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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. OSCAR MADDOX, Defendant and Appellant.	B282232 (Los Angeles County Super. Ct. No. BA453130)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Judgment of conviction affirmed in part and reversed in part, and sentence vacated with directions.

Goldstein Legal Office and Elana Goldstein under appointment of the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews, and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Oscar Maddox appeals from his convictions for felony driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) and the following misdemeanors: two counts of battery (Pen. Code, § 243, subd. (e)(1))[1] and one count each of resisting arrest (§ 148, subd. (a)(1)), petty theft (§ 484, subd. (a)), and vandalism (§ 594, subd. (b)(2)(A)).

Maddox contends: (1) the prosecutor's failure to timely disclose information favorable to the defense violated his due process rights; (2) the trial court erred by failing to inform the jury of the prosecution's discovery violations; (3) the prosecutor committed misconduct by making disparaging comments about defense counsel, arguing facts not in evidence, and misstating the law; (4) the court erred by instructing the jury that prior statements could be considered for their truth; (5) there was no evidence that the value of the vehicle exceeded $950, so his felony conviction of driving or taking a vehicle without consent must be reversed; and (6) the prosecutor failed to prove the prior robbery conviction alleged in the information, and the court abused its discretion by allowing the prosecutor to amend the information to conform to proof at trial.

We conclude that the felony conviction of driving or taking a vehicle without consent must be reversed because there was no evidence that the value of the vehicle exceeded $950. Maddox has shown either no error or no prejudicial error with respect to his other contentions. We therefore reverse the felony conviction with directions, vacate the sentence in its entirety, remand for resentencing, and affirm the judgment in all other respects.

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

FACTUAL AND PROCEDURAL BACKGROUND

1. *The August 2016 Incidents*

At 5:41 p.m. on August 17, 2016, Amiya M. called 911 and stated that her boyfriend, Maddox, had punched her in the face, broken her phone, and taken her car. She stated, "I want to press charges on everything he's doing right now," and, "And this time I'm pressing charges, I want him to go to jail. He keep putting his hands on me." Amiya stated, "when I got out of work he was standing outside my um door and just like, when I opened my door he pushed me in and just like fought me." She asked the operator to send the police and stated that she did not need medical attention.

Officer Robert Casturita of the Los Angeles Police Department (LAPD) and his partner arrived at Amiya's apartment in response to her 911 call. Amiya told the two officers that when she opened the door to her apartment after coming home from work Maddox suddenly appeared, punched her in the face, and pushed her inside the apartment. She said that Maddox pulled her hair, broke her cell phone, threw items around her apartment, took her car keys from her hand, and fled in her car. Casturita did not observe any facial injuries, and the officers did not enter the apartment. The officers did not find any witnesses.

Amiya called 911 again more than five hours later, reporting that Maddox had returned to her apartment, taken her belongings, and broken another phone. LAPD officer Claudia Guillen and her partner responded to the call. Amiya told the officers that Maddox drove by her apartment, got out of the car, stated, "Watch out, bitch," and slapped her. Amiya said that Maddox knocked a phone out of her hand and then, standing

behind her, grasped her neck with both hands and choked her for about 10 seconds before she pulled away. Maddox then drove off.[2] Guillen did not observe any injuries, but thought Amiya appeared shaken up and fearful. Guillen requested an emergency protective order for Amiya against Maddox, and a magistrate issued the order.

2. *Amiya Recants*

On August 30, 2016, Amiya went to the police station and spoke with LAPD detective Paul Rodriguez. She told him that she wanted to recant her statements about the incident. Amiya stated that she was living with Maddox and did not want to proceed with any prosecution.

LAPD detective Richard Record attempted to contact Amiya. For several days his attempts were unsuccessful. On September 6, 2016, Amiya returned his phone call. Amiya told the detective that she lied about the incident because she was upset with Maddox for giving her chlamydia and gonorrhea. When asked about the stolen car, Amiya said that Maddox did not take her car and that she asked a friend to move her car so she could report it stolen. She stated that she did not want to discuss the matter any further and did not want to go to court.

Detective Record prepared police reports dated September 3 and 6, 2016, regarding Amiya's statements to himself and Detective Rodriguez. The prosecutor did not obtain the reports until March 29, 2017, during trial, and immediately provided them to the defense.

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[2] The record does not disclose whether Maddox was still driving Amiya's car at that time or was driving another car.

3. *The December 2016 Incident and Arrest*

At 3:45 p.m. on December 1, 2016, Amiya called 911 and stated that Maddox had kicked her door open, threatened her, pulled her hair, taken her phone, and broken her television. Amiya stated, "I am pressing charges. I cannot deal with this person no more."

LAPD officer Julio Zamora and his partner arrived at Amiya's apartment in response to the call. Amiya told the officers that Maddox banged on her door repeatedly, kicked the door open, entered her apartment, grabbed Amiya's hair, called her a bitch, and spat at her face. Amiya stated that Maddox grabbed her purse, threw its contents on the floor, took her cell phone, and then left the apartment. The officers noted that the front door was damaged, the apartment looked ransacked, and a purse with a detached strap was on the floor.

On December 8, 2016, LAPD officer John Richardson and his partner were on patrol when they saw Maddox and two other men standing at a location known for drug sales. The officers approached, asked to talk with the men, and directed them to get up against a wall. Maddox started running. The officers pursued Maddox and, with the help of other officers, quickly caught up with and arrested him.

LAPD officer Romulo Frias was assigned to investigate the reported crimes of December 1, 2016. Officer Frias called Amiya on December 9, 2016. Amiya stated that Maddox banged on the door to her apartment, kicked the door open, pulled her hair, took her purse, and ended up taking her cell phone. Amiya also stated that Maddox had physically attacked her previously, that she could not take it anymore, and that she wanted charges filed this time.

4. *The Preliminary Hearing*

Amiya testified at the preliminary hearing on January 10, 2017. She stated that Maddox was her boyfriend, and that on August 17, 2016, she asked Maddox to come to her apartment, where she told him that he had given her a disease. She stated that there was yelling and screaming but no physical altercation, and that Maddox did not take her cell phone. Amiya stated that she did not remember calling the police or speaking to the police that day. She denied telling the police that Maddox had punched her, pulled her hair, taken her car keys, and taken her car. Amiya also denied seeing Maddox late in the evening of August 17, 2016, and denied telling the police about an incident that occurred that evening.

Amiya testified that she recalled calling the police on December 1, 2017. She stated that she and Maddox had argued a couple of days earlier and she told him to sleep elsewhere. Amiya stated that Maddox asked to pick up his clothes, but she ignored him. When he came to her apartment, she refused to let him in, so he kicked the door open and entered the apartment. Amiya stated that Maddox called her a bitch, said that he hated her, brushed her hair to the side, spat at her, and told her to keep the clothes but he was taking her phone because he bought it. He then dumped the contents of the purse onto the floor and took her cell phone. Amiya told him he could have the phone, and Maddox left the apartment.

5. *The Information*

On January 24, 2017, the district attorney filed an information charging Maddox with first degree burglary committed on December 1, 2016 (§ 459; count one); battery committed on December 1, 2016 (§ 243, subd. (e)(1); count three);

resisting arrest on December 8, 2016 (§ 148, subd. (a)(1); count four); second degree robbery committed on August 17, 2016 (§ 212.5, subd. (c); count five); battery committed on August 17, 2016 (§ 243, subd. (e)(1); count six); and driving or taking a vehicle without consent, committed on August 17, 2016 (Veh. Code, § 10851, subd. (a); count seven).[3] The information alleged that Maddox had a prior robbery conviction (§ 211), constituting a strike under the Three Strikes law (§§ 667, subds. (b)-(j), 1170.12) and a serious felony (§ 667, subd. (a)(1)). The information was later amended by adding a vandalism count (§ 594, subd. (b)(2)(A); count eight).

6. *The Jail Calls*

Between December 19, 2016, and March 23, 2017, approximately 200 phone calls were made to Amiya from the jail where Maddox was housed. Inmates were required to input a booking number and a PIN to place a call, but inmates sometimes used other inmates' booking numbers. About two-thirds of the calls to Amiya were made using Maddox's booking number. The calls were recorded.

On March 22, 2017, the trial court issued a body attachment for Amiya as a defaulting witness. That day at 5:49 p.m. an inmate other than Maddox called Amiya from jail and told her that a warrant had been issued for her arrest and that she should not answer her phone, not go to work, and "go to Hill house." The caller said, "Cause he go to court tomorrow. If you don't pop up tomorrow, he might go home. So you just stay out the way."

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[3] There was no count two in the information. The counts were later renumbered.

On March 23, 2017, at 12:25 p.m., Maddox, using another inmate's booking number, called Amiya and stated, "I go back tomorrow." When Amiya stated that she could not keep missing work, Maddox seemed to implore her to stay home, stating, "But home for sure for sure though"; "I said home for sure for sure"; "But home for sure for sure though"; "Home for sure for sure"; and "Yeah. For sure for sure. Repeat tomorrow."

7. *The Trial, Verdict and Sentencing*

The trial began on March 24, 2017. On that day, the prosecutor obtained and turned over to the defense audio recordings of phone calls made by Maddox and an unidentified inmate from the jail to Amiya. The recordings included calls made to Amiya within the past 48 hours dissuading her from appearing in court. The trial court offered to continue the trial, but defense counsel declined.

Also on March 24, 2017, the prosecutor informed the defense that Amiya had made statements to an investigator, later identified as Ste'ven Armenta, when Armenta served Amiya with a subpoena. The statements were to the effect that Amiya was back together with Maddox and would not appear in court to testify against him.

On March 28, 2017, during a hearing to determine whether Amiya was unavailable as a witness, Armenta testified that he had taken notes on his attempts to serve Amiya with a subpoena and his interaction with her. Defense counsel requested and received a copy of the notes. On March 29, the trial court found that Amiya was unavailable to testify at trial despite reasonable efforts by the prosecution.

On March 29, 2017, the prosecutor provided the defense with transcripts of two jail phone calls that were later admitted

at trial. That same day, the prosecutor provided the defense with the two police reports by detective Record, dated September 3 and 6, 2016. Defense counsel stated that despite the late disclosure she was not requesting a continuance. On March 30, 2017, defense counsel requested an instruction to inform the jury of the prosecution's failure to timely disclose the two police reports. The prosecutor argued that while he did not provide the reports earlier, in December 2016 he disclosed in his "filing packet" provided to the defense that Amiya claimed she had lied about the incident because she caught Maddox cheating and he had given her sexually transmitted diseases. The trial court denied the request.

The prosecution presented as witnesses at trial all of the LAPD officers and detectives named above, Armenta, and custodians of records for audio recordings of the 911 calls and audio recordings and call detail reports of the jail calls. The prosecution also presented audio recordings of the 911 calls, audio recordings and a call detail report of the jail calls, and a reading of Amiya's preliminary hearing testimony. The defense called Detective Record and investigator Armenta.

At the conclusion of trial, the prosecutor explained in argument that the burglary count was based on Maddox having forcefully entered the apartment with the specific intent to steal Amiya's cell phone. The prosecutor stated that the robbery count was based on forcefully taking Amiya's car keys away from her, and the taking of the car itself was a separate charge for taking or driving a vehicle without consent. During deliberations, the jury asked to clarify the basis for the robbery count: "Please clarify charge 4 (Robbery)[.] [¶] What was actually taken for Mr.

Maddox to be charged? [¶] •was it a phone? Keys?" The trial court responded, "Keys."

On April 3, 2017, the jury found Maddox not guilty of first degree burglary (§ 459) on December 1, 2016, and second degree robbery (§ 212.5, subd. (c)) on August 17, 2016. The jury found Maddox guilty of battery (§ 243, subd. (e)(1); two counts) on those two dates; petty theft (§ 484, subd. (4)) on August 17, 2016, as a lesser included offense of robbery; resisting arrest (§ 148, subd. (a)(1)) on December 8, 2016; driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)) on August 17, 2016; and vandalism (§ 594, subd. (b)(2)(A)) on December 1, 2016. The defense waived the right to jury trial on the prior conviction allegations, and the trial court discharged the jury. On April 18, 2017, the trial court found the prior conviction allegations true.

The trial court sentenced Maddox to a total of six years in prison, consisting of the upper term of three years for driving or taking a vehicle without consent, doubled pursuant to the three strikes law. The court imposed a six-month jail term for each misdemeanor conviction (battery, petty theft, resisting arrest, and vandalism) to run concurrent with the 6-year prison term.

DISCUSSION

1. *There Was No Brady Violation*

Maddox contends the prosecution's failure to timely disclose exculpatory information violated his due process rights. He notes several instances when the prosecutor disclosed information for the first time at trial, including information about the jail calls and audio recordings, disclosed on March 24, 2017; information about Amiya's statements to investigator Armenta when she was served with a subpoena, disclosed on March 24;

information about Armenta's notes and a copy of the notes, disclosed on March 28; and a copy of Detective Record's September 3 and 6 police reports, disclosed on March 29. Maddox emphasized the police reports in particular, which contained information that Amiya had lied about the crimes because she was upset with Maddox.

Under *Brady v. Maryland* (1963) 373 U.S. 83, 87 (*Brady*), the suppression by the prosecution of evidence favorable to the defendant violates due process if the evidence is material to the defendant's guilt or punishment, irrespective of the prosecution's good faith or bad faith. Evidence is material for purposes of *Brady* if there is a reasonable probability that its disclosure to the defense would have changed the result in the proceeding. (*People v. Masters* (2016) 62 Cal.4th 1019, 1067.) The prosecution has a duty to disclose exculpatory evidence and impeachment evidence, even without a request, and the duty extends to evidence known only to police investigators and not known to the prosecutor. (*Ibid.*)

"There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." (*Stickler v. Greene* (1999) 527 U.S. 263, 281–282.)

"'We independently review the question whether a *Brady* violation has occurred, but give great weight to any trial court findings of fact that are supported by substantial evidence. [Citation.]' [Citation.]" (*People v. Masters*, *supra*, 62 Cal.4th at p. 1067.)

At the time of trial, defense counsel was aware of the jail calls, recordings, Amiya's statements to investigator Armenta, and Armenta's notes. Maddox forfeited his claims of *Brady* error regarding that information by failing to assert such claims in the trial court, request appropriate sanctions, or seek a continuance. (*People v. Morrison* (2004) 34 Cal.4th 698, 714.)

Moreover, there was no *Brady* error here because the evidence was disclosed at trial. "Evidence actually presented at trial is not considered suppressed for *Brady* purposes, even if that evidence had not been previously disclosed during discovery. [Citations.]" (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 467; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 281 ["'[E]vidence that is presented at trial is not considered suppressed, regardless of whether or not it had previously been disclosed during discovery'"].)

2. *The Trial Court Properly Denied the Request to Instruct the Jury About the Prosecution's Supposed Discovery Violations*

Maddox contends the trial court erred by denying his request for an instruction informing the jury of the prosecution's failure to timely disclose the two police reports by Detective Record, as required by section 1054.1.

Section 1054.1 requires the prosecution to disclose to the defense certain categories of evidence in the prosecutor's possession or known by the prosecutor to be in the possession of the investigating agencies. (*People v. Verdugo*, *supra*, 50 Cal.4th 263, 279–280.) Evidence subject to disclosure under the statute includes "[a]ny exculpatory evidence" and "[r]elevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial . . . ." (§ 1054.1, subds. (e), (f).)

A disclosure required by section 1054.1 "shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred. If the material and information becomes known to, or comes into the possession of, a party within 30 days of trial, disclosure shall be made immediately, unless good cause is shown why a disclosure should be denied, restricted, or deferred." (§ 1054.7.) If the trial court finds that the prosecution failed to comply with its statutory disclosure obligation, the court "may make any order necessary to enforce the provisions" of the statute, including, "immediate disclosure, contempt proceedings, delaying or prohibiting the testimony of a witness or the presentation of real evidence, continuance of the matter, or any other lawful order." (§ 1054.5, subd. (b).) The court may also "advise the jury of any failure or refusal to disclose and of any untimely disclosure." (*Ibid*.)

We review the trial court's ruling on a matter concerning discovery for abuse of discretion. (*People v. Thompson* (2016) 1 Cal.5th 1043, 1105 [failure to disclose evidence under § 1054.1].)

The prosecutor argued that in December 2016 he informed the defense in his "filing packet" that Amiya claimed she had lied about the incident because she caught Maddox cheating and he had given her sexually transmitted diseases. In denying the request to advise the jury of a discovery violation, the trial court stated that since December 2016 the defense was aware that Amiya was claiming that she had lied about the incident because Maddox had given her a sexually transmitted disease, and at the preliminary hearing in January 2017 Amiya "recanted everything." The court stated that the information in the police

reports was not a surprise, the prosecutor obtained the reports as soon as he became aware of them, and, "I don't think it would be fair to give an instruction to the jurors that somehow the defense has been disadvantaged by the late discovery of this particular report. So based upon that, I am denying the proposed instruction."

Defense counsel said in her opening statement, before receiving the two reports, that Amiya had told either law enforcement or someone from the prosecutor's office that she lied about the August 2016 incidents because she was angry with Maddox for giving her a sexually transmitted disease.[4] Detective Record testified to those facts at trial. Maddox argues that had he known about the specific information in the two reports sooner, "the defense would have been able to present a stronger defense from the beginning of trial," but he fails to explain what the defense would have done differently and therefore has not shown prejudice. (*People v. Thompson*, *supra*, 1 Cal.5th at p. 1103 [defendant failed to explain how earlier disclosure would have made any difference to her defense strategy]; *People v. Verdugo*, *supra*, 50 Cal.4th at p. 283 [defendant failed to show prejudice because he "[did] not state specifically what counsel would have done differently if [the] oral statement had been disclosed sooner"].) Moreover, having failed to request a continuance in the trial court to address the new evidence, Maddox has the burden to show that a continuance would not

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[4] Maddox fails to acknowledge in his opening brief that long before receiving the two reports on March 29, 2017, defense counsel was aware of Amiya's claim that she had lied about the incidents.

have cured any harm, but he fails to show this. (*Thompson*, at p. 1103.)

The trial court reasonably concluded that the defense was not prejudiced by the failure to disclose the police reports earlier because the defense was already aware that Amiya had recanted and was aware of the reasons she gave for her prior statements incriminating Maddox. The court's decision not to advise the jury of a discovery violation because it would not be fair to instruct the jury that the defense was disadvantaged by the late discovery of the reports was not an abuse of discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 951 [absent prejudice to the defendant at trial, the trial court properly refused to impose a sanction or instruct the jury about an alleged discovery abuse].)

3. *There Was No Prejudicial Prosecutorial Misconduct*

Maddox contends the prosecutor committed misconduct by making disparaging comments about defense counsel, arguing facts not in evidence, and misstating the law. He also argues that this conduct was cumulatively prejudicial.

3.1. Governing Law

Prosecutorial error (or misconduct) violates the Fourteenth Amendment to the United States Constitution only if it comprises a pattern of conduct so serious and egregious as to render the trial fundamentally unfair and make the conviction a denial of due process.[5] (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th

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[5] "'[T]he term prosecutorial "misconduct" is somewhat of a misnomer to the extent that it suggests a prosecutor must act with a culpable state of mind. A more apt description of the transgression is prosecutorial error. [Citation.]'" (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 853.)

at p. 854; *People v. Cortez* (2016) 63 Cal.4th 101, 130.) Such federal constitutional error is prejudicial unless it was harmless beyond a reasonable doubt. (*Daveggio and Michaud*, at p. 854; *People v. Cook* (2006) 39 Cal.4th 566, 608.)

Under California law, prosecutorial error (or misconduct) occurs when the prosecutor uses deceptive or reprehensible tactics in an effort to persuade the trier of fact, even if the conduct does not render the trial fundamentally unfair. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 854 [under state law, prosecutorial error occurs "when a prosecutor 'engage[s] in deceptive or reprehensible tactics in order to persuade the trier of fact to convict'"]; *People v. Cortez*, *supra*, 63 Cal.4th at p. 130 ["Improper comments . . . constitute misconduct under state law if they involve use of deceptive or reprehensible methods to attempt to persuade either the court or the jury"].) Under federal or California law, a defendant need not show that the prosecutor acted in bad faith, but must show a reasonable likelihood that the jury understood or applied the challenged comments in an improper or erroneous manner. (*Cortez*, at p. 130; *People v. Centeno* (2014) 60 Cal.4th 659, 667.)

A defendant is entitled to relief only if the challenged conduct was prejudicial. Prosecutorial error is prejudicial under state law only if there is a reasonable likelihood the defendant would have obtained a more favorable verdict in the absence of the challenged conduct. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 854; *People v. Cook*, *supra*, 39 Cal.4th 608.)

3.2. Disparaging Defense Counsel

Defense counsel argued in her closing argument that through a "loophole" and a "technicality" Maddox was deprived of his Sixth Amendment right to confront his accuser. The trial

court at sidebar told defense counsel she could either correct her misstatement or the court would do so. Defense counsel then explained to the jury that there was no constitutional violation when a witness testified in a preliminary hearing, subject to cross-examination, and was unavailable to testify at trial.

The prosecutor argued in rebuttal:

"There was no constitutional right—the notion that his right to confront his accuser has been violated, when he told her not to come to court, again, try not to be insulted by the absurdity of that argument; she's just doing what she thinks is in her client's best interest, making the arguments that—"

Defense counsel objected. The trial court overruled the objection.

"'"Personal attacks on opposing counsel are improper and irrelevant to the issues."' [Citations.]" (*People v. Woodruff* (2018) 5 Cal.5th 697, 764.) "'It is generally improper for the prosecutor to accuse defense counsel of fabricating a defense [citations], or to imply that counsel is free to deceive the jury [citation]. Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom.' [Citation.]" (*People v. Winbush* (2017) 2 Cal.5th 402, 484.)

On the other hand, "It is not misconduct to comment on the role of defense counsel as an advocate." (*People v. Powell* (2018) 6 Cal.5th 136, 172.) "'[T]he prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account.'" (*People v. Winbush*, *supra*, 2 Cal.5th at p. 484.) "We have upheld prosecutorial arguments suggesting defense

counsel's 'job' is to confuse the jury and say anything necessary to obtain a favorable verdict. [Citations.]" (*Ibid.*)

The challenged comments by the prosecutor focused on the deficiencies in defense counsel's argument and her role as a zealous advocate, without crossing the line to an attack on her integrity. The prosecutor did not suggest that defense counsel had fabricated a defense or deceived the jury. The comments were brief and were not serious and egregious, or deceptive or reprehensible. The comments were not prosecutorial error under federal or California law.

3.3. Arguing Facts Not in Evidence

During his opening argument the prosecutor told the jury:

"So there was a time when a man could smack around his wife and if it was not that bad the authorities would look the other way. What happened behind closed doors stayed behind closed doors. If someone ended up in the hospital, maybe he spends the night in jail. But that was about it.

"There was a time when if a victim came forward and had the courage but later wanted to not prosecute, we figured if she didn't care, we shouldn't care either. We don't live in those times anymore, because we understand now how dangerous domestic violence is for the victims and how the things that happen behind closed doors can't stay behind closed doors.

"We don't drop cases any more when a victim doesn't want to proceed on a case. When we have the evidence of a crime, we are going to give that person a trial and put on that evidence. Even if the victim doesn't want to hold that person responsible anymore, I'm going to ask you that you do.

"We're also familiar today with the cycle of domestic violence. The fights, the reconciliation—"

Defense counsel objected, "Facts not in evidence."

The trial court overruled the objection, stating, "I believe it's within common knowledge."

The prosecutor continued:

"It's a familiar cycle. Couple gets in a fight; it starts out with words. At some point it turns physical. At some point it goes too far. He scares the other person. She want to break up. She wants to get away. She's in fear.

"But he begs her. He tells her, 'This time it's going to be the last time,' and as time passes the memories of the incident, the trauma, it fades, and she takes him back, and the cycle begins again. And he's nice for awhile, until she does something else. The old jealousy, the angry, whatever it was, whatever the trigger is, resurfaces and they fight again.

"And so you have this never ending cycle. In some cases it gets worse, not in all cases but in many cases it does. And that's why it's so important that we send a message that it's not okay.

"This case follows that classic cycle of domestic violence."

The prosecutor returned to the same theme in his rebuttal argument:

"She is saying that she lied afterwards because she is protecting the defendant. It fits into a classic cycle of domestic violence. She's protecting him. They fight; she's endangered; she's scared. When she needs help, she calls 911. When that danger is passed, when she's no longer upset, when the defendant is apologizing, when he's calling her from jail, telling her [it] won't happen again, that's when she's—she's over it."

The prosecutor later continued:

"Now, I spoke at the beginning and I said that I don't know if Amiya is going to come to court . And even if she did come to

court, I don't know what she's going to say. Because there's a cycle of abuse. They're in a relationship. They get into fights. The defendant abuses her. Then he apologizes. They get back together. And then she protects him. That's the pattern we see.

"August she takes the statements back and wants to drop the charges. But then happens in December, and this time, worse. And she wants to take back those charges again.

"We don't live in a time anymore where we just drop charges when a victim doesn't want to come to court."

Defense counsel objected, "Improper argument." The trial court overruled the objection.

The prosecutor argued further:

"It's a cycle. And cycles tend to keep going if we don't send a message."

Courts give prosecutors wide latitude during argument. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 289.) A prosecutor may comment on the evidence, including reasonable inferences and deductions from the evidence. (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) A prosecutor may state matters of common knowledge that are not in evidence. (*Ghobrial*, at p. 289; *People v. Cunningham* (2001) 25 Cal.4th 926, 1026.) However, apart from matters of common knowledge, "It is well settled that it is misconduct for a prosecutor to base argument on facts not in evidence." (*People v. Mendoza* (2016) 62 Cal.4th 856, 906.)

A prosecutor's reference in argument to facts not in evidence "is 'clearly . . . misconduct' [citation], because such statements 'tend[] to make the prosecutor his own witness—offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony "although worthless as a matter of law, can be 'dynamite' to the jury because of the special

regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." [Citations.]' [Citations] 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 828; accord, *People v. Rodriguez* (2018) 26 Cal.App.5th 890, 905.)

There was no expert testimony presented at trial on what the prosecutor described as the cycle of domestic violence. Evidence Code section 1107, subdivision (a) authorizes the admission of expert testimony regarding "intimate partner battering and its effects, including the nature and effect of physical, emotional, or mental abuse on the beliefs, perceptions, or behavior of victims of domestic violence, except when offered against a criminal defendant to prove the occurrence of the act or acts of abuse which form the basis of the criminal charge." Such evidence may be relevant to the victim's credibility when the victim has recanted. (*People v. Brown* (2004) 33 Cal.4th 892, 906–908; *People v. Kovacich* (2011) 201 Cal.App.4th 863, 902.) The parties did not present such evidence here.

The People argue and the trial court found that the "cycle of domestic violence" and its impact on victim behavior were matters of common knowledge. To the contrary, courts have held that expert testimony on intimate partner battering is admissible to overcome common misperceptions concerning victim behavior, such as ""'the ordinary lay person's perception that a woman in a battering relationship is free to leave at any time.'"" (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1087; see *People v. Riggs* (2008) 44 Cal.4th 248, 293–294 [absent expert testimony, "the jury might have discredited [the victim's] testimony based on a misconception that anyone who was physically and mentally

abused in the severe manner to which she testified would not have remained in a relationship with her abuser"].) Expert testimony on this subject is admissible because the impact of domestic violence on victim behavior is "'sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.'" (*People v. Brown*, *supra*, 33 Cal.4th at p. 905, quoting Evid. Code, § 801, subd. (a).) The *Brown* court explained:

"When the trial testimony of an alleged victim of domestic violence is inconsistent with what the victim had earlier told the police, the jurors may well assume that the victim is an untruthful or unreliable witness. [Citations.] And when the victim's trial testimony supports the defendant or minimizes the violence of his actions, the jurors may assume that if there really had been abusive behavior, the victim would not be testifying in the defendant's favor. [Citations.] These are common notions about domestic violence victims . . . ." (*People v. Brown*, *supra*, 33 Cal.4th at p. 906.) Testimony by a domestic violence expert can help to overcome these common misperceptions. (*Id.* at p. 906–907.) Such expert opinion is not common knowledge.

We reject the People's argument that the prosecutor was only commenting on the evidence in this case. The prosecutor stated, "We're also familiar today with the cycle of domestic violence. The fights, the reconciliation—" The prosecutor spoke of a "familiar cycle," stated that the behavior of Maddox and Amiya "fits into a classic cycle of domestic violence," facts in this case. These statements explained Amiya's conduct by reference to a phenomenon purportedly observed in other cases, a concept the prosecutor reinforced by stating, "you have this never ending cycle. In some cases it gets worse, not in all cases but in many

cases it does." The prosecutor's argument was based on facts not in evidence and therefore was improper.

In the context of the entire trial, the improper argument did not comprise a pattern of behavior so serious and egregious as to render the trial fundamentally unfair in violation of federal due process. (See *People v. Winbush*, *supra*, 2 Cal.5th at p. 484 ["even if the comments [personal attacks] were unfair to defense counsel, they 'did not comprise a pattern of egregious misbehavior making the trial fundamentally unfair' "]; *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [prosecutor's occasional rude and intemperate behavior in the course of a lengthy trial did not comprise a pattern of egregious misbehavior rendering the trial fundamentally unfair].)

The improper argument was prejudicial under California law only if there is a reasonable likelihood that Maddox would have obtained a more favorable verdict absent the prosecutorial error, as stated. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 854; *People v. Cook*, *supra*, 39 Cal.4th 608.)

The prosecutor's argument concerning the cycle of domestic violence supported the theory that Amiya was truthful when she called 911 and spoke with the responding officers, and untruthful when she recanted concerning the events of August 17, 2016, and minimized the incident of December 1, 2016. The evidence presented at trial strongly supported this theory.

The 911 calls played for the jury, in which Amiya described the crimes and identified Maddox as the perpetrator, were strong evidence that Maddox committed the crimes. Amiya's statements to the responding police officers supported those accounts, as did the police officers' observations. Although the officers did not observe any physical injuries or the condition of Amiya's

apartment on August 17, 2016, the officers' observation of the damaged front door and ransacked apartment on December 1, 2016, corroborated Amiya's statements on that date and supported the veracity of her statements on both dates. The jail calls dissuading Amiya from testifying in court were also strong evidence of guilt and therefore supported the veracity of Amiya's inculpatory statements.

When Amiya initially recanted at the police station on August 30, 2016, she only stated that she was living with Maddox and did not want him to be prosecuted, and not that her prior statements were false. Detective Record attempted to reach Amiya for several days after that, until she returned his call on September 6, 2016. Amiya provided further details at that time, stating that she had lied about the incident because she was upset with Maddox for giving her sexually transmitted diseases. When detective Record asked about the stolen car, Amiya stated that she had asked a friend to move it. She stated that she did not want to discuss the matter further and did not want to go to court. Amiya's statements to detective Record and her evasiveness strongly suggested that she simply wanted to put the matter behind her and mend her relationship with Maddox.

At the preliminary hearing, Amiya did not testify that she had lied about the incident of August 17, 2016 in her statements to the police, as she had stated earlier at the police station. Instead, she first testified that she did not remember calling the police or speaking to the police on that day. Then she denied telling the police that Maddox had punched her, pulled her hair, taken her car keys, and taken her car. Amiya testified that she and Maddox argued that day, but there was no physical altercation, and that Maddox did not take her cell phone.

In her preliminary hearing testimony, Amiya acknowledged that she called the police on December 1, 2017. She testified that, as she had told the police, Maddox kicked the door open, entered her apartment, called her a bitch, grabbed her purse, emptied its contents on the floor, and took her cell phone. Amiya minimized the physical confrontation, testifying that Maddox only brushed her hair aside, and not that he grabbed her hair as she had stated earlier. Thus, Amiya recanted her prior statements only in part, and her recantation at the preliminary hearing was somewhat inconsistent with her recantation at the police station.

The trial court instructed the jury, "Nothing the attorneys say is evidence," and, "So I'm going to remind you again that arguments are not evidence; they're the attorney's interpretation of what they think the evidence in this case showed." We presume the jury followed the court's instructions absent a showing to the contrary. (*People v. Daveggio and Michaud*, *supra*, 4 Cal.5th at p. 821; *People v Zurinaga* (2007) 148 Cal.App.4th 1248, 1260 [prosecutor's argument based on facts not in evidence was harmless, in part because the jury presumably followed the instruction that counsel's argument was not evidence].)

Moreover, the verdict acquitting Maddox of two felonies (burglary and robbery) while convicting him of five offenses indicates that the jury carefully considered the evidence and did not simply accept Amiya's inculpatory statements and reject her exculpatory statements. (See *People v. Winbush*, *supra*, 2 Cal.5th at p. 485 [found no prejudicial misconduct, noting the jury reached different verdicts for different defendants even though the prosecutor's derogatory comments were directed against all of

the defense lawyers]; *People v. Ellison* (2011) 196 Cal.App.4th 1342, 1353 [acquittal on some charges indicated the jury understood the applicable burden of proof despite the prosecutor's improper argument on the burden of proof].)

Based on our review of the entire record, we conclude that Maddox was not prejudiced by the improper argument.

3.4. Misstating the Law

The prosecutor stated in his opening argument:

"If the defendant had just kicked down the door, that's a vandalism, but as soon as he crossed the threshold into that house, that's a burglary."

Defense counsel objected, "Mistates the law." The trial court overruled the objection.

The prosecutor continued:

"You've been read the law by the judge, and we'll talk more specifically about what I need to prove to prove to you that a burglary occurred.

"But I want to emphasize right now that the reason a burglary is more serious than a vandalism is because the home is a sacred place of safety, and the defendant on that day, when he kicked the door open when she wouldn't let him in violated that."

The prosecutor later stated:

"Now we come to the burglary. So I want to come back to the point I briefly touched upon at the beginning. When the defendant kicked down her door, that's a vandalism. When he entered the threshold of her apartment, when he violated the privacy and safety of her space and entered her home, that's a burglary, if he had a specific intent to commit a theft." The prosecutor then discussed the evidence of specific intent.

The statement that Maddox committed a burglary as soon as he entered Amiya's home misstated the law because burglary requires entry "with intent to commit grand or petit larceny or any other felony." (§ 459.) However, immediately after the overruling of the objection, the prosecutor referred to the instruction on burglary, and later in his argument the prosecutor qualified his earlier statement by stating that Maddox committed a burglary "if he had a specific intent to commit a theft."

Viewed in the context of the entire argument, the prosecutor's initial statement that Maddox committed a burglary as soon as he crossed the threshold to the house was not misleading or deceptive, and therefore was not prosecutorial error under federal or California law. There is no reasonable likelihood that the jury understood or applied the comments in an improper or erroneous manner. (*People v. Cortez*, *supra*, 63 Cal.4th at p. 131.) Moreover, the jury acquitted Maddox of burglary, so no prejudice resulted from any misstatement by the prosecutor regarding the law of burglary. (*People v. Ochoa* (1998) 19 Cal.4th 353, 432; *People v. Williams* (2017) 7 Cal.App.5th 644, 684.)

3.5. Cumulative Error

Maddox has shown prosecutorial error only with respect to the argument based on facts not in evidence, and we have concluded that the error was harmless. There is no other error to cumulate, so his claim of cumulative prosecutorial error fails. (*People v. Ghobrial*, *supra*, 5 Cal.5th at p. 293 ["We have found no errors to cumulate and thus no possible cumulative prejudice"].)

4. *Maddox Has Not Shown any Instructional Error Regarding Prior Statements*

Maddox contends the trial court erred by instructing the jury that Amiya's prior statements could be considered for their truth. The court instructed on CALCRIM No. 318, as requested by the prosecution, rather than CALCRIM No. 319, as requested by the defense. The court instructed:

"You have heard evidence of statements that a witness made before the trial. If you decide that the witness made those statements, you may use those statements in two ways: one, to evaluate whether the witness's testimony in court is believable, and, two, as evidence that the information in the earlier statements is true."[6]

In contrast, CALCRIM No. 319 states that the jury may consider prior statements made by a witness who did not testify at trial in deciding whether to believe the witness's prior testimony that was read to the jury at trial, but may not consider the prior statements for the truth of the information contained in those statements:

"[Unavailable witness] did not testify in this trial, but (his/her) testimony, taken at another time, was (read/played) for you. In addition to this testimony, you have heard evidence that [unavailable witness] made (another/other) statement[s]. [I am referring to the statement[s] about which [unavailable witness] testified.]

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[6] The trial court instructed the jury regarding statements made in the jail call by the unidentified inmate to consider those statements not for their truth, but to explain later conduct by the victim or for the defendant's consciousness of guilt.

"If you conclude that [unavailable witness] made (that/those) other statement[s], you may only consider (it/them) in a limited way. You may only use (it/them) in deciding whether to believe the testimony of [unavailable witness] that was (read/played) here at trial. You may not use (that/those) other statement[s] as proof that the information contained in (it/them) is true, nor may you use (it/them) for any other reason." (CALCRIM No. 319.)

The trial court initially agreed with the defense that CALCRIM No. 319 was the appropriate instruction because Amiya did not testify at trial and was not confronted with prior inconsistent statements. The court stated that in those circumstances prior inconsistent statements generally should be considered for impeachment only and not for their truth. However, the prosecutor argued that some of the prior statements in this case should be considered for their truth, including the 911 calls and other statements.[7] The court noted that the defense wanted the jury to consider prior statements made by the detectives for the truth of the matter asserted, and that CALRIM No. 319 appeared to preclude that. The court concluded:

"I don't have a problem with your statements coming in, and I don't have a problem with your statements coming in even as inconsistent and for state of mind, or whatever you want to call it, but also for their truth.

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[7] The trial court had ruled earlier that the 911 calls were admissible under the hearsay exception for spontaneous statements (Evid. Code, § 1240). Maddox does not challenge that ruling on appeal.

"Given the fact that you want these statements in for their truth, the prosecutor wants the statements in, all their other statements in for their truth, I'm not going to parse out which inconsistent statements aren't coming in for truth and which inconsistent statement are coming in for truth. I think, logically, now that it's been explained to me, that 318 is the proper instruction."

On appeal, Maddox argues that CALCRIM No. 318 is appropriate only if the prior statements were made by a witness who testified at trial, and CALCRIM No. 319 should be given if the prior statements were made by a witness who did not testify at trial and whose testimony from a previous hearing was read to the jury. Maddox does not discuss any specific prior statements and explain why the jury could not consider those statements for their truth pursuant to a hearsay exception. His categorical argument without discussing the evidence in the record fails to show that it was error to give the instruction in light of the evidence in this case. (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 [an appealed judgment is presumed correct, "and it is the appellant's burden to affirmatively demonstrate error"].)

5. *The Felony Conviction of Driving or Taking a Vehicle Without Consent Must Be Reversed*

Maddox contends there was no evidence that the value of the vehicle exceeded $950, so we must reverse his felony conviction of driving or taking a vehicle without consent and allow the People to either accept a reduction to a misdemeanor or retry Maddox on the felony charge. The People concede the point, and we agree.

Vehicle Code section 10851 proscribes driving or taking a vehicle without the owner's consent. Subdivision (a) states, "Any

person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle . . . is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or . . . by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment." A Vehicle Code section 10851 violation is a "wobbler" offense, punishable as either a misdemeanor or a felony. (*Id.*, subd. (a); *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 853.)

"As the Supreme Court has observed, section 10851, subdivision (a), '"proscribes a wide range of conduct."' (*People v. Garza* (2005) 35 Cal.4th 866, 876 [28 Cal.Rptr.3d 335, 111 P.3d 310].) A person can violate section 10851 by '[u]nlawfully taking a vehicle with the intent to permanently deprive the owner of possession.' (*Garza*, at p. 871.) Section 10851 can also be violated 'when the driving occurs or continues after the theft is complete' (referred to by the Supreme Court as 'posttheft driving') or by '"driving [a vehicle] with the intent only to temporarily deprive its owner of possession (i.e. joyriding)."' (*Garza*, at pp. 871, 876.)" (*People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 854.)

Taking a vehicle without the owner's consent with the intent to permanently deprive the owner of possession is a form of theft. (*People v. Page* (2017) 3 Cal.5th 1175, 1183.) A Vehicle Code section 10851 violation based on such a taking is a theft offense. (*Page*, at p. 1183.) In contrast, posttheft taking and joyriding under the statute are not theft offenses. (*Ibid.*)

Enacted by the voters on November 4, 2014, and effective the next day, Proposition 47 reduced the punishment for certain drug and theft offenses by reclassifying them from felonies to misdemeanors. (*People v. Page*, *supra*, 3 Cal.5th at pp. 1179, 1181.) Proposition 47 amended or added several statutory provisions. (*Page*, at p. 1179.) Section 490.2, added by Proposition 47, provides that notwithstanding any other law defining a form of grand theft, the theft of property with a value not exceeding $950 constitutes petty theft and is punished as a misdemeanor. After the passage of Proposition 47, a theft offense under Vehicle Code section 10851 constitutes petty theft if the value of the vehicle was $950 or less, and such an offense is punishable as only a misdemeanor. (*Page*, at p. 1187; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 855.)

The incident for which Maddox was convicted of a felony violation of Vehicle Code section 10851 occurred in August 2016, after the effective date of Proposition 47. A felony conviction for vehicle theft under Vehicle Code section 10851 requires proof that the value of the vehicle exceeded $950. (*People v. Jackson* (2018) 26 Cal.App.5th 371, 372; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 855.) Maddox argues and the People concede that there was no such evidence in this case.

The jury instructions allowed the jury to convict Maddox of a felony violation of Vehicle Code section 10851 based on either taking a vehicle without the owner's consent and "depriv[ing] the owner of possession or ownership of the vehicle for any period of time" or driving a vehicle without the owner's consent and depriving the owner of possession or ownership for any period of

time.[8] Absent evidence that the value of the vehicle exceeded $950, a felony conviction based on a theft offense under the statute would be improper, as stated. Thus, the instructions allowed the jury to convict Maddox based on a theory of guilt that was legally incorrect.[9] This was error.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect,

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[8] The trial court instructed: "The defendant is charged in count 6 with unlawfully taking or driving a vehicle in violation of Vehicle Code section 10851 on or about August 17, 2016. To prove the defendant is guilty of this crime, the people must prove that:

"One, defendant took or drove someone else's vehicle without the owner's consent, and

"Two, when the defendant did so he intended to deprive the owner of possession or ownership of the vehicle for any period of time."

[9] A theft offense under Vehicle Code section 10851 requires an intent to permanently deprive the owner of possession. (*People v. Page*, *supra*, 3 Cal.5th at p. 1182.) As in *People v. Gutierrez*, *supra*, 20 Cal.App.5th at page 856, the instructions here did not require the jury to find such an intent in order to convict.

The California Supreme Court granted review in *People v. Bullard*, review granted February 22, 2017, No. S239488, and asked the parties to brief the question: "Does equal protection or the avoidance of absurd consequences require that misdemeanor sentencing under Penal Code sections 490.2 and 1170.18 extend not only to those convicted of violating Vehicle Code section 10851 by theft, but also to those convicted for taking a vehicle without the intent to permanently deprive the owner of possession? (See *People v. Page*, *supra*, 3 Cal.5th 1175, 1188, fn. 5.)"

reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 167; accord, *In re Martinez* (2017) 3 Cal.5th 1216, 1221.) The conviction must be reversed unless the reviewing court concludes beyond a reasonable doubt that the jury based its verdict on a legally valid theory. (*Chiu*, at p. 167; *People v. Jackson*, *supra*, 26 Cal.App.5th at pp. 378–379.) In other words, an instruction on an invalid theory is prejudicial unless there is no reasonable possibility that the jury relied on an invalid theory in convicting the defendant. (*Martinez*, at p. 1226.)

The People concede that the record does not show whether the jury convicted Maddox based on a legally valid theory. We agree and therefore must reverse the conviction. (*People v. Chiu*, *supra*, 59 Cal.4th at p. 167; *People v. Jackson*, *supra*, 26 Cal.App.5th at pp. 378–379.) The People may either accept a reduction of the felony Vehicle Code section 10851 conviction to a misdemeanor or retry the charge as a felony with appropriate instructions. (*Jackson*, at p. 381; *People v. Gutierrez*, *supra*, 20 Cal.App.5th at p. 857.) If the People do not bring Maddox to trial on the felony charge within the time allowed under section 1382, subdivision (a)(2), or file a written election not to retry Maddox, the trial court shall proceed as if the remittitur modified the judgment to reflect a misdemeanor Vehicle Code section 10851 conviction. (*People v. Edwards* (1985) 39 Cal.3d 107, 118; *People v. Hayes* (2006) 142 Cal.App.4th 175, 184; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1596.)

The trial court should be given an opportunity to reconsider all of its discretionary sentencing choices in light of the changed circumstances. (*People v. Burbine* (2003) 106 Cal.App.4th 1250, 1258 ["trial courts are, and should be, afforded discretion by rule

and statute to reconsider an entire sentencing structure in multicount cases where a portion of the original verdict and resulting sentence has been vacated by a higher court"]; *People v. Hill* (1986) 185 Cal.App.3d 831, 834 ["an aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components"].) Accordingly, we will vacate the entire sentence and remand for resentencing. (*People v. Gutierrez*, *supra*, 20 Cal.App.4th at p. 863 ["[defendant's] sentence is vacated in its entirety"].)

6. *The Trial Court Properly Found the Prior Conviction Allegations True*

Maddox contends the prosecutor failed to prove the prior robbery conviction alleged in the information, and the trial court abused its discretion by allowing the prosecutor to amend the information to conform to proof at trial.

The information alleged that Maddox had suffered a prior robbery conviction on May 23, 2011, in Los Angeles Superior Court case No. BA417319. In fact, case No. BA417319 involved a false imprisonment (§ 236) charge to which Maddox had pled guilty on January 3, 2014, and was sentenced to probation.

On April 12, 2017, prior to the court trial on the prior conviction allegations, the defense filed its sentencing memorandum stating that case No. BA417319 involved a violation of section 236, and that Maddox had pled guilty and was on probation in that case at the time of the offenses in this case. Regarding the alleged prior robbery conviction, the defense stated that Maddox had entered into a plea deal and initially was sentenced to probation, but after "some drug-related setbacks" he was resentenced to three years in state prison in November 2011. The defense argued that Maddox had accepted

responsibility for the robbery and requested that the trial court strike his prior strike conviction.

On April 18, 2017, in the court trial of the prior conviction allegations, the prosecutor presented certified records of Maddox's robbery conviction on February 14, 2011, in case No. BA378335.

The trial court found that Maddox had been convicted of robbery in case No. BA378335. The defense then argued "for appellate record purposes" that the information alleged a prior strike in a different case and that the prosecutor had failed to prove the conviction alleged in the information. The court stated that despite the "technical mistake" in the information, the court was convinced that Maddox had suffered a prior robbery conviction.

The prosecutor moved to amend the information to conform to proof. The defense opposed the motion, arguing that it was improper to amend the information after the trial court's ruling. The trial court granted the motion to amend and proceeded with sentencing. Regarding probation in case No. BA417319, the court found that Maddox had violated his probation by committing the current offenses, and terminated probation.

A variance between pleading in an information and proof at trial is material only if it is of such a substantial character as to mislead the defendant in preparing a defense. (*People v. Maury* (2003) 30 Cal.4th 342, 427; *People v. Amperano* (2011) 199 Cal.App.4th 336, 343.) The defense discussed the prior robbery conviction in its sentencing memorandum before the court trial of the prior conviction allegations. Maddox has not shown that the variance in the case number and date of the conviction misled

him in any manner or prejudiced his defense, and therefore has shown no error.

DISPOSITION

The felony conviction of driving or taking a vehicle without consent is reversed; the convictions on all other counts are affirmed. If the People do not bring Maddox to trial for a felony violation of Vehicle Code section 10851, subdivision (a) within the time allowed under section 1382, subdivision (a)(2), or if the People file a written election not to retry Maddox, the trial court shall proceed as if the remittitur modified the judgment to reflect a conviction of a misdemeanor violation of Vehicle section 10851, subdivision (a). The sentence is vacated in its entirety, and the trial court shall resentence Maddox. The judgment is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MICON, J.*

We concur:

WILLHITE, Acting P. J. COLLINS, J.

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