Filed 10/1/12 P. v. Zarate CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MANUEL ZARATE, Defendant and Appellant.	B233578 (Los Angeles County Super. Ct. No. TA108563)

APPEAL from a judgment of the Superior Court of Los Angeles County. Francis J. Hourigan, Judge. Affirmed.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

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

A jury convicted Manuel Zarate of one count of attempted willful, deliberate, premeditated murder and one count of shooting at an occupied dwelling. Zarate does not contest his conviction for shooting at an occupied building. He does contend, however, that he was denied a fair trial on the attempted murder charge by the court's restrictions on his psychiatrist's testimony on the issue of whether he formed the intent to kill and the court's refusal to continue the trial in light of the highly-publicized Arizona shopping mall shooting, which occurred during jury selection, or to allow counsel to question the potential jurors regarding that event. He also contends the prosecutor engaged in prejudicial misconduct in his closing argument to the jury. We find no merit in any of these arguments and affirm the judgment.

FACTS AND PROCEEDINGS BELOW

On the night of the shooting, September 20, 2009, Zarate stopped by the home of his neighbor, Theo Jensen. Jensen testified Zarate looked "like he was ready to cry." When Jensen told Zarate that he looked ready to cry, Zarate did not respond directly. Instead Zarate told Jensen that he wanted Jensen to go somewhere with him. When Jensen responded "I'm not going anywhere," Zarate said to Jensen, "I want you to help me get him out of the house." Jensen did not know who Zarate was referring to. Jensen asked Zarate, "What are you gonna do, beat him up?" When Zarate did not respond, Jensen told Zarate: "Just let it go, man." Zarate left without saying more.

Approximately two hours later, Zarate went to the home of another friend, Eddy Fraga. According to Fraga, he and Zarate were "'great friends.'" "We did everything two good friends would do together," he testified, including going fishing, working on Fraga's boat, having dinners and barbeques and sitting by the fire together. They often drank together and occasionally did drugs together—marijuana and methamphetamine. Fraga attended Zarate's birthday party a few months earlier. He saw Zarate using methamphetamine at the party.

When Zarate arrived at Fraga's home the two men and Fraga's wife talked for a few minutes outside Fraga's front door. After Fraga's wife went inside the house,

Zarate said to Fraga: "Oh, dude, come here. I've got something to show you" and the two men walked down Fraga's driveway to where Zarate's motorcycle was parked at the curb. Nothing in Zarate's behavior made Fraga think anything was wrong. As Fraga stood next to the motorcycle, Zarate reached into one of the saddlebags, pulled out a 12-gauge sawed-off shotgun and held it six to eight inches from Fraga's face. Zarate pulled the trigger but the gun did not fire. Fraga assumed the gun wasn't loaded so he turned and walked away. After he walked approximately 15 feet he heard the sound of the gun being recocked and a "split second" after that the gun went off and the shot struck Fraga on his hand. Fraga ran inside his house and shut the front door. Zarate fired another blast striking the door and then rode away on his motorcycle.

Fraga testified that prior to the shooting "absolutely nothing had occurred" between him and Zarate "by way of a fight, an argument, [or] a dispute" that would have explained Zarate's behavior. He also stated at trial that at the time of the shooting Zarate did not appear to be sweating or "high on drugs." Fraga said he did not recall telling the sheriff's deputies who interviewed him shortly after the shooting that since Zarate's divorce he had been smoking methamphetamine or that Zarate was starting to hear and see things that were not there. He testified he "might have said" that just before the shooting Zarate had a look of "extreme anger" and he believed that "the Devil had taken over [Zarate's] body[.]"

Sheriff's deputies testified that when they interviewed Fraga shortly after the shooting he informed them that "since Zarate was divorced, he had been . . . smoking methamphetamines and he began to hear things and see things that weren't really there;" that at the time of the shooting "Zarate was high on methamphetamine, sweating, [and] extremely nervous." Fraga also told the deputies that "he believed because Mr. Zarate was using drugs, coupled with the fact he'd gone through a bad divorce, lost his job, and was losing his house, he must have just snapped[.]"

After he shot Fraga, Zarate went to the home of Ruben Torrez and asked Torrez for permission to leave his motorcycle there. Torrez consented. At trial Torrez testified

that Zarate was not acting the way he usually did: "[H]e is usually a talkative person, jokes around a lot, at that wasn't him that day." Torrez described Zarate that night as "kind of quiet, not really talkative, no eye contact, stuff like that" and "there in body, but just not there in mind[.]" He did not respond to Torrez's questions and "seemed distracted." In Torrez's opinion Zarate was "under the influence of drugs" that night.

Zarate's younger brother, Henry, testified that in the course of his employment he received training in detecting whether persons were using illegal substances. Based on this training he concluded that on two of the last three times he had seen his brother, his brother was under the influence of drugs. Henry also testified that at Zarate's birthday party: "He looked like he had been drinking. . . . [H]e just grabbed a couple of beers, went to the back of the garage, just sat there by himself looking very depressed and unattached. . . . [T]here was a house full of people and he was off in the back all by himself drinking." In Henry's opinion Zarate was not acting the way he normally did when he wasn't drinking or using drugs.

Jackie Zarate, defendant's sister, testified that prior to the shooting she saw her brother two to three times a week. She observed signs that Zarate was using drugs. She also noted that he had become "very depressed [and] sad." Jackie attributed her brother's depression to a series of incidents including his divorce, his car being stolen, losing his job and ending up losing his house after "trying really hard to keep [it]."

Zarate's daughter, Brittany, testified that one or two days before the shooting her father came to the store where she worked. He appeared to be under the influence of drugs. He gave Brittany a hug and then "just stayed there" in the store while she waited on customers. Zarate "didn't look like himself. . . . He just looked very sad. He kept looking down. He looked like a ghost to me, like that wasn't my dad, like I've never seen him like that before and it was breaking my heart to see him like that."

Dr. Haig Kojian, a forensic psychologist, testified for the defense. He stated that based on interviews with Zarate and letters he received from Zarate's brother, sister and daughter, it appeared that Zarate had been using drugs and alcohol since he was 12 or

13 years of age and that at the time of the shooting, "drugs were a significant problem." It also appeared from his interview with Zarate that Zarate had been suffering from depression "just about his entire life." Zarate and his family reported that Zarate had been experiencing what Kojian described as four "psychosocial stressors" prior to the shooting:[1] the breakup of his marriage and attendant quarrels over spousal and child support; financial struggles resulting from being laid off from work; a foreclosure on his house that he had spent a great deal of time and money improving; and the theft of his truck. Dr. Kojian testified that losing the truck was "like the straw that broke the camel's back[.] It just seemed to, in essence, throw him off kilter." The Rorschach test that Kojian administered showed Zarate was deficient in his ability to cope with stressors.

Dr. Kojian concluded from interviewing and testing Zarate and reading reports from his relatives that Zarate suffered from hallucinations, paranoia, extreme sweating and nervousness and that it was "a reasonable possibility" that the combination of those mental disturbances could "affect a person's ability to form the specific intent to kill." He added that it was possible that the use of methamphetamine could also affect a person's ability to form a specific intent to kill.

The jury found Zarate guilty of one count of attempted murder and one count of shooting at an inhabited dwelling. As to the attempted murder charge the jury found true the gun use allegations and that the offense was willful, deliberate and premeditated. The jury found that in both offenses, Zarate personally inflicted great bodily injury on Eddy Fraga. The court sentenced Zarate to 25 years to life for the attempted murder and imposed and stayed sentencing on the enhancements and the punishment for shooting at an occupied dwelling.

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[1] Dr. Kojian testified that a "psychosocial stressor" is "any untoward consequence or any untoward occasion in the person's life that causes them to feel stressed or upset."

DISCUSSION

I. THE COURT DID NOT ERR IN RESTRICTING DR. KOJIAN'S TESTIMONY ABOUT ZARATE'SMENTAL STATE

Under Penal Code sections 28 and 29 expert opinion is admissible on the issue of whether the defendant suffered from a mental disorder at the time of the alleged offense and how that disorder affected the defendant's ability at the time of the offense to form the requisite mental state for the crime charged (e.g. intent, premeditation, deliberation). The expert cannot, however, testify "as to whether the defendant had or did not have the required mental states . . . for the crimes charged." That question, "shall be decided by the trier of fact." (*People v. Coddington* (2000) 23 Cal.4th 529, 582-583; *People v. Cortes* (2011) 192 Cal.App.4th 873, 908.)[2]

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[2] Section 28: "(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

"(b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.

"(c) This section shall not be applicable to an insanity hearing pursuant to Section 1026 or 1429.5.

"(d) Nothing in this section shall limit a court's discretion, pursuant to the Evidence Code, to exclude psychiatric or psychological evidence on whether the accused had a mental disease, mental defect, or mental disorder at the time of the alleged offense."

Section 29: "In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact."

Before Dr. Kojian testified the court held a hearing to determine the permissible scope of his testimony.

The court concluded that "Dr. Kojian can testify as to his opinion as to how a person's use of methamphetamine could affect . . . in combination with the other stressors that he pointed out in his examination . . . a person's ability to form the intent to kill." In addition, the court ruled that "Dr. Kojian, as an expert psychologist, can testify to factors that in his opinion affect the ability of a defendant, Mr. Zarate, to form certain intents." But, over Zarate's objection, the court declared that Kojian could not testify that in forming his opinions about Zarate's mental disorders he considered Fraga's statements to sheriff's deputies in which Fraga described Zarate's physical and mental conditions at the time of the shooting. This prohibited evidence included Fraga's statements to the officers that Zarate "began to hear things and see things that weren't really there," his description of Zarate at the time of the shooting as being high on methamphetamine, sweating, nervous and paranoid and that he "didn't look right," had a look of extreme anger, and appeared as though "the Devil had taken over his body."

Finally, the court ruled that Kojian could describe Zarate's demeanor during his interview and repeat what Zarate told him about his "growing up and his use of drugs[.]" Kojian could also relate what Zarate told him about his "stressors"—his broken marriage, the loss of his job, the foreclosure on his home and the theft of his car. Over Zarate's objection, however, the court prohibited Kojian from testifying Zarate told him that on the night of the shooting he believed "that his son may have been kidnapped and held for ransom;" that he was not "thinking straight at the time;" that he "believed the alleged victim [Fraga] was coming after him with a gun;" and that belief was what caused him to arm himself.

The court reasoned that because Fraga testified he did not make or could not remember making certain statements to the sheriff's deputies describing Zarate's physical and mental conditions at the time of the shooting the deputies could testify to those statements under the hearsay exception for prior inconsistent statements

(Evid. Code, § 1235) but Kojian could not testify that he relied on those same statements in forming his opinions about Zarate's mental condition because the statements were "unreliable hearsay." In other words, Fraga's statements were "not admissible to support any opinions rendered by [Kojian], but . . . admissible evidence for the jury to determine whether Mr. Zarate formed the intent [to commit murder]."

Zarate argues that the court erred in ruling Kojian could not testify that in forming his opinion of Zarate's mental condition he relied on Fraga's statements as reported by the deputies. We agree that the court erred but find the error harmless.

An expert witness is permitted to state the reasons for an opinion and the matter on which the opinion is based. (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) The trial court, of course, has discretion to decide how far it will allow the expert to go in describing the basis for an opinion. (*People v. Gardeley* (1997) 14 Cal.4th 605, 618-619.) This discretion is usually exercised to limit the backdoor introduction of inadmissible hearsay. (*Id*. at p. 619.) In this case, however, Kojian was prohibited from testifying about matters that were already in evidence as *admissible* hearsay under the exception for prior inconsistent statements. As to reliability, prior inconsistent statements are admissible not just as impeachment of trial testimony but as substantive evidence of their truth if the requirements of Evidence Code section 770 are met, as they were here.[3] Indeed, our Supreme Court has pointed out that "'[i]n many cases the inconsistent statement is more likely to be true than the testimony of the witness at trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation.'" (*People v. Ochoa* (2001) 26 Cal.4th 398, 445 [citation omitted].) The Attorney General argues Fraga's statements were too "vague" to form a reliable basis for an expert opinion as to Zarate's mental state but this argument goes to the weight of the evidence, not its admissibility. Presumably

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[3] Those requirements are that "(a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or (b) The witness has not been excused from giving further testimony in the action." (Evid. Code, § 770.)

under Evidence Code section 352 a court could exclude otherwise admissible testimony about the matter on which the expert opinion was based (see *People v. Coleman* (1985) 38 Cal.3d 69, 92) but the Attorney General does not argue that theory and we do not believe Kojian's testimony by its nature would necessitate an "undue consumption of time," create a "substantial danger of undue prejudice" or risk "confusing the issues" or "misleading the jury." (Evid. Code, § 352.)

The court's error was harmless, however, because the jury did hear Fraga's description of Zarate's condition just before the crime and could consider it as supporting Kojian's opinion.

Zarate also contends the court erred in prohibiting Kojian from testifying that in developing his opinion of Zarate's mental state he relied on Zarate's statements that on the night of the shooting he believed that his son may have been kidnapped and held for ransom, that he was not "thinking straight at the time" and that be believed Fraga "was coming after him with a gun." This argument fails because Zarate did not make an offer of proof Kojian would have testified that these statements played a role in his evaluation of Zarate's mental state. (*People v. Demond* (1976) 59 Cal.App.3d 574, 588 [failure to make an offer of proof regarding the materiality of the excluded evidence forecloses challenge on appeal]; and see Evidence Code section 354 [verdict will not be set aside for erroneous exclusion of evidence unless relevance of the excluded evidence was made known to the court].)

In any event, the exclusion of Kojian's proffered testimony and Zarate's statements to Kojian did not prejudice Zarate's defense because the court permitted Kojian to testify that he concluded from interviewing and testing Zarate and reading reports from his relatives that Zarate suffered from hallucinations, paranoia, extreme sweating and nervousness and that it was "a reasonable possibility" that the combination of those mental disturbances could "affect a person's ability to form the specific intent to kill." Moreover, as we noted above, the jury did hear Fraga's description of Zarate's condition just before the crime and could consider it as supporting Kojian's opinion.

II. THE COURT DID NOT ERR IN REFUSING TO CONTINUE THE TRIAL OR ALTER THE VOIR DIRE FOLLOWING NEWS OF THE SHOOTING RAMPAGE IN ARIZONA.

While the jury selection phase of this case was in recess for the weekend, a gunman during a shooting rampage in Tucson Arizona killed six people including a federal judge and a nine-year-old child and seriously wounded a member of Congress. News of the event saturated the media. On the following Monday, Zarate moved to continue the trial "to a future date that is not so close in time with the horrible event in Tucson Arizona." In the alternative Zarate moved the court to question the prospective jurors as to "whether that recent event has caused any prospective juror to emotionalize to the extent that they cannot be a fair and impartial juror in the Zarate matter[.]" The trial court denied both motions.

Zarate contends there is a "reasonable likelihood" that he did not receive a fair trial due to the court's failure to protect him from the impact of the sensational publicity surrounding the Arizona shooting.

Leaving aside the lack of precedent for either of Zarate's motions,[4] there are no similarities between Zarate's attempted murder of his one-time friend, Fraga, and Jared Loughner's murder and attempted murder of 19 strangers for what appeared to be political motives. (See 2011 Tucson Shooting, Wikipedia, http://en.wikipedia.org/wiki/2011_Tucson_shooting **(**last viewed 9/27/12**.)** Finally, if we accepted Zarate's argument few homicide cases would ever go to trial since mass murder is not, unfortunately, an unusual occurrence in the United States in the 21st Century. While this appeal was pending gunmen killed and wounded moviegoers in Colorado, worshipers at a Sikh Temple in Wisconsin and patrons of a hair salon in Huntington Beach.

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[4] All the cases Zarate cites regarding pretrial publicity involved pretrial publicity about the defendant's *own* case, none involved publicity about an unrelated crime that occurred nearly 500 miles away in another state.

III. ZARATE'S FAILURE TO OBJECT TO THE PROSECUTOR'S ALLEGED MISCONDUCT FORFEITED THE ISSUE ON APPEAL AND IN ANY EVENT WE FIND NO PREJUDICIAL ERROR

On appeal Zarate claims for the first time that the prosecutor engaged in multiple instances of misconduct during closing argument. He also acknowledges that in most cases such a claim is preserved for appeal only if the defendant objects and requests an admonition. (*People v. Blacksher* (2011) 52 Cal.4th 769, 829.) Zarate does not argue that this case should be an exception to the rule. Accordingly, because Zarate did not timely object and request an admonition and has not shown that an admonition would have failed to cure the alleged harm or that the objection would have been futile, he forfeited his claim of prosecutorial misconduct.

Even if we were to consider Zarate's objection on the merits, we would find no prejudicial misconduct.

A. Zarate's Claim That The Prosecutor Misstated The Evidence And Argued Facts Not In Evidence

1. Attempt to recruit Jensen as an accomplice

Zarate's friend Jensen testified that earlier in the evening of the shooting Zarate came to Jensen's home and asked Jensen to help "get him out of the house." Jensen did not know who Zarate wanted to get "out of the house" or what house Zarate was referring to. Jensen asked Zarate: "What are you gonna do, beat him up?" Zarate argues nothing in Jensen's testimony suggested that he tried to persuade Jensen to be his accomplice in a crime; in fact, it was Jensen, not Zarate, who mentioned beating someone up. The prosecutor, however, has wide latitude to argue reasonable inferences from the evidence. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) The conversation between Zarate and Jensen reasonably permits an inference that Zarate was asking Jensen to help him lure Fraga out of his house so that he could shoot him outdoors and not risk harming Fraga's wife; Zarate did not go inside Fraga's house but talked with Fraga and his wife

on the front porch and then Zarate had Fraga accompany him out to the sidewalk where he first attempted to shoot him.

2. Zarate's jealousy of Fraga as a motive for attempted murder

Although admitting "the evidence is very thin," the prosecutor suggested to the jury that Zarate may have wanted to kill Fraga out of jealousy: Fraga had a house, a wife who waited on him and his friends, and two boats; Zarate's house had recently been foreclosed, he was going through a "bad divorce," and his car had been stolen. We agree that it takes a considerable stretch to make the evidence support a motive of jealousy but given the prosecutor's prefatory disclaimer, the argument was not prejudicial. Moreover, it is not a ground for reversal that the prosecutor's reasoning is faulty or the inferences illogical since these are matters for the jury. (*People v. Lewis* (1990) 50 Cal.3d 262, 266.)

3. No one saw Zarate "high"

In rebutting Zarate's argument that his use of methamphetamine prevented him from forming the specific intent to kill Fraga, the prosecutor observed: "[W]hat is absent from the record, ladies and gentlemen, [is that] nobody saw him high." The prosecutor's statement did not accurately portray the evidence. Jensen, who saw Zarate shortly before the shooting, testified that Zarate was acting abnormally but did not testify that he thought Zarate was "high." On the other hand, Torrez, who saw Zarate shortly after the shooting, testified that in his opinion Zarate was "under the influence of drugs" that night. Fraga gave conflicting statements regarding Zarate's drug intoxication at the time of the shooting. In court Fraga testified that Zarate did not "appear to be high on drugs" but at the hospital shortly after the shooting he told Detective Starkey that Zarate "was high on methamphetamine[.]" Although the prosecutor misstated the evidence, we conclude that the error was harmless. The court instructed the jury that counsel's statements do not constitute evidence and that it is up to the jurors to decide the case "based only on the evidence that has been presented . . . in this trial." Under the circumstances it is not

reasonably probable that absent the prosecutor's error Zarate would have obtained a more favorable result. (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

4. Zarate introduced no evidence from a drug expert

In an argument covering the evidence of the shooting and reasons why the jury should credit Fraga's trial testimony over his postshooting statements to the sheriff's deputies, the prosecutor remarked as an aside: "I think [defense counsel] would like to have Mr. Fraga qualified as . . . a narcotics expert because he certainly didn't bring one in." Zarate argues that the prosecutor's comment misstated the evidence and misled the jury because before Kojian testified the court held a hearing under Evidence Code section 402 to determine his qualification as an expert on use and abuse of controlled substances and methamphetamine in particular. Kojian detailed his experience and the prosecutor stated on the record that he was satisfied as to Kojian's expertise in the field. It is not clear what the prosecutor meant by his remark about Zarate not bringing in a drug expert and wanting to use Fraga as such an expert. Nevertheless, the jury heard Kojian testify to his extensive experience in evaluating criminal offenders with substance abuse issues and, as we noted above, they are the sole determiners of the facts in the case.

5. Zarate was estranged from his family

Zarate argues the prosecutor committed misconduct in telling the jury that Zarate's family had been "estranged" from him for the months preceding the shooting. The prosecutor's remark, taken in context, was a retort to Zarate's argument that he was high on methamphetamine when he shot Fraga. The prosecutor's point was that Zarate's family would not know whether he habitually got high on methamphetamine because they did not see him often. Although the prosecutor chose the wrong word to convey his point,[5] his isolated statement was at most harmless hyperbole. (Cf. *People v. Sandoval* (1992) 4 Cal.4th 155, 184.)

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[5] The word estrange connotes a mutual dislike where there previously had been love and affection. (Webster's Collegiate Dictionary (10th ed. 1995) p. 397, col. 2.) There

B. Zarate's Claim That The Prosecutor Shifted The Burden Of Proof On Intent

Zarate argues that the prosecutor attempted to shift the burden to him to prove *lack* of intent to commit murder. He cites two statements by the prosecutor.

In the first statement, the prosecutor responded to Zarate's criticism of the sheriff's department for not videotaping their interviews with witnesses or giving them drug tests. The prosecutor stated: "What did Kojian [do]? Didn't talk to anybody except for the family members and the defendant. Did you subpoena work records? No. Did you interview anybody outside the family that he knew? No. Would that have been helpful? It could have been. Oh, so we're going to hold the police to the same standard and not Dr. Kojian. Right. But you're supposed [to] take what he has to say.

In the second statement the prosecutor posed a rhetorical question to the jurors: "What's the evidence that he was so high he didn't know what he was doing? You don't have any."

Neither statement constituted an attempt by the prosecutor to require Zarate to prove he lacked the intent to commit murder. Under the defense theory of the case, Zarate was prevented by drug intoxication and mental disorders from forming the intent to commit murder. Therefore, it was incumbent on Zarate to produce enough evidence in support of that theory to raise a reasonable doubt whether he formed the requisite intent. Viewed in this context the prosecutor's statements were "nothing more than proper fair comment on the state of the evidence." (*People v. Hughes* (2002) 27 Cal.4th 287, 373.)

C. Zarate's Claim That The Prosecutor Disparaged His Attorney

The prosecutor referred to defense counsel as "crafty," and a "magician" and, in Zarate's view, suggested that his attorney was trying to deceive or confuse the jury by blurring the distinction between doubt about a witness's credibility and reasonable doubt about an element of the crime. A prosecutor is not bound by "'Chesterfieldian

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was no evidence that Zarate was estranged from his family. His sister and daughter testified otherwise.

politeness'" in arguing the People's case. (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) And, although ad hominum attacks are frowned on by most jurists, our Supreme Court has been reticent to label such attacks misconduct. In *People v. Gionis* (1995) 9 Cal.4th 1196, 1216, for example, the court held it was not misconduct to accuse defense counsel of "arguing out of both sides of his mouth." And, in *People v. Bell* (1989) 49 Cal.3d 502, 538, it was not misconduct to accuse defense counsel of deliberately trying to confuse the jurors and "'to throw sand in [their] eyes.'" The prosecutor's remarks in this case were no worse than the ones the court found not to be improper in *Gionis* and *Bell.*

D. Zarate's Claim That The Prosecutor Vouched For His Witnesses

The prosecutor told the jury: "I believe that the evidence that you had is credible." Later he told the jury that prior to the trial "I didn't show [Fraga]" the sheriff's reports containing Fraga's statements "because that's not what we do. We get live testimony. We need credible, honest testimony."

It is misconduct for a prosecutor to """"place the prestige of [his] office behind the testimony of a witness by offering the impression that [he] has taken steps to assure a witness's truthfulness at trial."""" (*People v. Ward* (2005) 36 Cal.4th 186, 215 [brackets in original].) The prosecutor's first remark, that the prosecution's evidence "is credible," was not misconduct because the prosecutor was not attesting to a particular witness's credibility but commenting on the relative strength of the prosecution's evidence. (Cf. *People v Ward*, *supra*, 36 Cal.4th at p. 216.) The second remark is problematic. It could be interpreted as "offering the impression" that the prosecutor took steps "to assure [Fraga's] truthfulness at trial" by not showing him the sheriff's reports. (*Id*. at p. 215) Or, the second remark could be viewed as nothing more than a comment on the strength of Fraga's testimony at trial as opposed to the statements he made while suffering the trauma of the shooting. (*Id*. at p. 216.) Under either interpretation,

however, we do not believe that the prosecutor's second remark gave the People an unfair advantage on the issue of Fraga's credibility.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.