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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LOUIE SERGIO GUTIERREZ, Defendant and Appellant.	B270658 (Los Angeles County Super. Ct. No. PA081695)

APPEAL from a judgment of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed.

Robert Booher, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Louie Sergio Gutierrez (defendant) appeals from his conviction of possession of methamphetamine for sale. He contends that the prosecutor committed prejudicial misconduct on two occasions during the trial, and that defense counsel rendered ineffective assistance by failing to object or request an appropriate admonition. Defendant also asks that we review the in camera hearing of his *Pitchess* discovery motion.[1] We find that any prosecutorial misconduct was not preserved for review and that defendant suffered no prejudice due to alleged errors of his counsel. We further find no abuse of discretion in the trial's court's ruling on defendant's *Pitchess* motion. We thus affirm the judgment.

BACKGROUND

Defendant was charged with one count of possession for sale of a controlled substance, in violation of Health and Safety Code section 11378. The information alleged that defendant was out of custody on bail at the time of the offense, within the meaning of Penal Code section 12022.1,[2] and had served three prior prison terms, within the meaning of section 667.5, subdivision (b). In addition, the information alleged pursuant to the "Three Strikes" law (§§ 1170.12, subd. (b), 667, subd. (b)-(j)), that defendant had suffered a prior serious or violent felony conviction. A jury found defendant guilty of the offense as charged, and in a bifurcated proceeding, defendant waived his right to trial and admitted the special allegations.

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[1] See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); *People v. Jackson* (1996) 13 Cal.4th 1164, 1220; Penal Code sections 832.5 and 832.7; Evidence Code sections 1043 through 1045.

[2] All further statutory references are to the Penal Code, unless otherwise indicated.

On March 3, 2016, the trial court denied probation and sentenced defendant to 10 years in prison, consisting of the middle term of two years doubled to four years as a second strike, plus a consecutive two-year term for the bail enhancement, a consecutive three-year term for the prior narcotics sale conviction, and a consecutive one-year term for one prior prison term enhancement. The court struck two of the prison enhancements, awarded a combined total of 1,092 days of presentence custody credit, and imposed mandatory fines and fees.

Defendant filed a timely notice of appeal from the judgment.

Prosecution evidence

Detective Robert Springer testified as both the lead investigator in the case and the prosecution's expert in narcotics sales.

On August 21, 2014, at about 6:00 a.m., he and other Los Angeles Sheriff's deputies executed a search warrant at a house on Pleasantdale Street in Los Angeles County. The deputies contained the area around the outside of the house, and as Detective Springer approached the front door, he made eye contact with defendant through a crack in the window shade. Defendant froze for a second, then moved in a way that caused Detective Springer to think defendant was preparing to flee. The deputies forced entry and Detective Springer, who was the first through the door, saw defendant throw an object from the living room toward the kitchen. Detective Springer recovered the thrown object, which appeared to be crystal methamphetamine. Defendant was then handcuffed and removed from the house.

When deputies called for anyone else in house to come out, five individuals (four women and one man) came from two bedrooms. One of the women was Elizabeth Garcia. All five seemed somewhat disoriented and

appeared to have been awakened. They were detained as the deputies searched the entire house.

In the living room, about six feet from defendant's location at the time they entered the house, the deputies found digital scales and plastic packaging material of the type commonly used for street level narcotic scales. They also found a substance similar in appearance to methamphetamine which could be used to "cut" methamphetamine for sale. Defendant's wallet, found on a coffee table between the two couches in the living room, contained six $20 bills and one $10 bill. Detective Springer testified that narcotic sales usually involved increments of $20. The deputies found three cell phones from the couch area: a gray Samsung (exhibit No. 7) with the initials "LCG" etched on the back; a black Motorola (exhibit No. 8); and a white Samsung (exhibit No. 9). Data in the white Samsung indicated that defendant was the owner or user of that phone, and that Liz Garcia was the owner or user of the Motorola. Nothing relating to defendant was found on the Motorola or the gray Samsung.[3] Detective Springer testified that it was common for drug dealers to have multiple cell phones, called "burner" phones because they were often pre-paid and without established accounts, or with accounts in other people's names. No evidence linked to defendant was found in the bedrooms or bathrooms.

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[3] Detective Greg Meyer, expert in extracting data from cell phones, later examined and reported on the three cell phones in evidence. The user name on the white Samsung (exhibit 9) was shown as louiegutierrez05@sprintpcs.com," and an email address associated it was "louiegutierrez72@gmail.com." The phone's contacts list showed the account as belonging to "louiegutierr." The Motorola contained a Tango application profile and a Google account for "Liz Garcia."

Later, at the station, the gray Samsung (exhibit 7) rang twice, and Detective Springer answered. The first caller said: "What's up, player? Can I get point eight for 40?" Detective Springer explained that point eight meant eight-tenths of a gram of narcotics for $40. In the second call, the caller I.D. displayed the name Marissa. A female voice said, "What's up? Can I get a gram for 60?" Detective Springer explained that a gram was the typical weight to purchase and that $60 was a normal price for a gram of methamphetamine.

Detective Springer found numerous text messages on the gray Samsung that were consistent with narcotics sales. He read some that had been sent in July and August 2014, and explained their meanings. An August text read: "Hey, boy, you got that black? Need a quarter." Detective Springer explained that "black" commonly meant black tar heroin, and a quarter was a quarter ounce. Another read: "Did you say you gave me point eight?" Two July texts read: "Hey, my boy, you only shot me four grams, dog"; and "I got 60. Can you do a gram?" Two July messages, sent 10 seconds apart were "Luis" and then *que onda* (misspelled as *Keonda*, which is Spanish for "What's up?").

Detective Springer testified that narcotic dealers commonly kept their narcotics nearby, depending on the setting. For example, in a location where several people live, some of whom may be narcotics users, a dealer would not leave the narcotics out where they could be stolen, but instead would most likely keep them on his person. In Detective Springer's opinion, the Pleasantdale house was a "flop house" or "crash pad." A crash pad usually meant a run down house with an owner who did not or could not prevent people, often associated with narcotics sales, from coming and going.

The crystal substance recovered at the house was tested, found to contain methamphetamine, and weighed just under 22 grams. Detective Springer testified that such an amount would yield about 1,050 individual doses. In his opinion, the methamphetamine in defendant's possession was intended for the sole purpose of sales. He based his opinion on the amount of methamphetamine recovered, the scales, the packaging and cutting material found nearby, and the $20 bills in defendant's wallet. In addition, the search of the living room and kitchen areas turned up no devices used to ingest methamphetamine, and there was no indication that defendant was a methamphetamine user.

DISCUSSION

I. Prosecutorial misconduct

A. Alleged misconduct

Defendant contends that the prosecutor committed two instances of misconduct which violated his rights under the federal and state constitutions.

The first instance occurred after Detective Springer testified that he interviewed the five occupants who emerged from the two bedrooms of the house. The prosecutor asked: "Based on your interview, did it appear to you that any of the five individuals were involved in narcotic sales?" Defense counsel interposed a relevance objection, which was sustained, and then moved for a mistrial. The trial court denied the motion, and warned the prosecutor not to allow the detective to give his opinion on narcotic sales based upon what he may have been told by the other people in the house. After a recess, the court said to the jury: "As to the last response of Detective Springer just prior to the break, if there was a response that will be stricken."

The second alleged instance of misconduct occurred during the prosecutor's final summation:

> "Now, again, as I stated, in a criminal case the People and People only have the burden of proof. However, what we can argue is that it was a failure by the defense to call a logical witness. If Liz Garcia was that helpful, why didn't we hear from her? Now, the defense also made kind [of] a big deal about the fact that the People did not call as witnesses the five other individuals that were in the house . . . . Now, let me explain why. Those five individuals, not only were they in a totally different area of the house, being the western portion where the two bedrooms were, they were all asleep and it was 6:00 a.m. So what did those individuals actually see? They didn't see anything that is relevant to this case. Now, I could have called those individuals and asked did you see anything, and they would have said no. And I could --"

Defendant then objected to the argument as assuming facts not in evidence. The trial court sustained the objection "as to that last argument."

B. Standard of review

A prosecutor's improper remark violates the federal constitution if it was so egregious that it infected the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819; see also *Darden v. Wainwright* (1986) 477 U.S. 168, 181.) If not so egregious, misconduct violates state law only if the prosecutor has used deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*Hill, supra,* at p. 819.)

"Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.] Harsh and vivid attacks on the credibility of opposing witnesses are permitted, and counsel can argue from the evidence that a witness's testimony is unsound,

unbelievable, or even a patent lie. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) To demonstrate misconduct, defendant must refer to more than just a few phrases or sentences, as we must view the statements in the context of the argument as a whole. (*Ibid.*) Prosecutorial misconduct will not justify reversal absent a clear showing of prejudice under the applicable test for harmless error. (*People v. Hill, supra,* 17 Cal.4th at p. 844; see *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Watson* (1956) 46 Cal.2d 818, 836 [state law error].)

"'"[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion -- and on the same ground -- the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]"' [Citation.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298, quoting *People v. Stanley* (2006) 39 Cal.4th 913, 952.) An objection is not enough; both objection and request for an admonition are required. (See *People v. Prieto* (2003) 30 Cal.4th 226, 259-260.) The claim is reviewable only if an admonition would not have otherwise cured the harm caused by the misconduct. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1146.) It is the defendant's burden on appeal to demonstrate that an admonition would have been ineffective. (*People v. Wrest* (1992) 3 Cal.4th 1088, 1108.)

C. Improper question

Defendant contends that the question to Detective Springer was misconduct because it would have elicited inadmissible irrelevant hearsay, as well as improper expert opinion as to guilt. He contends that the question essentially informed the jury that the other five occupants of the house were innocent, and the drugs must therefore have belonged to defendant.

The trial court sustained the objection to the question posed to Detective Springer, who did not answer the question. Nevertheless, the court struck any response. Defendant did not request an admonition, but asserts here that he should not be deemed to have forfeited the issue. He argues that because the trial court waited until after the lunch recess to tell the jury that Detective Springer's response, if any, was stricken, the jury had a chance to process the information, and by that time, it was too late to "unring the bell" with an admonition. Defendant compares the circumstances there to those in *People v. Alvarado* (2006) 141 Cal.App.4th 1577, 1585-1586, where the failure to object or to request admonitions to multiple instances of misconduct was excused as futile, because "the challenged comments were so prejudicial that an admonition would not have dispelled the harm."

Defendant's comparison fails. A single unanswered question does not amount to the sort of pervasive misconduct that would excuse the failure to request an admonition as futile or ineffective; nor could it cause defendant any prejudice. (*People v. Riggs*, *supra*, 44 Cal.4th at pp. 298-299.) There is generally no prejudice where an objection is made and sustained, particularly where, as here, the jury heard no inadmissible testimony. (*People v. Trinh* (2014) 59 Cal.4th 216, 248-249.)

D. Remarks in summation

With regard to the prosecutor's remarks in summation, defendant apparently challenges only the statement, "I could have called those individuals and asked did you see anything, and they would have said no." He contends that the statement referred to evidence outside the record and amounted to vouching.

Defense counsel objected to the statement as assuming facts not in evidence. Defendant contends that he was not required to specify misconduct

as a ground, because misstatement of law or facts in argument is misconduct. (See *People v. Boyette* (2002) 29 Cal.4th 381, 435.) Even assuming defendant's objection was adequate, he failed to request an admonition and here merely concludes that an admonition would have been ineffective and thus futile. To be excused from the necessity of a request for admonition on the ground of futility, defendant must explain why such a request "would have fallen upon deaf ears." (*People v. Peoples* (2016) 62 Cal.4th 718, 797.) Defendant has failed to do so, as he has not demonstrated that any misstatements were "'so extreme or so divorced from the record that they could not have been cured by prompt objections and admonitions. [Citation.]' [Citation.]" (*People v. Dennis, supra*, 17 Cal.4th at p. 521.)

Indeed defendant cannot demonstrate that the prosecutor misstated evidence or referred to evidence outside the record. We agree with respondent that the prosecutor merely drew an inference from the evidence. Detective Springer testified that the five other occupants of the house were in the bedrooms, and when they came out, they appeared disoriented, as though they had just awakened. The prosecutor thus properly argued: "Those five individuals, not only were they in a totally different area of the house, being the western portion where the two bedrooms were, they were all asleep and it was 6:00 a.m." The prosecutor then drew the following inference: "So what did those individuals actually see? They didn't see anything that is relevant to this case." The challenged statement took the inference farther, but was nevertheless taken from the evidence: "I could have called [them] and asked did you see anything, and they would have said no."

"[A] "'prosecutor has a wide-ranging right to discuss the case in closing argument[,] to fully state [his] views as to what the evidence shows and to urge whatever conclusions [he] deems proper. Opposing counsel may not

complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine.'" [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1342.) We discern no reasonable likelihood that the jury understood the prosecutor's inference as a claim that the five occupants had actually said something to inculpate defendant or exculpate themselves. Under such circumstances, we conclude that defendant has failed to adequately explain why an admonition "would have fallen upon deaf ears." (*People v. Peoples, supra*, 62 Cal.4th at p. 797.)

E. Assistance of counsel

Defendant contends that if review of alleged misconduct is deemed forfeited by defense counsel's failure to object or request an admonition, reversal is required on the ground that he was denied his constitutional right to effective assistance of counsel. The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-674; see also Cal. Const., art. I, § 15.) We ""'need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." [Citation.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126; see also *Strickland*, *supra*, at pp. 688, 694.) Defendant must affirmatively prove prejudice by demonstrating "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694.)

We discern no reasonable probability that the verdict would have been different. The evidence that defendant possessed the methamphetamine was overwhelming. He was observed tossing it from his hand. Undisputed

evidence showed that the amount of methamphetamine in defendant's possession was approximately 1,050 individual doses, suggesting an intent to sell the drugs. Defendant was the only person in the living room at 6:00 a.m., along with his wallet, his cell phone, a burner phone, scales, and materials used in packaging narcotics for sale. The text messages soliciting the purchase of drugs indicated an acquaintance with the seller and that the seller was male. Further, one of the texts referred to the seller as Luis. While defendant's name is Louie, not Luis, that text was immediately followed by a text in misspelled Spanish asking what was up.

Defendant argues that without the challenged question and argument, the jury might have had a reasonable doubt whether defendant was the person in the house who possessed the methamphetamine or was involved in selling drugs, because one of the occupants was Elizabeth Garcia, one of the three cell phones belonged to Liz Garcia, and the cell phone used for narcotics sales had the initials LCG, not defendant's initials (LSG), etched into it.

We disagree. The court instructed the jury with CALCRIM No. 222: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys discuss the case, but their remarks are not evidence. Their questions are not evidence. Only the witness[es'] answers are evidence. The attorneys' questions are significant only if they helped you to understand the witness[es'] answers. Do not assume that something is true just because one of the attorneys asked a question that suggested it was true. During the trial, the attorneys may have objected to questions or moved to strike answers given by the witnesses. I ruled on the objections according to the law. If I sustained an objection, you must ignore the question. If the witness was not permitted to answer, do not guess what the answer might have been or why I ruled as I did. If I ordered testimony

stricken from the record, you must disregard it and must not consider that testimony for any purpose."

"'Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.' [Citation.]" (*People v. Lewis* (2001) 26 Cal.4th 334, 390.) We thus presume that the jury disregarded the unanswered question and the challenged argument, and thus, any prejudice was dispelled by the instruction. (See *People v. Seumanu*, *supra*, 61 Cal.4th at p. 1350.)

II. *Pitchess* review

Prior to trial, defendant brought a *Pitchess* motion for the discovery of all material in the personnel files of Detective Springer and other deputies relating to misconduct. The trial court granted the motion only as to Detective Springer, and only for information relating to false reporting and false testimony under oath. The court conducted an in camera review, found one discoverable item in the records produced, and ordered that it be released to defense counsel. Defendant requests that we review the sealed transcript of the *Pitchess* hearing for possible error. Respondent has no objection.

The trial court's determination is reviewed for an abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.) The records produced in the trial court were not retained, but during the in camera hearing the trial judge examined and described each document, and stated reasons for his determination. We have reviewed the sealed transcript of that hearing, and find it sufficient to review the trial court's determination (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229) and conclude the trial court properly exercised its discretion in determining that the documents produced complied with the scope of the *Pitchess* motion, and that none of the other documents or information should be disclosed to the defense.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT