Filed 10/17/17 P. v. Lopez CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CELESTINO GERMAN LOPEZ, Defendant and Appellant.	B271237 Los Angeles County Super. Ct. No. BA440335-01

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael D. Abzug, Judge. Affirmed with directions.

Valarie Mark Kalb, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and J. Michael Lehmann, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant Celestino German Lopez of simple assault and assault with force likely to produce great bodily injury, and found true the allegation that defendant personally inflicted great bodily injury on the victim. On appeal, defendant attacks the conviction on numerous grounds. Primarily, he contends the great bodily injury allegation is unsupported by substantial evidence. We reject this argument because the victim's injuries—two stab wounds which required 15 stitches to repair, as well as bruising sustained during a prolonged beating—support the jury's finding. Defendant also asserts the trial court erred by allowing an eyewitness to the altercation to testify to hearsay statements made by his companion and then failing to adequately instruct the jury to disregard the offending statements. We conclude the court's admonishment to the jury sufficiently cured any error and that, in any event, any error was not prejudicial. We also reject defendant's arguments that the prosecutor committed misconduct during closing argument, that his counsel rendered ineffective assistance of counsel, and that cumulative error infected the trial resulting in a denial of due process. Accordingly, we affirm the judgment of conviction. We also direct the court to correct the abstract of judgment to accurately reflect the sentence properly imposed in the first instance.

PROCEDURAL BACKGROUND

By amended information, the people charged defendant with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1),

count 1),[1] a serious felony (§ 1192.7, subd. (c)), and assault with force likely to produce great bodily injury (§ 254, subd. (a)(4), count 2). As to both counts, the People alleged defendant personally inflicted great bodily injury on the victim within the meaning of section 12022.7, subdivision (a), which enhancement caused count 2 to become a serious felony (§ 1192.7, subd. (c)(8)). Defendant pled not guilty and denied the allegation.

A jury found defendant not guilty on count 1 as charged and convicted defendant of the lesser included offense of simple assault (§ 240). On count 2, the jury convicted defendant as charged and found the great bodily injury allegation true.

The court selected count 2 (§ 254, subd. (a)(4)) as the base term and imposed the middle term of three years to be served in state prison. With respect to the great bodily injury enhancement, the court struck the punishment only (§ 1385, subd. (c)) and awarded custody credit of 173 days time served and 26 days worktime credit. (See *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1444–1445 [where punishment stricken but enhancement conviction remains, a defendant convicted of a serious felony (§ 667.5, subd. (c)) may not accrue more than 15 percent of worktime credit under § 2933.1, subd. (a)].) As to count 1, the court imposed a 180-day sentence to be served in county jail, which sentence the court stayed under section 654. Defendant filed a timely notice of appeal.

FACTUAL BACKGROUND

At approximately 12:30 a.m. on October 2, 2015, defendant was walking along Normandie Avenue. He saw R.L.P. (victim),

---

[1] All undesignated statutory references are to the Penal Code.

who was also walking along Normandie Avenue. Defendant and the victim knew each other; they grew up in the same town in Mexico and defendant suspected the victim was having an affair with his wife. As defendant approached the victim, defendant said to him that he wanted to talk. However, because defendant's body language was aggressive and suggested he actually wanted to fight, the victim turned away from defendant and began to run. The victim saw defendant holding a bladed weapon. Then, as he ran, the victim felt a blow and a prick on the back of his left shoulder. He sustained a significant puncture wound to his shoulder, which required eight stitches to close.

The victim continued to run from defendant, into the street but tripped and fell to the ground. Defendant jumped on top of the victim and attacked him, throwing punches and jabbing at him. The victim put his arms in front of his face and chest to protect himself and sustained a second stab wound—which was approximately two inches long and required seven stitches to close—to his right forearm. Defendant paused, allowing the victim to stand and run further down Normandie. After the victim fell again, defendant resumed his attack.

At that point, a car approached and stopped a few feet from the fight. The driver of the car saw that the victim's shirt was bloody and thought the victim was "fighting for his life." The driver began yelling at the two men, and while defendant was momentarily distracted, the victim escaped and ran to his apartment.

After he was safely inside his apartment, the victim called 9-1-1 and reported that he had been stabbed. Paramedics transported the victim to a hospital where he was treated for his injuries. In addition to the wounds on his shoulder and forearm,

the victim also sustained bruising on his left leg. As of the time of trial, the victim was experiencing a loss of strength in his arm as well as some restriction in his range of motion in the affected arm, hand, and fingers.

CONTENTIONS

Defendant makes four assignments of error on appeal: (1) no substantial evidence supports the jury's true finding that he inflicted great bodily injury with respect to the conduct underlying count 2; (2) the court erred by admitting hearsay testimony and its attempt to cure the error was inadequate; (3) the prosecutor committed misconduct by relying on facts not in evidence during closing argument; and (4) the prosecutor misstated the People's burden of proof during closing argument and defense counsel's failure to object constituted ineffective assistance of counsel. Defendant also argues that the cumulative effect of the foregoing errors denied him a fair trial. We consider each contention in turn.

DISCUSSION

1. Substantial evidence supports the jury's true finding on the great bodily injury allegation.

As noted, the jury convicted defendant on count 2 of assault with force likely to inflict great bodily injury (§ 245, subd. (a)(4)) and found true the additional allegation that defendant personally inflicted great bodily injury on the victim (§ 12022.7, subd. (a)). Defendant contends no substantial evidence supports the jury's true finding on the allegation. We disagree.

1.1. Standard of Review

In reviewing a substantial evidence claim, our role on appeal is a limited one. " 'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]

" 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]' " (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, quoting *People v. Jones* (1990) 51 Cal.3d 294, 314; *People v. Smith* (2005) 37 Cal.4th 733, 738–739.)

1.2. Analysis

Great bodily injury is defined in section 12022.7, subdivision (f), as "significant or substantial physical injury." As the court instructed the jury, "it is injury that is greater than minor or moderate harm." (CALCRIM No. 3160.) "Proof that a victim's bodily injury is 'great' … is commonly established by evidence of the severity of the victim's physical injury, the resulting pain, or the medical care required to treat or repair the

injury." (*People v. Cross* (2008) 45 Cal.4th 58, 66 (*Cross*); *People v. Woods* (2015) 241 Cal.App.4th 461, 486.) "[T]o be significant or substantial the injury need not be so grave as to cause the victim ' "permanent," "prolonged," or "protracted" ' bodily damage. [Citation.]" (*Cross, supra*, at p. 64.) " ' "A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description." ' [Citations.] Where to draw that line is for the jury to decide." (*Ibid*.)

Here, the People presented evidence of the victim's injuries from several sources. The jury saw photographs of the wounds on the victim's back and forearm which show that each of the wounds was several inches in length and together required 15 sutures. Further, the jury heard from an eyewitness to the fight who testified that, at the time of the altercation, both the front and the back of the victim's shirt and sweater were covered in blood. Photographs of the victim's clothing taken after the altercation confirm that significant bleeding occurred as a result of the victim's injuries. The victim also showed the jury the scar from the stab wound on his forearm and described the ongoing pain and limited range of motion resulting from his injuries. Finally, the jury saw photographs of bruising along the victim's left leg and around his knee which occurred during the fight, although the victim stated he was unsure whether defendant inflicted those injuries or they were sustained during one of the falls.

There is no precise litmus test to determine whether an injury rises to the level of a great bodily injury. However, several cases have upheld a finding of great bodily injury where, as here, the victim sustains a combination of lacerations, abrasions,

contusions and bruising. (See, e.g., *People v. Escobar* (1992) 3 Cal.4th 740 [bruises and abrasions on victim's legs, arms, elbows, neck injury, and severe vaginal bruising sufficient].) Other "[e]xamples of injuries sufficient to constitute 'great bodily injury' include a broken jaw (*People v. Johnson* (1980) 104 Cal.App.3d 598), a broken hand (*People v. Kent* (1979) 96 Cal.App.3d 130), or swollen and discolored portions of the body causing pain when lightly touched, injuries sustained when a child was 'caned' by her mother (*People v. Jaramillo* [1983] 98 Cal.App.3d 830)." (*People v. Sanchez* (1982) 131 Cal.App.3d 718, 733.) We conclude substantial evidence supports the jury's true finding in this case.

Defendant contends we cannot consider the evidence of the victim's stab wounds because, in his view, the People tried the case on the theory that the stab wounds formed the basis of count 1 (assault with a deadly weapon) and count 2 (assault with force likely to cause great bodily injury) related only to the latter stages of the altercation which took place in the street. According to defendant, because the prosecutor elected these theories, we must limit our review of the evidence relating to the beating. Further, defendant urges, the only evidence of injury not related to the stab wounds—bruising on defendant's leg due to an unknown cause—is insufficient as a matter of law to support a great bodily injury finding. We agree, in principle, that the bruises suffered by the victim here, standing alone, would be insufficient to support the jury's finding of great bodily injury. Nevertheless, we reject defendant's argument because the foundation of the argument—that the People made an election which circumscribes our substantial evidence review—is both legally and factually unsound.

Defendant appears to invoke the well-established principle "that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) " 'The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done something sufficient to convict on one count.' " (*Ibid.*) By requiring either that the People present a single course of conduct to support a conviction, or that the jurors agree on which course of conduct justifies the conviction, the defendant's right to a unanimous verdict is preserved. (*People v. Collins* (1976) 17 Cal.3d 687, 693; Cal. Const., art. I, § 16.)

The recent case of *People v. Brown* (2017) 11 Cal.App.5th 332, cited by defendant, took the principle one step further, holding that where the prosecutor elects a specific theory of guilt, thereby avoiding the need for a unanimity instruction, a subsequent review of the evidence supporting the conviction must be limited to that evidence which supports the People's chosen theory. Defendant attempts to apply that principle here, arguing the People made an election in this case and our review of the evidence is therefore constrained by the People's election.

The fundamental problem with defendant's argument is that the People did not make an election in this case and, in any event, the court instructed the jury it must unanimously agree on which course of conduct defendant committed with regard to each of the charged counts.

The People charged defendant with two counts: assault with a deadly weapon (a knife) and assault with force likely to produce great bodily injury. The People argued that the jury could convict defendant on count 1 based upon the wounds inflicted on the victim's back and forearm, and could convict on count 2 based upon the beating which took place in the street. But that argument was not a formal election made in order to avoid a unanimity instruction and the jury was not limited by the argument presented by the People. Further, the evidence was conflicting as to whether defendant had a knife, specifically. The victim said he saw a "bladed weapon" but defendant denied having a knife and the eyewitness did not see a knife. And the victim's wounds could have been inflicted by any number of sharp objects.

In any event, the defense did not request an election and, most importantly, the court gave a unanimity instruction in the case: "The People have presented evidence of more than one act to prove that the defendant committed these offenses. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act he committed. The same individual act can support a conviction for only one of these two counts." When the People present evidence of multiple acts, any one of which could form the basis of a single conviction, they may either elect one theory of guilt or agree that the court should give a unanimity instruction. It must follow, therefore, that where a unanimity instruction is given—and the defendant's right to a unanimous jury verdict is preserved—the concept of prosecutorial election and circumscribed review of the evidence on appeal falls by the wayside.

2. Any error in initially admitting hearsay evidence was corrected by the court.

Defendant contends the trial court erred in admitting testimony by the eyewitness to the altercation concerning hearsay statements made to him by the passenger in the eyewitness's car. Although the court later struck the objected-to statements and instructed the jury to disregard them, defendant contends the court's admonition to the jury failed to cure the error because the court's statements about the testimony were vague, incomplete and confusing. We disagree.

2.1. Standard of Review

"On appeal, 'an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence, including one that turns on the hearsay nature of the evidence in question … .' [Citations.]" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007–1008.)

2.2. Additional Facts Regarding the Hearsay Statements

On direct examination by the People, the eyewitness to the altercation testified that once he saw the victim on the ground being beaten by defendant, his initial thought was that he should get out of the car to help the victim. He said he asked the passenger in the car, his friend Dave, whether they should get out and help the victim. According to the eyewitness, Dave responded, "Don't. He has a knife." Defense counsel immediately objected, whereupon the court struck the entire statement: "David's response is stricken from the record. The jury is instructed to disregard it. It's hearsay."

The prosecutor raised the matter again a few moments later. The eyewitness testified he parked his car across the street from where the men were fighting and the prosecutor asked, "Did you make any attempts to get in between the defendant and the victim?" The witness responded, "When I parked my car I asked my friend David and he said, no, not to put yourself—your life in danger, so I didn't." Defense counsel objected again, but this time the court stated, "It's not hearsay. It's an imperative. He's telling—he's giving instructions. It's not an assertion of fact." At sidebar, defense counsel explained the implication of the witness's testimony: "This witness specifically said he did not see the knife; however, that his friend did." The court agreed that "the friend's statement that he saw a knife is hearsay," but stated that "the instruction [don't get out of the car was] not a statement of fact," but rather was an imperative. The court overruled the hearsay objection.

As the witness described his additional observations of the fight, the prosecutor raised the issue once more:

"Q: You testified that you felt—or that your friend David told you not to get involved.

A: Correct.

Q: Because your life might be in danger; is that correct?"

A: Correct.

Q: Did you believe that your life might be in danger?

A: I didn't at the time. My instinct all of a sudden was this guy is defenseless. …

[¶] … [¶]

I rolled down my window and I yelled out and I asked my friend, should I get off, and he said, 'Don't. You're putting your life in danger.'

Q: So you took his words for it, that your life might be in danger if you got involved?

A: Yes."

Defense counsel did not object during this portion of the testimony.

Later, and outside the presence of the jury, the court advised counsel that it planned to tell the jury it could only consider Dave's statement, "Don't go out there, it's dangerous." The court elaborated: "The statement that he has a knife is clearly hearsay. The statement that it's dangerous is likewise hearsay, in my view. It's a statement of fact. It's a statement of opinion. In my view it's is [*sic*] sufficient assertion of fact that calls forth the reason for the hearsay rule is we can't cross-examine Dave as to why it was dangerous and it could be used to the defendant's detriment." The court further offered that "the statement 'Don't go out there,' is an imperative. It's not hearsay. But the other portions appear to me to be hearsay." Defense counsel agreed with the court's analysis and reiterated her objection to the testimony, particularly in light of the fact that the eyewitness himself clearly stated he did not see defendant in possession of a knife.

After the jury returned to the courtroom, the court admonished the jury to disregard a portion of the eyewitness's testimony: "Ladies and Gentlemen, I want to clarify one thing before we pick up and go on. There's been some testimony about alleged conversation between the witness and Dave. The only statement of Dave that was made to this witness that you are permitted to consider is [Dave's] admonition to him not to go out there. The other thing that Dave said is stricken from the record. You're not to consider it. It's inadmissible."

2.3. The court's admonition cured any error.

Evidence Code section 1200, subdivision (a), defines hearsay as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." Hearsay is generally inadmissible unless it falls under an exception. (Evid. Code, § 1200, subd. (b); see, e.g., *People v. Sanchez* (2016) 63 Cal.4th 665, 674.)

As defendant notes, and as the court properly concluded, the eyewitness's testimony relating Dave's statements regarding the apparent danger of the ongoing fight between defendant and the victim is inadmissible hearsay. Although the court initially overruled defendant's objection to the testimony, it corrected itself shortly thereafter by striking the testimony and instructing the jury to disregard it.

In most cases, "the trial court is permitted to correct an error in admitting improper evidence by ordering it stricken from the record and admonishing the jury to disregard it, and the jury is presumed to obey the instruction." (*People v. Hardy* (1948) 33 Cal.2d 52, 61 (*Hardy*).) " 'A jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. [Citations.] It is only in the exceptional case that "the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions." ' " (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) The exceptional case is where the incompetent evidence goes to the main issue and where the proof of defendant's guilt is not clear and convincing. (*Hardy, supra*, at p. 61.) Under those circumstances, the error in admitting the incompetent evidence

cannot reasonably be cured by striking it out and instructing the jury to disregard it. (*Ibid.*)

This is not an exceptional case. The incompetent evidence—Dave's belief that intervening in the altercation would be dangerous—was not the main issue in the case. Rather, from the perspective of the defense, the main issue was whether defendant attacked the victim, defendant and the victim were engaged in mutual combat, or defendant was acting in self-defense. Further, the eyewitness testified to numerous other observations regarding the intensity of the fight. For example, he testified that the victim was on the ground, on his back, defenseless, and was "fighting for his life." The eyewitness also testified that both sides of the victim's torso were covered in blood—a fact confirmed by photographs taken after the fact which showed the condition of the victim's clothing. The victim's testimony regarding his injuries, hospital treatment, and lingering disability also gave the jury additional evidence regarding the severity of the altercation. Thus, even in the absence of the objected-to statements, the jury was surely aware that the fight between defendant and the victim produced significant injuries and was therefore potentially dangerous to a bystander who might attempt to intervene.

Defendant argues the court's admonishment did not cure the erroneous admission of the testimony because the admonishment was "incomplete, vague and confusing." Defendant takes issue with the fact that the court advised the jury it could only consider Dave's instruction to the eyewitness not to leave the car and identified the testimony to be disregarded simply as "the other thing that Dave said." But if the court had repeated the inadmissible hearsay statements, only

to then instruct the jury to disregard them, that could have further impressed the statements in the jurors' minds, making it that much more difficult to disregard them. (See, e.g., *Hardy, supra*, 33 Cal.2d at p. 61 ["[I]n an effort to distinguish between the part to be stricken and certain other testimony given by Kennedy, the court again read the testimony quoted above and then instructed the jury that it was expunged from the record and that the jurors should entirely disregard it in their deliberations. [¶] Defendant urges that the action of the court was prejudicial because the testimony was read to the jury on two different occasions, and the jurors could not possibly have erased it from their minds."].) We see no error in the court's admonition.

Defendant also contends the court erred by refusing to strike the eyewitness's testimony that he didn't intervene in the fight because he believed his life was in danger: "A: I rolled down my window and I yelled out and I asked my friend, should I get off, and he said, 'Don't … [Testimony stricken]' Q: So you took his words for it, that your life might be in danger if you got involved? A: Yes." According to defendant, this subsequent testimony by the eyewitness effectively allowed the jury to accept as true Dave's hearsay statement that by intervening in the fight, the eyewitness would be putting his life in danger. Assuming for the sake of argument that the court's failure to strike this additional testimony was erroneous, it was not prejudicial. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Breverman* (1998) 19 Cal.4th 142, 178.) As just explained, the jury heard ample other evidence concerning the severity of the fight and the nature of the injuries sustained by the victim.

3. The prosecutor's brief references to facts outside the record during closing argument do not require reversal of the convictions.

Defendant argues the prosecutor committed misconduct by referring, during his closing argument, to evidence outside the record. Specifically, the prosecutor referred to a statement by the victim regarding his condition at the hospital that had been stricken by the court. He also argued the eyewitness had not been asked to identify the defendant prior to trial, but no evidence was introduced on that point. Defendant asserts the prosecutor's misconduct infected the trial with such unfairness as to violate both his federal constitutional rights and his rights under state law. We agree the prosecutor erred by briefly referring to facts outside the record, but conclude the errors do not warrant reversal of the convictions.

3.1. Background Principles and Standard of Review

A prosecutor's conduct violates a defendant's constitutional rights when the behavior comprises a pattern of conduct so egregious that it infects " 'the trial with unfairness as to make the resulting conviction a denial of due process.' [Citation.]" (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) The focus of the inquiry is on the effect of the prosecutor's action on the defendant, not on the intent or bad faith of the prosecutor. (*People v. Crew* (2003) 31 Cal.4th 822, 839.) Conduct that does not render a trial fundamentally unfair is error under state law only when it involves " ' "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." ' [Citations.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 820; *People v. Mendoza* (2007) 42 Cal.4th 686, 700.)

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole argument and the instructions' [citation], there was '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. [Citation.]' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 667 (*Centeno*).)

3.2. Additional Facts Regarding the Victim's Statement About His Medical Condition

During his testimony, the victim told the jury he was taken to the hospital by paramedics and treated for his injuries. When asked what treatment he received, the victim stated, "They put me through a machine because they thought my lung was damaged." Defense counsel objected and the court struck "the portion of the answer where the witness describe[d] why he was put into a machine."

During his closing argument, the prosecutor briefly referenced this testimony as he discussed the elements of assault: "When you say the word assault, you think somebody was attacked; physical contact between two persons. But by law, an assault—there doesn't have to be contact for those five elements to be met." The prosecutor went on to explain: "In this case there's physical contact. Physical contact is an understatement. In this case there are stab wounds. If you recall, [the victim] testified that when he was in the hospital they put him in a machine because they were worried his lung may have been punctured." Defense counsel objected that those facts were not in

evidence. The court did not expressly rule on the objection, but advised the jury, "Ladies and gentlemen, it's up to you to decide what facts are in evidence. Your recollection controls."

3.3. Additional Facts About the Eyewitness's Identification of Defendant

During the defense closing, counsel attempted to undermine the credibility of the eyewitness. Referencing the witness's identification of defendant as the aggressor in the fight, counsel argued: "Now, again, his memory. He stated to an investigator from the defense that he had never seen the individuals before, and he was 70 percent sure he could identify them. But now, as more time has passed, now he's 100 percent sure. Now, once he's here testifying, 'No, I'm absolutely sure.' " Counsel went on to argue, "I'm not saying he's lying. I'm just saying, can his memory be relied upon? Again, how did he know who was on top when the individuals are more or less the same height, skin tone, the clothing was similar."

During the People's final closing argument, the prosecutor responded: "The defense, however, questions [the eyewitness's] testimony by saying his identification was perhaps no good. Well, look at the testimony. Remember [the eyewitness] said that—when questioned by the officer days after the stabbing he said that he was 70 percent sure that he could identify the suspect again. The officers did not show him photographs. He was never asked to identify the defendant prior to yesterday." Moments later, he continued, "You see, he was never shown photographs. He was never asked to do a lineup." Defense counsel objected to the argument on the ground that it misstated the evidence. The court did not expressly rule on the objection but stated, "Again, ladies and gentlemen, your recollection of the evidence controls."

3.4. Analysis

" 'While counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence [citation]," counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence [citation].' [Citation.]" (*People v. Collins* (2010) 49 Cal.4th 175, 209.) In both instances identified by defendant and described above, the prosecutor referred to facts not in evidence. As noted, the court struck the victim's testimony regarding the doctors' concern about his lungs when he arrived at the hospital and instructed the jury to disregard that testimony. Further, defendant correctly asserts that no testimony or other evidence was offered or admitted concerning any pretrial attempts to have the eyewitness identify defendant. Accordingly, we agree it was inappropriate for the prosecutor to include references to these facts during closing argument. We conclude, however, that there is not " 'a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*Centeno, supra*, 60 Cal.4th at p. 667.)

As to the first comment regarding the hospital personnel's concerns about the victim's condition, defendant asserts "the argument implied the prosecutor was aware of medical information unavailable to the jury indicating [the victim's] injuries were of such seriousness that physicians were worried about the integrity of his lungs." Although he does not expressly say so, we presume defendant is concerned that the jury may have based its true finding on the great bodily injury allegation in part on speculation about the severity of the injury sustained by the victim. However, it seems improbable the jury would have been focused on the offending statement—the victim's perception

that his doctors were initially concerned that his lung *might* have been injured—in light of the fact that no evidence was presented that the victim's lung *was* injured. Further, the jury had ample evidence before it relating to the injuries actually sustained by the victim—two wounds that required 15 sutures to close, and bruising on one of the victim's legs. The jury saw several photographs of the victim's bloody clothing and heard the eyewitness account of the victim's condition during the assault, as well as the victim's account of his condition. In addition, the jury saw photographs of the victim's wounds after they had been sutured and heard the victim's testimony about the long-term impact of the injuries he sustained during the assault. In light of the state of the evidence, we do not believe the jury would have understood the prosecutor's brief mention of the concerns about the victim's lung as evidence of an injury otherwise unmentioned during trial.

As to the second issue regarding the eyewitness's identification of defendant at trial, we note this is not a case in which the defendant asserted a mistaken-identity defense. Here, in fact, defendant turned himself in to police and admitted he was involved in the fight. Thus, the reliability of the eyewitness's identification of defendant is less important in this case than it often is. Apparently, defendant takes issue with the eyewitness's description of him as the "suspect" or the "aggressor" because defendant contended he and the victim engaged in mutual combat, or that he was acting in self-defense after the victim initiated the fight. As to that issue, the prosecutor's comment that the eyewitness had not viewed a lineup or photographs prior to trial is entirely irrelevant. Because defendant admitted he participated in the fight with the victim, we do not believe the

jury would have understood the prosecutor's argument about the eyewitness's identification in an improper or objectionable manner.

4. The prosecutor did not misstate the People's burden of proof during closing argument.

Defendant argues the prosecutor "egregiously" misstated the reasonable doubt standard by "insinuat[ing] that a 'reasonable' interpretation of the evidence satisfied the [People's] burden of proof." Defendant concedes his counsel failed to object at trial and recognizes that he forfeited the right to challenge the prosecutor's alleged misconduct directly in this appeal. Nevertheless, defendant asserts his counsel was constitutionally ineffective, requiring reversal of both convictions and the great bodily injury enhancement. We conclude the prosecutor did not misstate the People's burden of proof.

4.1. Governing Legal Principles

"Advocates are given significant leeway in discussing the legal and factual merits of a case during argument. [Citation.] However, 'it is improper for the prosecutor to misstate the law generally [citation], and particularly to attempt to absolve the prosecution from its … obligation to overcome reasonable doubt on all elements [citation].' [Citations.] To establish such error, bad faith on the prosecutor's part is not required. [Citation.] '[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error.' [Citation.]

"When attacking the prosecutor's remarks to the jury, the defendant must show that, '[i]n the context of the whole

argument and the instructions' [citation], there was '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. [Citation.]' [Citation.]" (*Centeno, supra,* 60 Cal.4th at pp. 666–667.)

4.2. Closing Arguments

In closing, the thrust of the prosecutor's argument was that defendant was the aggressor in the altercation. The People relied heavily on the testimony of the eyewitness, who the prosecutor emphasized was simply a bystander with no connection to either defendant or the victim and testified that defendant was pummeling the victim, who was lying on the ground and appeared to be defenseless. In response, defense counsel argued there was insufficient evidence that defendant used a knife during the altercation, and generally attempted to undermine the credibility of both the victim and the eyewitness by suggesting certain portions of their testimony were internally inconsistent. With regard to the victim specifically, defense counsel suggested the victim was lying to cover up the fact that he was having an affair with defendant's wife. Counsel then reminded the jury that defendant testified the victim hit him first by swinging his keys in the air and told the jurors mutual combat was a defense to the assault charges.

Both parties repeatedly mentioned the People's burden of proof during closing argument.

During his initial closing, the prosecutor generally explained the People's burden of proof: "Every crime in the Penal Code, whether it be murder, petty theft, assault, forgery,

embezzlement—each of those crimes have [sic] elements that the People, the prosecution, must prove beyond a reasonable doubt before a jury can find that person guilty. If any of those elements are not met beyond a reasonable doubt, the charge or that count fails." Then, with respect to the elements in count 1, he said, "I want to tell you what the People must prove beyond a reasonable doubt before you 12 can find the defendant guilty of that count." After summarizing the evidence on the first four elements of assault, the prosecutor addressed the fifth element: "And finally, the defendant did not act in self-defense. What this means is, in a nutshell, is that the People have to prove that when he did the stabbing or assault with a deadly weapon, he didn't do it in self-defense, and the People have to prove that beyond a reasonable doubt." He emphasized the People's burden again, as he pointed the jury to the court's instructions: "Those are the elements of the crime of assault. Those are the elements that you should deliberate and discuss as a group; okay? Have the People proved beyond a reasonable doubt these elements. And you can go through them like a checklist and decide them." After the prosecutor briefly addressed the facts related to the special allegation, he returned to the facts relating to the assault charges: "So now let's get to the facts of the case and see if the People have proven beyond a reasonable doubt." (*Sic*.)

Defense counsel also emphasized the standard of proof during the course of her argument: "Each and every single element of the offenses must be proven beyond a reasonable doubt. Each and every single one." She described the People's burden of proof, "This very high burden; the highest of our country." She then distinguished the reasonable doubt standard of proof from other less-demanding standards such as

preponderance of the evidence. Returning to the point later in her argument, defense counsel asked, "What is the legal definition? A defendant in a criminal case is presumed to be innocent. That is the presumption, and the People must prove the crime beyond a reasonable doubt. This is proof that leaves you with an abiding conviction that the charge is true. Lasting, forever. You're not gonna change your mind about it. You don't have questions. You're convinced. It was done that way. Again, you must feel that way about every single element of the charge."

In rebuttal, the prosecutor responded to the defense's attacks on the credibility of the victim and the eyewitness. The prosecutor challenged defendant's suggestion that he believed the victim was having an affair with his wife. He also cast doubt on defendant's self-defense theory, saying, "If it's true that your wife is running around on you with this guy and he doesn't want to talk to you, you don't get to stab him either. That's not justification" for self-defense. The prosecutor then returned to the People's burden of proof: "Talking about reasonable doubt. The defense's charts will have you believe—or insinuate that perhaps the standard of beyond a reasonable doubt is an impossible standard. It's not. It's reasonable. Jurors up and down this state hear cases just like you have. You've seen the jurors outside going into other courtrooms, listening to cases; different, obviously, from yours, but yet still having to evaluate the evidence and determine if, beyond a reasonable doubt, the crimes were committed. Juries, every day in this state for years, have been able to find people guilty beyond a reasonable doubt, just as they have acquitted people where cases have not been found beyond a reasonable doubt. It is not an impossible standard. It's reasonable."

The court properly instructed the jury regarding the People's burden of proof using CALCRIM No. 220.

4.3. Analysis

Defendant argues that when the prosecutor stated twice during his rebuttal, "It's reasonable," he misstated the law and improperly urged the jury to apply a standard of proof lower than the applicable beyond-a-reasonable-doubt standard. Taken out of context, the statement "It's reasonable," plainly does not accurately describe the People's burden of proof. But in context, it does not appear that the prosecutor intended to describe the burden of proof with those statements. In any event, viewing those two isolated statements in the context of the prosecutor's entire closing argument, and considering the defense closing argument and the court's proper instruction regarding the People's burden of proof, we conclude there was no " 'reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' " (*Centeno*, *supra*, 60 Cal.4th at p. 667.)

In support of his argument, defendant provides an extensive discussion of *Centeno, supra.* Although the general principles discussed in that case are relevant to our analysis, it is distinguishable.

In *Centeno*, as here, the Supreme Court considered whether a prosecutor misstated the reasonable-doubt standard during closing argument. There, the People's case was filled with inconsistent witness statements and an absence of direct evidence of the defendant's wrongdoing. (*Centeno, supra*, 60 Cal.4th at p. 670.) In closing, the prosecutor used a visual aid—an outline of the State of California—and placed it in front of the jury. (*Id.* at p. 664.) In explaining the People's burden of proof,

the prosecutor gave the jury a hypothetical in which the issue to be decided was what state the outline represented. (*Id.* at p. 665–666.) She described the hypothetical evidence, which included witness testimony about the state, some accurate some not. For example, one witness testified that the state was next to another state that allowed gambling. (*Id.* at p. 665.) Another hypothetical witness testified she had been to the state and visited a town called "Fran-something" with cable cars and a beautiful bridge. (*Id.* at p. 665.) The prosecutor summarized additional fictional evidence and posited that some of the hypothetical testimony was correct, some was incomplete, some was inaccurate, and a lot of information about the state had not been presented. She then stated, using the visual aid, " 'but is there a reasonable doubt that this is California? No. You can have missing evidence, you can have questions, you can have inaccurate information and still reach a decision beyond a reasonable doubt.' " (*Id.* at p. 665.) Discussing the evidence before the jury, counsel then argued the jury's decision should be "based on reason. It has to be a reasonable account." (*Id.* at p. 666.) She went on to describe the conflicting evidence in detail, repeatedly urging that the People's interpretation of the evidence was the most reasonable, as compared to the defense theory of the case. (*Ibid.*)

The Supreme Court held the prosecutor's argument was improper because it impermissibly suggested that the jury apply a lower burden of proof. The court explained that the image used, an outline of the State of California, "necessarily [drew] on the jurors' own knowledge rather than evidence presented at trial . . . . [and] trivialize[d] the deliberative process, essentially turning it into a game that encourages the jurors to guess or

jump to a conclusion." (*Centeno, supra*, 60 Cal.4th at p. 669.) Further, the prosecutor implied that, in the face of starkly conflicting evidence and issues of witness credibility, the People's burden was met if its theory was "reasonable" in light of the facts supporting it. (*Id*. at p. 671.) In short, "it [was] error for the prosecutor to suggest that a 'reasonable' account of the evidence *satisfies the prosecutor's burden of proof*." (*Id*. at p. 672, emphasis in the original.)

We find defendant's argument that the prosecutor's remarks in this case were similar to those in *Centeno* to be unpersuasive. A review of the prosecutor's argument demonstrates that he properly characterized the beyond-a-reasonable-doubt standard multiple times during his closing and rebuttal arguments and measured the evidence presented by the People against that standard. We see nothing untoward in the prosecutor's use of the phrase, "It's reasonable," taken in context. (See *People v. Romero* (2008) 44 Cal.4th 386, 416 [approving prosecutor's argument that the jury must " 'decide what is reasonable to believe versus unreasonable to believe' " and " 'accept the reasonable and reject the unreasonable' "].)

Unlike the prosecutor in *Centeno*, the prosecutor here did not encourage the jury to accept the People's theory solely because it was "reasonable." Instead, his comments simply advised the jury that the correct standard of proof was not insurmountable, as the defense attempted to suggest. "Nothing in the prosecutor's explanation lessened the prosecution's burden of proof. The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt." (*People v. Romero, supra*, 44 Cal.4th at p. 416.) This type of argument on behalf of the People is commonplace and we see no prosecutorial

error here. We therefore reject defendant's argument that his counsel was constitutionally ineffective for failing to object during the prosecutor's closing argument.[2]

5. The abstract of judgment is incorrect.

"An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) "Courts may correct clerical errors at any time, and appellate courts (including this one) that have properly assumed jurisdiction of cases" (*ibid.*) may order correction of an abstract of judgment that does not accurately reflect the oral pronouncement of the sentence (*id.* at pp. 185–188).

The abstract of judgment fails to list the great bodily injury enhancement under section 12022.7, subdivision (a). As already noted, the court struck the punishment, but not the enhancement itself, under section 1385, subdivision (c). Therefore, the enhancement should be listed on the abstract of judgment with the appropriate notation regarding punishment.

We are confident that upon remand, the court will correct these errors and " 'actively and personally [e]nsure the clerk accurately prepares a correct amended abstract of judgment.' " (*People v. Johnson* (2015) 234 Cal.App.4th 1432, 1459.)

---

[2] Because we reject defendant's claims of individual error, we also reject defendant's claim of cumulative error.

DISPOSITION

The judgment is affirmed. Upon issuance of remittitur, the trial court is directed to amend the abstract of judgment to reflect the jury's true finding on the section 12022.7, subdivision (a), enhancement as well as the court's decision to strike the punishment only, and to send a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

LAVIN, J.

WE CONCUR:

EDMON, P. J.

STONE, J.*

---

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