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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JOSE ARANA, Defendant and Appellant.	B255512 (Los Angeles County Super. Ct. No. LA072453)

APPEAL from the judgment of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Affirmed as modified.

Mona D. Miller, 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, Steven E. Mercer and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found defendant and appellant Jose Arana guilty of first degree residential burglary, and the trial court sentenced defendant as a third-strike offender to a prison term of 38 years to life. Defendant appeals, contending the trial court committed evidentiary, instructional and sentencing errors. Defendant also argues the prosecutor committed misconduct during closing argument, there is no substantial evidence supporting the first degree burglary finding, and cumulative error.

We conclude two of the one-year sentence enhancements, imposed pursuant to Penal Code section 667.5, subdivision (b),[1] must be stricken, but otherwise affirm the judgment of conviction.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2012, Douglas and Lori Busch lived on a 10-acre property in the hills of Malibu. The grounds included a multi-story main house, a guesthouse, a cabana and swimming pool, a garage/carport area, and a separate detached studio. The studio was closer to the front of the property, with the main house located up a fairly lengthy driveway. Mr. Busch, an architect, used the studio to meet with clients. Arturo Garcia was the Busches' gardener. He performed the gardening and general maintenance tasks on the property, including tending to the large koi pond that wrapped around the studio. On occasion, Mr. Garcia would bring workers with him to help with certain projects.

On Sunday, September 16, 2012, around 11:30 a.m., Mr. Busch was in the studio with his wife and some clients. His niece and her boyfriend were at the pool. A car pulled up the driveway, which was unusual because the phones had not rung. A security gate at the driveway entrance required guests to push a button which caused the phones to ring to alert the Busches that someone had arrived, but that had not occurred. The only other way to open the gate and obtain access to the property was by punching in the security code. The Busches did not give out the security code to many people, but Mr. Garcia did know the number.

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

The car stopped near the pool and a man got out. A woman was in the car as well but she stayed in the car. The man walked up to the studio. Mr. Busch asked who he was, and the man told him that Mr. Garcia had sent him to do some repair work on the koi pond aerators. Mr. Busch told him to go ahead and do what he needed to do.

The man told Mr. Busch he first needed to go up to the house to get some parts. Mr. Busch said fine and turned back to his meeting. The man walked toward the house and was gone for around 30 minutes. Mrs. Busch saw him briefly near the pond. He then showed up at the studio again and told Mr. Busch he was going to the hardware store to get some more parts for the repair. Several hours passed and the man did not return, so Mr. Busch called Mr. Garcia. Mr. Garcia told Mr. Busch he had not sent anybody to do any work.

Around 3:00 that afternoon, Mrs. Busch noticed her iPad was missing, as was $261 that had been in her wallet inside her purse. The purse and her iPad had been in the dining room of the main house before she went to the studio for the meeting with their clients that morning. Mr. Busch and his wife looked for the items, but could not find them anywhere. Later, Mr. Busch discovered some jackhammers and a chainsaw were also missing from the carport storage area. The carport was open and accessible and was not locked that afternoon. The doors to the house were also unlocked at the time, including the door to the house that was accessible from the stairway that went down to the carport. Mr. Busch never saw defendant carrying any tools or place any items in his car. He was busy with his client meeting and was not focused on what was going on elsewhere on the property.

The Busches reported the missing property the next day to the Los Angeles County Sheriff's Department. Two deputies came out to speak with them. On October 1, 2012, Samuel Taylor, the detective assigned to investigate their case, contacted Mr. and Mrs. Busch. They discussed the incident and the missing property and money. They also gave Detective Taylor Mr. Garcia's telephone number and told him that defendant had previously been at their property working for Mr. Garcia.

Detective Taylor called Mr. Garcia and asked him about any contact information he had for defendant. Mr. Garcia told him he only had a telephone number for defendant, and the name "Jose Luis," with no last name.

Mr. Garcia explained that he was trying to hire an assistant, so he had been bringing several individuals to work with him the last month or so to determine if any of them would be good for the job. One of the people who tried out for the position was defendant. He came with Mr. Garcia to the Busch property some time during the last week of August, or early September 2012. Defendant was in the front seat of Mr. Garcia's truck as Mr. Garcia punched in the security code at the gate when they first arrived at the Busch property. Defendant had another opportunity to view the security code when he and Mr. Garcia went outside the gate to take out the trash, and then had to re-enter the gate to finish their work. Mr. Garcia did not believe defendant was motivated to work and did not believe he would offer him any further work, but he kept his telephone number. He never told defendant to go back to the Busch property to perform any kind of work, with or without him, on September 16 or any other day.

Based on the contact information from Mr. Garcia, Detective Taylor was able to determine defendant's full name and run a criminal background check. Detective Taylor discovered defendant was on parole, so he contacted defendant's parole officer, Willie Mack. Mr. Mack gave Detective Taylor defendant's home address in La Puente and also told him defendant was required to wear a global positioning system (GPS) monitoring device on his ankle as a condition of his parole. Detective Taylor asked about the device transmissions on the date of September 16, 2012. Mr. Mack confirmed that defendant's GPS device showed he had been at the Busch property midday on September 16, 2012.

Detective Taylor asked Mr. Mack to have defendant come in to the office for an appointment. Mr. Mack called defendant and told him he needed to "check-in" on October 12, 2012. He did not tell defendant he was being investigated for the burglary at the Busch property. Detective Taylor went to Mr. Mack's office on October 12 to await defendant's arrival, but defendant never showed up. When Mr. Mack called defendant at work to ask about his nonappearance, defendant claimed his boss would not let him

leave. Mr. Mack told Detective Taylor defendant worked at a mechanic's shop called Car Loops in La Puente.

Detective Taylor and several deputies went to Car Loops to talk to defendant there. When they arrived, several employees told them defendant had just gone on a break. Detective Taylor called Mr. Mack, and Mr. Mack told him he just received an "alert" from defendant's GPS device that it had been tampered with. The last place the device had transmitted a location was on Radway Avenue in La Puente, within walking distance of Car Loops. Detective Taylor had one of the deputies drive to defendant's residence in case he showed up there, and Detective Taylor went to the address on Radway Avenue, which was the home of Edward Baca.

Mr. Baca explained he was a coworker of defendant's at Car Loops, and that defendant had shown up unexpectedly and "very excited." Defendant told Mr. Baca he believed the police were looking for him. He handed Mr. Baca his GPS monitoring device (Mr. Baca was not sure what it was), asked Mr. Baca to hold it for him, and said his wife would come pick it up soon. Defendant then asked Mr. Baca to drop him off at a liquor store down the street and he did so. After Mr. Baca returned home, a young pregnant woman arrived and took the GPS device.

Detective Taylor took Mr. Baca to defendant's residence. Mr. Baca identified Guadalupe Marquez as the woman who came and took the GPS device. Detective Taylor and several deputies executed a search warrant at defendant's home that same day. Detective Taylor located defendant's GPS device on the bed in one of the bedrooms. The band that attached the device to defendant's ankle was broken or cut. Ms. Marquez said she did not know where defendant was. She would not answer most of Detective Taylor's questions, and when she was told she could be arrested for her role in taking the GPS device, she said "I'll do the time." Detective Taylor did not find any of the stolen property in the home.

Several days later, Detective Taylor showed six-pack photographic lineups to both Mr. Garcia and Mr. Busch. Mr. Garcia identified defendant, without equivocation, as the person he brought to the Busch property in late August or early September 2012.

Mr. Busch also identified defendant as the individual who had been at their property on September 16, 2012.

Defendant failed to report back to Mr. Mack at any time thereafter, despite his requirement to report in twice a month. Defendant was eventually located and arrested several months later in February 2013.

Defendant was charged, by amended information, with one count of first degree burglary (§ 459). It was specially alleged defendant had served five prior prison terms within the meaning of section 667.5, subdivision (b), two of which also qualified as prior serious or violent felony convictions within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law (§ 1170.12, subds. (a)-(d), § 667, subds. (b)-(i)). Defendant pled not guilty and denied the special allegations.

The case proceeded to a jury trial in July 2013. Defendant moved to exclude the evidence that he removed the GPS monitoring device. The court denied the motion. After conducting an Evidence Code section 402 hearing, the court also ruled that testimony regarding the GPS monitoring of defendant and the data produced on September 16, 2012, was admissible. The court bifurcated trial on the prior allegations.

The prosecution presented the facts set forth above. The prosecution also presented the testimony of Ashley Morgan, Director of Judicial Affairs and Crime Scene Analysis for Satellite Tracking of People. Ms. Morgan testified that the California Department of Corrections and Rehabilitation is one of the company's clients. Ms. Morgan attested to her familiarity with the GPS device assigned to defendant as a condition of his parole. She attested to the data transmitted by defendant's device on September 16, 2012, at around 11:30 a.m. Using an overlay of the transmissions (each represented as a red dot) on an aerial map depicting the Busch property, Ms. Morgan verified the location of defendant's device on that date. The transmissions from the device were sent approximately every 60 seconds. The margin of accuracy as to the location of the device at each transmission point is 15 meters, or within approximately 50 feet of the actual location. The prosecution's exhibit No. 1 and defense exhibit G both

showed the primary cluster of red dots in and next to the Busch home and near the garage/carport area.

Defendant did not testify in his own defense. The defense presented the testimony of Ms. Marquez. She testified that in September 2012, she and defendant were living together in La Puente and she was about seven months pregnant with his child. On September 15, she overheard a conversation between defendant and Mr. Garcia because defendant was using the speakerphone on his cell phone which he often did.
Ms. Marquez said Mr. Garcia told defendant to go to the Busch property in Malibu to do some repair work on the koi pond. She was "positive" they went to the property on Saturday, September 15, not Sunday, September 16, 2012. They parked near the pool and defendant got out of the car. He was only gone about five minutes. When he came back he had a piece of pipe in his hand and said they needed to go to a hardware store.

Ms. Marquez complained to defendant that it was a hot day and she wanted to go home, so they returned to La Puente. They did not go to a hardware store and they did not return to the Busch property. Ms. Marquez did not believe it was odd defendant never went back because Mr. Garcia "fired" defendant.

Ms. Marquez testified that at least three to four deputies arrived at her home on October 12, 2012, looking for defendant. She told them she had just been on the telephone with defendant and he had asked her to pick up his GPS device from Mr. Baca, so she had gone and done so. She knew defendant was required to wear the device as a condition of his parole. She intended to turn it in to defendant's parole officer.
Ms. Marquez said defendant did not return home at any time between October 12 and the day he was eventually arrested, and that she had no idea where he was.

The jury found defendant guilty of first degree burglary.

The court denied defendant's motion to strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The prosecution advised the court of its intent not to proceed on the prior in case number KA092854. The four remaining prior allegations were tried to the court, and the court found them to be true.

The court sentenced defendant as a third strike offender to a state prison term of 38 years to life. The determinate portion of the sentence included three consecutive one-year enhancements pursuant to section 667.5, subdivision (b).

This appeal followed. This court, on defendant's request, received one envelope of exhibits admitted at trial as part of the record on appeal. On June 24, 2015, this court granted defendant's request to submit a supplemental brief and augment the record with a March 17, 2015 order from the trial court in case No. KA021171 reclassifying defendant's prior conviction in that case as a misdemeanor. Respondent did not submit any opposition.

DISCUSSION

Defendant raises the following arguments: (1) the trial court erred in admitting evidence of his removal of the GPS monitoring device because it was irrelevant and prejudicial; (2) the court erred in instructing the jury with CALCRIM No. 371 (destruction of evidence) and CALCRIM No. 372 (flight); (3) the prosecutor committed misconduct during closing argument; (4) there was insufficient evidence defendant entered the Busch residence; (5) cumulative errors resulted in undue prejudice; and (6) the court committed sentencing error by imposing three, instead of one, one-year sentence enhancements pursuant to section 667.5, subdivision (b). We address each argument in turn.

1. Evidentiary Error

Defendant contends the evidence of his removal of his GPS monitoring device almost a month after the incident was irrelevant and unduly prejudicial and should therefore have been excluded. Respondent argues defendant forfeited any relevance objection by failing to object on that specific ground below, and that, in any event, the evidence was properly admitted.

"[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal." (*People v. Seijas* (2005) 36 Cal.4th 291, 301.) Defendant objected, and argued at length, that any testimony regarding defendant's removal of the

GPS monitoring device was unduly prejudicial and had to be excluded under Evidence Code section 352. Defendant did *not* specifically raise a relevance objection. The objection was forfeited. However, even if considered on the merits, the evidence was plainly relevant to the issue of flight.

As for defendant's contention the evidence was unduly prejudicial, we find no abuse by the trial court in concluding otherwise. (*People v. Carter* (2005) 36 Cal.4th 1114, 1166.) " '[E]vidence is prejudicial within the meaning of Evidence Code section 352 if it " 'uniquely tends to evoke an emotional bias against a party as an individual' "[citation] or if it would cause the jury to " ' "prejudg[e]" a person or cause on the basis of extraneous factors' " [citation].' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 889.) Defendant argues the evidence that he removed the GPS device which was a violation of the terms of his parole was akin to admitting evidence of other bad acts or propensity evidence. We are not persuaded.

Detective Taylor found defendant's GPS device, with the ankle band broken or cut, at his home after defendant failed to appear at his parole officer's office. Mr. Baca testified defendant arrived at his house unexpectedly, in an agitated state, and that defendant told him he thought the police were after him. He asked Mr. Baca to hold the GPS device for him. Ms. Marquez testified defendant never returned home after that date, despite the fact she was pregnant with his child at the time. Mr. Mack testified that after defendant removed the device on October 12, he never again reported in to the parole office. Defendant's removal of the device was probative on the issue of defendant's flight and avoidance of arrest, and not the type of evidence which would provoke the jury to prejudge him solely on an emotional, extraneous basis. The evidence was not unduly prejudicial within the meaning of Evidence Code section 352.

2. Instructional Error

Defendant contends the court committed prejudicial instructional error by instructing the jury with both CALCRIM No. 371 (destruction of evidence) and CALCRIM No. 372 (flight). We review a claim of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no error.

The jury was instructed with CALCRIM No. 371 as follows: "If the defendant tried to hide or destroy evidence against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

The prosecution presented evidence defendant unlawfully removed the GPS monitoring device the same day he was scheduled for an appointment with his parole officer, arranged for Ms. Marquez to retrieve it, and thereafter did not return home for several months. A reasonable inference from that evidence is that defendant was attempting to hide or eventually intended to destroy the device which could establish his presence at the Busch property on the day of the burglary. The fact the removal or destruction of the device would not in fact "destroy" the data that had already been transmitted from the device does not render the giving of the instruction error. The instruction tells the jury to determine the "meaning and importance" of the evidence. The jury was free to disregard the evidence or give it whatever weight and credence it deemed appropriate.

The jury was also instructed with CALCRIM No. 372 as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilty by itself."

" ' "An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." ' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 522 (*Abilez*); accord, *People v.*

Avila (2009) 46 Cal.4th 680, 710.) Section 1127c[2] requires that the flight instruction be given where evidence of flight is relied upon by the prosecution as tending to show guilt of the charged offense. It is for the jury to determine what weight and significance to be accorded to any such evidence. (*Avila*, at p. 710; accord, *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; see also *People v. Mason* (1991) 52 Cal.3d 909, 942-943 (*Mason*) [flight evidence was not unduly prejudicial because the defendant was "forced" to admit uncharged offenses to explain flight; jury could determine weight and credibility of evidence].)

The prosecutor argued there was evidence of flight tending to show defendant's consciousness of guilt at two different times. First, defendant, on the day of the burglary, made up a story that he was leaving the property to get more parts to repair the pond, but then simply fled the Busch property and did not return. And, after being asked by his parole officer to come in for a meeting on October 12, defendant failed to show, removed his GPS device, dropped it off with a coworker expressing his fear the police were looking for him, and fled, not returning home before his arrest in February 2013.

Defendant argues there was no credible evidence of flight because the removal of the GPS device occurred almost one month after the burglary at the Busch property and defendant's parole officer had not told him he was a suspect in the burglary. The Supreme Court has *not* created "inflexible rules about the required proximity between crime and flight. Instead, the facts of each case determine whether it is reasonable to infer that flight shows consciousness of guilt." (*Mason, supra,* 52 Cal.3d at p. 941 [rejecting argument that the defendant's flight from officers four weeks after murders

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[2] Section 1127c provides as follows: "In any criminal trial or proceeding where evidence of flight of a defendant is relied upon as tending to show guilt, the court shall instruct the jury substantially as follows: [¶] The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. [¶] No further instruction on the subject of flight need be given."

were committed rendered the evidence of marginal probative value and unduly prejudicial].)

Given the evidence already discussed at length above, we find the evidence of flight occurred within a reasonable period of time from the commission of the charged offense and was relevant on the issue of defendant's consciousness of guilt. (*People v. Bonilla* (2007) 41 Cal.4th 313, 328 [prosecution need not prove flight; evidence need only be sufficient to support an inference of consciousness of guilt].)

Moreover, the fact Mr. Mack did not specifically advise defendant he was a suspect in the burglary before he fled, is not dispositive. A defendant's "awareness of the charges is *not required* as a prerequisite for the instruction." (*Abilez, supra*, 41 Cal.4th at p. 523, italics added [discussing predecessor flight instruction, CALJIC No. 2.52].) Defendant argues without direct evidence of his knowledge of current charges, there could have been many other reasons he wanted to avoid law enforcement. That may be true, but it does not discredit the fact that one reasonable inference is that defendant fled because he did not want to be arrested for having burglarized the Busch home. The totality of evidence proffered on the issue of flight was sufficient to go to the jury and warranted the giving of CALCRIM No. 372.

3. Prosecutorial Misconduct

Defendant argues the prosecutor committed misconduct during closing argument that amplified the impropriety and prejudice of the two challenged jury instructions. Defendant contends the prosecutor conflated the removal of the GPS device and leaving the property with the charged offense, and made arguments based on improper conjecture and inferences not supported by any evidence. Respondent contends defendant forfeited all but one instance of alleged misconduct by failing to object below, and that, in any event, there was no misconduct.

Because our determination of the propriety of the prosecutor's argument must be considered in context (*People v. Dennis* (1998) 17 Cal.4th 468, 522), we set forth material portions of the prosecutor's argument, highlighting with italics the statements challenged by defendant:

"Then when the police get involved and they track down the person, the defendant, *you have the defendant removing from his person incriminating evidence. . . . [Y]ou have the defendant removing an item that incriminates himself, that puts him at the scene of the crime*. [¶] . . . [¶]

"*It is not a coincidence the defendant did these actions on the 12th of October because that was the day that he was supposed to meet with Detective Taylor and Parole Agent Mack at Agent Mack's office*.

"You take all these factors combined and the defendant is guilty of burglary, and that's without the GPS. You put the GPS evidence on top of that and it is overwhelming and damaging. [¶] . . . [¶]

"However, evidence of such an attempt does not prove guilt by itself. What are we talking about when we give this instruction [(CALCRIM No. 371)]? *Hide or destroy evidence against him. It's what we talked about earlier, removing the GPS ankle bracelet because the law recognizes people who commit crimes try to do things to disassociate themselves with those crimes when the police are chasing after them*. [¶] . . . [¶]

"On both the instructions, 371 and 372, that last line, . . . evidence of such intent does not prove guilt by itself.

"All that means is that you need some other evidence that a burglary occurred. You have got plenty of evidence, as well as all the GPS evidence which I will talk about briefly. . . . [¶] . . . [¶]

"We see the car chases on TV. Guilty people try to flee. And in this case, immediately after the crime was committed, remember the defendant gave Mr. [Busch] that bogus excuse about I need to leave the property to go pick some stuff up for repair, and he never came back.

"*So immediately after the crime was committed, he fled, he left. He never came back even per Ms. Marquez, the defense's own witness, the defendant never went back to the property. He was not there to fix anything. He was there because he stole and needs*

to get away. The defendant fled twice actually that time and also after being accused of committing the crime. He was indirectly accused of committing the crime.

"The parole agent, Agent Mack, at Detective Taylor's instructions, tried to set up the meeting at the parole office. *The defendant obviously became aware of what was going on, and so initially delayed them by saying oh, my boss won't let me leave work. Detective Taylor has to go to the defendant's place of employment. The defendant by that point had taken off, not to be seen again, even by the mother of his child. He never returned home.* [¶] . . . [¶]

"*Ladies and gentlemen, the evidence is clear in this case. It is overwhelming. Both the evidence from witnesses who were there at the time, the GPS evidence and the defendant's behavior after the fact all point towards the defendant's guilt. There is no reliable credible evidence at all pointing otherwise*." (Italics added.)

Defendant did not object to any of the italicized arguments by the prosecutor set forth above, which he now claims constituted misconduct. "When a defendant believes the prosecutor has made remarks constituting misconduct during argument, he or she is obliged to call them to the court's attention by a timely objection. Otherwise no claim is preserved for appeal." (*People v. Morales* (2001) 25 Cal.4th 34, 43-44 (*Morales*); accord, *People v. Turner* (2004) 34 Cal.4th 406, 432 [failure to object or seek court's admonition to numerous comments by prosecutor vouching for the credibility of expert witnesses and expressing his personal admiration for their integrity resulted in forfeiture of claim on appeal].) Forfeiture is justified because the failure to timely object to improper argument deprives the trial court of an "opportunity to consider the objection and give appropriate admonitions when the alleged misconduct first occur[s], or to prevent additional remarks of a similar nature from being made." (*People v. Bemore* (2000) 22 Cal.4th 809, 846.)

Defendant forfeited his objections to the prosecutor's argument. In any event, even if considered on the merits, the contention lacks merit. All of the challenged comments, read in context, were fair comment on the evidence.

Defendant did *timely object* to the prosecutor's argument when he began to argue that the jury should disregard Ms. Marquez's testimony because she was not credible. The following colloquy occurred:

"[PROSECUTOR]: [¶] . . . [¶] An additional factor, and this is one which is why you should reject Ms. Marquez's testimony in its entirety. . . . [H]as the witness engaged in conduct that reflects on his or her believability. . . . [¶] . . . Ms. Marquez aided and abetted a crime after the fact.

"[DEFENSE COUNSEL]: Objection, Your Honor. That's improper argument.

"THE COURT: Overruled.

"[PROSECUTOR]: Aided and abetted a crime after the fact by helping the defendant hide the ankle bracelet, remove his ankle bracelet, and she picked it up from Mr. Baca. Is she a criminal mastermind? No. She's a naïve younger person who has gotten involved with a man who burglarized a home, and then remove [*sic*] the GPS device that put him at that location."

Our Supreme Court has summarized the standards for evaluating a claim of prosecutorial misconduct as follows. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it i*nfects the trial with such unfairness as to make the conviction a denial of due process*. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the *use of deceptive or reprehensible methods* to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, *when the claim focuses upon comments made by the prosecutor 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*." (*Morales, supra,* 25 Cal.4th at p. 44, italics added; accord, *People v. Cole* (2004) 33 Cal.4th 1158, 1202-1203.) In assessing the prosecutor's argument, we must not lose sight of the "presumption that 'the jury treated the court's instructions as statements of law, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*Morales,* at p. 47.)

The evidence showed Ms. Marquez picked up the GPS device from Mr. Baca and brought it home. She testified she knew defendant was required to wear it as a condition of his parole. Detective Taylor testified that when he was questioning Ms. Marquez about the device and her potential complicity in defendant's conduct, she repeatedly said "I'll do the time." The prosecutor's argument was fair comment on the evidence and reasonable inferences therefrom. It did not amount to "deceptive" or "reprehensible" conduct, nor did it deprive defendant of due process. It was an advocate's argument, based on the evidence, for why the jury could reasonably discredit the testimony of a defense witness.

4. Substantial Evidence

Defendant contends there is insufficient evidence demonstrating he entered the residence and therefore the first degree burglary conviction must be reversed. We conclude the evidence, and reasonable inferences therefrom, amply support the verdict.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence." (*Ibid*.) "Reversal on this ground is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The evidence here established defendant was at the Busch property on the day the stolen property went missing from the home. The GPS device, and Ms. Morgan's testimony related thereto, showed defendant was at and inside the home and near the garage/carport area. Mrs. Busch testified that before she went down to the studio for the client meeting, she had been using her iPad in the house. Mr. and Mrs. Busch both testified no one else had been in the home during that time frame. A reasonable inference from such evidence is that defendant entered the house and took the iPad and cash from

Mrs. Busch's purse. Defendant did not present any contrary evidence to discredit or undermine such an inference.

5. Cumulative Error

Defendant has not shown any trial error or that he was deprived of a fair trial.

6. Sentencing Error

Defendant argues that two of the one-year sentence enhancements pursuant to section 667.5, subdivision (b) must be stricken. Respondent concedes the sentencing error as to the enhancement imposed for defendant's conviction in case No. KA092854. No evidence was presented during the bench trial as to case No. KA092854, the prior conviction on which the prosecution chose not to proceed. The two other priors were proved up and found to be true. However, the court, in error, nonetheless imposed three 1-year sentence enhancements. Respondent concedes it was error for the court to impose a one-year enhancement for case No. KA092854. The one-year term for that prior conviction must be vacated and stricken.

Defendant also argues the one-year enhancement for case No. KA021171 must be vacated and stricken. During the pendency of this appeal, defendant augmented the record to show that the trial court in case No. KA021171, by order dated March 17, 2015, reduced defendant's conviction for second degree burglary in that case to a misdemeanor pursuant to section 1170.18, subdivisions (f) and (g). Defendant, in supplemental briefing, argued the one-year enhancement for that prior must be stricken because imposition of a one-year term under section 667.5, subdivision (b) applies only to prior *felony* convictions. (§ 667.5; see also *People v. Tenner* (1993) 6 Cal.4th 559, 563.) Respondent did not file any brief in response to defendant's motion. (Cal. Rules of Court, rule 8.54(c) ["A failure to oppose a motion may be deemed a consent to the granting of the motion"].) At oral argument, respondent stated it had not filed a response to the supplemental brief because it did not receive notice the supplemental brief had been accepted for filing, but also stated respondent did not object to the striking of this enhancement.

Section 1170.18 was enacted pursuant to the Safe Neighborhoods and Schools Act (Act), adopted by the voters as Proposition 47 in November 2014. The Act reclassified certain drug and theft-related offenses that were felonies or "wobblers" as misdemeanors, unless committed by ineligible defendants. Subdivision (f) of section 1170.18 provides that a person who has completed a prison term on a felony conviction that would have been a misdemeanor under the Act had it been in effect at the time of the conviction, may file an application to have the prior judgment of conviction reclassified as a misdemeanor. Defendant obtained such an order by the trial court in case No. KA021171.

Subdivision (k) of section 1170.18 provides, in relevant part, that "[a]ny felony conviction that is . . . designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*." (Italics added.) Defendant contends section 1170.18, subdivision (k) applies retroactively, and his conviction in case No. KA021171, which is now a misdemeanor, does not support imposition of a one-year sentence enhancement pursuant to section 667.5, subdivision (b). We found no previous opinion deciding this question. Applying the general rule of lenity, we are inclined to agree the one-year sentence enhancement imposed for defendant's prior conviction in case No. KA021171 should be vacated and stricken.

As the Supreme Court has explained: "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date. [Citation.] We based this conclusion on the premise that ' "[*a*] *legislative mitigation of the penalty for a particular crime* represents a legislative judgment that the lesser penalty or the different treatment is sufficient to meet the legitimate ends of the criminal law." ' [Citation.]" (*People v. Brown* (2012) 54 Cal.4th 314, 323, fn. omitted.) "[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306.)

The Act mitigated the penalty for the offense of which defendant was convicted in case No. KA021171 before defendant's judgment of conviction in this case became final. We therefore conclude that prior conviction should be treated as a misdemeanor for purposes of his sentencing in this case and may not be used to impose a sentence enhancement under section 667.5, subdivision (b).

DISPOSITION

The sentence imposed is modified in the following respects: the one-year term imposed pursuant to Penal Code section 667.5, subdivision (b) based on defendant's prior conviction in case No. KA092854 is vacated and stricken; and, the one-year term imposed pursuant to Penal Code section 667.5, subdivision (b) based on defendant's prior conviction in case No. KA021171 is vacated and stricken. The judgment of conviction is affirmed in all other respects.

The superior court is directed to prepare and transmit forthwith a modified abstract of judgment consistent with this opinion to the Department of Corrections and Rehabilitation.

GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

OHTA, J.*

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