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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MARK DWAYNE WILSON, Defendant and Appellant.	B234013 (Los Angeles County Super. Ct. No. LA067265)

APPEAL from a judgment of the Superior Court of Los Angeles County, Barry A. Taylor, Judge. Affirmed.

Brandie G. Devall, 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, Victoria B. Wilson and Seth P. McCutcheon, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Mark Dwayne Wilson, appeals his conviction for robbery, with deadly weapon use, prior serious felony conviction and Three Strikes findings (Pen. Code, §§ 211, 12022, 667, subd. (a)-(i)).[1] Wilson was sentenced to state prison for 10 years.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

Magnolia Market in Los Angeles was owned and operated by Sanjay Patel and his two brothers. Patel was familiar with the defendant Mark Dwayne Wilson, who had been a customer for approximately 20 years. The two of them often engaged in a joking exchange of name-calling when Wilson came into the store. Patel testified Wilson "called me sometimes B word [i.e., bitch]. And I called him white trash. We just very friendly. We never had any problem about that."

The Patel brothers allowed many customers, including Wilson, to run a tab at the store. Customers usually paid off their tabs on a monthly basis. Before putting particular items on their tabs, the customers would ask for permission.

Patel was working at the store on February 26, 2011, when Wilson came in, picked up some beer from a cooler and brought it to the front counter. Believing Wilson was intoxicated and that it was illegal to sell beer to someone who was intoxicated, Patel refused to sell him the beer. An argument ensued. Wilson came around behind the counter and grabbed Patel. Because Patel did not think Wilson was merely joking around, he told him to leave the store. Just then Ricky Oriol, another long-time customer, came in. Oriol saw Wilson, who seemed to be drunk, behind the counter and threatening Patel. Wilson had his finger on Patel's chest and he was saying, "I'm not white trash. Fuck you. I'll kick your ass," and "I'll fucking kill you."

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[1] All further statutory references are to the Penal Code unless otherwise specified.

Oriol yelled at Wilson and coaxed him out of the store: "It took all of about five to six minutes . . . so I got him away from the counter, away from [Patel]. And on the way out, he knocked over things, cursed, and ranted on and on." As he was leaving, Wilson told Patel, "I can come back here any time. I can kick your ass. I can fuck you up." When Oriol threatened to call the police, Wilson said, "Fuck the cops. What are they going to do to me?" In response, Oriol called 911. Wilson then left the area.

When Oriol was asked if, upon first entering the store, it appeared to him that Wilson and Patel were just joking around, Oriol testified, "Absolutely not."

Wilson returned to the Magnolia Market a short time later. Oriol was no longer there. When Wilson walked straight to the cooler, Patel said, "Mark, I told you I'm not going to sell you beer. I'm not going to give it to you." Taking a can of Budweiser from the cooler and a bag of Funyon chips from a shelf, Wilson said, "What are you going to do, [bitch]?" Wilson then began to walk out of the store. Patel came out from behind the counter and said, "Mark, you better put it back." As Patel approached, Wilson turned around and pointed the blade of a small knife at him, saying, "What are you going to do [bitch]?" Wilson also said, "I'm going to wait for you until you close the store. I'm going to kill you tonight." Afraid for his safety, Patel retreated behind the counter and called 911. Wilson left the area as Patel was making the call.

Police Officer Jason Haggis responded to the robbery report. He saw Wilson being detained by other officers. An open bag of Funyon chips and a nearly empty can of Budweiser beer were recovered from Wilson's location.

Wilson did not testify or present any evidence.

CONTENTION

The trial court erred by withdrawing a jury instruction on grand theft person as a lesser included offense of robbery.

DISCUSSION

Wilson raises a series of claims related to the trial court's decision, during jury deliberations, to withdraw an instruction on grand theft person as a lesser included offense of robbery. He claims: (1) the instruction should have been given because grand theft person was a necessarily lesser included offense of robbery; (2) the instruction should not have been withdrawn during jury deliberations; and (3) the trial court should have reopened closing argument so defense counsel could address the withdrawal of this instruction. Wilson's claims are without merit.

1. *Background.*

a. *Jury instructions.*

The jury was instructed before the attorneys delivered their closing arguments. Jurors were told the single charged offense was robbery, but that they had the alternative of convicting Wilson on either of two lesser included offenses -- grand theft or petty theft.

The jury was instructed that robbery is committed by "tak[ing] personal property from the possession of another, against the will and from the person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property." "Immediate presence" was defined as "an area within the alleged victim's reach, observation or control, so that he could, if not overcome by violence or prevented by fear, retain possession of the subject property." The trial court also instructed on the concept of constructive possession: "Constructive possession does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing either directly or through another person or persons. The law as it relates to the crime of robbery is that all employees have constructive possession of the employer's property while on duty and thus may be separate victims of a robbery of the employer's business, assuming the other requirements for a robbery have been established as to that employee."

Regarding the lesser included offenses, the trial court instructed: "The theft of personal property of any value from the person of another is grand theft. A taking of property is from the person if the property was either on the body or in the clothing worn or in a container carried by the person from whom it was taken. If you are not satisfied beyond a reasonable doubt the defendant is guilty of the crime charged, you may nevertheless convict him of any lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of grand theft from the person is a lesser crime to the crime of robbery. The crime of petty theft is a lesser crime to the crime of robbery. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in count 1 or any lesser crime."

b. *Closing argument.*

After these jury instructions, the attorneys gave their closing arguments. The prosecutor argued all of the required elements of robbery had been proven. Defense counsel argued the prosecution had failed to prove two of the elements. As to the "force or fear" element, defense counsel asserted there was evidence calling Patel's testimony into question: A courtroom demonstration showed Patel could not have seen a knife in Wilson's hand at the distance involved; it takes two hands to open Wilson's pocket knife, which is inconsistent with the fact he was also holding the beer and chips; during the 911 call Patel did not say Wilson had a knife, but only that he thought Wilson had a knife; Patel did not describe the knife to the 911 operator; Patel's claim of being scared was contradicted by his preliminary hearing testimony and his history of joking around with Wilson.

Defense counsel also argued the "specific intent to permanently deprive" element of robbery was missing, either because the evidence showed Wilson believed the cost of the beer and chips would just be added to his running tab, or because his intoxicated condition negated his ability to form the requisite specific intent.

Defense counsel told the jurors they should acquit Wilson of robbery and instead convict him of grand theft person: "[I]t appears in this case from the evidence, since there's inconsistent and unreasonable testimony regarding the force and fear for robbery, the personal use of a knife, recollections that don't seem to be innocent, it seems the grand theft person may be the reasonable lesser included crime or more descriptive of what happened here. I'm not going to come here and say nothing happened. I'm not going to come up here and say Mr. Wilson was not there. I'm not going to come up here and say he wasn't drunk. . . . [¶] So, if anything, this is all about a grand theft person. This is not more and nothing less."

c. *Final instructions and jury question.*

After closing arguments, the trial court gave the jury a few final instructions, beginning with this one: "We talked about grand theft, but we never defined what petty theft was. So I'm going to define that right now. When property is taken by theft and the value of the property taken exceeds $400,[2] the [crime] is grand theft; the item is under $400, the crime is petty theft. That $400 restriction does not apply to grand theft of a person . . . ."

The jury began deliberating, but then sent out a question: "Does grand theft person include constructive possession?" Discussing this question with counsel, the trial court said, "[U]nder the theory that we gave [for] that instruction, the answer would have to be, 'Yes.' [¶] But upon further consideration, I don't think there's a factual basis for . . . grand theft from a person." When the prosecutor asked the court to withdraw this instruction, defense counsel objected. In response, the trial court noted grand theft person required the property to have been taken either from the person's body, clothing or a container being carried by the person. The trial court also pointed out the jury was hardly going to find Wilson guilty of grand theft based on the value of the property taken since that had merely been one beer and a bag of chips. But defense counsel argued that

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[2] The parties subsequently pointed out to the trial court that the statutory minimum for grand theft had been increased to $950 in 2010.

withdrawing the instruction at this point would be prejudicial: "No, I understand, but . . . I argued the way that the instructions were given, and now it's taken away from them [i.e., the jurors], and I don't know what they're going to do in terms of what do we do now. It changes, okay, like directing a verdict."

The trial court overruled the defense objection, said it would withdraw the grand theft person instruction from the jury, and denied defense counsel's request to reopen closing argument.

The trial court reinstructed the jury as follows: "And then the fourth question, 'Does grand theft person include constructive possession?' That's a very good question. And after further reflection on it, I determined that it does not – properly does not. So for grand theft person, it has to be particularly taken from the person, from his clothing, or from something he's carrying or pushing like a shopping cart or something like that. And that brings us to the last question. 'Clarify grand theft person page 32, versus page 33. Page 32 says, '$400 or more.' Page 33 says, 'any value.' [¶] Well, the $400 or more refers to the distinction between petty theft and grand theft. In other words, if you go into a store and shoplift something worth $5, it's petty theft. If you shoplift something worth a thousand dollars, it's grand theft. Page 33 says, 'any value.' But that goes to the grand theft from the person issue, not to straight grand theft is how normally it's defined." The trial court then added: "Just to clarify one more time, it's stricken, the instruction grand theft from the person . . . is withdrawn. So you're not to use that at all."

2. *Discussion.*

a. *Grand theft person was not a proper lesser included offense.*

Wilson initially contends his conviction must be reversed because withdrawing the grand theft person instruction violated the trial court's duty to instruct the jury on all lesser included offenses. Citing *People v. Breverman* (1998) 19 Cal.4th 142, 162 ("trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence"), Wilson argues there were

problems with Patel's testimony[3] and asserts, "Based on the evidence presented and the instructions given, a reasonable juror could have concluded that the theft/taking was grand theft person and not a robbery." We disagree. Based on the evidence presented at trial, Wilson could not have been properly convicted of grand theft person and, under the *Breverman* rule, "a trial judge need not instruct the jury as to all lesser included offenses, just those that find substantial support in the evidence." (*People v. Haley* (2004) 34 Cal.4th 283, 312.)[4]

"The seminal case on grand theft from the person is *People v. McElroy* (1897) 116 Cal. 583 . . . , where the defendant took $17 from a wallet in the pocket of the victim's trousers while the victim was asleep and was using the trousers as a pillow. The California Supreme Court reversed the defendant's conviction for grand theft from the person, concluding the defendant had not taken the property from the person of the victim. [Citation.] According to the court, the obvious purpose of making theft from the person of another a more serious crime 'was to protect persons and property against the approach of the pickpocket, the purse-snatcher, the jewel abstracter, and other thieves of like character who obtain property by similar means of stealth or fraud, and that it was in contemplation that the property shall at the time be in some way actually upon or attached to the person, or carried or held in actual physical possession – such as clothing, apparel, or ornaments, or things contained therein, or attached thereto, or property held or carried in the hands, or by other means, upon the person; that it was not intended to

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[3] Wilson argues, "At trial there was evidence that the force element of robbery was not met because Patel testified that he and appellant often joked in an aggressive nature and called each other names, so the alleged 'threat' could have been a joke. There was also evidence that there was no actual threat with a knife because Patel told the 911 operator that he 'thought' appellant had a knife, not that he actually threatened him with a knife, or that he even saw a knife, a difference that Patel confessed under cross examination. At trial Patel also provided conflicting testimony about when he saw the knife."

[4] Nor could Wilson have been properly convicted of straight grand theft because he did not take personal property worth $950 (§ 487, subd. (a)).

include property removed from the person and laid aside, however immediately it may be retained in the presence or constructive control or possession of the owner while so laid away from his person and out of his hands. . . . Had the [L]egislature intended that the offense should include instances of property merely in the immediate presence, but not in the manual possession about the person, it would doubtless have so provided, as it has in defining robbery." (*People v. Geter* (2012) 202 Cal.App.4th 1430, 1434.)

It is clear a conviction for grand theft person would not have been a permissible verdict in this case. As the Attorney General points out, "It was uncontroverted the appellant took the beer and chips from locations within the store, not directly from Patel's person. . . . There was no evidence offered that suggested the items appellant took were on Patel's person, in his clothing, or in any container he was holding." Wilson does not dispute that this is the state of the evidence. Hence, the trial court did not err by concluding it should not have instructed on grand theft person.

b. *Trial court properly withdrew jury instruction after closing argument.*

Wilson next contends the trial court erred by withdrawing the grand theft person instruction after closing arguments were given and while the jury was deliberating. This claim is meritless.

Various statutes govern the proper chronology of trial proceedings:

Section 1093 provides, in pertinent part: "The jury having been impaneled and sworn . . . the trial shall proceed in the following order, unless otherwise directed by the court: [¶] . . . [¶] (e) When the evidence is concluded . . . the district attorney, or other counsel for the people, and counsel for the defendant, may argue the case to the court and jury . . . . [¶] (f) The judge may then charge the jury, and shall do so on any points of law pertinent to the issue, if requested by either party . . . . At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case."

Section 1093.5 provides: "In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court

and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However, if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof."

Section 1094 provides: "When the state of the pleadings requires it, or in any other case, for good reasons, and in the sound discretion of the court, the order prescribed in Section 1093 may be departed from."

Section 1138 provides: "After the jury ha[s] retired for deliberation, if . . . they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

Hence, the Penal Code both prescribes a particular order for the unfolding of a trial, and permits that order to be altered when the need arises. As our Supreme Court said many years ago, "There is no doubt of the general rule that after a jury ha[s] retired for consultation they may be called into court for further instructions . . . ." (*People v. Stouter* (1904) 142 Cal. 146, 149.)

So, for instance, *People v. Ardoin* (2011) 196 Cal.App.4th 102, held a trial court did not err by modifying a felony murder instruction so it applied to both defendants, instead of just one, even though this was done "during jury deliberations . . . upon learning of the jury's expression of confusion about the felony-murder rule as applied to [the codefendant]." (*Id*. at p. 127.) *Ardoin* reasoned, "When presented with the jury's inquiry, the trial court had the statutory obligation 'to provide the jury with information the jury desires on points of law.' [Citations.] Under [Penal Code] 'section 1138 the court must attempt "to clear up any instructional confusion expressed by the jury." [Citation.]' [Citation.]" (*Id*. at pp. 127-128.)

The same thing happened here. When the jury asked about the applicability of the "constructive possession" concept to the crime of grand theft person, the trial court realized the undisputed evidence in the case would not support a conviction for grand theft person. In this situation, the trial court "for good reasons, and in [its] sound discretion" (§ 1094), acted properly by withdrawing the erroneous instruction even though the jury had already begun to deliberate.

c. *Wilson not prejudiced when trial court refused to reopen closing argument.*

Wilson's final contention is that, even if the trial court was justified in withdrawing the grand theft person instruction while the jury was deliberating, the court erred by refusing to reopen closing argument so defense counsel could respond to the reinstruction. Wilson argues, "[C]ourts have long held that to prevent unfair prejudice, if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory. [Citations.] The converse is also true, if a supplemental instruction withdraws a crucial matter from consideration by the jury – particularly after deliberations have commenced, counsel should be given the opportunity to address the altered theory."

We agree with the general premise that a defendant can possibly be prejudiced when the jury is reinstructed after closing arguments. As *Ardoin* explained, "To prevent unfair prejudice, if a supplemental instruction introduces new matter for consideration by the jury, the parties should be given an opportunity to argue the theory. [Citations.] 'The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant the right to the effective assistance of counsel at all critical stages of the proceedings.' [Citation.] ' "To effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have a reasonable opportunity to prepare a defense and respond to the charges." [Citation.]' [Citation.] *If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of section 1093.5 and the defendant's right to a fair trial may be compromised*.

[Citations.]" (*People v. Ardoin, supra,* 196 Cal.App.4th at p. 129, fn. omitted, italics added.)

However, the cases reversing convictions in this situation have been ones where, to use Wilson's own well-chosen phrase, the reinstruction affects a "crucial matter." This is the kind of thing that occurs when reinstruction expands, in some way, the prosecution's theory of criminal liability. (See *People v. Stouter, supra,* 142 Cal. at pp. 148-150 [child molesting charge was based on allegation defendant inserted his finger into child's vagina, but after jury asked if " 'attempt to insert the finger in the vagina' " would suffice, trial court instructed on attempted child molestation and jury found defendant guilty]; *People v. Sanchez* (1978) 83 Cal.App.3d Supp. 1, 7 [in prosecution for sexual battery on undercover officer, trial court withdrew "lack of consent" element during closing argument]; *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 459 [defense counsel should have been allowed to address new aiding and abetting instruction because "arguments based on convicting a defendant as a principal or convicting a defendant as an aider and abettor are based on two conceptually different theories"]; *United States v. Oliver* (6th Cir. 1985) 766 F.2d 252, 254, italics added [in prosecution for making threats via U.S. mail, "defense counsel expressly tailored his closing argument upon the alleged failure of the government to prove a critical element of the crime, i.e. that the letter had in fact been *delivered,* as directed by the original jury charge. When the court subsequently omitted that element as a prerequisite for conviction [saying defendant only had to have *deposited* the letter for delivery], the defense attorney was left with the impossible task of rearguing to the jury points which he had conceded during his first argument."].)

Wilson claims his situation was equally prejudicial: "During closing argument defense counsel relied heavily on the grand theft instruction . . . . When the trial court subsequently withdrew the instruction on grand theft, *after* defense counsel's admission that grand theft was a reasonable description of what had occurred, the court essentially rendered counsel and her argument totally ineffective." We cannot agree. The heart of the defense case was that the prosecution had failed to prove the "force or fear" element of robbery. Nothing in the trial court's reinstruction altered the power of that argument. Although defense counsel urged the jury to find Wilson guilty of grand theft person instead of robbery, even after that instruction was withdrawn there remained an alternative lesser included offense -- petty theft.

As we noted, *ante*, the jury had been instructed: "If you are not satisfied beyond a reasonable doubt the defendant is guilty of the crime charged, you may nevertheless convict him of *any* lesser crime if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. [¶] The crime of grand theft from the person is a lesser crime to the crime of robbery. The crime of petty theft is a lesser crime to the crime of robbery. [¶] Thus, you are to determine whether the defendant is guilty or not guilty of the crime charged in count 1 or *any* lesser crime." (Italics added.)

In addition to that explicit explanation of the possible verdicts from which it could choose, the jury was additionally informed by other instructions that grand theft person and petty theft were *alternative* possible lesser included offenses: "In the crime of the robbery of which the defendant is accused in count 1 or that of grand theft or petty theft, which are lesser crimes thereto, or in the allegation that the defendant used a deadly or dangerous weapon, a necessary element is the existence in the mind of the defendant of the specific intent to permanently deprive and/or use a weapon"; and "Theft is . . . either grand theft or petty theft. If you find the defendant guilty of theft, you must determine whether the crime was grand theft or petty theft and state which it is in your verdict. [¶] If you find the defendant guilty of theft, but unanimously have a reasonable doubt as to whether it is grand theft, you must find it to be petty theft."

Even without resorting to the usual rule that an appellate court must assume the jury properly followed a trial court's instructions (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1364), in this case there is no reason at all to think the jurors would have simply disregarded all these instructions when grand theft person was withdrawn, and somehow believed their only choice was to either convict Wilson of robbery or acquit him completely. Although Wilson argues defense counsel relied on the grand theft person instruction to make an "admission of wrong doing," this admission did not give away anything of value because it was virtually undisputed Wilson had committed some kind of theft offense.[5]

Because the reinstruction in this case did not materially alter the scope of criminal liability or otherwise affect any matter crucial to Wilson's defense, we conclude the trial court did not err by refusing to reopen closing argument.

Moreover, even when a reinstruction does affect a crucial matter, and closing argument should therefore be reopened, the defendant is not necessarily prejudiced. In *People v. Ardoin, supra,* 196 Cal.App.4th 102, where the trial court added a felony-murder instruction after closing argument, the court of appeal acknowledged there was an inherent risk of prejudice: "We cannot dispute the premise . . . that once the trial court decided to clarify the felony-murder instruction to include both defendants, fairness dictated that the court also reopen the case for the limited purpose of granting Ardoin's counsel the right to offer rebuttal argument." (*Id*. at p. 129.) Nevertheless, *Ardoin* found the defendant had not been prejudiced: "[T]he error is one that requires reversal only if, viewing the record in its entirety, a party ' "was unfairly prevented from arguing his or her defense to the jury or was substantially misled in formulating and presenting arguments." [Citation.]' [Citations.] 'The question is whether this court can "conclude

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[5] The suggestion Wilson might have legitimately believed Patel was going to put the beer on his tab is not credible; the evidence plainly showed Patel refused to sell Wilson the beer not because he thought Wilson could not pay for it, but because Wilson was drunk.

that the effectiveness of counsel's argument and hence of appellant's defense was not impaired by counsel's inaccurate information regarding the court's charge." [Citation.]' [Citation.] We conclude that Ardoin was not substantially misled in formulating or presenting closing argument, nor was he unfairly prevented from imparting his defense to the jury. [Citations.] Moreover, from our reading of the record we do not perceive that defense counsel's argument on the felony-murder issue would have appreciably differed or been any more persuasive if the case had been reopened." (*Id*. at p. 134.)

The same is true here. The only thing defense counsel was prevented from telling the jury would have been this: "Now that the trial court has withdrawn the grand theft person instruction, you should still find the prosecution failed to prove all the elements of a robbery and you should instead convict Wilson of petty theft for shoplifting beer and chips from the Magnolia Market." But as noted, *ante*, the jury had been well-instructed on petty theft as an alternative lesser included offense. The trial court even told the jury, "[I]f you go into a store and shoplift something worth $5, it's petty theft." We see no reason why the jury would have ignored all these instructions just because the grand theft person instruction was withdrawn. And even though defense counsel told the jury, "[T]his is all about a grand theft person. This is not more and nothing less," we do not believe the jury would have ignored the possibility of convicting Wilson of petty theft.

Hence, any error in failing to reopen closing argument was harmless because Wilson was not "unfairly prevented from imparting his defense to the jury." (*People v. Ardoin, supra,* 196 Cal.App.4th at p. 134.)

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.