal.4th 340, 354 [the *Aranda-Bruton* rule does not apply at preliminary hearings; qualified officer may relate nontestifying codefendant's out-of-court statement incriminating defendant] is misplaced.

Constitutions where the declarant testifies at trial and is subject to cross-examination.""""].)

Because Javier's statements were admissible pursuant to Evidence Code section 1235,[12] Eddie's claim his trial counsel was incompetent for not objecting to their admission on hearsay grounds is unavailing. (*People v. Williams* (1997) 16 Cal.4th 635, 681 ["Because we conclude that the statements were properly admitted, [the] defendant is wrong that trial counsel was incompetent for not objecting to their admission."].) The failure to make a futile or unmeritorious request is not ineffective assistance. (See *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 836.)[13]

Indeed, given the considerable independent (and corroborating) evidence of Eddie's guilt, even assuming error in the failure to object to the admission of introduction of Javier's out-of-court statements, Eddie cannot establish he was prejudiced as a result. (*People v. Johnson*, *supra*, 60 Cal.4th at p. 980.) Javier pled guilty to burglary before trial. When he testified, he admitted the details of the crime and his own role in it; he

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12 See *California v. Green*, *supra*, 399 U.S. at p. 154, footnote omitted [§ 1235 "represents a considered choice by the California Legislature . . . concerning the extent to which a witness' prior statements may be introduced at trial without violating hearsay rules of evidence"].

13 It is true that when the "powerfully incriminating extrajudicial statements" of a defendant's accomplice are introduced at trial, their credibility is "inevitably suspect" (*Bruton v. United States*, *supra*, 391 U.S. at pp. 135-136), but in recognition of this fact, when accomplices *do* take the stand, "the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others" (*id.* at p. 136, fn. omitted; *People v. Guiuan* (1998) 18 Cal.4th 558, 569; and see CALCRIM Nos. 301, 335). Further, Penal Code section 1111 provides that a conviction "can not be had upon the testimony of an accomplice unless it be corroborated" and defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Consistent with Penal Code section 1111 and the concerns raised by the use of incriminating accomplice statements, the jury was instructed that Javier was an accomplice (if a burglary was committed); any statement he made was to be viewed with caution; and Eddie could not be convicted on the basis of Javier's statements alone. (Pen. Code, § 1111; CALCRIM Nos. 301, 335; *Guiuan*, *supra*, at p. 569.)

simply claimed Eddie had not participated in the burglary. (He said he was one of three men involved in the burglary, not four.) Balcazar identified both Javier and Eddie as two of the four men involved, Eddie's grandfather testified both Javier and Eddie had left together in the grandfather's van, Eddie had a laptop computer and iPad stolen from the Kittridge house in his car when he was stopped shortly afterward, and Eddie's own statements to police incriminated him. Eddie has failed to demonstrate a reasonable probability that, absent defense counsel's failure to object, the result would have been more favorable to him. (*Ibid.*)

C. *The Failure To Object to the Prosecutor's Closing Argument Was Not Ineffective Assistance*

Eddie argues the prosecutor "mischaracterized two key pieces of evidence" during his closing argument, (1) stating Balcazar had seen the men at the victim's house five times (when, according to Eddie, Balcazar had only seen them twice); and (2) asserting Eddie admitted knowing the items he had in his possession were stolen (contrary to Eddie's statement he did not know they were stolen).

Considered on their merits, neither portion of the prosecutor's closing argument represents misconduct. (*People v. Williams*, *supra*, 56 Cal.4th at p. 671 ["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."'"].)

During his closing argument, the prosecutor said Balcazar saw three men get out of and back into the van twice and also saw them inside the victim's house for a total of "five separate viewings" of the men.[14]

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[14] The prosecutor prefaced his argument by stating that he would "briefly summarize the facts as [he] believe[d] they came out," but added: "Obviously you need to remember your own perception of how the witnesses testified and what they stated and what the credibility was."

Although defense counsel did not object at the time, he told the jury in his own closing: "I submit to you that's not true." He urged the jurors to review their own notes and, if they had questions, reminded them the court reporter was available to them. "Based on what I remember, the van came twice. The first time, [Balcazar] said no one got out of the car. . . . Five to ten minutes later the van came back . . . . At that point in time, three people exited the car . . . ." Describing the front door glass as "opaque," he also told the jury Balcazar "didn't see faces" inside the house—he "saw shadows," and urged them to "[l]isten to his testimony again."

In his rebuttal, the prosecutor responded: "We know it was at least two times. It could have been four times depending on whether you're taking Javier's word for it or you're taking [Balcazar]'s word on the stand," noting it had been over a year since the incident.[15] In addition, he said it was clear from Balcazar's testimony he could see the men through the front door glass and also through the glass window.[16] To "wrap up," the prosecutor listed "key points that I believe that I want you to consider," including "[t]he fact that [Balcazar] saw the defendant five times in broad daylight."

The prosecutor's comments about the number of times Balcazar saw Eddie "were founded on evidence in the record and fell within the permissible bounds of argument."

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[15] According to Javier's testimony, the three men got out of the van (the first time they drove to the victim's house), went to the back of the Kittridge house to see if anyone was home, got back in the van before asking Balcazar about who lived there, and then drove off. The three men then returned, went to the back of the Kittridge house, entered, and returned to the van with the stolen property. At trial, Balcazar initially testified he "saw a van approaching th[e victim's] house, and then they [got] out from the van[, and s]omeone came and asked me if I knew who lives in there." Later, seemingly contradicting himself, he testified that the first time the van pulled up, no one said anything to him and no one got out; the van parked, then made a U-turn and left that time.

[16] It appears the prosecutor referred to a photograph of the house as an exhibit during closing argument, indicating "Here's [Balcazar]'s approximate view of the house . . . so he can see this entire room, and plus you can see the glass in the door. That's what he's looking through." Officer Rodolfo Rivera had testified Balcazar told him he "saw those three men who ran into the backyard inside the actual residence."

(*People v. Williams*, *supra*, 56 Cal.4th at p. 672.) Moreover, in addition to the prosecutor's own cautions in this regard, the trial court instructed the jury that they "alone" must decide the facts "based only on the evidence . . . presented . . . [at] trial" (CALCRIM No. 200) and that "[n]othing that the attorneys say is evidence" (CALCRIM No. 222). Also, at the jury's request, the court reporter read Balcazar's testimony back to the jury in its entirety. There is no reasonable likelihood the jury misconstrued or misapplied the prosecutor's remarks. (*Williams*, *supra*, at pp. 671, 674; *People v. Dykes* (2009) 46 Cal.4th 731, 771-772.) It follows defense counsel's failure to object to the remarks did not constitute ineffective assistance. (*Williams*, *supra*, at p. 671; *People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 836.)

Eddie also claims the prosecutor's argument that Eddie admitted he had bought stolen property constituted misconduct because Officer Williams testified Eddie told him "he didn't know that he bought stolen stuff."

Consistent with Officer Williams' testimony regarding Eddie's post-arrest statement, the prosecutor argued: "At first, before Officer Williams had actually told [Eddie] that a burglary took place, [Eddie] made the statement, 'Yeah, I bought some stuff from some guys on Craigslist.' Then . . . he changed his story to say, 'Yeah, it's true. I bought some stolen items.'"

"Now, the fact that [Eddie is] changing his testimony when confronted with the fact that the police know about the [burglary], you can infer the fact he realizes—you know, his reaction wasn't, 'Wait, a burglary? I don't know anything about a burglary. What are you talking about?' No. He changes it to figuring out what version of events will allow him to not be connected to the burglary. He doesn't know that Javier at this point has already explained to Officer Williams that [Eddie] was involved in it."[17]

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[17] The prosecutor reiterated this argument in his rebuttal: "[Eddie] admitted that he knew he was in possession of stolen property, [from] which [it] can be inferred that he was aware of the burglary and in fact that he participated in it, and when [Eddie] changed his story it just furthermore indicated that he had knowledge of the burglary."

"""[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. . . ."' [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 221; accord, *People v. Jackson* (2016) 1 Cal.5th 269, 368.) Here, the prosecutor summarized the evidence and then argued his interpretation of that evidence, urging the jury it could infer from the fact Eddie volunteered that "he didn't know that he bought stolen stuff" and kept "chang[ing] his story," that Eddie was effectively admitting that he did know the property was stolen because he had stolen it himself. Again, the prosecutor, defense counsel and the trial court repeatedly advised the jury the statements of counsel are not evidence. Reading the prosecutor's argument in the context of the record establishes the prosecutor did not engage in misconduct by mischaracterizing Eddie's testimony and misleading the jury, but rather drew inferences from that testimony, within the range of permissible argument. (*People v. Thomas* (1992) 2 Cal.4th 489, 526-527; accord, *People v. Williams, supra*, 56 Cal.4th at p. 674.) Defense counsel's failure to object to these arguments did not amount to ineffective assistance.

## DISPOSITION

The judgment is affirmed.

GARNETT, J.*

We concur:

PERLUSS, P. J. SEGAL, J.

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