Filed 1/17/17 P. v. Crowder CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALFRED CROWDER, Defendant and Appellant.	B256412 (Los Angeles County Super. Ct. No. MA057733)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bernie C. LaForteza, Judge. Affirmed.

Danalynn Pritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi, and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Alfred Crowder challenges his first degree murder conviction for his role in the killing of Victor Enriquez. The prosecution alleged that Crowder and Jonathan Duke cornered Enriquez at the security gate of an apartment complex in Palmdale and stabbed him repeatedly. Crowder contends that his conviction must be reversed because his trial counsel provided him with ineffective assistance by failing to object to pervasive prosecutorial misconduct. We affirm.[1]

FACTS AND PROCEEDINGS BELOW

Around 11:00 p.m. on the night of October 17, 2012, Los Angeles County Sheriff's Department deputies discovered the body of Enriquez in the carport area of an apartment building in Palmdale. Deputies arrested Crowder, and an information charged him with one count of murder, in violation of Penal Code section 187, subdivision (a).[2] The information further alleged that Crowder committed the crime for the benefit of, at the direction of, or in association with, a criminal street gang. (§ 186.22, subd. (b)(4).)[3]

The murder of Enriquez took place in the world of criminal street gangs in Palmdale. Testimony indicated that the accused, the victim, and the main witnesses were all active or former members of various gangs. Enriquez's friend Terrance Dorsey admitted that he was a member of the Kitchen Crips, but claimed he had not been active in the gang in almost 10 years. According to Dorsey, Crowder was a member of the

---

[1] Crowder also filed a petition for a writ of habeas corpus. We address his petition in a separate order. Crowder's codefendant Duke was tried separately and was also convicted of first degree murder. We address Duke's appeal in our opinion filed in case No. B264579.

[2] Unless otherwise specified, subsequent statutory references are to the Penal Code.

[3] The information also alleged that Crowder had suffered one prior strike under the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had been convicted of one prior serious felony pursuant to section 667, subdivision (a). Finally, the information alleged that Crowder had four prison priors, as defined in section 667.5, subdivision (b).

Fruit Town Piru gang, and Duke was a member of the Rollin' 60's gang. Dorsey and a prosecution gang expert testified that they knew Enriquez to be a member of the Rollin' 60's. Deon Tatum, who testified to events just before the stabbing, was a former member of the Dime Block gang. Anthony Palmer, another eyewitness, testified that he was a member of Dime Block at the time of the killing.

A. *The Prosecution's Case*

1. *Percipient Witnesses*

Dorsey testified that he was a friend of Enriquez, and that the two spent the afternoon of October 17, 2012 hanging out at an apartment complex in Palmdale. Dorsey left there around 10:00 p.m., and returned to find Enriquez arguing with someone named "L." Dorsey helped resolve the argument, and he and Enriquez went to the back of the complex, just inside a security gate.

Dorsey noticed Crowder and Duke walking toward them from across the street. According to Dorsey, Enriquez asked, " 'You need to get in the gate, Bro?' " Enriquez opened the gate. Crowder walked through, pulled Enriquez toward him, and started stabbing him. At this point, Dorsey ran away. A few minutes later, Dorsey returned to the complex, called 911, and flagged down a police officer. Dorsey pointed the officer in Enriquez's direction and took off.

Palmer testified that on the night of the killing, he was hanging out with a group of approximately 15 to 20 people across the street from the apartment complex where the stabbing occurred. In the course of the evening, Duke told Palmer and Crowder that Enriquez had been snitching, and according to Palmer, Duke seemed upset about it. Duke asked Palmer to kill Enriquez for snitching, but Palmer refused. Crowder told Palmer that he should not allow snitches in the hood. Duke went inside his house, which was nearby, and brought out some knives.

Palmer testified that, prior to the stabbing, he went back to Tatum's house to change clothes, and consequently, he did not see the stabbing. Palmer acknowledged that he told a detective a different story in an interview that took place shortly after the stabbing. In that interview,

Palmer told the detective the following: He saw Crowder and Duke walk across the street toward the area where Enriquez and Dorsey were located. After someone opened the gate for Crowder, Palmer saw Crowder stab Enriquez. Enriquez attempted to flee, but Crowder pursued him. Duke struck Enriquez with his fist, causing Enriquez to fall. Crowder tripped over Enriquez and fell on the pavement. Crowder then got up and continued stabbing Enriquez. Duke struck Enriquez as well, but Palmer could not see if Duke had a knife in his hand. Palmer and Tatum then left the scene. After the prosecutor questioned him about his earlier statements to police, Palmer acknowledged that he did in fact see Crowder and Duke cross the street and attack Enriquez, though he continued to deny having seen knives in their hands.

Tatum testified that on the night of the killing, he saw Crowder and Duke hanging out at the apartment complex among a group of other people. They were both playing with knives. At trial, Tatum initially could not recall what the knives looked like. After reading the transcript of a prior interview with the police, Tatum remembered telling a detective that Crowder's knife looked like brass knuckles. Tatum heard Crowder and Duke talking about beating someone up, possibly a man named Kaleb. Tatum decided to leave for home when he saw Crowder and Duke head across the street toward Enriquez.

After Tatum returned home, he heard Dorsey screaming into his phone, and Tatum could hear the police dispatcher talking to Dorsey on the phone's speaker.

At trial, Kenneth Thomas denied knowing anything about the killing or telling the police anything about it. In particular, he denied telling police in an interview that on the night of the stabbing, he saw two men standing over Enriquez, that he saw one man get into a waiting blue compact car while the other man fled in the opposite direction, or that the two men were Crowder and Duke. Detective Brandt House, the investigating officer on the case, testified that in an interview, Thomas told him that he saw Duke and Crowder stabbing Enriquez.

Detective House testified that he went to the scene of the crime shortly after it occurred and discovered footprints in the blood at the

scene. Three nights later, Detective House received an anonymous phone call telling him that the murder weapons were inside a mattress near the murder scene. Deputies searched the mattress and found two knives hidden inside. One of the knives had finger holes in it, in the style of brass knuckles.

Sheriff's deputies searched Crowder's residence shortly after the crime. In the course of their search, they discovered Crowder's shoes. The parties stipulated that there were six bloodstains on the top and side of the left shoe. DNA analysis showed that the blood on the shoes and on the brass-knuckles-style knife they recovered from the mattress matched the DNA of Enriquez, the victim. The parties also stipulated that all the footprints photographed at the crime scene were consistent in size and tread marks with the bloodstained shoes police recovered in Crowder's house. When Crowder was arrested, he had scrapes on his left kneecap. He claimed he was injured when he slipped while carrying a speaker box up some stairs.

Detective House interrogated Crowder after his arrest, and a recording of the interrogation was played to the jury. In the interview, Crowder claimed he went home at 8:00 p.m. on the night of the stabbing and did not leave his house afterward. He claimed not to know anything about the stabbing.

2. *Gang Experts*

The prosecution called two Los Angeles County Sheriff's Department deputies to testify as expert witnesses on gangs in Palmdale: Detectives Daniel Welle and Richard O'Neal.

Both experts testified that gangs in the Antelope Valley, where Palmdale is located, do not have well-defined territories as they do in the rest of Los Angeles County. Members of the Crips and Bloods may work together in Palmdale in a way that might not happen elsewhere. The Rollin' 60's gang, associated with the Crips, and the Fruit Town Piru gang, associated with the Bloods, both started in South Los Angeles or Compton, but they have members in Palmdale. The Dime Block Hustlers are a more

recent gang, and are native to the area of Palmdale where the stabbing occurred.

The experts agreed that gangs detest snitches, and that snitches may be killed if they are discovered. Detective Welle testified that the Rollin' 60's gang would have a strong incentive to get rid of snitches from within its ranks. The prosecutor asked both experts hypothetical questions based on the facts in this case, and both testified that, in their opinion, if those facts were true, the killing would have been accomplished for the benefit of both the Rollin' 60's and the Fruit Town Piru gangs.

Detective O'Neal testified that Enriquez had been working for him as a confidential informant, providing information about crimes committed by other gang members, including members of his own Rollin' 60's gang. According to Detective O'Neal, Enriquez had snitched on his own brother—himself a member of the Rollin' 60's—regarding the brother's role in a shooting.

B. *The Defense Case*

Crowder testified on his own behalf. He claimed he left the Fruit Town Piru gang in 2008. He testified that he went to East 10th Place, where the stabbing occurred, around 9:00 p.m. to sell marijuana. He saw Thomas, Tatum, and Palmer hanging out there that night. He did not know Dorsey well. Crowder left the area around 10:00 or 10:30 p.m., then returned and saw Dorsey and Enriquez hanging out by the gate of the apartment complex.

From across the street, Crowder saw two people get into a fight with Enriquez and one person being chased, but it was too dark to see what was happening very well. He did not see anyone get stabbed. After the stabbing, Crowder and others walked over to the body. He saw a body on the ground and blood everywhere, then got on his bike and left.

Crowder testified that he knew Duke, but they were not friends. He denied knowing that Enriquez was a police informant, and did not participate in a conversation with Palmer, Dorsey, and Tatum on the subject. He acknowledged lying in his interview with Detective House when he told the detective that he had been in all night after 8:00 p.m. He claimed that he had done so because he had just been released from parole and did not want to be involved in the murder investigation.

C. *Conviction and Sentencing*

The jury found Crowder guilty of first degree murder and found the gang enhancement true. Crowder admitted his prior convictions. The trial court sentenced him to serve an indeterminate term of 55 years to life. This sentence consisted of 25 years to life for first degree murder, doubled pursuant to the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), plus five additional years for the serious-felony prior. (§ 667, subd. (a).) The court imposed but stayed an additional 25-years-to-life sentence for the gang enhancement. (§ 186.22, subd. (b)(4).)

DISCUSSION

Crowder contends that his attorney was deficient in failing to object to multiple instances of prosecutorial misconduct. The instances of alleged misconduct are as follows: (1) asking expert witnesses guilt-assuming hypotheticals based on facts not in evidence; (2) asking Dorsey about being the victim of a drive-by shooting after Dorsey testified against Crowder at a preliminary hearing; (3) eliciting inadmissible testimony in violation of *Miranda*;[4] (4) improperly asking Palmer leading questions; (5) asking Crowder to comment on the veracity of other witnesses; (6) improperly impeaching Crowder with the recording of his police interrogation; and (7) multiple examples of improper arguments during closing and rebuttal arguments.

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

Because Crowder's trial attorney failed to object to the prosecutor's alleged misconduct at trial,[5] the claims are forfeited, and Crowder may not challenge them directly on appeal. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) Instead, Crowder alleges that by failing to object, his attorney provided him with ineffective assistance of counsel. A defense attorney's failure to object to prosecutorial misconduct may indeed serve as the basis of a claim of ineffective assistance of counsel. (See, e.g., *People v. Anzalone* (2006) 141 Cal.App.4th 380, 395.) In order to prevail on this kind of claim, a defendant must be able to show that the underlying claim of prosecutorial misconduct has merit. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 428.)

"A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (*People v. Hill* (1998) 17 Cal.4th 800, 820 (*Hill*).) "The standards governing review of [prosecutorial] misconduct claims are settled. 'A prosecutor who uses deceptive or reprehensible methods to persuade the jury commits misconduct, and such actions require reversal under the federal Constitution when they infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 . . . ; see *People v. Cash* (2002) 28 Cal.4th 703, 733 . . . .) Under state law, a prosecutor who uses such methods commits misconduct even when those actions do not result in a fundamentally unfair trial.' (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1328 . . . .) 'In order to preserve a claim of misconduct, a defendant must make a timely objection and request an admonition; only if an admonition would not have cured the harm is the claim of misconduct preserved for review.' (*Ibid.*) When a claim of misconduct is based on

---

[5] There are two exceptions. Crowder's attorney did object to the prosecutor's conduct in eliciting testimony from a detective regarding statements Crowder and Duke made without being informed of their *Miranda* rights, and in implying that Crowder's attorney did not believe in his own case. These issues are discussed below in Discussion parts III and VII.B.

the prosecutor's comments before the jury, ' "the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." ' " (*People v. Friend* (2009) 47 Cal.4th 1, 29.) To establish a claim of misconduct, "bad faith on the prosecutor's part is not required. (*Hill*, [*supra*, 17 Cal.4th] at pp. 822-823.)" (*People v. Centeno* (2014) 60 Cal.4th 659, 666.)

Although we agree with some of Crowder's allegations of prosecutorial misconduct, we hold that the prosecutor's actions do not merit reversal of Crowder's conviction. The prosecutor's misconduct was not so pervasive as to infect the trial with such " 'unfairness as to make the resulting conviction a denial of due process.' " (*Darden v. Wainwright* (1986) 477 U.S. 168, 181.) Furthermore, under state law, "it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of any alleged misconduct." (*People v. Turner* (1994) 8 Cal.4th 137, 194 (*Turner*), abrogated on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Because Crowder did not suffer prejudice as a consequence of any prosecutorial misconduct, his claim of ineffective assistance of counsel fails as well. (See *People v. Ochoa*, *supra*, 19 Cal.4th at pp. 428-429.) Accordingly, we affirm Crowder's conviction.

We address each of Crowder's allegations of error in turn.

I. *Hypothetical Questions To Expert Witnesses*

Crowder contends that the prosecutor committed misconduct by asking the prosecution's expert gang witnesses hypothetical questions that assumed Crowder's guilt and were based on facts not in evidence. Except in a few instances, Crowder does not object to the subject matter or form of the questions. Rather, he contends that the prosecutor committed misconduct by calling the expert witnesses to testify before any percipient witnesses to the killing had testified. In so doing, Crowder alleges that the prosecutor prejudiced the jury against him. Although the order of the witnesses was unusual, there was good reason for changing the usual order of testimony, and we disagree that the decision amounted to prosecutorial misconduct.

On the first day of trial, the prosecutor planned to call Tatum as his first witness, but Tatum failed to appear in court that day. The court issued a warrant for Tatum to be brought to court. After opening statements, the prosecutor called the sheriff's deputy who found Enriquez's body to testify. After this brief testimony, the court asked the prosecutor what he intended to do if he could not locate Tatum by the next day. The prosecutor responded, "I don't know, Your Honor. . . . We'll just have to put on other witnesses until he's found at some point." The prosecutor had managed to locate Detective Welle on short notice, and he testified that afternoon as an expert witness about gangs in Palmdale. Late that evening, authorities located Tatum and took him into custody.

The next day, the prosecution's first two witnesses were also Los Angeles County Sheriff's Department deputies: Deputy Nemeth and Detective O'Neal. Deputy Nemeth testified about questioning Crowder and filling out a field identification card (FI card)[6] for him at the county jail, approximately two months after the stabbing, and Detective O'Neal testified as a gang expert. The prosecutor then called the percipient witnesses, beginning with Dorsey, and then, the following day, Tatum. The record does not indicate whether Palmer or the other percipient witnesses could have been called earlier.

The prosecutor asked the experts hypothetical questions common to a trial involving gang allegations. For example, the prosecutor asked Detective O'Neal, "Assume that there's a Rollin' 60's gang member who is snitching out on his own people and possibly some other people in a Dime Block area. A Rollin' 60's gang member—so again, someone from his own gang—and a Fruit Town Piru gang member are discussing the fact that a Rollin' 60's gang member is a snitch and needs to be taken care of[.] The two walk over to the location where that snitch is[.] At least one of them is armed with a knife, if not both[.] The Rollin' 60's gang member might punch the snitch, and the Fruit Town Piru gang member stabbed that particular snitch about 15 times and kills him. Do you have an opinion as

---

[6] Witnesses in the record referred to these cards as both field interview and field identification cards.

to whether that crime was done for the benefit of, at the direction of, or in association with a criminal street gang?"

The prosecutor may ask an expert witness hypothetical questions based on the facts of a case, including questions that embrace the ultimate question of the defendant's guilt or innocence. (*People v. Vang* (2011) 52 Cal.4th 1038, 1048 (*Vang*).) On the other hand, it is improper for a prosecutor to use hypothetical questions "to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced." (*People v. Boyette* (2002) 29 Cal.4th 381, 449.) Crowder cites a few instances in which he claims the prosecutor's questions did not match the facts the witnesses also testified to. In these instances, the questions for the experts may have diverged slightly from the facts that the percipient witnesses ultimately testified to, but the hypotheticals were close enough to the facts of the case that they were "properly rooted in the evidence presented at trial." (*People v. Ferraez* (2003) 112 Cal.App.4th 925, 930.)

But Crowder's main contention is that, even if the content of the questions was not objectionable under *Vang*, the prosecutor committed misconduct by asking hypothetical questions of the expert witnesses before the percipient witnesses testified about what they saw. We are not persuaded. The key requirement for the admission of a hypothetical question is that the " 'question must be rooted in facts shown by the evidence.' " (*People v. Richardson* (2008) 43 Cal.4th 959, 1008.) This does not mean, however, that the facts that form the basis of the hypothetcial must *already be in evidence*. Section 320 of the Evidence Code provides broad discretion to trial courts, so that "[e]xcept as otherwise provided by law, the court in its discretion shall regulate the order of proof." Indeed, our Supreme Court has held that the "hypothetical statement of facts posed to an expert witness need not be limited to evidence already admitted into evidence." (*People v. Boyette*, *supra*, 29 Cal.4th at p. 449.) Although the early opinion testimony may be objectionable on the ground that it assumes facts not in evidence, the court has discretion to admit the opinion evidence provisionally, subject to a motion to strike the opinion if the evidence supporting the hypothetical facts are not ultimately adduced.

(Evid. Code, § 403, subd. (b); *Ault v. International Harvester Co.* (1974) 13 Cal.3d 113, 123; *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339; see generally Annot., Modern Status of Rules Regarding Use of Hypothetical Questions in Eliciting Opinion of Expert Witness (1974) 56 A.L.R.3d 300, 324, § 6[c] ["it is within the trial judge's discretion, or at least not prejudicially erroneous, to permit an expert witness to respond to a hypothetical question which assumes matter not yet supported by evidence in the record"].) The court may also require an offer of proof or assurances from counsel that the necessary evidence will be forthcoming. (See 1 McCormick on Evidence (2016 supp.) § 14.)

Here, defense counsel did not object to the prosecutor's hypothetical questions to the experts on any ground. To the extent any question was objectionable because the evidence necessary to support the hypothetical facts had not been admitted, counsel could have reasonably concluded that the evidence to support the facts would be forthcoming.

Crowder argues that the presentation of expert testimony before any percipient witnesses was improper because it must have confused the jury. He cites cases holding that, for purposes of the Sixth Amendment's confrontation clause, a court may not rely on the jury to distinguish between hearsay used solely to evaluate how an expert witness formed an opinion, and hearsay admitted for the truth of the matter asserted. Thus, in a concurring opinion in *Williams v. Illinois* (2012) 567 U.S. __ [132 S.Ct. 2221, 183 L.Ed.2d 89] Justice Thomas stated, "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth. 'To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true.' [Citation.] 'If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.' " (*Id.* at p. 2257 (conc. opn. of Thomas, J.).) Crowder argues that, in the same way, "the jury could not assess the so-called expert opinions of . . . [Detectives] Welle and O'Neal without accepting as a premise that the prosecutor's

guilt-assuming hypothetical questions, encompassing all the facts in dispute, were true."

We are not persuaded. In the case of evaluating an expert's testimony regarding hypothetical situations, jurors do not need to make a preliminary decision as to whether the facts underlying the hypotheticals are true. For example, Detective Welle testified that if the facts the prosecution alleged in this case were true, then the murder of Enriquez was committed for the benefit of the Rollin' 60's gang. It may make the jury's task easier to hear testimony from percipient witnesses first, followed by expert witnesses, but the trial court does not abuse its discretion by allowing expert witnesses to testify first.

Moreover, the failure to object, even if constitutionally deficient, was not prejudicial. If counsel had objected, it is reasonably likely that the court would have either allowed the testimony (as it had discretion to do) or allowed the testimony provisionally, subject to a motion to strike if the hypothetical facts were not ultimately supported by percipient witnesses. If the court had allowed the expert testimony provisionally, any subsequent motion to strike would probably not have been granted because the evidence ultimately did support the hypothetical facts. In either case, the failure to object was, therefore, inconsequential.

II. *Asking Dorsey And Crowder About The Drive-By Shooting*

Crowder contends that the prosecutor committed misconduct by asking Dorsey about being the victim of a drive-by shooting shortly after he testified at the preliminary hearing in the case. We disagree.

Dorsey testified that, about one week after he testified against Crowder and Duke in a preliminary hearing, he was standing on the front porch of his house when a car pulled up. Someone in the car called Dorsey a snitch and fired shots at the house. Dorsey's grandmother and niece were inside the house at the time. In consequence, Dorsey relocated to a new state with the help of the sheriff's department.

Later, during cross-examination of Crowder, the prosecutor asked Crowder several questions about the consequences of snitching. Among other questions, the prosecutor asked, "So, for example, like Terrance Dor[s]ey, he testified that after the preliminary hearing against you and Jonathan Duke, his house was shot up. Do you remember him testifying to that?" Crowder answered, "Yes." The prosecutor continued, "And that's something that could happen to a snitch, right?" Crowder answered, "Yes."

"Although evidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated [citations], evidence that a witness is afraid to testify is relevant to the credibility of that witness and therefore admissible." (*People v. Warren* (1988) 45 Cal.3d 471, 481.) Crowder argues that the prosecutor committed misconduct by deliberately eliciting testimony implying that Crowder had been involved in the shooting of Dorsey's house. (See *People v. Chatman* (2006) 38 Cal.4th 344, 379-380 [eliciting inadmissible testimony constitutes prosecutorial error only if intentional].)

We see no prosecutorial misconduct with respect to the prosecutor's questioning of Dorsey. The prosecutor did not ask Dorsey whether Crowder was responsible for the drive-by shooting, nor did Dorsey testify about Crowder's involvement. The testimony was powerful evidence of Dorsey's fear of testifying and being labeled a snitch. We are more troubled by the prosecutor's questioning of Crowder about the attack on Dorsey during Crowder's cross-examination. Although the question was relevant to help establish the plausibility of the prosecution's theory that the motive for the murder of Enriquez was to take revenge against a snitch, the question could also serve to link in jurors' minds the attack on Dorsey with Crowder. To encourage the jury to infer, with no substantiation, that Crowder was involved in the attack on Dorsey would constitute misconduct.

But even if the prosecutor did commit misconduct, the error was harmless because there is no reasonable probability that Crowder would have obtained a different outcome without the alleged misconduct.

(See *Turner*, *supra*, 8 Cal.4th at p. 194.) If misconduct occurred here, it was limited to a single hypothetical question. In light of the overwhelming physical evidence and testimony against Crowder, the question regarding the drive-by shooting could not have made a difference in the jury's verdict.

III. *Questioning Deputy Nemeth Regarding Interrogation Of Crowder And Duke Without Miranda Warnings*

Approximately two months after the stabbing, Deputy Nemeth interviewed Crowder and Duke in jail. He asked them about their gang affiliations, apparently under the guise that the information would be used for purposes of housing, to keep them from being placed in cells with members of rival gangs. In fact, Detective House, the investigating officer on the case, had asked Deputy Nemeth to question Crowder and Duke in order to gain information for the case against them. Crowder and Duke told Deputy Nemeth their gang affiliations, and Deputy Nemeth filled out an FI card with this information, along with details of their tattoos.

During cross-examination, Crowder's attorney asked Deputy Nemeth whether he had informed Crowder and Duke about their *Miranda* rights prior to asking them about their gang affiliations. The prosecutor objected, arguing that the question was irrelevant. At a sidebar conference, Crowder's attorney argued that Crowder's and Duke's statements were inadmissible because Deputy Nemeth had questioned the prisoners without informing them of their *Miranda* rights. The prosecutor stated, "I believe the courts have made it clear that when there is an issue of inventory searches or classification for procedural purposes done by law enforcement, that no *Miranda* needs to be given." The court asked whether it mattered that Detective House had asked Deputy Nemeth to obtain the gang information for the purposes of the case, and the prosecutor answered, "It doesn't matter, Your Honor." The court set a hearing to resolve the issue.

On the day set for the hearing, the parties informed the court that they had resolved the matter by stipulating to exclude Deputy Nemeth's testimony about the FI cards, including Crowder's statements about his gang affiliation. If Crowder should testify about his gang affiliation,

the prosecutor would seek to introduce Deputy Nemeth's statements to impeach him. Crowder testified that he had left the Fruit Town Piru gang in 2008. During cross-examination, the prosecutor asked Crowder about Deputy Nemeth's questioning of him, and Crowder denied telling Deputy Nemeth that he was a gang member.

At the jury instructions conference, Crowder's attorney argued that Deputy Nemeth's testimony should not be admitted even for purposes of impeachment. The trial court disagreed and instructed the jury as follows: "If you conclude that [Crowder] made this statement, you may consider it only to help you decide whether to believe [Crowder]'s testimony. You may not consider it proof that the statement is true or for any other purpose."

Crowder argues that his attorney rendered ineffective assistance by failing to argue that his statements to Deputy Nemeth should be excluded in their entirety, including for purposes of impeachment, pursuant to *People v. Bey* (1993) 21 Cal.App.4th 1623, 1627–1628 (*Bey*). But even if Crowder's attorney did not cite *Bey* by name, he did argue that the statements should be excluded in their entirety, not merely for purposes of impeachment. (See *ibid.*) We can see no manner in which Crowder's attorney fell below the standard of care with respect to this point. Consequently, Crowder's argument of ineffective assistance of counsel as to this issue fails.[7]

---

[7] Crowder also contends that his attorney was ineffective for failing to object on the basis of prosecutorial misconduct to the prosecutor's attempt to elicit Deputy Nemeth's testimony regarding Crowder's statements to Deputy Nemeth. But Crowder did successfully object to the testimony on the ground that Crowder's statements were inadmissible because of a lack of *Miranda* warnings. We fail to see the purpose of objecting specifically to the prosecutor's alleged error. For the same reason, we reject Crowder's contention that his counsel was ineffective for failing to object to the prosecutor's alleged misstatement of the law regarding inventory searches.

Even if Crowder had raised this issue purely as a matter of prosecutorial error, he would not be entitled to relief because any error was harmless. If Deputy Nemeth had not testified at all about Crowder's statements to him, the only difference in the trial would have been to present one fewer way to impeach Crowder's testimony that he was not a gang member. But this would not have allowed Crowder to obtain a better result in his trial because the gang enhancement did not require that Crowder be a gang member, so long as he acted for the benefit of a criminal street gang. There was ample evidence showing that Crowder committed the crime to benefit a street gang, regardless of whether he himself was a member.

IV. *Impeachment Of Palmer With His Prior Statements To Police*

Crowder contends that the prosecutor committed misconduct by asking Palmer leading questions about what he had told police in an interview that occurred shortly after the stabbing. We disagree. Palmer's testimony was inconsistent with previous statements he had made to police, and the prosecutor properly impeached him using leading questions regarding his previous statements.

Palmer testified that he left the scene prior to the stabbing and did not return until after it was over. This was inconsistent with statements he made to police, in which he claimed that he saw Crowder and Duke walk across the street and attack Enriquez. The prosecutor asked Palmer a series of leading questions regarding his statements to police. For example, the prosecutor asked, "Did you tell this detective here seated next to me that you saw Duke and Crowder walking eastbound across 10th Place East towards the sallyport of the apartment? Did you ever say that?"

In general, a party may not ask leading questions of its own witness on direct or redirect examination. (Evid. Code, § 767, subd. (a)(1).) This rule has exceptions, however. In particular, "[w]hen impeaching a witness a questioner may be permitted to confront with leading questions." (*People v. Collins* (2010) 49 Cal.4th 175, 217.) When a witness has made previous statements inconsistent with his testimony, a party may impeach

him with his previous statements. (Evid. Code, § 1235.) The prosecutor's leading questions were proper impeachment, not misconduct.

V. *Asking Crowder To Comment On The Veracity Of Palmer's Testimony*

Crowder contends that the prosecutor committed misconduct by asking him whether Palmer lied in his testimony. We are not persuaded.

Palmer testified that shortly before the stabbing, Duke urged him to kill Enriquez and even offered to provide a gun for Palmer to use. During cross-examination of Crowder, the prosecutor asked him about this conversation: "You heard Anthony Palmer say that you got into that conversation by saying 'you shouldn't let snitches in your hood.' Do you remember him saying that?" Crowder answered, "Yes." The prosecutor asked, "Is that true or not true?" Crowder answered, "That's not true." The prosecutor asked, "You didn't say that." Crowder answered, "No, sir."

Crowder argues that it was improper for the prosecutor to ask, in effect, whether Palmer was lying. According to Crowder, the prosecutor should have simply asked whether Palmer had ever said "you shouldn't let snitches into your hood." We see no misconduct here. First, the prosecutor did not explicitly ask whether Palmer was lying, much less whether he had a motive to lie or was a liar in general. In fact, it may have been necessary for the prosecutor, in asking the question, to refer to Palmer's earlier testimony in order to remind the jury and Crowder himself of the context of the question. Furthermore, prosecutors are forbidden to ask whether a witness was lying only when those questions are "argumentative, or when designed to elicit testimony that is irrelevant or speculative." (*People v. Chatman*, *supra*, 38 Cal.4th at p. 384.) These questions may be permissible "if the witness to whom they are addressed has personal knowledge that allows him to provide competent testimony that may legitimately assist the trier of fact in resolving credibility questions." (*Ibid.*) That is the case here. Palmer testified that Crowder was present for the conversation in question. The prosecutor's questions were not argumentative. They "called for and received an actual answer." (*Id.* at p. 383.)

VI. *Cross-Examination Of Crowder*

Crowder contends that the prosecutor committed misconduct in two respects in cross-examining him. First, he argues that it was improper impeachment for the prosecutor to play for the jury a recording of his interview with police. Second, Crowder contends that the prosecutor committed misconduct by asking him how many times he had been arrested for murder. We reject both of these contentions.

A. *Playing the Recording of Crowder's Interview*

Crowder contends that the prosecutor committed misconduct by playing for the jury a recording of his interrogation by police. He argues that the playing of the recording was improper impeachment because it was not inconsistent with his trial testimony. We disagree.

During the interrogation following his arrest, Crowder told sheriff's deputies that he had returned to his home around 8:00 p.m., approximately three hours before Enriquez was killed, and that he did not go out again that night. In his testimony, Crowder acknowledged that this statement was a lie. He testified that he was with Palmer, Tatum, and the other people who congregated outside Duke's house, and that he saw two other people attack Enriquez. After Crowder testified, the prosecutor played a recording of the interrogation for the jury. Crowder's trial counsel objected to the playing of the recording, but the court overruled the objection.

Crowder argues that this was improper impeachment. According to Crowder, because he admitted in his testimony that he lied during his interrogation, his testimony was not inconsistent with his earlier statement. This argument is meritless. First, as the prosecutor argued, the recording was admissible as an admission by the defendant. (Evid. Code, § 1220.) There was no need to satisfy the requirement of Evidence Code section 1235 that a party's hearsay declaration be inconsistent with his testimony. Even if that section did apply, however, Crowder's statement to police that he did not go outside his house flatly contradicted his testimony that he saw the murder and its aftermath. Crowder cites no law indicating that he can avoid impeachment with his

previous statement simply by claiming on the stand that the earlier statement was a lie.

B. *Asking About Arrest for Murder*

Crowder also contends that the prosecutor committed misconduct by asking him how many times before he had been arrested for murder. We are not convinced that this was error.

During cross-examination, Crowder testified that at the time of his interrogation, he did not believe he was a suspect in the murder of Enriquez, and denied that he was then under arrest. The prosecutor quoted from the transcript of the interrogation, in which a sheriff's deputy told Crowder, " '[Y]ou have been arrested for murder.' " Crowder replied, "Yeah, I probably did say that. It was so long ago, I just can't remember exactly what I told them." The prosecutor asked, "How many times have you been arrested for murder?" Crowder answered, "Just this time."

Crowder contends that this was improper, noting that courts have held that a party may not impeach a witness with evidence of the witness's prior arrests. (E.g., *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522-1523.) Impeachment with prior arrests is improper because it is more prejudicial than probative: A mere arrest is very little evidence to show that the witness is likely to lie in his testimony, but " 'a witness'[s] credibility in the eyes of the jury would be seriously impaired by evidence of prior criminal arrests, because of the 'bad character' inevitably suggested thereby.' " (*Id.* at p. 1523.) But in this case, the prosecutor did not attempt to impeach Crowder in this manner. Indeed, the point of the question was to show that Crowder had *not* previously been arrested for murder, as Crowder confirmed when he answered the question. By asking the question, the prosecutor sought to establish that being arrested for murder was an unusual and memorable event for Crowder, and that his claim that he did not realize he was a suspect in Enriquez's murder was implausible. This line of questioning may have been effective in rendering Crowder's testimony less credible, but we fail to see how it unfairly prejudiced him.

VII. *Closing Arguments*

Crowder contends that the prosecutor committed several errors during closing arguments. He argues that the prosecutor committed misconduct by (1) suggesting that Crowder was responsible for the drive-by shooting of Dorsey; (2) arguing that Crowder's attorney did not believe in his own case; (3) trivializing the standard for premeditation and deliberation; (4) commenting on Crowder's silence in response to the deputy's questions; and (5) withholding the strongest arguments against Crowder until rebuttal, so that Crowder would not have an opportunity to respond to them. We address each of these contentions in turn.

A. *Argument Regarding the Drive-By Shooting of Dorsey*

Crowder contends that the prosecutor committed misconduct by arguing that he was responsible for the drive-by shooting of Dorsey. We agree, but we conclude that the error did not prejudice him.

We have already discussed Dorsey's testimony about the attack on him shortly after he testified at the preliminary hearing. (See Discussion part II, *ante*.) In rebuttal argument, the prosecutor returned to the subject. In response to the defense's argument that Dorsey and other witnesses were not credible because they were gang members and had prior convictions, the prosecutor used the drive-by shooting to buttress Dorsey's credibility. The prosecutor argued, "after [Dorsey] testifies against this defendant and Jonathan Duke, he is sitting out on the porch of his house, a car pulls up, and they shoot at him. . . . And now he's got to be up here snitching out . . . the guy who killed his friend, and he doesn't want to do that. He doesn't want to be involved in that anymore. Because he could end up dead." Thus, the prosecutor suggested that the jury should use Dorsey's fear of testifying against Crowder as a reason to believe him. This was a proper use of evidence of witness intimidation. (See *People v. Warren*, *supra*, 45 Cal.3d at p. 481.)

The prosecutor, however, continued: "So why kill Terrance Dor[s]ey? Why was he shot up right after the preliminary hearing? Who is preventing him from testifying? Who is it that wants Terrance Dor[s]ey not to testify?" The prosecutor went on to argue that neither Dime Block nor the Rollin' 60's could be responsible for the drive-by, because they did not have an incentive to try to silence Dorsey. The prosecutor then concluded, "Well, who's left? That leaves Fruit Town Piru. If it's Fruit Town Piru who is shooting up Terrance Dor[s]ey's house, then it tells us who the person who actually committed the crime is. I mean, that in itself is not definitive as to who committed the crime, but it's another piece of the puzzle."

By implying that the Fruit Town Piru gang attacked Dorsey in order to silence him, the prosecutor encouraged the jury to draw the conclusion that Crowder himself was involved in the attack against Dorsey. This was highly improper. "[E]vidence that a defendant is threatening witnesses implies a consciousness of guilt and thus is highly prejudicial and admissible only if adequately substantiated." (*People v. Warren*, *supra*, 45 Cal.3d at p. 481.) When it was a third party, rather than the defendant himself, who attempted to suppress testimony, evidence of the witness intimidation " ' "is inadmissible against a defendant where the effort did not occur in his presence. [Citation.] However, if the defendant has authorized the attempt of the third person to suppress testimony, evidence of such conduct is admissible against the defendant." ' " (*People v. Hannon* (1977) 19 Cal.3d 588, 599.) To establish a link between the defendant and an effort to intimidate a witness, it is not enough for the prosecution to show that the defendant merely had an opportunity to authorize the witness intimidation. (*People v. Williams* (1997) 16 Cal.4th 153, 201.)

In this case, the prosecution produced no evidence linking Crowder to the shooting at Dorsey. The only connection was the prosecutor's supposition that Crowder's gang was the only group with a reason to attack Dorsey. This inference was hardly airtight. There was testimony from the prosecution's own experts that gang members detest snitches and may attack even members of other gangs who are suspected of snitching. Furthermore, the same prosecutor had earlier attempted to link Duke to

the shooting by arguing at Duke's trial that Duke's gang had an incentive to attack Dorsey. But even if these other possibilities did not exist, so long as there was no evidence linking Crowder to the attack on Dorsey, it still was misconduct for the prosecutor to imply a connection. Nevertheless, we hold that the error did not prejudice Crowder. The attack on Dorsey was ancillary to the stabbing of Enriquez, and the evidence against Crowder was overwhelming. Multiple eyewitnesses testified that they saw Crowder commit the murder. Physical evidence linked Crowder to the crime scene, including Enriquez's blood discovered on Crowder's shoe, and Crowder's shoe prints in the blood at the scene of the killing. This evidence contradicted Crowder's story in his first interview with the police that he had not been present at the crime scene. In his testimony, Crowder admitted that he lied to police during that interview. Any rational jury would have voted to convict Crowder regardless of whether the prosecutor had argued improperly regarding the shooting at Dorsey.

B. *Argument that Crowder's Attorney Did Not Believe in His Case*

Crowder contends that the prosecutor committed misconduct by arguing that Crowder's own attorney did not believe in his case or believed his client was guilty. In this instance, Crowder's attorney objected to the prosecutor's argument and, when his objection was overruled, asked the court for a general admonition. By taking these steps, the attorney did all that he reasonably could have done to protect his client's rights. Consequently, Crowder's claim of ineffective assistance of counsel fails. Even if Crowder had argued this claim simply as a matter of prosecutorial error, without alleging ineffective assistance of counsel, he would not be entitled to relief because the prosecutor's misconduct was harmless. Our holding of harmless error, however, should not serve to minimize the reality of the prosecutor's misconduct in this instance.

During closing arguments, Crowder's attorney argued that the prosecution had failed to prove beyond a reasonable doubt that Crowder killed Enriquez. He also argued to the jury regarding what was meant by premeditation and deliberation, which were required to convict Crowder of first degree, rather than second degree, murder. (See § 189.)

In rebuttal, the prosecutor argued as follows: "My question for [defense counsel] would be this, the first and second-degree murder . . . why does that [distinction] matter to him? How does it matter? Remember [according to the defense,] this guy didn't do it. Alfred Crowder got up on the stand and said, 'it wasn't me.' He got on that stand, swore to tell the truth, told you 'that wasn't me. I didn't stab him. Those other two guys, those two other guys that were there that night, they're the ones who stabbed him.' So why does the issue of first- or second-degree murder matter to the defense? It matters because there is evidence of murder by this defendant. . . . [T]hat's why [defense counsel] brought up that issue."

In *People v. Bell* (1989) 49 Cal.3d 502 (*Bell*), our Supreme Court held that the prosecutor in a murder case erred by remarking to the jury "that defense counsel had spent some time on the special circumstances issues, 'and for a man who says that his client didn't commit the crime, that must be a waste of time. But, on the other hand, he might be worried that he did commit it.' " (*Id.* at p. 537.) Although a prosecutor may comment on inconsistencies in the defense's case, "[t]here is no inconsistency in denying that an accused was the perpetrator of an offense while simultaneously arguing that no matter who committed it the crime was not premeditated. We note also that while comment[ing] on apparent inconsistencies in argument is permissible, defense counsel's personal belief in his client's guilt or innocence is no more relevant than the belief of the prosecutor." (*Id.* at pp. 537-538.) In this case, the facts are virtually the same as in *Bell*. Just as in *Bell*, there was no inconsistency between Crowder's attorney's argument that his client was innocent, and that whoever did commit the murder had not acted with premeditation and deliberation. Unlike in *Bell*, the prosecutor here did not explicitly argue that Crowder's attorney believed his client was guilty. But it is difficult to escape that implication in the prosecutor's closing argument. To the extent that the prosecutor argued that Crowder's counsel spent time arguing about premeditation and deliberation because he knew the evidence suggested Crowder was guilty of stabbing Enriquez, the prosecutor committed misconduct. Moreover, the trial court failed to

correct the error when it did not admonish the jury as requested by defense counsel. (See *id.* at p. 538.)

Nevertheless, the prosecutor's misconduct did not prejudice Crowder. There was overwhelming evidence that Crowder killed Enriquez, and that he acted with premeditation and deliberation when he did so. In addition to testimony or recorded statements from four eyewitnesses, the bloodstains on Crowder's shoe, and his footprints at the scene of the crime, tied him to the murder. Furthermore, the fact that Crowder approached Enriquez and began stabbing him immediately and without provocation, inflicting multiple stab wounds that each would have been fatal, shows that Crowder acted with premeditation and deliberation.

C. *Analogies Regarding the Standard for Premeditation and Deliberation*

Crowder contends that the prosecutor committed misconduct by trivializing the standard of premeditation and deliberation. We disagree.

In explaining to the jury the standard of premeditation and deliberation during rebuttal argument, the prosecutor drew a series of analogies to everyday decision-making. He said, "When you go to a restaurant, you sit down, and the waiter comes up to you and says, 'what are you going to have for lunch?' And when they say, 'What would you like to order,' many of us sit there and think to ourselves, well, you know, I really want the prime rib sandwich, but I know I should have a salad. The reason you do that is because we think to ourselves, well, what is healthier[?] And in those few seconds, that minute, two minutes, three minutes, whatever it is, in the very few—in the interim there, you are able to determine how things affect you." The prosecutor drew another analogy to a decision to run a red light. The conclusion, the prosecutor argued, was that "[e]very one of us make . . . important decisions, in 30 seconds, in 60 seconds, in one minute. We're not required to sit for hours on end deliberating, agonizing over a decision. That's not what premeditation and deliberation is. It means you make a calculated decision as to how the effects are going to play out."

Crowder argues that this was a misstatement of the law. He notes that in several cases, courts have found error in prosecutors' arguments comparing the standard of guilt beyond a reasonable doubt to ordinary decision-making. For example, in *People v. Nguyen* (1995) 40 Cal.App.4th 28, the court held that the prosecutor committed misconduct by comparing the standard of proof beyond a reasonable doubt to decisions to get married or to change lanes while driving a car. (*Id.* at p. 36.) The court noted, "It is clear the almost reflexive decision to change lanes while driving is quite different from the reasonable doubt standard in a criminal case. The marriage example is also misleading since the decision to marry is often based on a standard far less than reasonable doubt, as reflected in statistics indicating 33 to 60 percent of all marriages end in divorce." (*Ibid.*)

In this case, however, the prosecutor's example from everyday life did not distort the legal standard. " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) The prosecutor's argument accurately described the law.

D. *Commenting on Crowder's Silence and Accusing Him of Lying*

Crowder argues that the prosecutor committed misconduct by commenting on Crowder's silence when the sheriff's deputies interrogating him asked if he had any questions for them, and by accusing him of lying. We are not persuaded.

1. *Commenting on Crowder's Silence*

Crowder waived his *Miranda* rights and answered questions from sheriff's deputies after his arrest. At the end of the interrogation, on two occasions, Detective House asked Crowder if he had any questions for them. Crowder answered that he did not. During rebuttal argument, the prosecutor recounted these facts, then stated, "It's almost like he knew that he committed the crime, it's almost like he knew what the evidence might be, and he didn't have any questions because he knew he did it."

Crowder argues that this was error under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*). In *Doyle*, the United States Supreme Court held that the use of a defendant's silence after receiving his *Miranda* warnings violated his Fourteenth Amendment right to due process. (*Id.* at p. 619.) Subsequent case law has not extended the application of *Doyle* to other situations. For example, in *Anderson v. Charles* (1980) 447 U.S. 404, the United States Supreme Court held that "*Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence, because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent." (*Id.* at p. 408.) In *Fletcher v. Weir* (1982) 455 U.S. 603 (*Fletcher*), the Supreme Court held that *Doyle* does not apply when authorities do not read the defendant his *Miranda* rights following arrest. The Court concluded that, "[i]n the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to postarrest silence when a defendant chooses to take the stand." (*Id.* at p. 607.) Similarly, in *Salinas v. Texas* (2013) 570 U.S. ___ [133 S.Ct. 2174, 186 L.Ed.2d 376] (*Salinas*), the Supreme Court held that a prosecutor does not violate a defendant's Fifth Amendment rights by commenting on the defendant's silence in the face of noncustodial questioning by the police, unless the defendant says that he is not answering the question on Fifth Amendment grounds. (*Salinas*, *supra*, 133 S.Ct. at p. 2180 (plur. opn. of Alito, J.).)

This case does not fit within the narrow confines of *Doyle*. The sheriff's deputies who interrogated Crowder read him his *Miranda* rights, and Crowder waived them and answered the deputies' questions. Although a defendant may "selectively waive his Fifth Amendment rights by indicating that he will respond to some questions, but not to others," his intermittent silence in response to questions is insufficient to revoke a prior waiver of *Miranda* rights. (*United States v. Lorenzo* (9th Cir. 1978) 570 F.2d 294, 297-298.) Nothing about Crowder's actions during interrogation indicated that he meant to assert his right to remain silent in response to the deputies' questions. Because Crowder did not invoke his right to remain silent under *Miranda*, the prosecutor did not commit *Doyle* error by commenting on his answer.

Nevertheless, we are troubled by the prosecutor's argument. Part of a prosecutor's responsibility is to avoid distorting the evidence, and to encourage the jury to draw only "reasonable inferences" therefrom. (*Hill*, *supra*, 17 Cal.4th at p. 819.) In the cases where the Supreme Court has upheld the use of a defendant's silence against him, it was possible to draw a reasonable inference that the defendant's silence either showed a consciousness of guilt or impeached the testimony offered at trial. Thus, in *Fletcher*, *supra*, 455 U.S. at page 603, the defendant stabbed the victim in a fight outside a nightclub. He "immediately left the scene, and did not report the incident to the police." (*Ibid.*) After the defendant claimed for the first time at trial that he had been acting in self-defense and that the stabbing was accidental, the prosecutor asked him during cross-examination why he had not said this to the police at the time of his arrest. (*Id.* at pp. 603-604.) This was a reasonable question to ask. As the Supreme Court noted, " 'Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted.' " (*Id.* at p. 606, quoting *Jenkins v. Anderson* (1980) 447 U.S. 231, 239.)

In this case, however, Crowder did not remain silent in response to a police request for information. Indeed, he answered all the questions the deputies asked him. He simply told them that he did not have any questions of his own when they offered him an opportunity to ask them

questions. There are several possible explanations for Crowder's answer. For example, as a parolee who had just been arrested for murder, he may not have trusted the police. He may have declined to ask any questions simply because he wanted the interview to be over. Or perhaps nothing they asked prompted him to ask any questions. There was no logical connection, however, between Crowder's failure to ask the deputies questions and the consciousness of guilt. We need not decide, however, whether this argument rose to the level of prosecutorial misconduct through mischaracterizing the evidence (see *Hill*, *supra*, 17 Cal.4th at p. 823) because, even if it did, any such error was harmless. There were many reasons to doubt Crowder's testimony on the stand. By admitting that he lied during his interview with police, and by failing to explain fully how his footprints were the only ones found in the blood at the murder scene, or how Enriquez's blood ended up on the top of his shoe, Crowder impeached himself thoroughly. The prosecutor's attempt to draw an inference of consciousness of guilt from Crowder's failure to ask questions of the deputies would have made no difference to any rational jury.

2. *Accusing Crowder of Lying*

During closing argument, the prosecutor said, "I mean, if any one of us had committed a crime like that and we're facing conviction for murder, I mean, probably all of us would lie. And so it's not surprising that he does." Later, in rebuttal argument, the prosecutor said, "Well, I think we all understand why [Crowder] might get up here and lie to every one of us."

Crowder argues that this was an improper accusation of perjury. He cites our Supreme Court's opinion in *People v. Ellis* (1966) 65 Cal.2d 529, where the Court held that the prosecutor committed misconduct by calling the defendant and other witnesses perjurers. (*Id.* at pp. 539-540.) The Court noted that the accusation of perjury was significant because "[p]erjury is a felony, and the connotation conveyed to the jury is therefore apt to be far more derogatory than that conveyed by the term liar. Particularly when applied to the defendant, it is apt adversely and unnecessarily to affect the ability of the jury dispassionately to weigh the credibility of the accused and the issue of guilt or innocence."

(*Id.* at p. 540.) In this case, the prosecutor made no such accusation. Instead, the prosecutor argued that the jury should disbelieve Crowder's testimony because he had a strong incentive to tell untruths in order to save himself from a conviction for murder.

E. *Withholding Arguments until Rebuttal*

Crowder contends that the prosecution erred by withholding its most powerful arguments until rebuttal. We disagree. In *People v. Robinson* (1995) 31 Cal.App.4th 494, the court held that the prosecutor committed misconduct by beginning closing arguments with a perfunctory argument of only three and one-half transcript pages, then making the vast majority of his argument, 35 transcript pages, in rebuttal, when the defense counsel could not respond. (*Id.* at p. 505.) Here, the prosecutor's initial argument and rebuttal were approximately the same length, and we see nothing to suggest that the prosecutor sandbagged the defense by waiting until rebuttal to make his strongest arguments.

DISPOSITION

The judgment of the trial court is affirmed. In light of the concerns stated above regarding the prosecutor's conduct in this case, the clerk of this court is directed to forward a copy of this opinion to the prosecutor and to the State Bar of California.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.