Filed 11/30/12 P. v. Cluchette CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>KOJO DAMANI CLUTCHETTE,<br><br>Defendant and Appellant. | B230421<br><br>(Los Angeles County<br>Super. Ct. No. BA321348) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Pamela C. Hamanaka, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Kojo Damani Clutchette appeals from the judgment entered following his conviction for first degree murder (Pen. Code, § 187, subd. (a)) with personal use of a firearm (former Pen. Code, § 12022.53, subd. (b)), personal and intentional discharge of a firearm (former Pen. Code, § 12022.53, subd. (c)), personal and intentional discharge of a firearm causing death (former Pen. Code, § 12022.53, subd. (d)), and a finding he was released on bail or on his own recognizance at the time of the offense (Pen. Code, § 12022.1.) The court sentenced appellant to prison for 52 years to life. We affirm the judgment.

## *FACTUAL SUMMARY*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on June 1, 2006, Rian Cain (also known as T.L.) lived in the house at 809 West 50th Place in Los Angeles. On that date, perhaps about 10:00 a.m., Christopher Garrett arrived. Appellant was already there. Trunnell Powell lived in a rear house.

Powell testified that about 11:00 a.m., Powell came home. Appellant, a man named Chris (apparently Garrett), and another male were on Cain's porch (porch). Cain was Powell's stepson. Sheena King (the decedent) was sitting in a nearby car. Powell entered his rear house but, about 12:30 p.m., exited when he heard cursing out front. Powell walked down the driveway and saw King cursing at appellant. Garrett testified that after Garrett arrived at Cain's house, Garrett remained for an hour or two, then left.

Powell testified that about 2:40 p.m., he heard loud voices again, exited his house, and went to the porch. Powell saw appellant, a man named Chris, another man, and King. King was again using profanity. Powell entered Cain's house to go to Powell's house. A person named Mark was on the phone in Cain's house.

Garrett testified that after he returned to Cain's house, King and appellant were cursing at each other. Garrett saw Mark Lemon give appellant a semiautomatic gun at

the side of the house.[1] About 10 minutes later, King used her cellphone to tell her "homeboys" that she had "got[ten] into it with somebody." Perhaps 20 minutes after Garrett saw Lemon give the gun to appellant, Garrett heard six to eight shots coming from the porch. Just before Garrett heard the shots, appellant, Lemon, Cain, and King were on the porch. As Garrett continued running past the porch, he saw appellant shoot King. Appellant tried to run with Garrett, Garrett told him not to do so, and they fled in different directions. Appellant ran to the back and gave the gun to Cain.

Powell, who was in his house when the shooting began, heard seven gunshots. He opened his door and saw Garrett and appellant fleeing. Garrett and appellant went over a fence.[2]

King suffered eight gunshot wounds and was mortally wounded. It appeared two bullets created one of the wounds. Gunshot wounds to King's left hand and left arm could have been defensive wounds. About 4:40 p.m., a detective went to the scene after King's body had been removed. The detective found on the porch, inter alia, two nine-millimeter casings and a knife.

Lasharica Ross testified that in December 2006, appellant, who was then Ross's boyfriend, hit her with a cord during an argument. Ross called police about the matter but also told police that appellant had committed a murder and had told her about it. Ross told the officer that appellant told Ross the following. Appellant had been in an altercation with a girl. The girl called men from another gang "to do some stuff" to appellant. Appellant was at the house of his friend T.L. on 50th Place. A second friend

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[1] Garrett gave police a written statement indicating Lemon walked to the side of the house and appellant followed him, and when Lemon and appellant returned, Lemon handed appellant a handgun and appellant put it in his waistband.

[2] Los Angeles Police Detective Refugio Garza testified that on June 1, 2006, Powell told police that he was in his room when he heard four to six shots, exited, saw the victim on the porch, but saw no suspects. In about December 2006, Powell told Garza that Powell saw two people leaving the scene. Powell told Garza that Powell was scared.

named Chris or Cedric was outside. T.L. gave a nine-millimeter gun to appellant. Appellant used the gun to shoot the girl seven times, then returned it to T.L.

In December 2006, Los Angeles Police Detective Refugio Garza interviewed Garrett.[3] Garrett first said he was nowhere near the scene when the shooting took place. He later said he was there but did not really see what happened. Garza talked with Garrett further, told him to tell the truth, and Garrett ultimately told Garza that appellant shot King. Garrett identified appellant as the shooter at appellant's preliminary hearing and at trial. Garza denied at trial that he had information connecting Garrett with the gun used to shoot King.

In defense, appellant denied shooting King and denied telling Ross that he killed King. Appellant denied remembering whether he was at 827 West 50th Place on June 1, 2006, but he had a vivid memory that he was in that neighborhood the previous day.

## *ISSUES*

Appellant claims (1) Garza's false testimony and the prosecutor's failure to correct it violated appellant's rights to due process and a fair trial, (2) the trial court erroneously refused to grant judicial immunity to Cain, (3) the trial court erroneously refused to permit appellant to impeach Powell with Powell's alleged perjury, and (4) the prosecutor committed misconduct and the failure of appellant's trial counsel to timely object thereto constituted ineffective assistance of counsel.

## *DISCUSSION*

1. *The Prosecutor Did Not Present False Testimony from Garza or Fail to Correct Same in Violation of Appellant's Rights to Due Process and a Fair Trial*.

As discussed below, Garza testified that in December 2006, when he interviewed Garrett, Garza knew the murder weapon in the present case was also at the scene of a May 2006, murder, Garza knew Garrett was present at both murder scenes, but Garza had

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[3] After the King killing, Garrett was convicted of receiving stolen property and burglary. At time of trial, Garrett was on parole for the former offense and on probation for the latter.

no evidence connecting Garrett to the present crime. Appellant argues Garza's testimony that he had no evidence connecting Garrett to the present crime was false because, before Garza interviewed Garrett, Shauntrai Byers told Garza that Garrett had come to her house just before King was shot, Garrett possessed a gun which he had obtained from Cory Gray, and Gray was angry Garrett had used Gray's gun to kill King.

*a. Pertinent Facts.*

(1) *Garza's Interview of Byers.*

Garza's synopsis of his November 30, 2006, interview of Shauntrai Byers is reflected in exhibit No. 9 to appellant's motion for a new trial, which appellant filed in pro per. In the exhibit, Garza indicates Byers told him the following about the King murder. "[Garrett] had given the gun to [appellant] to murder [King]." Byers knew "[Garrett] gave the gun to [appellant] because the day that [King] was murdered they had been by her house first."

Moreover, Byers heard that appellant and King fought "the night before" over Antwanique, Byers's cousin. Appellant and another person were trying to cause Antwanique to become a prostitute and King did not approve. The reason Byers was talking to police was her friend Monica Johnson saw appellant walking around the neighborhood, knowing he had killed King. Byers heard that "[Garrett] gave the gun to [appellant] to kill [King]." Byers heard that King had fought twice with appellant that day and had beaten him up. While Byers was at the hospital, her friend Monique Johnson told her that "[appellant] had shot [King] because they had a heated argument."

(2) *Garza's Interview of Garrett.*

Garza testified as follows during direct examination at trial. Garza investigated a separate May 29, 2006, murder involving a shooting. In December 2006, Garrett gave Garza a statement about the June 1, 2006, King murder and appellant's use of a gun to shoot King. During the interview, Garza told Garrett that "[Garrett] and the gun were connected in the two shootings, just that he and the gun were at the same place of those two shootings."

The following then occurred during direct examination: "Q *Now, at the time that you were talking to [Garrett] about this gun, did you have any connection to [Garrett] and the gun?* [¶] A No, sir. [¶] Q *Did you have any information that [Garrett] ever had possession of that gun?* A That gun in particular, no, sir. [¶] Q *Did you have any information that he was identified [sic] or matched the description of the person who did have the gun?* [¶] A No, sir. [¶] Q And in fact, the May 29th shooting you had a description of a suspect by the name of Cory Gray? [¶] A Yes, sir." Appellant challenges the three above italicized questions, which we will discuss later.

b. *Analysis*.

Appellant claims his rights to due process and a fair trial were violated when Garza presented false or misleading testimony and the prosecutor failed to correct it. He argues that, in light of Byers's statements to Garza, Garza falsely testified when he replied no to the three previously italicized questions, and the truth would have challenged Garza's credibility and provided evidence Garrett was an accomplice whose testimony should have been viewed with caution. We conclude otherwise.

The prosecution cannot present evidence it knows is false and must correct any falsity of which it is aware in the evidence it presents. The prosecution also has the duty to correct the testimony of its own witnesses that it knows, or should know, is false or misleading. (*People v. Morrison* (2004) 34 Cal.4th 698, 716-717 (*Morrison*).) A prosecutor's failure to correct such testimony requires reversal of the judgment unless the failure is harmless beyond a reasonable doubt. (*People v. Dickey* (2005) 35 Cal.4th 884, 909 (*Dickey*).)

We reject appellant's argument. First, appellant never challenged the subject testimony of Garza on these grounds when Garza presented it. Appellant waived the issue. (Cf. *People v. Wilson* (2008) 44 Cal.4th 758, 799-801; *People v. Marshall* (1996) 13 Cal.4th 799, 830-831; see *Morrison, supra*, 34 Cal.4th at p. 717.) Second, even if the issue was not waived, we assume without deciding that during Garza's November 2006, interview of Byers, she repeatedly stated to Garza, in connection with the King murder,

that Garrett gave the gun to appellant. We also therefore assume (1) Garza's replies of no to the first two previously italicized questions were testimony he had no information connecting Garrett and the gun, and no information Garrett ever possessed the gun, (2) those replies were false or misleading, and (3) the prosecutor knew or should have known they were false or misleading.

This however leaves the issue of whether prejudice resulted. Even if Garza had testified truthfully, he would have testified simply that he had "information" connecting Garrett and the gun, and had "information" Garrett possessed the gun. That testimony would not have told the jury what the information was. Moreover, assuming the "information" was Byers's statement to Garza, any testimony by Garza relating Byers's statement would have been inadmissible hearsay. Indeed, Byers's statement itself related hearsay from others. She also suggested the basis of her knowledge that Garrett had given the gun to appellant was the vague fact that the day King was murdered "they had been by her house first." Garza's synopsis does not make clear Byers's statement was based on personal knowledge.

Further, even if testimony by Garza relating Byers's statements was admissible, she indicated Garrett not only gave the gun but gave it "to [appellant]" to murder King. This statement provided incriminating evidence that appellant, using the gun, murdered King. Byers made similar incriminating statements to Garza and made statements providing evidence appellant had a motive to kill King based on prior altercations with her. Garrett testified he saw appellant shoot King. Appellant admitted to Ross that he shot and killed King. Powell saw appellant and Garrett fleeing the shooting scene. In sum, even if the prosecutor presented false or misleading testimony and failed to correct it as urged by appellant, reversal is not required because the alleged error was harmless beyond a reasonable doubt. (Cf. *Dickey*, *supra*, 35 Cal.4th at pp. 909-910.)

This leaves the prosecutor's third previously italicized question, "Q Did you have any information that [Garrett] was identified [*sic*] or matched the description of the person who did have the gun?" Garza replied no. The argument that Garza's reply was

false or misleading in light of Byers's statements lacks merit because the colloquy between the prosecutor and Garza is ambiguous. It cannot be determined from that colloquy whether the prosecutor's question, and therefore Garza's reply, were referring to the person who had possessed the gun during the May 29, 2006, murder, or to the person who had possessed the gun during the June 1, 2006, King murder. The conclusion that that colloquy is ambiguous is supported by the prosecutor's fourth question, and Garza's reply, which pertained to the May 29, 2006, murder. Appellant has failed to demonstrate Garza's reply to the third question was false or misleading. (Cf. *People v. Valdez* (2004) 32 Cal.4th 73, 126; *Morrison*, *supra*, 34 Cal.4th at pp. 717-718.) Even if Garza's reply to the third question was false or misleading, the error was harmless beyond a reasonable doubt for the reasons previously discussed.

2. *The Trial Court Did Not Err by Refusing to Grant Judicial Immunity to Cain*.

On September 23, 2009, during trial, the court indicated appellant was going to call Cain as a defense witness. Cain indicated he would invoke his right against self-incrimination. The court commented the prosecutor was not considering granting immunity to Cain. Appellant's counsel indicated Cain made a statement to detectives and appellant's counsel might call them as witnesses "because there are things in that statement that we want the jury to hear."

Cain later invoked his right against self-incrimination. Appellant asked the court to grant immunity to Cain but the court refused to do so on the ground that only the prosecutor could grant immunity. Appellant did not, during the above discussions, proffer the substance, purpose, or relevance of Cain's anticipated testimony.

Appellant filed, in pro per, a motion for a new trial. The motion is supported by what purports to be a police report that reflects at 9:00 p.m. on June 1, 2006, Cain told detectives that King was sitting in a chair on Cain's porch and "[s]uddenly Cain heard 6-7 shots but the way the porch is situated towards the side of the house he could not see the suspect."

The motion was also supported by appellant's unsworn memorandum of points and authorities (memorandum). The memorandum states, inter alia, "Mr. Powell testified Marksavian Lemon was in the house on the phone the whole time he was home and that no one else who lived at the house was home, including his stepson, Rian Cain (TL), who made a recorded statement to police detectives on June 2, 2006, saying that he witnessed the original suspect, Michael Miller, murder the victim in a jealous rage after a heated argument over the chirp phone. (Transcribed police interview with Rian Cain on 6-2-06, pp. 6, 12, 30; . . . .)"[4]

Appellant claims the trial court erred by refusing his request to grant judicial immunity to Cain. We disagree. The granting of immunity is an executive function. (*People v. Williams* (2008) 43 Cal.4th 584, 622 (*Williams*).) Our Supreme Court, which has assumed without deciding that circumstances might exist in which a trial court might have inherent authority to grant immunity to preserve a defendant's rights to compulsory process and a fair trial (*People v. Stewart* (2004) 33 Cal.4th 425, 468-469 (*Stewart*)), has employed two tests to determine if those circumstances existed. The first has three elements, i.e., (1) the proffered testimony is clearly exculpatory, (2) the testimony is essential, and (3) there is no strong governmental interest which countervails against a grant of immunity. Under this test, immunity will be denied if the proffered testimony is ambiguous. (*Id.* at p. 469, fn. 23.)

The second test would permit judicial immunity when " 'the prosecutor intentionally refuse[s] to grant immunity to a key defense witness for the purpose of suppressing essential, noncumulative exculpatory evidence,' thereby distorting the judicial factfinding process." (*Stewart, supra*, 33 Cal.4th at p. 470.) This requires the prosecutor to act "with the deliberate intention of distorting the factfinding process. [Citations.]" (*Id.* at p. 471.)

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[4] This statement from the memorandum is ambiguous on the issue of whether it was Powell or appellant who was indicating Cain made the alleged "recorded statement." The alleged transcribed police interview with Cain is not part of the record.

We conclude appellant failed to make the requisite showing under either test for two reasons. First, on September 23, 2009, when the court and parties were discussing a grant of immunity to Cain, appellant never told the court the substance, purpose, or relevance of Cain's anticipated testimony prior to the trial court's refusal to grant judicial immunity. We review the validity of a trial court's ruling as of the time of the ruling, without reference to evidence produced at a later date (*People v. Welch* (1999) 20 Cal.4th 701, 739), such as any alleged evidence produced in appellant's motion for a new trial.

Second, even if the alleged facts asserted in appellant's motion for a new trial had been presented to the trial court during the discussions leading to its denial of appellant's judicial immunity request, the alleged police report that appellant himself attached to said motion clearly indicates that on June 1, 2006, Cain told detectives "[Cain] could not see the suspect." This conflicts with the vague and unsworn statement by appellant in his memorandum that on June 2, 2006, Cain told detectives that Miller murdered King. Appellant's showing is therefore ambiguous and not clearly exculpatory.

Moreover, the statement in the memorandum appears to rely on multiple hearsay at least some of which is not part of the record, e.g., (1) appellant's unsworn statements in his memorandum relating Cain's alleged statements to detectives about Miller, and/or (2) an alleged transcript of Cain's statements to detectives about Miller (and said transcript is not part of the record). No violation of appellant's constitutional rights, including his right to present a defense, his right to due process, or his right to a fair trial, resulted from the trial court's denial of appellant's request for judicial immunity for Cain.

3. *The Trial Court Did Not Err by Refusing to Permit Appellant to Impeach Powell with Powell's Alleged Perjury.*

On September 22, 2009, Powell admitted during cross-examination by appellant that Powell had suffered a misdemeanor conviction for welfare fraud. Later outside the presence of the jury, appellant indicated he wanted to cross-examine Powell concerning Powell's acts of perjury. Appellant observed Powell had been charged in a complaint, and perhaps in an information, with welfare fraud and numerous counts of perjury.

Appellant indicated, as relevant here, he was not concerned with anything else. Appellant indicated Powell had been convicted in 2007 for the welfare fraud, which involved multiple perjurious statements.

Appellant claims the trial court erroneously refused to permit appellant to impeach Powell with Powell's perjury. Appellant argues the trial court refused "on the ground that Powell had not been convicted of the perjury counts charged against him." We reject appellant's claim.

"A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court's exercise of discretion under Evidence Code section 352. [Fn. omitted.] (*People v. Wheeler* (1992) 4 Cal.4th 284, 290-296 [citation]; [citation].)" (*People v. Clark* (2011) 52 Cal.4th 856, 931 (*Clark*).) The trial court's ruling is reviewed for abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652, 684.) A reviewing court ordinarily upholds a trial court's exercise of its discretion in excluding impeachment evidence. (*Clark, supra*, 52 Cal.4th at p. 932.)

Fairly read, the record reflects the court precluded appellant from impeaching Powell with evidence of the perjury that underlay the *dismissed perjury counts*, the alleged facts pertaining to which served as the basis for Powell's welfare fraud conviction. The record, fairly read, also reflects the court excluded said proffered evidence pursuant to Evidence Code section 352.

Notwithstanding appellant's argument to the contrary, the record does not reflect the trial court erroneously excluded the anticipated evidence of Powell's perjury based merely on the fact Powell had not been convicted on the perjury counts. True, the trial court did state "he wasn't convicted of that," but that statement is ambiguous because it does not make clear whether the trial court was relying on the fact that Powell had not been convicted (1) to exclude as a matter of law (contrary to *Wheeler*) the anticipated evidence of perjury, or (2) as merely a factor to be considered in the Evidence Code

section 352 analysis (e.g., whether introduction of the proffered evidence would necessitate undue consumption of time).

The threshold issue is whether the trial court properly excluded the proffered evidence under Evidence Code section 352. Prior to the trial court's ruling, appellant never explicitly identified what Powell's alleged perjury was. On this record, appellant expressed intent to proffer evidence of an unspecified number (and therefore perhaps a large number) of alleged perjurious acts committed at an unspecified time (and therefore perhaps over a lengthy period of time) by Powell (and perhaps with an accomplice(s)). This would have involved not only a trial within a trial, but the handling of additional issues such as why the district attorney failed to prosecute to conviction each allegedly perjurious act underlying the perjury counts and, instead, dismissed them.

Moreover, the trial court reasonably could have considered the fact that misconduct for which a person has not been convicted generally is less probative of immoral character or dishonesty, and could involve problems of proof and unfair surprise. (*Clark*, *supra*, 52 Cal.4th at p. 931.) Powell admitted he had suffered a conviction for welfare fraud. The jury reasonably could have concluded from that conviction alone that Powell falsely or perjuriously obtained welfare assistance. The trial court's ruling did not preclude Powell from testifying. Appellant impeached Powell with contradictory statements.

We conclude the trial court did not abuse its discretion by excluding the proffered evidence of alleged perjury by Powell under Evidence Code section 352. Moreover, the application of ordinary rules of evidence, as here, did not violate appellant's constitutional rights to due process and a fair trial. (Cf. *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

Finally, the jury heard Powell had been convicted of welfare fraud. Appellant extensively cross-examined Powell. Powell testified he saw appellant and Garrett run away after Powell heard gunshots. However, Garrett more incriminatingly testified at trial that 20 minutes before King was shot, he saw Lemon give appellant a gun. Garrett

testified he saw appellant shoot King. Ross testified appellant told her that he shot and murdered King. Any error by the trial court in excluding the anticipated evidence was harmless. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836.)

4. *No Prejudicial Prosecutorial Misconduct Occurred.*

Appellant claims the prosecutor committed misconduct on five occasions as indicated below. As to each occasion appellant failed to object on the ground of prosecutorial misconduct and failed to request a jury admonition with respect to the alleged misconduct, which would have cured any harm. Appellant therefore waived each of the prosecutorial misconduct issues below. (Cf. *People v. Gionis* (1995) 9 Cal.4th 1196, 1215; *People v. Mincey* (1992) 2 Cal.4th 408, 471.)

a. *The Prosecutor's Alleged Vouching for Garrett.*

At the beginning of the People's redirect examination of Garrett, the prosecutor greeted Garrett and asked him how was he doing. Garrett indicated he was fine and greeted the prosecutor. The following then occurred: "Q Chris, I noticed during the testimony you keep touching your face. Why do you keep doing that? [¶] A I have a bad toothache, sir. [¶] Q Are you presently in pain? [¶] A Yes, sir. [¶] Q Are you taking medication because of that? [¶] A Yes, sir."

Appellant argues that in the above quoted colloquy, the prosecutor vouched for Garrett. We disagree. "A prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record." (*People v. Frye* (1998) 18 Cal.4th 894, 971.) However, in the present case, the trial court, as part of its final charge to the jury, gave CALJIC No. 2.20 concerning believability of a witness. That instruction told the jury that in determining the believability of a witness, the jury could consider the "demeanor and manner of the witness while testifying." The prosecutor inquired into such a matter here. No vouching occurred.

b. *The Prosecutor's Alleged Vouching for Powell.*

During rebuttal argument, the prosecutor commented appellant's counsel had to brush over Powell because appellant's counsel knew Powell was the "final nail," appellant's counsel could not really disparage Powell, and appellant's counsel could not "really find an axe for . . . Powell to grind against the defendant." The prosecutor then asked the jury to think about Powell, and the prosecutor later discussed Powell's testimony. The prosecutor urged that if Powell had an axe to grind against appellant, Powell would have provided more incriminating testimony such as testifying Powell saw appellant shoot King, Powell thought appellant was going to shoot Powell, and, at a minimum, Powell saw appellant running around and saw him with a gun. The prosecutor argued Powell did not so testify because he was telling the truth.

Appellant argues that in the above rebuttal argument, the prosecutor vouched for Powell.[5] We disagree. The prosecutor's comments were fair comment on the evidence. (See *People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).) No vouching occurred.

c. *The Prosecutor's Alleged Misstatement of Facts Regarding King.*

Towards the beginning of the prosecutor's rebuttal argument, the prosecutor commented appellant did not shoot King once or twice but shot her seven times, shot her when she was defenseless and seated, then fled. The prosecutor later reiterated this, adding the shots were fired at close range.

The memorandum in appellant's pro per motion for a new trial indicates an officer D. Shaw, the first officer on the scene, reported that the victim possessed a knife. The memorandum also indicates a photograph later depicted the knife on the porch. The motion also contains exhibit No. 2, that purports to be a written statement of Los Angeles Police Officer D. Shaw who arrived at the King shooting scene. The statement reflects that when the fire department rolled the victim on her back, Shaw observed that the victim had a knife in her waistband.

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[5] Appellant first raised this issue in the motion for a new trial filed by his trial counsel.

Appellant argues the prosecutor's above rebuttal argument that King was defenseless misstated the facts because evidence was presented at trial that there was a knife on the porch and because the prosecutor knew Shaw, one of the first officers on the scene, had reported that the victim had possessed a knife in her waistband. We reject the argument. The prosecutor's comments were fair comments on the evidence. (See *Hill, supra,* 17 Cal.4th at p. 819.)

d. *The Prosecutor's Alleged Misstatement of Facts Regarding Ross.*

The present offense occurred on June 1, 2006. Ross testified at trial that in August 2006 she arrived in Los Angeles from another state, in about September 2006, she became appellant's girlfriend, she met some of appellant's friends when she began dating him, and she met Cain and Garrett. At trial, Garrett denied knowing Ross but testified he knew appellant's girlfriend "at the time."

During rebuttal argument, the prosecutor commented as follows. Ross did not come on the scene until after June 1, 2006. "We know that she has *no real* connection or relationship with the buddies that the defendant was hanging out with at the time he killed [King]. [¶] But, most importantly, we know that the defendant told Miss Ross he killed [King]." (Italics added.) After making other comments including comments pertaining to Ross's relocation because she was a witness, the prosecutor argued Ross's testimony concerning what appellant told her included details that only appellant could have provided to her.

Appellant argues (1) the prosecutor's rebuttal argument was that Ross should be viewed as credible "because she had '*no* connection or relationship' with appellant's friends he was 'hanging out with' at the time of the crime (Garrett, Cain, Lemon) *and thus* could have learned facts about the shooting only from appellant" (italics added) and (2) this rebuttal argument misstated the facts. Appellant maintains this argument misstated the facts because Garrett testified he knew appellant's girlfriend and Ross testified she knew Cain and Garrett. Appellant's argument is without merit.

Appellant has mischaracterized the prosecutor's argument. The prosecutor qualified his comments, referring to no "real" connection or relationship. He never expressly referred to Garrett, Cain, or Lemon in the challenged testimony. Garrett's testimony could be construed as indicating he knew appellant's girlfriend as of June 1, 2006. (Ross was appellant's girlfriend later.) The prosecutor's comment to the effect Ross could have learned facts about the shooting only from appellant was explicitly based on the details of what appellant told her, not the presence or absence of a relationship between Ross and appellant's friends. The prosecutor's comments were fair comments on the evidence. (See *Hill, supra,* 17 Cal.4th at p. 819.)

e. *The Prosecutor's Comment Appellant Was Lying.*

During rebuttal argument, the prosecutor commented it was his burden, not appellant's, to produce evidence. The prosecutor then recited exchanges at trial between the prosecutor and appellant during which appellant had indicated he did not have certain evidence the prosecutor suggested appellant should have had if portions of his testimony were true. The prosecutor reiterated it was his burden to produce evidence but there had to be some basis to believe anything appellant testified. The prosecutor then commented, "And that's entirely absent. And we know why he's lying. We know why he's lying. [¶] Interpretation of facts." (*Sic*.) After discussing the testimony of Garrett, Ross, and Powell that incriminated appellant, the prosecutor commented, "Defendant does not remember the day of the murder. Well, he's lying, because he murdered [King]. That's the reasonable interpretation."

Appellant argues that in the prosecutor's above rebuttal argument he improperly opined appellant was lying. Appellant argues the prosecutor "stepped over the line into impropriety" when the prosecutor said, according to appellant, "we know" appellant was lying. We reject the argument. The prosecutor's comments were fair comments on the evidence. (See *Hill, supra,* 17 Cal.4th at p. 819.)

f. *Appellant Has Failed to Demonstrate His Trial Counsel Provided Ineffective Assistance of Counsel.*

Appellant claims his trial counsel provided ineffective assistance of counsel by failing to timely object to "the prosecutor's improper conduct." We reject appellant's claim.

Appellant's claim is conclusory. First, he has failed to identify what the "prosecutor's improper conduct" allegedly was. Even assuming appellant has preserved this issue for review by merely referring to alleged arguments contained in his motion for a new trial, the six-page portion of the memorandum does not identify the prosecutorial misconduct to which appellant refers. Appellant's reference to "some of the improper statements (as to Garrett and Powell)" suggests an admissibility issue(s), not prosecutorial misconduct issues; in any event, that reference is too vague to permit us to determine to what prosecutorial misconduct appellant refers. Appellant's reference to the alleged fact that "counsel objected after the fact in his motion for new trial" is similarly too vague a reference to identify to what prosecutorial misconduct appellant is referring.

The burden is on appellant to demonstrate error from the record. (*In re Kathy P*. (1979) 25 Cal.3d 91, 102.) It is not the responsibility of this court to canvass appellant's 127-page pro per motion for a new trial, or any portion thereof, to determine what his arguments here are. (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379.) Even if appellant were referring to the alleged prosecutorial misconduct that we have previously discussed in this part of the Discussion, we have concluded no misconduct occurred. Appellant's ineffective assistance claim fails. (See *People v. Slaughter* (2002) 27 Cal.4th 1187, 1219; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) None of appellant's claims that his rights to due process and/or a fair trial were violated have merit.

## *DISPOSITION*

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.