Filed 3/21/18 P. v. Lujan CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICKY ANTHONY LUJAN, Defendant and Appellant.	B278711 (Los Angeles County Super. Ct. No. MA064759)

APPEAL from a judgment of the Superior Court of Los Angeles County. Andrew E. Cooper, Judge. Affirmed.

Roberta Simon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and John Prosser, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ricky Anthony Lujan appeals his conviction of driving while under the influence of alcohol (DUI) with a prior DUI conviction, causing great bodily injury. He contends that prosecutorial misconduct during closing argument deprived him of a fair trial. Finding no merit to defendant's contention, we affirm the judgment.

BACKGROUND

Defendant was charged in counts 3 and 4 of an amended information[1] with two misdemeanor counts of driving while his license was suspended, in violation of Vehicle Code sections 14601.1, subdivision (a) and 14601.2, subdivision (a).[2] Count 5 alleged that defendant drove under the influence within 10 years of a prior DUI offense and caused bodily injury, in violation of sections 23153, subdivision (a), and 23560. Count 6 alleged that defendant drove with a blood alcohol content (BAC) of .08 percent or higher,[3] within 10 years of a prior DUI offense and caused bodily injury, in violation of sections 23153, subdivision (b), and 23560. The information alleged as to counts 3 and 4 that defendant had suffered three prior convictions of driving on a suspended license, and as to count 6, that defendant's BAC was above 0.15 percent, within the meaning of section 23578. The information further alleged as to counts 5 and 6, that defendant personally inflicted great bodily injury on Nicole Vega, within the

---

[1] Counts 1 and 2 were dismissed prior to the filing of the amended information.

[2] All further statutory references are to the Vehicle Code unless otherwise indicated.

[3] "It is unlawful for a person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle." (§ 23152, subd. (b).)

meaning of Penal Code section 12022.7, subdivision (a); that defendant willfully refused a peace officer's request to submit to a chemical test; and willfully failed to complete the chemical test pursuant to section 23612, within the meaning of sections 23577, 23578, and 23538, subdivision (b)(2). In addition, it was alleged that defendant had previously been convicted of a prior serious or violent felony within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12); and pursuant to Penal Code section 667, subdivision (a)(1).

Before evidence was presented, defendant pled no contest to count 3, and admitted the three prior convictions of driving while his license was suspended. A jury thereafter convicted defendant on the remaining counts, and found true all special allegations. In a bifurcated proceeding defendant admitted all prior conviction allegations. On October 26, the trial court denied probation and sentenced defendant to a total term of 13 years in prison, as follows: the middle term of two years as to count 5, doubled under the Three Strikes law, plus three years for the great bodily injury enhancement and five years for the prior serious felony conviction; two years as to count 6, stayed pursuant to Penal Code section 654; as to count 3, one consecutive year in any penal institution; and as to count 4, one year in any penal institution, stayed pursuant to Penal Code section 654. The court imposed mandatory fines and fees and awarded presentence custody credit of 295 actual days and 294 conduct credits.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

The collision

At approximately 10:00 p.m. on September 19, 2014, Nicole Vega and her husband Esteban Vega[4] and two others were traveling through the Antelope Valley. Nicole was driving her red 2013 Chevy Cruz with Alberto Vega in the front passenger seat. Esteban was seated in the back with Mercy Delmonte and her one-year-old son. Esteban, who had been sleeping, woke up hearing Nicole saying, "Oh, my god. I don't think he's going to --" As soon as her voice stopped and Esteban opened his eyes, they crashed into defendant's Ford F-150 truck. Nicole testified that just before the collision, she saw headlights coming from her left, and thought "Oh, my god. He's not going to stop." She could not remember anything else until she found herself sitting on the ground in the dirt, feeling panicky and disoriented. She asked Mercy why they were there together, and what happened.

Esteban had gone to the aid of Nicole who he saw slouched over the seat belt after the collision. He removed her seat belt, leaned her back, yelled her name, and shook her several times to wake her up, which she did within a few seconds. Nicole was shaking, scared, and asked where they were, what they were doing there, and why they were with Albert and Mercy. To Esteban, Nicole seemed "lost," "scared and just [not] there at all." He placed her on the ground to wait for the ambulance. Esteban saw their damaged car and defendant's truck flipped on its side. He also saw defendant climb out of the truck.

The investigation

California Highway Patrol (CHP) Officer Jessie Velasquez testified that he was on duty and assigned to the area of the

---

[4] To avoid confusion, we will refer to the Vegas by their first names.

collision that night. He also testified regarding his education and experience investigating traffic collisions and determining whether a driver was under the influence of alcohol. Officer Velasquez arrived at the intersection of 60th Street West and Avenue D, the accident scene, at approximately 10:15 p.m. He identified photographs of the intersection, and explained there was no control for traffic traveling eastbound on Avenue D, but there was a reflective stop sign on 60th Street, with a limit line just before the sign, as well as another sign stating "Cross traffic does not stop." The officer saw no obstructions that would block the view of cross traffic at the intersection, as it was "open for miles." The posted speed limit was 55 miles per hour.

Once Officer Velasquez determined that defendant was the driver of the Ford F-150 truck, he spoke to defendant. In response to the officer's questions, defendant said he had been driving southbound on 60th Street West at 55 miles per hour, approached the intersection with Avenue D, stopped at the stop sign, and when he did not see any vehicle to the left or right of him, he drove into the intersection where he was hit by the car. Defendant's eyes were red and watery, and Officer Velasquez noticed a strong odor of alcohol about him. Defendant complained of pain, and complained even more after Officer Velasquez mentioned driving under the influence.

After defendant was taken to the hospital, Officer Velasquez asked defendant standard pre-field sobriety test questions; whether the vehicle was mechanically functioning; where was he coming from and going to; how long had he slept; if he had eaten; and what alcoholic beverage, if any, had he been drinking. Defendant claimed he had consumed a single 16-ounce Bud Light beer at 1:00 p.m. that day, but did not answer the question whether he had eaten anything after drinking the beer. Officer Velasquez believed that defendant's appearance was not

consistent with having had just one beer nine hours earlier. Defendant added that he had taken an allergy pill earlier in the day, but denied that he felt the effects of either the alcohol or the pill. Officer Velasquez nevertheless found defendant's red, watery eyes consistent with his prior observations of others under the influence of alcohol.

The officer was unable to perform a horizontal gaze nystagmus ("follow my finger") test, because defendant complained of pain and squinted his eyes, making it impossible to observe. Defendant had not squinted before Officer Velasquez tried that test. Next the officer administered the preliminary alcohol screening test, which involved blowing twice into a handheld device which gave BAC readings. The result of the first test, at 10:51 p.m., was a BAC reading of .169, and the result of the second test, given at 10:54 p.m., was a reading of .159. Defendant was then placed under arrest. When Officer Velasquez asked him to submit to a blood test, defendant refused, stating that his license was suspended, so it did not matter.[5]

Officer Velasquez also spoke to Nicole at the scene. She reported traveling eastbound on Avenue D at approximately 65 to 70 miles per hour, approaching the intersection of 60th Street West. Near the intersection, she observed a vehicle traveling southbound on 60th Street West, and she thought to herself that it was not stopping. She could not remember anything else after that. In Officer Velasquez's opinion, Nicole had not been drinking and her speed was not a factor in the collision because there were no visual hazards at the intersection. He opined that

---

[5] Custodian of records for the Department of Motor Vehicles identified the license records regarding defendant. In addition to three suspensions, the records showed a license revocation on November 20, 2014.

defendant was under the influence of alcohol, driving southbound on 60th Street West with no obstruction of his view, when he drove into the intersection without stopping at the posted stop sign or checking both east and westbound traffic on Avenue D, causing Nicole's car to collide with the side of his vehicle. Officer Velasquez also opined that in failing to stop and to check cross traffic, defendant violated sections 22450, subdivision (a), and 21802, subdivision (a).[6]

Great bodily injury

Nicole's medical records (130 pages) from Woodland Healthcare, were admitted into evidence without objection, along with eight photographs depicting her injuries. No medical expert testified.

Nicole testified that she did not remember the ride to the hospital, and she remembered only bits and pieces of the time spent there, such as speaking to doctors and a CHP officer, getting x-rays and an MRI. Her memory remained blurry for some time after that. Nicole remembered going home to Woodland, but not the first evening there, and she did not remember her first visit to the doctor with Esteban. After that,

---

[6] Vehicle Code section 22450, subdivision (a), provides: "The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection shall stop at a limit line, if marked, otherwise before entering the crosswalk on the near side of the intersection."

Vehicle Code section 21802, subdivision (a), provides: "The driver of any vehicle approaching a stop sign at the entrance to, or within, an intersection shall stop as required by Section 22450. The driver shall then yield the right-of-way to any vehicles which have approached from another highway, or which are approaching so closely as to constitute an immediate hazard, and shall continue to yield the right-of-way to those vehicles until he or she can proceed with reasonable safety."

her mother took her to her medical appointments, which occurred once or twice per week. She was not able to move very much and she was unable to concentrate. Nicole's thigh was bruised, the left side of her face was swollen, a bruise above her temple was filled with fluid, her scalp was cut, she lost some hair, her eye was swollen shut for about a week, and she had a black eye for at least a month. Nicole's other bruises took about two months to completely heal. She was treated by a chiropractor, neurologist, a neuropsychologist, and a psychiatrist, and was prescribed anti-anxiety medication for her posttraumatic stress disorder. She took the medication until she became pregnant in February 2016.

Nicole testified that she and Esteban had been married for two years, had no children, and both worked full time. She was employed as the registrar of a middle school, where she was in charge of permanent records, registering students, dropping students, grading schedules, and other tasks which required preparing a great deal of paperwork, for which she received continuing training monthly at the school district office. Nicole had completed a bachelor's degree in 2012, and planned to start a teaching credential program. When Nicole returned to work after a week and a half, she was able to work only three hours a day for three or four days per week, per doctor's instructions. She felt overwhelmed and frustrated at work. She often had to redo tasks and check to see if she had already done things she had no memory of doing. This had not been a problem before the collision; she had been organized, knew what she had already done, knew what needed to be done, and could prioritize tasks. After the collision, when writing correspondence, she would lose her train of thought, not know what she was supposed to be writing, and find herself staring at a blank screen for 10 or 15 minutes. Coworkers' questions overwhelmed her, and her lack of confidence in communicating caused her to seclude herself from

them. It was more difficult to be organized at home, as well, and she had to make lists and cross off what she had done.

Though over time her concentration had improved, it was still not the same as before the collision. School used to be easy for her, but it became a real struggle, and she had to take a break from the credential program because she found herself constantly reading the same things over and over. It has made her angry and frustrated to be unable to do the things she used to, although at the time of trial she had been getting progressively better.

Esteban testified that Nicole had been able to take care of herself before the collision, had no physical restrictions, and drove by herself. When they returned home after the collision, Nicole was unable to care for herself, needed help getting out of bed and walking, which hurt her a lot. Her head hurt, her left eye was swollen shut, and she could not drive. He and her mother took her to the doctor's appointments, brought her food and water in bed, helped her to the bathroom and into the shower, and did the cleaning. Nicole would often forget things and get frustrated, and when she could not concentrate on a conversation, she would stop talking. When she went back to work, she would text him that she was tired, could not focus on what she was doing, and wanted to leave. Esteban also suffered injuries as a result of the collision. Skin was torn from his arm, leaving a scar, and his lower back was bruised by luggage hitting him. They were both still in a lot of pain from their injuries by Christmastime. Nicole could not finish everyday chores, and at the time of trial, she was still not back to her prior condition. She was still frequently forgetting, having to make lists, still getting frustrated by her inability to focus, and still terrified at every intersection they passed when other cars approached.

The defense presented no evidence.

DISCUSSION

I. Prosecutorial misconduct

Defendant contends the prosecutor committed prejudicial misconduct during rebuttal closing remarks by (1) asking the jury why defense counsel did not have the courage to say that Nicole lied; (2) telling the jury that doctors understate patients' medical conditions; (3) pointing out that the defense did not call an accident investigator of its own; and (4) telling the jury that the defense should have asked Nicole more questions. Defendant also contends that the misconduct resulted in a denial of due process.

A prosecutor's improper remark does not violate the federal constitution unless it is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Otherwise, misconduct violates state law only if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill*, at p. 819.)

"Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.] Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound, unbelievable, or even a patent lie. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) Even characterizing defense arguments as "'ludicrous,' 'ridiculous,' 'preposterous,' 'outrageous,' 'offensive,' 'shock[ing]' or 'bull,'" had been held not to constitute prosecutorial misconduct (albeit offensive). (*People v. Peoples* (2016) 62 Cal.4th 718, 793.) To demonstrate misconduct, defendant must refer to more than just a few phrases or sentences, as we must view the

statements in the context of the argument as a whole. (*People v. Dennis*, at p. 522.)

"In order to preserve a claim of prosecutorial misconduct for appeal, the defense must make a timely objection at trial and request an admonition. [Citations.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146.) An objection is not enough; both objection and request for an admonition are required. (See *People v. Prieto* (2003) 30 Cal.4th 226, 259-260.) The claim is otherwise reviewable only if the trial court immediately overruled the objection or an admonition would not have cured the harm caused by the misconduct. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328-1329.)

"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. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

With these principles in mind we turn to the four alleged incidents of misconduct.

A. Courage to say the victim lied

Defendant contends that the prosecutor committed misconduct by suggesting that defense counsel did not have the courage to say that Nicole lied.

The prosecutor's remarks came in response to the following argument by defense counsel: "Why would Ms. Vega want to exaggerate? I'm not going to say she is a liar. I don't think she did lie, but perhaps she exaggerated some of her memory lapses or the affects [*sic*] that the accident had on her. And why would

she be motivated to do that? If you look at . . . page 5 of Dr. Steven McCormick's report . . . and I imagine, again, he got this information from Ms. Vega herself. He says, 'Mrs. Vega is,' quote, 'represented in a lawsuit regarding the motor vehicle by Mike Vincent, an attorney.'. . . So she's suing my client in civil court over this accident. Is that a reason to exaggerate one's injuries? In a civil court, injuries equal monetary gains. The more injuries you have, the more money you can get either at settlement or at trial."

Defendant complains to the following remarks the prosecutor made at the outset of his rebuttal argument: "[Defense counsel] got up there and basically said Nicole Vega lied under oath. He says he doesn't want to call her a liar, but she exaggerated. If you're going to claim she's, under oath, lying to you, ladies and gentlemen, at least have the courage to say she wasn't --" After an overruled defense objection, the prosecutor continued: "That's not what [defense counsel] did. He . . . threw this thing out there. 'I'm not calling her a liar, but what about this?' Ladies and gentlemen, what about the fairness?"

Defendant suggests that the remarks carried an implication of the prosecutor's personal assurances for the witness's credibility, and thus amounted to improper vouching. Defendant also asserts that the prosecutor's argument amounted to appealing to sympathy and implying that defense counsel had fabricated evidence. Defendant argues that the remarks resulted in "building up Nicole Vega's version of her injuries, and . . . destroying defense counsel's credibility with the jury."

"Improper vouching" is stating a personal belief in a witness's credibility based on evidence outside the record. (*People v. Dickey* (2005) 35 Cal.4th 884, 913-914.) We discern no personal assurance of Nicole's credibility in the quoted remarks, or any reference to matters outside the record. And while it is

improper for a prosecutor to appeal for sympathy for the victim (*People v. Seumanu*, *supra*, 61 Cal.4th at p. 1342), we are at a loss to find any appeal to the jury's sympathy or any accusation that defense counsel fabricated evidence. Defendant has failed to explain just which of the prosecutor's words amount to either of these alleged improprieties.

Defendant also contends that the prosecutor maligned defense counsel's character by implying that counsel lacked the courage to expressly call Nicole a liar. "It is misconduct for the prosecutor in argument to impugn the integrity of defense counsel or to suggest defense counsel has fabricated a defense. [Citations.]" (*People v. Cash* (2002) 28 Cal.4th 703, 732.) However, the use of colorful or hyperbolic language is not generally prosecutorial misconduct. (*People v. Stitely* (2005) 35 Cal.4th 514, 559-560; cf. *People v. Peoples*, *supra*, 62 Cal.4th at p. 793 ["'ludicrous,' 'ridiculous,' 'preposterous,' 'outrageous,' 'offensive,' 'shock[ing]' or 'bull'"].)

Moreover, we agree with respondent that the prosecutor was merely responding to defense counsel's rhetorical device to suggest that the witness had not been truthful. We also agree that when the remarks are considered in context, there is no reasonable likelihood that the jury construed the comment as an attack on defense counsel's integrity or honesty, rather than the absence of evidence to support the argument that there was a pending civil suit which provided Nicole with a motive to exaggerate her injuries. "An argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper. [Citation.]" (*People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47, overruled on another point in *People v. Merritt* (2017) 2 Cal.5th 819, 831.)

B. Arguing that doctors understate medical conditions

Defendant contends that the prosecution argument that doctors understate medical conditions infected the trial with such unfairness as to amount to a denial of due process. He also contends that if this issue is deemed forfeited, it is due to ineffective assistance of counsel.

The prosecutor made the challenged statement after explaining to the jury the concept of great bodily injury, and in response to the defense argument that Nicole's injuries were not serious, because she suffered only scrapes, bruises, a swollen eye, and per Antelope Valley Hospital, had "no concussion." The prosecutor pointed out that Nicole's own doctor wrote "concussion" in his report, and recommended shortened work hours and limits on mental engagement; and that in a later report, the doctor diagnosed "'post-concussion syndrome.'" The prosecutor then said: "On January 15, the doctor puts down the diagnosis of 'post-concussion syndrome.' . . . Again, the doctors, the way they note things down, they have seen these things before. And they just write down routine language because *mild* for them, they've seen more severe things." Defense counsel interrupted with an objection on the ground that the argument assumed facts not in evidence. The trial court sustained the objection, but as defendant did not request a curative instruction, he has not preserved this issue for appeal. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1146.)

Defendant's contention is nevertheless without merit, as we perceive no reasonable likelihood that the jury construed the remarks in an erroneous manner. In objecting to the remarks, defense counsel stated, "[A]ssumes facts not in evidence," and the court replied, "Sustained. Sustained." Thus, the jurors knew that the remark was not based on facts in evidence. Prior to

closing arguments the court had instructed the jury that it was up to them alone to decide what happened based on the evidence; and the court further instructed: "'Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence.'" Moreover, a bit earlier in his rebuttal argument, the prosecutor told the jury to ask for read back when appropriate, and he quoted the instruction read by the court, telling the jury that nothing the attorneys said was evidence. "It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.) It is not reasonably probable that the jurors believed that the evidence showed that doctors routinely understate medical conditions. We thus do not infer that they misapplied the remark. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 970.)

Defendant's claim of ineffective assistance of counsel must also fail. To prevail on a claim of ineffective assistance of counsel, defendant must demonstrate a reasonable probability that the outcome of the case would have been different if counsel had not erred. (*Strickland v. Washington* (1984) 466 U.S. 668, 686, 694.) As there is no reasonable likelihood that the jurors had an improper or erroneous understanding of the prosecutor's remarks, defendant has failed to meet his burden.

C. Failure to call a defense investigator

Defendant next contends that the prosecutor responded improperly to defense counsel's argument that the investigation of the collision by CHP Officer Velasquez was "half-ass[ed]."

In addition to challenging the investigation as incomplete, defense counsel argued that "in order to do a proper accident reconstruction, you really need to spend more time looking at the -- not only the damage to the vehicles, but the resting point of the

vehicles so that you can come to some determination about, for example, the relative speeds and positions of the vehicles . . . . You can do this with things like physics models . . . ." After summarizing some of Officer Velasquez's testimony, defense counsel argued, "But that is not the way a collision investigation is supposed to work."

Immediately before addressing this defense argument, the prosecutor told the jury to ask for read back when appropriate, and quoted the instruction read by the court, telling the jury that the attorneys' remarks were not evidence. The prosecutor then said that defense counsel had "a lot of opinions, a lot of accusations, a lot of conclusions, but I don't' remember any of it coming from the witness stand. . . . He said [the investigation] was shoddy. He went so far as to call it 'half-ass' [*sic*]. Where is the evidence to evaluate that? If there was another investigator, a reconstruction collision investigator who came into court and testified 'the proper way to do an investigation is this, this, and this,' you would think that would be a logical piece of evidence if you come to the conclusion that something is shoddy. We didn't hear that. We heard [defense counsel's] opinion." Defense counsel objected at that point on the ground of "improper burden." After the objection was overruled, the prosecutor assured the jury that "the People have the burden of proof. That is clear in the instructions." He continued, "I'm not saying the burden shifts at all [but] the logical evidence based on what? . . . There is no other expert that we can compare Officer Velasquez'[s] investigation against."

Defendant acknowledges that it is not improper for a prosecutor to comment on the defendant's failure to present material evidence or to call a logical witness. (*People v. Wash* (1993) 6 Cal.4th 215, 262-263.) This includes the failure to call an expert. (*Id*. at p. 263; *People v. Frye*, *supra*, 18 Cal.4th at pp.

972-973.) Defendant contends, however, that the prosecutor's argument was akin to that condemned in *People v. Gaines* (1997) 54 Cal.App.4th 821, where the prosecutor argued that defense counsel "'was worried about the inferences we are going to draw from the absence of one of his alibi witnesses, Mr. Hicks. . . . [¶] . . . This friend of the defendant, this person that presumably would like to help him out, could help the defendant. Where is Mr. Hicks? We know about Mr. Hicks. Mr. Hicks was sitting in this courtroom. Mr. Hicks didn't testify. That decision was made after the defendant testified, because the defendant slipped and he told some untruths. And Mr. Hicks was going to testify to the contrary. Mr. Hicks would have impeached the defendant, and it was the defense that got Mr. Hicks out of here before he could damage them. It was the People that were trying to find Mr. Hicks at that point.'" (*Id.* at p. 824.)

Defendant argues that here too, the prosecutor told the jury what the testimony of the investigator would have been. Not so. The misconduct in *Gaines* was telling the jury what the missing witness's testimony would have been and that it would have conflicted with the defendant's version of events. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1304, fn. 37.) That did not happen here. As respondent observes, the prosecutor merely pointed out that defense counsel's argument was not supported by the evidence. "A prosecutor may make fair comment on the state of the evidence. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 608.) Defense counsel purported to describe a competent collision investigation involving models and physics, and argued that Officer Velasquez's investigation was "not the way a collision investigation is supposed to work." As there was no evidence of the "way a collision investigation is supposed to work," the prosecutor's comment to that effect was not misconduct.

D. Suggesting the defense should have asked more questions

Defendant contends that the prosecutor improperly implied that further cross-examination of Nicole would have been unfavorable to defendant and that was the reason that the defense did not ask her more questions. Defendant also contends that the prosecutor represented to the jury what Nicole would have said on additional cross-examination. The prosecutor said nothing of the sort.

Defense counsel had read a doctor's notation that Nicole was represented by a particular attorney in a lawsuit regarding her vehicle, and counsel implied that this gave her a reason to exaggerate her injuries in order to recover more in damages. The prosecutor referred to that argument and said, "What about since he had those medical records, why he didn't ask Nicole Vega, when she was up on the stand about this?" As there was no objection to the prosecutor's rhetorical question, defendant has not preserved his claim of misconduct in this regard. (*People v. Gutierrez*, *supra*, 28 Cal.4th at p. 1146.) Still, the prosecutor did not represent or imply what Nicole's response would be. He was clearly commenting on the absence of evidence that a civil action had been filed and the fact that the medical chart note was never mentioned until closing argument, because counsel had not asked Nicole whether she had filed a lawsuit or about her motives in describing her injuries.

There was a later defense objection on the ground of "improper argument," when the prosecutor asked, "Why did he have to sneak it in at the end when Nicole Vega is back home with her husband and not have a chance to answer in front of you? That is not fair. That is not seeking the truth." The objection was overruled. Defendant suggests that the remarks were improper because it would still have been "difficult to

ascertain whether she was exaggerating or telling the truth." Defendant cites no authority for this proposition. Indeed, he cites no authority for this issue at all. A prosecutor may comment on the failure of the defense to call a witness, and may argue any reasonable inferences to be drawn from such failure. (*People v. Lewis*, *supra*, 46 Cal.4th at p. 1305.) We thus agree with respondent that the prosecutor was making fair comment on the state of the evidence to support defense counsel's argument.

II. No prejudice

Defendant contends that it is probable that he would have obtained a more favorable result absent repeated incidents of prosecutorial misconduct. As defendant has failed to demonstrate such misconduct, it follows that defendant's claim that he was prejudiced by repeated incidents of misconduct is without merit.

Regardless, there is no merit to defendant's contention that he was prejudiced because Officer Velasquez failed to do a proper accident reconstruction or field sobriety test; nor is there merit to defendant's contention that the evidence did not overwhelmingly show that defendant caused the collision, or that Nicole suffered great bodily injury. There was only argument, not evidence, of an inadequate investigation. Officer Velasquez's observations, the preliminary breath test, defendant's deceitful claim of having had just one beer nine hours before, well established that defendant was under the influence of alcohol. Contrary to defendant's claim that the evidence was not overwhelming, his attempt at deceit and Nicole's exclamation immediately before the collision provided compelling evidence that defendant did not stop at the stop sign, in violation of sections 22450, subdivision (a), and 21802, subdivision (a). Defendant's speculation that Nicole's speeding and the darkness of the area caused the collision were easily overcome by Officer Velasquez's testimony that the stop

sign was reflective and there were no obstructions on the landscape for miles.

Finally, we reject defendant's contention that the medical records do not show great bodily injury, as defendant has not made those records a part of the record on appeal. (See *People v. Whalen* (2013) 56 Cal.4th 1, 84.) Nevertheless, Nicole testified that her thigh was bruised, the left side of her face was swollen, her scalp was cut, her eye was swollen shut for about a week, and she had a black eye for at least a month, as well as her difficulty thinking and processing. Esteban also testified that Nicole required help getting out of bed and to the bathroom, that it hurt for her to walk, that her head hurt, her left eye was swollen shut, and she could not drive. "An examination of California case law reveals that some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury.' [Citations.]" (*People v. Washington* (2012) 210 Cal.App.4th 1042, 1047-1048 [and see cases cited therein].)

We conclude that there was no reasonable probability that the result would have been different absent the prosecutor's statements.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
ASHMANN-GERST