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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ELEONORA IGOVA, Defendant and Appellant.	B222762 (Los Angeles County Super. Ct. No. SA067128)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elden S. Fox, Judge. Affirmed.

Law Office of Kiana Sloan-Hillier, Kiana Sloan-Hillier; Joel R. Isaacson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A. Taryle and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Eleonora Igova was convicted of second degree murder with firearm use allegations also found true. The trial court sentenced her to a term of 40 years to life in state prison. She appeals, claiming multiple instances of prosecutorial misconduct during closing argument, including improper comment on her failure to testify in violation of *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*). We agree with Igova that she has identified a number of instances of serious overreaching by the prosecutor, and we emphasize our disapproval of such questionable behavior. Nevertheless, having reviewed the record in its entirety, while we disapprove of the prosecutor's questionable behavior, we find the evidence of Igova's guilt so overwhelming that we must also conclude she could not have been prejudiced as a result. Accordingly, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On March 13, 2008, J.P. Lipson was happy until he got a call from Eleonora Igova. Lipson and Igova were married but had separated. When he slammed down the phone, he was upset. He told his housekeeper (Leticia Torres) it was Nora on the phone, and she wanted more money. It was "always money, money, money" with her. Torres had worked for Lipson and Igova for a couple of years when they lived together in La Jolla and continued to work for Lipson for another two or three years after Igova moved out and Lipson moved to another home in La Jolla—a big mansion with a swimming pool and view of the ocean. During the time Igova lived with Lipson, Torres saw guns on Igova's side of the bed, but she never saw any guns once Lipson was living alone.

At around 1:00 p.m., Cliff Wright drove Lipson to the Peninsula Hotel in Beverly Hills, dropped Lipson off at about 3:30, and drove off in Lipson's Bentley. Igova and Lipson left the hotel together and went back to Igova's residence on the second floor of a duplex on Durant Drive in Beverly Hills.

At around midnight that night, Nick Rivera and his 15-year-old daughter Estelle were getting ready for bed when they both heard a "loud bang" followed by a loud thump

that sounded to Estelle like a table dropping on the ceiling directly above her bedroom, in Igova's apartment. Both Estelle and her father knew Igova as "Nora," and both heard a man saying, "Nora, Nora" a "bunch of times." Rivera was in his own bedroom nearby, but Estelle was directly below the sounds. After the sound like a table dropping on the floor, Estelle heard the man say, "Nora, don't do it. Nora, stop," and then Estelle and Rivera both heard five or six more gunshots. Rivera went to his daughter and told her to get on the floor and call 911.

While Estelle was on the phone with the 911 operator, Rivera heard someone pounding on his front door and trying to open it by "jimm[ying the handle] forcefully." Then he heard Igova saying, "Nick, let me in." She did not say anything else, such as "Help" or "Call the police" or "Someone shot my husband" –"not anything of that nature." Rivera told Igova, "No. I can't let you in," and went to check on his daughter. Estelle told the operator she could hear Igova walking around upstairs. The operator told her the police were outside. Rivera had been watching for the police and saw an officer hunkered down behind a car gesturing for him to come outside. He went back for his daughter and the two ran out.

When Officer Andrew Myers of the Beverly Hills Police Department arrived at the Durant address within three to four minutes of Estelle's 911 call, other officers were already positioned out front so he went to the alley in back and concealed himself behind an SUV. Within four or five minutes of his arrival, Officer Myers saw Igova exit the rear of the building. She opened and closed the security gate carefully, confirming the gate did not slam, and shut it quietly behind her. Igova then walked away slowly in the direction where her car was parked. She walked almost touching the garage and held her purse by its handles at her side. Officer Myers identified himself as a police officer. Igova stopped and complied with his verbal commands; she did not say anything when he ordered her to walk back toward him. Additional officers joined Myers, and Igova was

handcuffed and placed in the back of a patrol car where she sat quietly, sometimes closing her eyes and appearing to be asleep. She did not appear to be upset.

Officer Donald Hecht retrieved Igova's purse. The first thing he saw on top was a red Bulgarian passport with Igova's picture and name (Eleonora Igova). He also found a resident alien card in the name of "Nora Lipson," a document that appeared to be a Bulgarian birth certificate, a wallet containing $806 dollars and several credit cards, a Motorola cell phone and a key to a Lincoln.

When officers initially searched Igova's apartment, they found no armed suspects but saw Lipson lying on the floor of the middle bedroom, with his pants "pulled slightly down and his shirt was unbuttoned." In a cabinet outside Igova's master bedroom, beneath some women's underwear, officers found a Smith and Wesson nine millimeter semiautomatic handgun in a "slide lock position," indicating the weapon had either been fired until it was out of ammunition or manually placed and locked in that position. A box of nine millimeter hollow point Makarov ammunition was found in the nightstand of the master bedroom. Those rounds could not be fired from the nine millimeter found at the apartment because the bullets were slightly larger so they would not fit into the barrel of the gun.

In the master bedroom closet, police found two boxes of ammunition, including one box of Winchester nine millimeter Luger rounds and a box of shotgun shells. (The 100-count box of nine millimeter ammunition in the master bedroom closet contained only 83 rounds. In addition to the boxes, live rounds of nine millimeter ammunition were recovered from a checkbook found in a nightstand in the master bedroom, the top of the bed in the master bedroom, the foot of that bed and under a lamp in the master bedroom. (Six rounds were found in a case in the living room.) The live rounds were the same make, model and caliber as the bullets found in the master bedroom closet.

Igova was charged with murder in violation of Penal Code section 187, subdivision (a), with special firearm allegations pursuant to section 12022.53, subdivisions (b) through (d).[1] (All further undesignated statutory references are to the Penal Code.)

At trial, the People presented evidence of the facts summarized above, including the transcript of Estelle Rivera's 911 call. In addition, a private investigator (Daniel Gal) testified Igova had contacted him in June 2007. When she met with Gal, Igova said she was separating from Lipson and wanted to hire someone to locate his assets. That September, Igova hired Gal and said she believed Lipson was worth between $50 and $70 million.[2] Gal did not proceed past an initial cursory investigation because Igova's check "was not good."

The People presented additional evidence, including the following: Igova had deleted the incoming and outgoing history on her cellular phone. However, deleting the call history did not delete the call history from her cellular provider's billing records. According to these records, Igova had made or received a call from or to Lipson's cell phone at 10:21 p.m. on March 13, 2008. Then she had dialed or received calls from an international number between 10:22 and 11:47 p.m. She made no calls to 911.

In 1999, Igova bought the gun found in her apartment and used to kill Lipson. Witnesses who had gone target shooting with her said she had "excellent marksmanship" skills and was "quite an excellent shot."

Expended nine millimeter rounds were found lodged in a box spring mattress of a bed in the same middle bedroom where Lipson's body was found and in a table in that bedroom. The expended bullets had been fired from the recovered nine millimeter Smith

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1 This appeal follows Igova's second trial. Originally, Igova was charged with and tried for premeditated (first degree) murder. However, at her first trial, the jury found Igova not guilty of first degree murder and could not reach a verdict on second degree murder so the trial court declared a mistrial.

2 Following Lipson's death, an asset search company located $8 million in St. Thomas.

and Wesson. A total of seven expended casings were found. Casings were discovered under the table in the bedroom where Lipson's body was, on the top of the nightstand in the master bedroom, in the hallway near Lipson's body and near or under his body. All recovered shell casings were the same make, model and caliber as the ammunition found in the master bedroom closet and all had been ejected from the recovered Smith and Wesson.

Numerous blood stains were noted in the area where Lipson's body was found, including blood stains on a carpet near the bed comforter, blood stains leading from the bed towards the door where Lipson's body was discovered and blood stains on the doorway, wall and floor near his body. Lipson had a key to a Bentley in his pocket. An apparent impression of a hand brushing against the blood did not yield an identifiable print. Apparent blood spatter on the wall and door frame could have been caused by the splashing of blood after Lipson fell to the ground or as a result of "blow back." There were also two "non-directional" blood stains in the hallway on the wall facing the bedroom door.

Nick Rivera, a composer with excellent hearing, testified that he heard no cars leaving the area. He was looking outside the windows and did not see anyone or hear anything. He described the locking gates and doors at the front and back of the security building. Another neighbor (Rachel Kaiser) also testified to hearing the gunshots, but no cars or anyone running near her unit in that time frame. Upon receiving the call of shots fired, Beverly Hills Police Officer Sunday Arriaga set up a containment field and saw no one leaving the area. Officer Tomlin arrived on the scene within one minute of receiving the call of shots fired.

A pair of pants, a shirt, a robe and a "slightly damp" towel were on the floor of the master bedroom. Items of clothing, a wash cloth and water bottle were found in the laundry room. The wash cloth had a brown stain, but it did not test positive for blood and appeared to be women's makeup. There were other such stains on the walls and some

towels, but they were not tested as they looked similar to the apparent makeup stain. Another stain on the wall was negative for blood. The doorway leading to the laundry room, washer/dryer area and doorway near Lipson's body were processed for fingerprints. One print was obtained but the quality was too poor for identification.

There were no prints on the handgun; there was one on the magazine but the quality was too poor for identification.

There was no blood on the handgun or items of clothing recovered. DNA was extracted from swabs of the gun. Lipson and Igova could not be excluded as contributors; another swab contained a mixture from at least four other contributors, but there was no way to say how long that DNA had been present.

There appeared to be no blood on the walls or flooring toward the front door, walkways or stairwell or on any door handles to exit the unit. There was no sign of forced entry into Igova's apartment or the locked gate to the alley.

Lipson died of multiple gunshot wounds. Of seven wounds, not one was inflicted at close range. Two shots were fired into the top of Lipson's head, consistent with Lipson being on his hands and knees while someone stood over him and shooting. Other shots were to his torso and one to his right thumb, consistent with Lipson having his hands out in front of him. Four bullet fragments were recovered from his body.

The criminalist who swabbed Igova's hands for gunshot residue testified she found traces of lead, antimony and barium but no particles containing all three elements. Gunshot residue contains these three elements, but all three must be found in one particle to be considered positive for gunshot residue. Based on this analysis, there was no gunshot residue on Igova's hands.

The presence or absence of gunshot residue is not an indicator of whether someone has fired a weapon. It is possible to fire a weapon and have no gunshot residue on one's hands. Studies show that 90 percent of gunshot residue particles fall off the hands in the first hour. Any friction can remove the particles.

In her defense, Igova presented the testimony of Irina Gerber who lived next door to Igova. She heard gunshots and later heard footsteps running on the grass. She did not look out the window. Gerber and her mother said they also heard a car's motor and tires screeching.

Based on his review of photos and documents, defense expert John Jacobson criticized the police investigation for failing to treat the entire apartment as the crime scene and testing everything there, such as items in the kitchen (glasses, a bottle, a pizza box), among other cited deficiencies.

In rebuttal, the firearms expert testified as to the importance of visual and microscopic inspection and firearm testing for purposes of distance determinations. In addition, Gerber's daughter Masha said she heard the shots but did not hear running or movement near her apartment and did not hear a car starting or driving away.

The jury found Igova guilty of second degree murder and found true the firearm allegations. The trial court sentenced her to state prison for a term of 40 years to life: 15 years to life on the murder count, plus another 25 years to life based on the section 12022.53, subdivision (b), true finding.

Igova appeals.[3]

DISCUSSION

According to Igova, multiple errors in the prosecutor's closing arguments so severely tainted her trial that she was denied her right to due process and a fair trial. Although we emphasize our disapproval of a number of the prosecutor's specific statements (as italicized and further addressed in this discussion), after reviewing the record in its entirety and considering each instance of alleged prosecutorial misconduct in

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[3] After filing her appeal, Igova filed a petition for writ of habeas corpus (B234455), submitting evidence in support of two of her claims of prosecutorial misconduct. The petition will be denied by separate order.

context, we conclude, even after aggregating these errors, Igova was not prejudiced as a result.

Prosecutorial Misconduct.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. 'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant [requested] an assignment of misconduct and [also] requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1263-1264, citations and additional internal quotations omitted; *People v. Parson* (2008) 44 Cal.4th 332, 359, citations and internal quotations omitted ["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"].) "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." (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1403, citations omitted.) 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." (*People v. Hill* (1998) 17 Cal.4th 800, 819, citations and internal quotations omitted.)

The Prosecutor's Role.

"The role of a prosecutor is to see that those accused of crime are afforded a fair trial and '" . . . far transcends the objective of high scores of conviction . . . ."' [Citation.] A prosecutor is held to a standard higher than that imposed on other attorneys because he or she exercises the sovereign powers of the state. [Citation.] 'Prosecutors who engage in rude or intemperate behavior, even in response to provocation by opposing counsel, greatly demean the office they hold and the People in whose name they serve.' [Citation.] Personal attacks on the integrity of opposing counsel constitute prosecutorial misconduct. [Citations.]

"'"'As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's duty is more comprehensive than a simple obligation to press for conviction. As the court said in *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, [1321] 55 S.Ct. 629]: '[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.'. . ." (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075-1076.)

Closing Argument.

Igova raises multiple, overlapping claims of prosecutorial misconduct in the course of the prosecutor's closing argument (and claims cumulative error as well) so we examine her challenges in context. (*People v. Herring, supra*, 20 Cal.App.4th at p. 1074, citation omitted.) Preliminarily, we note that before closing arguments in this case, the trial court reminded the jury "the arguments of the attorneys are not evidence. The evidence is what you've seen and what you've heard in this courtroom during the course of these proceedings."[4] Although the attorneys were expected to "make every effort to provide you with an accurate representation of what they believe that evidence and testimony has established," the trial court instructed "each of you are going to be final judges of the facts. . . . If there is any conflict [between] your assessment of that testimony and evidence and counsel's representation, you, as I will remind you again, are the ultimate judges of the facts."

When it was his turn to address the jury, the prosecutor said Lipson "spent the last moments of his life on his hands and knees begging the defendant not to kill him. He was trying to yell, 'Nora, stop. Nora, don't. Nora, don't do it.' The defendant ignored those pleas for mercy and shot him multiple times, executing him by shooting him two times in the head." Just before shooting Lipson, the prosecutor said, Igova grabbed her gun and some live rounds, loaded the magazine, returned to the middle bedroom where Lipson was getting undressed and shot him in the stomach. At that point, the prosecutor continued, Lipson fell to the ground, and then tried to hold the wall on the corner trying to get himself up, trying to yell, "Nora, stop. Nora, don't." Estelle Rivera heard him. Igova then shot Lipson five or six more times, placed the gun in a drawer and went

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[4] Similarly, before opening statements, the trial court had instructed the jury "the attorneys are not witnesses," and the jury "must not consider as evidence any statement made by either of the attorneys during the course of this trial." The court later reiterated, "the statements of the attorneys are not evidence. What is presented by the witnesses is evidence."

downstairs to the Riveras' unit to try to "create some type of alibi." She never called 911 or tried to help Lipson.

Once police arrived, the prosecutor argued, Igova got her passport, birth certificate, driver's license and cash and tried to "sneak out the back door." She was not "crying for help" or "asking for assistance." She was arrested and placed in a patrol car, but her hands were not tested for gunshot residue until four hours later. She had the three components of the inside of a bullet on her hands—lead, barium and antimony. The finding was consistent with either firing a gun four hours earlier or washing her hands with water and not getting it all off.

The prosecutor reviewed the testimony of each of the witnesses, arguing how the testimony established Igova's guilt. "The fact where the defendant's going, everything's closed. It's all businesses. It's midnight." Defense counsel objected, "assumes facts not in evidence." The court responded, "The objection is overruled. Ladies and gentlemen, this is argument." The prosecutor continued, "He doesn't like it. She's going in a direction where nobody's at. If she wanted to go for help, she'd go out on Durant, go to another neighbor. Her husband is in this condition, she never once calls for any help, never once tries to assist him in any way. He's yelling her name as he's being shot not to do it. And when the police arrive, she's going out the back door."

After commenting the defense wanted the jury to believe "some random person committed this crime," the prosecutor said, "[Defense counsel] sat up her for almost 50 minutes, 50 minutes in his opening statement *and never once did he say his client didn't commit this crime*." (Italics added.) Defense counsel objected, "She has pled guilty, and she's denied—" The trial court corrected, "Pled not guilty," and continued, "This is, again, argument, ladies and gentlemen. You'll be the judges of the facts." The prosecutor resumed argument: "*He'll change that now. He sat up here for 50 minutes and never once said she didn't commit this crime*." (Italics added.) Defense counsel said, "It's the same argument. . . . He said the same thing, and I object[] again." The

court answered, "The objection is noted again and overruled. You're the judges of the facts, ladies and gentlemen. Statements of counsel are not evidence."

Continuing his argument, the prosecutor said, "All he's going to do is play with the evidence. He's going to throw out these little red herring balloons, these little bubbles and just hope that one of you guys trails off and gets lost in that red herring.

"Now, in order to believe the defense's case, this is what you have to believe. You have to believe that somebody else had the motive other than the defendant to kill J.P. Lipson even though there's been no evidence presented. Somebody else had the motive.

"Then you have to believe somebody else was able to go through two locked doors without having anybody hear them. They would have had to go through those two locked doors so quietly that nobody heard them, but also that they didn't leave any signs of forced entry.

"The mysterious person, once they were able to go through two locked doors to get into that unit, got inside the unit without J.P. Lipson or the defendant knowing; that that person then went into the defendant's room without the defendant knowing while they were up and was able to find the defendant's gun.

"That person then had to have that much gun knowledge to know that the ammunition right by that gun wouldn't even fire in that gun.

"That person then would have to know to search that room out, either one of them, and find the ammunition that's in her closet. That person then would have to go to the spot where she normally keeps the gun and load it there without her knowing, go into the same room at the same time J.P. Lipson is taking his pants off. He then has to mistake the person shooting him for his wife. Shoots J.P. Lipson multiple times. And then this is the other part: Leaves her as a witness.

"Do you think if someone else did this crime, they're just going to leave the defendant in there as a witness? No. Decides to leave her as a witness, decides then to

go back to the direction of her room, decides to put the gun in her panty drawer. Once again, hey, don't tell anybody, okay? Leaves her there. Doesn't take anything and then vanishes because nobody else hears them or sees them.

"Now, is that logical? Of course not. But that really is what you have to believe to find her not guilty. Not logical, and it's not what happened.

"Now, what the defense is going to do, he's going to play with the evidence. He's always going to twist it just a little bit and hope that one of you guys falls for it, like the GSR. "He got up here and talked about GSR. Her clothes were tested. Her hair was tested. She had no GSR on her. We know, first of all, they don't do hair. The fingernail scrapings [which were not tested] have nothing to do with the GSR. And . . . he talked about the bagging of the hands. *She did have the components of GSR on her hands.* The expert witness has told us that's not the ideal time to do it [testing for GSR four hours after the shooting as in this case]. He's going to play with the witnesses." (Italics added.)

As another example, the prosecutor argued: "The first witness he put forward: Irina Gerber. She was living in this unit here [next to Igova]. She hears the gunshots, and then at some point she hears running and at some point she hears a car screeching. Did you notice how he never once asked her, 'When in time did you hear the gunshots to the running to the car driving away?' Do you think that was a mistake? Absolutely not. Absolutely not. He didn't ask her those questions because it was going to be slightly after the shooting. That was Nick and Estelle [Rivera] running away.

"And she never sees the car. He's hoping he can confuse one of you. All he wants is just one or more. The more the merrier for him. . . ."

When the prosecutor discussed defense expert John Jacobson, he said, "How many people do you think [defense counsel] had to go through to try and find him? Some guy all the way up in Hayward, San Francisco. . . . And for $10,000 he'll come and tell you whatever you need to know . . . . *I'll bet for another five grand he probably could have*

told us smoking's good for you. For the amount of money, he'll tell you whatever you need him to say." (Italics added.) He urged the jury to consider the fact Jacobson based his conclusions on looking at photographs and reference books. "And that's what you want to rely on? No." "The reason why defense counsel wants him to say that this is close range, that the muzzle was close is because he wants to kind of play with the evidence a little bit because he wants to say that if the gun was close, that the shooter would have blood on their hands. [T]hey'd have blood on them, and since his client didn't, she didn't do it."

"First of all, we know the gun didn't have blood on it. The gun is the closest thing to the victim. So if there's no blood on the gun, there's not going to be any blood on the defendant. And he's going to talk about . . . her clothes didn't have blood on [them], the clothes that she was arrested in. Then he's going to talk about, well, Mr. Halligan [the prosecutor], how can you say . . . he thinks he's going to have sex with his wife." Defense counsel objected: "Your Honor, I'm going to suggest this is improper. This is rebuttal argument." Again, the trial court responded: "The objection's overruled. This is argument, ladies and gentlemen."

Returning to the point, the prosecutor said, "He got up here in his opening statement and said, Mr. Halligan told you that, oh, how ridiculous it is that he was going to have sex one last time with his wife, things of that nature.

"Ladies and gentlemen, I don't have all the answers. All I can do is draw logical conclusions based on the evidence. I don't know what the shooter was wearing, whether she was even wearing the same clothes she was arrested in. I don't know specifically what J.P. was doing when his pants were just below his waist when he was shot. *The only person that has those answers is the shooter, and she's seated right over there. She's seated right over there*. (Italics added.)

The prosecutor asked, "Why is the victim yelling out her name to stop?[] And [defense counsel] is going to try and twist that around. Just wait, we're going to talk about it. He's going to twist that around."

Regarding Jacobson's testimony "about all the things he would have done: the wine glasses, the water bottle, the pizza box. Okay. . . . Doesn't make any sense. . . . We don't know when they were left" or if they "had anything to do with that night." "*The only person who has the answers is the shooter, and she's seated right over there*." (Italics added.)

Regarding Jacobson's testimony about "a little bit of blood on the wall," blood that was not tested, and the argument that "[i]f it was never tested, it must be the real shooter's," the prosecutor told the jury, "that argument doesn't fly because there's no blood anywhere else in the house." "Once again, he's throwing these ideas out and hoping one of you falls for it." As to defense counsel's emphasis on Lipson's wealth, the prosecutor said, "he's going to try to confuse you a little bit . . . saying . . . if she just wanted the money, she could have just divorced him. . . . Do you think if he was hiding money from her in offshore accounts that he had any intention of giving her any money? No way."

The prosecutor reviewed the law relating to murder and the firearm allegation and then said it was defense counsel's turn to give his closing argument. "I ask you to give him the same consideration you've given me," but added: "[W]hen he gets up here and he's talking to you about all these things: GSR and John Jacobson and the car and all these things he wants to throw out at you and hopefully one of you falls for it, ask yourselves, well, who else had the motive to do this? Where was your client when this was going on? Why is the victim yelling out her name to stop? And he's going to try to twist that around. Just wait. We're going to talk about it. He's going to twist that around. But why is the victim yelling your client's name to stop? Why is it that she doesn't assist him in any way when he's on that ground bleeding out? And why is it that

when the police arrive, she's sneaking out the back door?" He urged the jury, "You think about those four things."

After the jury left the courtroom following the prosecutor's closing argument, defense counsel moved for a mistrial based on the prosecutor's comment "on the defendant's failure to testify or to explain." On "two occasions," the defense argued, the prosecutor "indicated the only answers are known by the defendant who's sitting there. She's the shooter. She didn't explain." The court told the prosecutor, "Mr. Halligan, you're on thin ice with that argument I will indicate to you. And I do note the objection. I did hear it referred to twice. I don't think it yet rises to the level of comment on her right to remain silent. But I will indicate if I hear it in closing, I may change my mind." The prosecutor acknowledged the trial court's warning, but said he had never said "the defendant"—"I said, 'the shooter.'" Defense counsel said, "Well, she's the only person sitting at the table here." The trial court reiterated: "I've heard the objection. I've commented to counsel. And, Mr. Halligan, I've noted that you're on thin ice with the argument."

During the defense closing argument, defense counsel told the jury there were "many areas of reasonable doubt," providing a list of "18 different reasonable doubts," and presented a graphic depicting the scales of justice and how it was up to the prosecutor to prove guilt beyond a reasonable doubt. He read the reasonable doubt instruction to the jury, discussed circumstantial evidence and said Igova had no motive to murder Lipson.

In rebuttal, the prosecutor contended there was "no doubt" Igova had "shot and murdered her husband." "As I told you in my opening argument, defense is going to try to play with the evidence. He's going to try to throw out all these little things hoping one of you falls for it." He said the arguments were "red herrings" and explained the origin of that term.

The prosecutor addressed gun shot residue and how its absence did not create reasonable doubt. "All I know is she still has lead, barium and antimony on her hands

four hours later. All three of those are consistent with when you fire a gun[--]what's produced." "[*W*]*hen a gun is fired, those particles are produced alone, and some of them actually form together. But it forms alone as well.* She happens to have all three." (Italics added.)

Turning to the defense counsel's argument that "it was an incomplete investigation. Wouldn't you like to have fingerprints on the wine glasses. Wouldn't you like to have—I don't know. The pizza box. I don't even know what we're getting in with the pizza box and all the things of that nature. That was all released to the defense. If that really had any type of value, they could have tested it if they wanted to. Once again, the red herring. If it had any type of value in the case, they could have done it. But they didn't."

Further, although defense counsel had argued Igova had left to look for help, the prosecutor said, "There's been no evidence of that whatsoever." She had gone to one neighbor and asked to be let in, but if she was actually looking for help, he argued, she would have sought assistance from other neighbors or called 911. "Talking about Ronnie's Diner is open. You know, it's a diner by its very nature. If that diner was open and that's where she's going, you would have some evidence on it. As you heard from Clark Fogg, nothing was open there in the back. Nothing. She's going to her car or she's getting out of there by walking away. That's what happened."

In addressing the prosecution's burden of proof, he argued the reasonable doubt standard fell "somewhere along the continuum" between "no idea what took place" on one end and "absolute certainty" on the other. "For everybody it's different. . . . But there's no way I can prove this case beyond all doubt. It's impossible. You weren't there; I wasn't there. [¶] *Reasonable doubt just means after looking at all the evidence, what's the reasonable interpretation? What is reasonable?* [¶] "If you look at the evidence*, it's clearly reasonable this defendant committed the murder*. . . ." (Italics added.)

He noted how defense counsel tried to argue against the accuracy of what Estelle Rivera told the 911 operator on the night of the murder. "It's on the tape. She indicated that's the best account of what happened. It's what's on the tape. . . . You can hear exactly what she says. She hears the words, "Nora, stop. Nora, don't." The prosecutor summarized the evidence supporting Igova's guilt of murdering her husband and argued, "J.P. Lipson spent the last moments of his life begging her not to kill him by trying to yell, 'Nora, don't. Nora, stop.'"

After she was convicted, Igova moved for a mistrial, arguing "numerous" acts of misconduct including violation of *Griffin v. California, supra,* 380 U.S. 609, supported by a declaration from Juror A, stating the jurors discussed the prosecutor's comments on the defendant's failure to testify and such comments were a "major reason" jurors voted to find Igova guilty. According to defense counsel, Juror No. 3 told him the defense should have presented evidence regarding fingerprints on items in the kitchen and the blood type or DNA evidence of blood in the hallway. At argument on the motion, the prosecutor said the jury had no idea he had somehow mentioned Igova's failure to testify; he said he had interviewed the juror who had provided a declaration, and that juror did not know what the prosecutor had said but rather based his declaration on what the defense attorney had told him.

The trial court asked the prosecutor to explain what he meant by his comments. The prosecutor said his comments—"[t]he only person that has those answers is the shooter, and she's seated right over there"-- were "no different than saying the shooter is the person here in court." When he argued there were only two people in the apartment, he was referring to the "evidence that was presented in this case," not Igova's failure to testify. Asked to explain his comment that defense counsel never said Igova did not commit the crime, the prosecutor said he was not commenting on Igova's failure to testify but rather was making a "comment on counsel." The court declined to hear

testimony from jurors to avoid "interfer[ing] with the entire intellectual process of jury deliberations."

In ruling on the motion, the trial court found the prosecutor's comment about defense counsel's failure to say Igova did not commit the crime "improper" for suggesting defense counsel was "misleading the jury" and had evidence in regard to her guilt which the jury did not have. The court noted the jurors had been instructed about Igova's Fifth Amendment rights and did not and "cannot find in this case" the jurors failed to follow the instructions. The trial court did not find the prosecutor's arguments constituted *Griffin* error because, considered in context, the statements did not necessarily refer to Igova's failure to testify. Moreover, the court commented, there was "a substantial amount of evidence in this case:" The murder weapon was Igova's registered firearm, it was found in a drawer containing her clothing, the ammunition used was found in the apartment, there was no evidence anyone else was in the apartment at the time the shots were fired, the words spoken and heard by witnesses indicated only two people were in the apartment and clearly the victim did not shoot himself six times. "I did not feel that there was any reasonable doubt in this case sitting as a thirteenth juror as to the fact that Ms. Igova was in fact the shooter in this case and that the jury made that determination after reviewing the entirety of the evidence. . . ."

We address each of Igova's challenges to the prosecutor's closing argument in turn.

Igova first argues the prosecutor improperly attacked defense counsel, eviscerating her Sixth Amendment right to counsel. In this regard, she cites the prosecutor's comments that defense counsel would "play with the evidence," "twist it" "hoping he can confuse one of you," "hoping one of you falls for it" and similar statements she says were meant to communicate defense counsel's dishonesty and to impugn his integrity.

First, Igova waived any objection to most of these comments by failing to object to them at trial, and nothing in the record suggests an admonition would not have cured

any error. (*People v. Gamache* (2010) 48 Cal.4th 347, 371 ["To preserve a claim for appeal under either state or federal law, a defendant must raise a contemporaneous objection at trial and seek a jury admonition"].). In any event, such comments do not constitute misconduct. (See *People v. Cunningham* (2001) 25 Cal.4th 926, 1002-1003 [prosecutor's comments defense attorney's job was to put up smoke, red herrings]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [arguing experienced defense attorney would "twist a little, poke a little, try to draw some speculation, try to get you to buy something"]; *People v. Seaton* (2001) 26 Cal.4th 598, 663 [permissible to argue defense case was ludicrous, contrived, concocted and bogus]; *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor did not commit misconduct in arguing "heavy, heavy smokescreen . . . has been laid down [by the defense] to hide the truth from you"]; *People v. Breaux* (1991) 1 Cal.4th 281, 305-306 [not misconduct to argue defense was trying "to create some sort of confusion . . . because any confusion at all is to the benefit of the defense"].)

Next, Igova argues, the prosecutor "pitted the prestige of the State against [her]" by telling jurors that accepting the defense theory of the case would be "falling for it." Again, Igova did not object to such comments (*People v. Gamache, supra,* 48 Cal.4th at p. 371), and in any event, it is not misconduct to urge the jury not to be misled and "to ask the jury to believe the prosecution's version of events as drawn from the evidence." (*People v. Huggins* (2006) 38 Cal.4th 175, 207.) Contrary to Igova's argument, this case is distinguishable from *People v. Turner* (1983) 145 Cal.App.3d 658, 674, in which the prosecutor said defense counsel was "an additional villain who was attacking the victim."

Third, Igova says, the prosecutor's remarks were improperly intended to incite the jury's prejudice. Igova says when defense counsel initially objected to the prosecutor's comments, the prosecutor "mocked" him for objecting when he commented, "he doesn't like it" and continued with "even more inflammatory invective," essentially "cautioning the juror[]s to be vigilant, lest they become defense counsel's victims." In context, the

prosecutor's comments suggested defense counsel did not like the state of the evidence—that Igova was leaving the scene, headed out the back toward closed business when she was stopped by police because it undermined any contention she was seeking help. (*People v. Huggins, supra,* 38 Cal.4th at p. 207.)

According to Igova, the prosecutor disparaged her defense expert and therefore tainted her trial and denied her due process, the right to a fair trial and her Sixth Amendment right to counsel. Again, Igova failed to object in this regard. (*People v. Gamache, supra,*48 Cal.4th at p. 371.) Moreover, noting the defense expert (Jacobson) was paid by the defense, was not a medical doctor and based his conclusions on photographs was not improper. (*People v. Parson, supra,* 44 Cal.4th at p. 360, citing *People v. Arias* (1996) 13 Cal.4th 92, 162 [prosecutor "is free to remind the jurors that a paid witness may accordingly be biased and is also allowed to argue, from the evidence, that a witness's testimony is unbelievable, unsound, or even a patent 'lie;'" not improper for prosecutor to imply that defense expert "'stretch[ed] [a principle] for a buck'"].)

We agree with Igova, however, that the prosecutor went too far when he made the specific statement that Jacobson would have testified smoking was good for people if paid another $5000 to do so—in other words, if paid enough, he (and by implication, the defense) would present false testimony. (*People v. Herring*, *supra*, 20 Cal.App.4th at p. 1076, citing *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [personal attacks on the integrity of opposing counsel constitute prosecutorial misconduct].)

Nevertheless, read in context, we do not find the jury would have understood or applied this hyperbolic comment in an improper manner. (*People v. Parson, supra,* 44 Cal.4th at pp. 360-361; *People v. Spector, supra,* 194 Cal.App.4th at p. 1403, internal quotations omitted ["To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] 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."].) There were numerous valid bases on which the prosecutor properly challenged the reliability of the defense expert's conclusions, and in any event, given the overwhelming evidence of Igova's guilt, she has failed to demonstrate how she was prejudiced as a result of this comment. (*People v. Parson, supra,* 44 Cal.4th at pp. 360-361.)

Igova says the prosecutor committed *Griffin* error by urging the jury to draw an inference of guilt from her failure to testify. *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*) "forbids either direct or indirect comment upon the failure of the defendant to take the witness stand." (*People v. Hovey* (1988) 44 Cal.3d 543, 572; see also *People v. Vargas* (1973) 9 Cal.3d 470, 475-476 [*Griffin* error to observe that defendant failed to "deny" his presence at the crime scene].) "The rule, however, does not extend to comments on the state of the evidence or on the failure of the defense to introduce material evidence or to call logical witnesses." (*People v. Brady* (2010) 50 Cal.4th 547, 566, citations and internal quotations omitted.)

In support of her claim of *Griffin* error, Igova first cites to the portion of the prosecutor's closing argument in which he commented the defense wanted the jury to believe "some random person committed this crime." The prosecutor said, "[Defense counsel] sat up her for almost 50 minutes, 50 minutes in his opening statement *and never once did he say his client didn't commit this crime*." (Italics added.) Defense counsel objected, "She has pled guilty, and she's denied—" The trial court corrected, "Pled not guilty," and continued, "This is, again, argument, ladies and gentlemen. You'll be the judges of the facts." The prosecutor resumed argument: "*He'll change that now. He sat up here for 50 minutes and never once said she didn't commit this crime*." (Italics added.) Defense counsel said, "It's the same argument. . . . He said the same thing, and I object[] again." The court answered, "The objection is noted again and overruled. You're the judges of the facts, ladies and gentlemen. Statements of counsel are not evidence."

Later, the prosecutor told the jury, "I don't have all the answers. All I can do is draw logical conclusions based on the evidence. I don't know what the shooter was wearing, whether she was even wearing the same clothes she was arrested in. I don't know specifically what J.P. was doing when his pants were just below his waist when he was shot. *The only person that has those answers is the shooter, and she's seated right over there. She's seated right over there*." (Italics added.)

Then, regarding Jacobson's testimony "about all the things he would have done: the wine glasses, the water bottle, the pizza box. Okay. . . . Doesn't make any sense. . . . We don't know when they were left" or if they "had anything to do with that night." "*The only person who has the answers is the shooter, and she's seated right over there*." (Italics added.)

Finally, Igova cites to the prosecutor's statement: "There were only two people in the apartment: the defendant and J.P. Lipson."

Citing to a police affidavit in support of a further search warrant (not before the jury), Igova says "the district attorney was well aware [she (Igova)] made a statement to police at the time of her arrest, explaining that she was not alone with the victim."[5]

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[5] According to the documentation in support of the warrant, when she was first detained attempting to leave her residence through the back gate, Igova initially told police Lipson had shot an unknown woman and was still inside; a short time later, she "changed her story, stating an unknown woman had shot her husband." Igova claimed she had taken two over-the-counter "herbal Bulgarian sleeping pills" and gone to sleep between 8:30 and 9:00 p.m. the night of Lipson's murder but later awoke to "loud noises"—"her husband shouting and the loud voice of an unknown woman with a Russian accent." According to Igova, the woman had come to the apartment at her husband's invitation. Upon hearing the commotion through her closed master bedroom door, Igova said, she opened her door and saw a beautiful Russian woman standing in the hallway. The woman said nothing as she ran out the apartment through the front door. As noted in the search warrant, the police noted numerous inconsistencies in Igova's account; in addition, several documents suggesting Igova's "dire financial situation" were found in her purse, including notice of disconnection of her electricity, suspension of credit account privileges and credit collection notices and an IRS backup withholding notice seeking payment for 2004 taxes, bearing early March 2008 dates.

Regarding the argument *defense counsel* did not say his client did not commit the crime, although the prosecutor was not commenting directly on *Igova's* failure to testify (and the reference was to defense counsel's opening statement—before any testimony had been presented), as the trial court later observed, the comments improperly suggested defense counsel was misleading the jury and had evidence of Igova's guilt which the jury did not have. "[W]hile comment on apparent inconsistencies in argument is permissible, defense counsel's personal belief in his client's guilt or innocence is no more relevant than the belief of the prosecutor. [Citation.] Inviting the jury to speculate about such belief is misconduct." (*People v. Bell* (1989) 49 Cal.3d 502, 537-538, citing *People v. Bain* (1971) 5 Cal.3d 839, 848-849; *People v. Herring, supra,* 20 Cal.App.4th at p. 1075.)

Moreover, although the trial court indicated the remarks were improper when defense counsel later filed a motion for mistrial, when defense counsel objected (that Igova had pled not guilty) during the prosecutor's closing argument, the trial court overruled the objections, telling the jury: "You're the judges of the facts, Ladies and Gentlemen. Statements of counsel are not evidence." The defense objections should have been sustained (and, had defense counsel properly requested one, a curative admonition should have been given). (*People v. Carter, supra,* 36 Cal.4th at p. 1205 [once objections to prosecution statements have been sustained, the defendant bears the burden of requesting a curative admonition from the court]; and see *People v. Woods* (2006) 146 Cal.App.4th 106, 118, citing *People v. Hughey* (1987) 194 Cal.App.3d 1383, 1396 ["Although the prejudicial effect of mild misconduct during argument may be dissipated by an instruction that the statements of the attorneys are not evidence [citation], an instruction is not a magical incantation that erases from jurors' minds a prosecutor's erroneous representations, especially when the trial court implicitly endorses the representations by overruling defense counsel's objections.].)

Of course, the prosecution bears the burden of proof, the defense has no obligation to present evidence (*People v. Woods, supra,* 146 Cal.App.4th at p. 113), and the

defendant has the constitutional right not to testify. By extension, the prosecutor's comments regarding defense *counsel's* failure to deny Igova committed the crime were improper and extended beyond mere criticism of a defense theory lacking in evidentiary support. (*People v. Huggins, supra,* 38 Cal.4th at p. 207; see also *People v. Arias, supra,* 13 Cal.4th at p. 162 ["Argument may not denigrate the integrity of opposing counsel . . . ."].) Nevertheless, when defense counsel objected, the jury was reminded Igova had pled not guilty, and on this record, we find no reason to conclude the jury failed to follow the court's instructions or misapplied the prosecutor's comments to Igova's prejudice. (*People v. Friend* (2009) 47 Cal.4th 1, 29.)

Next, Igova says the prosecutor's comments that "[t]he only person that has those answers is the shooter, and she's seated right over there" constituted *Griffin* error. Igova did not object to the prosecutor's comments at the time (near the end of the prosecutor's argument), but moved for a mistrial at the recess shortly thereafter. "I think the prosecutor commented on the defendant's failure to testify or to explain. On two occasions he indicated the only answers are known by the defendant who's sitting there. . . ." The trial court told the prosecutor (Kevin Halligan), "[Y]ou're on thin ice with that argument I will indicate to you. And I do note the objection. I did hear it referred to twice. I don't think it yet rises to the level of a comment on her right to remain silent. But I will indicate if I hearing it in closing, I may change my mind." When the prosecutor said he had only referred to " the shooter" and not "the defendant." The trial court reiterated, "I've heard the objection. I've commented to counsel. And, Mr. Halligan, I've noted that you're on thin ice with the argument." Defense counsel did not request an admonition. (See *People v. Carter, supra,* 36 Cal.4th at p. 1205.)

"It is a bedrock principle in our jurisprudence that one accused of a crime cannot be compelled to testify against oneself. (U.S. Const., Amend. V; Cal. Const., art. I, § 15.) In order that an accused not be penalized for his invocation of this fundamental right, the prosecutor may neither comment on a defendant's failure to testify nor urge the jury to

infer guilt from such silence." (*People v. Hardy* (1992) 2 Cal.4th 86, 153-154.) In other words, "Pursuant to *Griffin*, it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf." (*People v. Carter, supra,* 36 Cal.4th at p. 1266, internal quotations and citations omitted.) Similarly, "it is error for the prosecution to refer to the absence of evidence that only the defendant's testimony could provide." (*Ibid.*)

We agree with Igova that the prosecutor's comments that "[t]he only person that has those answers is the shooter, and she's seated right over there" ventured beyond commenting on the state of the evidence and instead implicated Igova's silence in violation of *Griffin.* (*People v. Carter, supra,* 36 Cal.4th at p. 1266.)

Nevertheless, while we agree the prosecutor's comments constituted misconduct, we conclude the error was harmless beyond a reasonable doubt in this case as the evidence of Igova's guilt was overwhelming. There were witnesses in the apartment just below Igova's who heard the circumstances surrounding the shooting, including the absence of any other sound or movement in the area, and the police response was almost immediate.[6] Yet, Igova did not call 911, could be heard walking around upstairs and then left through the back, with her passport, identification and cash. As the trial court observed, the murder weapon was Igova's registered firearm, it was found in a drawer containing her clothing, the ammunition used was found in the apartment, there was no evidence anyone else was in the apartment at the time the shots were fired and the words spoken and heard by witnesses indicated only two people were in the apartment and that

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6 Indeed, Estelle Rivera's 911 call effectively provided a compelling real-time narrative of what took place in Igova's apartment as the events unfolded through the arrival of the officers.

Igova was the shooter.[7] In addition, the trial court instructed the jury not to draw an inference from Igova's decision not to testify, and we presume the jurors understood and applied the instruction. (*People v. Brady, supra,* 50 Cal.4th at p. 566, fn. 9.) Consequently, although we agree with Igova that the prosecutor in this case committed *Griffin* error, given the strength of the evidence against her, the indirect nature of the prosecutor's comments and the court's reinstruction of the jury, it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even if the prosecutor had not made the comments at issue; therefore, no prejudicial error occurred. (*People v. Carter, supra,* 36 Cal.4th at p. 1267, citation and internal quotations omitted; *People v. Hardy, supra,* 2 Cal.4th at p. 154; *People v. Brady, supra,* 50 Cal.4th at p. 566; and see *People v. Vargas, supra,* 9 Cal.3d at p. 479, citations omitted ["The cases which have considered the prejudicial effect of errors similar to those committed in the instant case almost uniformly have found those errors to be harmless"].)[8]

Next, Igova says, the prosecutor improperly vouched for his case. In this regard, Igova cites the prosecutor's comments that she never called for help. "The fact where the defendant's going, everything's closed. It's all businesses. It's midnight." "Talking

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[7] Defense counsel told the jury in his opening statement that Igova told police, "My husband shot a woman," and was "really, really out of it." He also told the jury she was not running away as "there may have been businesses open. And if it gets to it, I think you will hear evidence that the diner, Rick's Diner was open there." The prosecutor's objections to defense counsel reading from the police report were overruled, but the trial court observed, assuming the statement is not going to be offered by the prosecution, "it's certainly something you might comment on," that "counsel had made reference to certain things that were not proven."

[8] As for the final comment Igova cites as *Griffin* error--that she and Lipson were the only two people in the apartment, Igova failed to object to this statement (*People v. Gamache, supra,* 48 Cal.4th at p. 371), and it was not impermissible for the prosecutor to comment on the state of the evidence. (*People v. Brady, supra,* 50 Cal.4th at p. 566.) As the jury was presented with no evidence of the presence of anyone other than Lipson and Igova in Igova's residence at the time of Lipson's murder, Igova has failed to establish prejudicial error. (*Ibid.*)

about Roni's Diner is open. If that diner was open, you would have heard some evidence on it. As you heard from Clark, nothing was open there in the back." Igova says there was no testimony that everything was closed and Clark Fogg testified he did not arrive until 2:40 a.m. and did not know if the diner was open. When defense counsel objected the argument assumed facts not in evidence, the trial court overruled the objection, but reminded the jury that argument was not evidence. The prosecutor commented, "He doesn't like it," and said, "She's going in a direction where nobody's at." Similarly, Igova objects to the prosecutor's reference to items being "released to the defense," and the defense "could have tested it if they wanted to." According to Igova, "No witness testified that the evidence had been released to the defense for testing." She says the prosecutor conveyed the clear message that the prosecutor had information the diner was not open and the untested evidence was of no forensic value.

Again, it was defense counsel who said in his opening statement that there would be evidence the diner was open at the time, but no such evidence was presented. It was not improper for the prosecutor to comment on the state of the evidence. (*People v. Brady*, *supra*, 50 Cal.4th at p. 566.) Contrary to Igova's representation of the record with respect to evidence turned over to the defense, when Detective John Czarnocki of the Beverly Hills Police Department was asked what happened to a "slightly damp" yellow towel seen in photographs, he testified it remained at the scene. The apartment was then returned to the owners of the apartment, the person who lived there and her representatives."

When defense expert John Jacobson was asked about wine glasses, the pizza box, bottles and "everything of that nature" he said he would have tested, he was asked, "all that was released back to the defense, correct?" He responded, "Correct." He further acknowledged he did not test any of these items. Again, it was not improper for the

prosecutor to comment on the state of the evidence.[9] (*People v. Brady, supra,* 50 Cal.4th at p. 566.)

Based on the same grounds—the prosecutor's argument that items were released to the defense and the defense could have tested these items if they wished and indicating Roni's Diner was open—Igova says the prosecutor impermissibly introduced extrinsic evidence into the jury's deliberations in violation of her Sixth Amendment rights to an impartial jury and to confront and cross-examine witnesses. As we have just explained, Igova's characterization of the record is simply inaccurate. Further, the prosecutor may comment on the state of the evidence, the jury was instructed that arguments were not evidence and they were the judges of the facts and in any event, Igova has failed to demonstrate any prejudice on this record. (*People v. Brady, supra,* 50 Cal.4th at p. 566.)

Igova says the prosecutor misstated the evidence regarding gunshot residue. Once again, Igova failed to object or request a jury admonition on this ground and therefore forfeited this claim of error. (*People v. Gamache, supra,* 48 Cal.4th at p. 371; *People v. Carter, supra,* 36 Cal.4th at 1205.) However, leaving to one side the issue of Igova's failure to object, we agree with Igova that the prosecutor misstated the evidence in this respect. (*People v. Bell, supra,* 49 Cal.3d at 539.)

It is true that the prosecutor may properly comment on the evidence, and "[w]hether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Farman* (2002) 28 Cal.4th 107, 169.) Here, however, the prosecutor misstated the evidence in arguing about the lead, barium and antimony found on Igova's hands: "[*W*]*hen a gun is fired, those particles are produced alone, and some of them actually form together. But it forms alone as well. She happens to have all three*." (Italics

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[9] Based on the property manager's testimony at Igova's first trial, after Lipson's murder, it appears Igova's father was given a key to her apartment, and the property inside was taken out by her family. Defense counsel did not object or seek to correct or clarify any purported misstatements in this respect at either the first or second trial.

added.) To the contrary, the prosecutor's own expert testified that when Igova's hands were swabbed four hours after Lipson's murder, she had traces of lead, antimony and barium—but no particles containing all three elements. Gunshot residue contains these three elements, but all three must be found in one particle to be considered positive for gunshot residue, and based on this analysis, there was no gunshot residue on Igova's hands. Given the amount of questioning devoted to confirming the state of the gunshot residue evidence and the unequivocal testimony that Igova had none on her hands, we find the prosecutor's argument to the contrary to be an egregious misstatement.

However, as disingenuous as we find the prosecutor's comments when his own expert testified that a positive gunshot residue result required all three components in one particle, the same extensive testimony that makes the prosecutor's remark disingenuous—emphasizing the distinction between individual particles of lead, barium and antimony on the one hand and particles of gunshot residue which are necessarily comprised of all three on the other—also confirms the absence of resulting prejudice. The jury was thoroughly informed of the distinction as well as the determination Igova did not have gunshot residue on her hands, and the trial court repeatedly advised that they were the judges of the facts and the statements of the attorneys were not evidence. Of particular significance is the fact the jury also heard considerable testimony about the fragility of gunshot residue to the extent that friction easily removes these particles; 90 percent of residue falls away within the first hour after shooting a gun; Igova's hands were not tested until four hours later; Lipson was shot from some distance; and the *absence* of gunshot residue did not rule out the possibility Igova had shot the gun used to kill Lipson. This is precisely the sort of misstatement an objection and jury admonition would have cured. (*People v. Carter, supra,* 36 Cal.4th at 1205.) In any event, given the overwhelming evidence of Igova's guilt, we conclude Igova was not prejudiced as a result. (*People v. Friend, supra,* 47 Cal.4th at p. 30.)

Contrary to Igova's next contention, the prosecutor did not improperly appeal to the jury to consider Lipson's last thoughts and feelings but rather pointed to the last words out of his mouth as evidence of who was shooting as he called Igova's name: "Nora, don't. Nora, stop." Based on the evidence, Lipson was shot in the stomach, but also received two gunshot wounds to the top of his head, consistent with Lipson being on his hands and knees as he was shot. Igova has shown no error.

Igova says the prosecutor mischaracterized the burden of proof and standard of reasonable doubt. Here again, Igova failed to object (and request a curative admonition) as required. (*People v. Carter, supra,* 36 Cal.4th at 1205.) Leaving to one side Igova's failure to object (*People v. Jasmin* (2008) 167 Cal.App.4th 98, 116 [defense counsel "could have easily objected and requested the court to reinforce the jury's understanding of the reasonable doubt standard and the prosecutor's burden of proof"], however, we agree that the prosecutor egregiously mischaracterized the definition of reasonable doubt in the following portion of closing argument: "*Reasonable doubt just means after looking at all the evidence, what's the reasonable interpretation? What is reasonable?* [¶] "If you look at the evidence*, it's clearly reasonable this defendant committed the murder. . . .*" (Italics added.) In context, the prosecutor was attempting to discredit the defense argument of "18 reasonable doubts" as unreasonable, but he misstated the law in doing so.[10] "Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law." (*People v. Bell, supra,* 49 Cal.3d at p. 538, citations and internal quotations omitted.)

Nevertheless, the jury was properly instructed on the definition of reasonable doubt and that the jury must follow the law as stated by the court and that the arguments of the attorneys were not evidence. More particularly, the jury was instructed "[i]f

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10 Our Supreme Court has "observe[d] that the term prosecutorial 'misconduct' is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable mind. A more apt description of the transgression is prosecutorial error." (*People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflict[ed]" with the court's instructions on the law, "you must follow" the court's instructions. "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.'" (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268, citation and further internal quotations omitted [addressing prosecutorial misconduct through improper reasonable doubt argument].) Accordingly, viewing the record as a whole, the jury was properly instructed and we find no error. (*Id.* at pp. 1268-1269.)

Citing *People v. Hill, supra,* 17 Cal.4th 800, 821, Igova argues defense counsel "should not be faulted for failing to continue to object to all of the error under the circumstances" because the "continual misconduct, coupled with the trial court's failure to rein in [the prosecutor's] excesses, created a trial atmosphere so poisonous that [defense counsel] was thrust upon the horns of a dilemma," continually objecting and provoking the court's wrath or forcing the defendant to suffer the prejudice of constant prosecutorial misconduct.

As stated in *People v. Dykes* (2009) 46 Cal.4th 731, 774-775, "Defendant's reliance upon *People v. Hill, supra,* 17 Cal.4th 800, is misplaced. Unlike that case, which we have characterized as representing an 'extreme' example of pervasive and corrosive prosecutorial misconduct that persisted throughout the trial (see *People v. Riel* (2000) 22 Cal.4th 1153, 1212 [96 Cal. Rptr. 2d 1, 998 P.2d 969]), the present case did not involve counsel experiencing—as did counsel in *Hill*—a 'constant barrage' of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to appropriate, well-founded objections. (See *People v. Hill*, *supra*, 17 Cal.4th at p. 821 [counsel risked 'repeatedly provoking the trial court's wrath, which took the form of

comments before the jury suggesting [counsel] was an obstructionist [who was] delaying the trial with "meritless" objections']."

Similarly, we reject Igova's contention this record supports the inference any objection would have been futile. (See *People v. Gamache, supra,* 48 Cal.4th at p. 371, citation omitted ["In those instances where Gamache concedes he failed to object, he argues his failure is excused because an objection would have been futile and an admonition would have failed to cure any harm. However, '[a] defendant claiming that one of these exceptions applies must find support for his or her claim in the record. [Citation.] The ritual incantation that an exception applies is not enough.'"].)

Here, for example, when defense counsel initially objected to the prosecutor's comments, although the trial court overruled the objections, the court cautioned the jury the arguments of counsel were not evidence and that the jurors were the judges of the facts. Then, when defense counsel voiced his *Griffin* error objection and requested a mistrial, the trial court did not dismiss the objection out of hand or otherwise show hostility to the defense. To the contrary, the trial court warned the prosecutor he was on "thin ice" and directed him not to continue with further argument along the same lines or risk changing the court's mind. Yet, despite the fact the trial court had recognized (rather than dismissed) defense counsel's concerns, defense counsel raised no objection to most of the prosecutor's subsequent argument—including comments Igova now claims as misconduct in this appeal. After examining the entire record, we conclude Igova has failed to demonstrate futility or error in this regard. (*People v. Gamache*, *supra*, 48 Cal.4th at p. 371.)

Finally, we reject Igova's claim of cumulative error as a result of prosecutorial misconduct. "For all the asserted instances of misconduct, whether forfeited or not, we conclude either that the instance was not misconduct or that any misconduct that occurred could not have contributed to the verdict and was harmless in light of the evidence of defendant's guilt." (*People v. Friend*, *supra,* 47 Cal.4th at p. 30; *People v. Carter*, *supra*,

36 Cal.4th at p. 1267 ["clear beyond a reasonable doubt that the jury would have returned a verdict of guilty" even if prosecutor had not committed misconduct]; *People v. Hardy, supra,* 2 Cal.4th at p. 154; *People v. Brady, supra,* 50 Cal.4th at p. 566; *People v. Bell, supra,* 49 Cal.3d at p. 542.) "Furthermore we conclude that none of the asserted instances of misconduct was of such severity, considered alone or together with the other asserted instances of misconduct, that it resulted in an unfair trial in violation of defendant's state and federal constitutional rights." (*People v. Friend, supra,* 47 Cal.4th at p. 30, citation omitted; *People v. Hardy, supra,* 2 Cal.4th at p. 154.)

As we have explained, the evidence of Igova's guilt was so overwhelming that the errors we have identified were necessarily harmless beyond a reasonable doubt. Nevertheless, leaving to one side defense counsel's failures to object, we reiterate that we find multiple instances of serious overreaching by the prosecutor in his closing argument, relating to the following: (1) defense counsel's failure to deny Igova's commission of the crime and statements constituting *Griffin* error; (2) overstatement of the gunshot residue evidence; (3) inappropriate disparagement of the defense expert (and by implication, defense counsel) by effectively stating the expert would commit perjury if paid enough to do so; and (4) mischaracterization of the reasonable doubt standard.

Although reversal is not warranted by the prosecutorial errors in this case, as the court in *People v. Herring, supra,* 20 Cal.App.4th 1066, emphasized, "Prosecutors must be aware that by engaging in improper prejudicial rhetoric they jeopardize what might otherwise be fairly won convictions. When . . . prosecutors trample on the rights of the accused and cause the need for a new trial, the law-abiding citizen has cause for outrage. Victims must then be subjected to the humiliation of testifying again. The taxpayer must bear the expense of a new trial. There is danger that the evidence may weaken with time, and a guilty person may escape punishment and put the public at new risk." (*Id.* at p. 1077 [prosecutorial misconduct required reversal].)

DISPOSITION

The judgment is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**