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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. DAVID CHARLES MACON, JR., Defendant and Appellant.	B270974 (Los Angeles County Super. Ct. No. BA419526)

APPEAL from a judgment of the Superior Court of Los Angeles County. William N. Sterling, Judge. Affirmed.

Carlo Andreani, under appointment by 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, Susan Sullivan Pithey and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant David Charles Macon, Jr., of second degree robbery for acting as the getaway driver while two of his associates committed an armed robbery of a gas station. He was sentenced to 39 years to life in state prison.[1] At the time of the robbery, appellant was wearing a Global Positioning System (GPS) tracking device on his ankle. He contends (1) the trial court erred in admitting the GPS records of his whereabouts because the prosecutor failed to lay a proper foundation under Evidence Code section 1280 and because the GPS records were testimonial hearsay; (2) the trial court improperly commented on his right not to testify; (3) the trial court improperly admitted a police officer's lay opinion; (4) his motion for a mistrial should have been granted; and (5) the prosecutor made improper comments during rebuttal argument. We disagree and affirm the judgment.

FACTS

Prosecution Evidence

The Robbery and Getaway

On December 16, 2013, at approximately 5:40 p.m., Korman Redd (Redd) and Theresa Brown (Brown) were sitting inside Redd's car parked at a Shell gas station. Redd noticed two men walking along the side of his car towards the entrance of the convenience store. Brown, who was seated in the passenger seat, saw one of the men walking by her window. The two men were

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[1] Appellant's sentence consisted of 25 years to life for the robbery (Pen. Code, § 211); plus 10 years for two prior serious felonies (Pen. Code, § 667, subd. (a); plus one year for the true finding that a principal was armed with a firearm (Pen. Code, § 12022, subd. (a)(1)); plus three years for three prior prison terms (Pen. Code, § 667.5, subd. (b)).

African-American, wearing black hoodies and gloves, and had covers over their faces. Redd saw that one of the men had a gun. Redd got out of his car and watched the men through the window of the store.

Store clerk December Miles (Miles) finished helping a customer with a transaction, then noticed a man standing by the door near the cigarette area. The man let the customer leave. Another man approached Miles from the refrigerator area. Both men were African-American, wearing black hoodies and black pants. While standing approximately 12 feet from Miles, the man from the refrigerator area pointed a gun at her. The gunman came around to Miles, grabbed her hair, and told her to get down on the ground. He placed the gun between Miles's legs and ordered her to open the safe, but she told him the safe was locked. The gunman told Miles to get up and open the cash register. The man who was standing by the door jumped over the counter and took the money out of the register. He grabbed Miles's purse, jumped back over the counter, and left the store with the gunman. Miles called 911. Video surveillance footage from inside the store captured the robbery and was shown to the jury.

Redd returned to his car and told Brown to call 911. When the robbers came out of the store, they ran northbound, making a left at the end of the building. Redd and Brown followed in Redd's car and saw the robbers in the alley jumping over a gate. Redd testified that the robbers got into a 2004 or 2005 black Chevrolet Impala (the Impala) with tinted windows that had been parked on the street behind the gas station. Redd clarified that he did not actually see the robbers get into the Impala, "[w]hat I saw was the door closing. The closing of the door and

brake lights coming on." Redd testified that he saw the Impala's license plate number of 5GTM495. The Impala had a distinct aftermarket circular emblem with two checkered flags inside attached to the trunk area. Redd pulled up next to the Impala and saw the two men from the gas station in the backseat.

Brown called 911 on her cell phone. She and Redd gave the operator a description of the getaway car, including its license plate number.[2] The Impala drove off westbound on 87th Street in an "aggressive manner," made a right turn onto Saint Andrews, and then a right turn onto Manchester going eastbound. Before the Impala reached Western Avenue, Redd pulled over to the left of the Impala and saw appellant driving the car. Appellant was wearing a "rag cap[]" "[l]ike a stocking" on top of his head, and a pair of silver glasses.

Redd flagged down a police car on Manchester and Harvard, and pointed to the getaway car. The officers began chasing the Impala going southbound on Denker. Redd made a U-turn and returned to the gas station. There, he told a police officer that the driver of the Impala could have been a "light-skinned" black woman in her 20's wearing glasses and a scarf. Surveillance video from the Bank of America near the Shell gas station captured the robbers and the Impala and was shown to the jury.

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[2] Redd testified that he could not recall the license plate at trial. The prosecutor showed him the transcript of his preliminary hearing testimony, in which Redd testified the Impala's license plate number was 5GTM495. On cross-examination, defense counsel played an audio recording of the 911 call and gave the jury a written transcript. The license plate number given to the police operator during the call was 5KS495.

Appellant's Arrest

The day after the robbery, on December 17, 2013, around 7:30 p.m., Los Angeles Police Department (LAPD) Officer Jessie West was on patrol near West 78th Street when he saw the Impala. Officer West stopped the car, which appellant was driving. When appellant stepped out of the car, Officer West noticed appellant was wearing a GPS bracelet on his left ankle. Appellant told Officer West the Impala was his car but that it was not registered in his name.

The Investigation

In an interview with LAPD Officer Chris Chavez, appellant said he purchased the Impala from Dwayne Childs (Childs), whom he knew from the neighborhood. When asked where he was on the day of the robbery, appellant said he was at the Shell gas station between 11:00 a.m. and 11:30 a.m., then went Christmas shopping with his wife in the city of Carson from about Noon to 5:00 p.m. Appellant said he then went to the area of 80th and Hoover where he remained until he went home at 6:00 p.m. Appellant denied being at the Shell gas station at 5:30 p.m.

On December 18, 2013, Redd was shown a six-pack photographic lineup. He identified appellant as the driver of the Impala, and drew a pair of glasses on appellant's photograph.

On the same day, Miles was also shown a six-pack photographic lineup. She identified Childs as the person that hopped over the counter and took the money from the cash register and her purse during the robbery. Sometime later, Miles was shown a second six-pack photographic lineup. She identified DeShawn Tyler (Tyler) as the person with a gun during the robbery.

On December 19, 2013, LAPD Officer Jason Fong searched the Impala. Inside the glove compartment, he found a vehicle registration and certificate of title with Childs's name and address. He also found a pair of glasses with a metal frame, a long-sleeve black T-shirt, and a hat.

Josephina Martinez, a latent print criminalist with the LAPD, collected 11 fingerprints from the Impala. Appellant's left middle finger matched the print found on the outside of the rear passenger door and his left little finger matched the print found on the outside front passenger door frame. Tyler's right little finger matched the print found on the outside of the front passenger door window.

At trial, Redd identified the Impala as the car he saw near the gas station.

The GPS Data

At the time of the robbery, appellant was wearing a GPS tracking device on his left ankle placed by his parole agent Geofrey Carr on November 14, 2013, one month before the robbery. Agent Carr testified the purpose of the GPS device was to monitor appellant's movement.

Steven Reinhart, a regional GPS coordinator for the California Department of Corrections and Rehabilitation (CDCR), testified as an expert on GPS ankle bracelets. The ankle bracelets used by the CDCR transmit GPS location data every minute to software called Veritracks. Reinhart reviewed the GPS location data for the ankle bracelet worn by appellant. On December 16, 2013, at 4:09 p.m., appellant was traveling by car near the area of Western and Manchester. At 4:18 p.m., appellant was on 79th Street. From 5:00 p.m. to 5:23 p.m., appellant remained in the area of 79th Street, west of Hoover. At

5:38 p.m., appellant was on 87th Street, west of Western Avenue. At 5:45 p.m., appellant again returned to the area of 79th Street, west of Hoover, until 5:50 p.m. At 7:02 p.m., appellant was in the area of Cerise and 139th Street. According to the GPS data, appellant was never in the city of Carson on the day of the robbery.

Defense Case

On December 16, 2013, LAPD Officer Michael Estrada was responding to the robbery call when he was flagged down by Redd on Manchester Avenue. Redd described the getaway car and pointed towards Denker Avenue. Officer Estrada made a U-turn and gave chase but was unable to catch up to the car. Officer Estrada went to the Shell gas station where he met with Redd. Redd described the driver of the car as a light-skinned woman in her 20's, possibly wearing glasses and something "draping the head." Redd also described the getaway car as a black Chevy Impala with a rear trunk decal displaying the letters "SS."

On January 17, 2014, LAPD Officer Gregory Sovick participated in the arrest of Childs. Officer Sovick recovered a cell phone from Childs's pocket and gave it to Officer Chavez. Officer Chavez reviewed the phone's call and text message records. The cell phone received a text message at 5:38 p.m., when the two robbers were inside the gas station's store.

Shaudi Pishvaie, an LAPD latent print criminalist, collected four fingerprints from the Shell gas station following the robbery. Only two of the lifted fingerprints were usable. They were not a match to appellant, Tyler or Childs.

Redd admitted he had previously been charged with possession of a stolen vehicle but the case was later dismissed. A portion of the preliminary hearing transcript in Redd's dismissed

criminal case was read to the jury. During an interview after his arrest, Redd told the police officer that he had obtained a 2006 Dodge Charger after paying $6,000 for it. Because he did not have the title to the vehicle, Redd decided to steal another vehicle's sale transaction documents from his employer and falsify them with the Dodge Charger's information. He later sold the Dodge vehicle with the falsified title documents.

The parties stipulated that on November 6, 2009, Brown was convicted of the sale or transportation of marijuana, a violation of Health and Safety Code section 11360, subdivision (a).

DISCUSSION

I. The GPS Records Were Properly Admitted

Appellant contends the trial court committed reversible error in admitting the GPS records into evidence because (1) the prosecutor failed to lay a proper foundation under the official government records exception to the hearsay rule, and (2) the records are testimonial hearsay whose admission violated appellant's constitutional right to confrontation.

A. Relevant Background

At trial, the prosecutor stated that she intended to call the CDCR's Reinhart to testify about appellant's GPS ankle bracelet and its corresponding location data. Defense counsel asked for an evidentiary hearing pursuant to Evidence Code section 402.

At the evidentiary hearing, Reinhart testified that he was a parole agent with the CDCR assigned as the regional GPS coordinator. He was familiar with the CDCR's ankle bracelets and the GPS system utilized by them and how they worked. Reinhart explained that the GPS data originated from satellites owned by the United States Department of Defense. The

satellites send signals to the ankle bracelet that determine its location on earth. The ankle bracelet stores the data, then periodically uploads the data via a cellular modem or cell tower to secure software servers that are operated and maintained by Satellite Tracking of People (STP). STP is a private company that contracts with the CDCR and sells or leases the ankle bracelets to the CDCR. The data transmitted from the ankle bracelet is "not produced by any human hands"; it is automatically uploaded to STP's software servers. STP stores and maintains the uploaded data on a password-protected software system called Veritracks. The data itself, however, is owned by the CDCR.

Reinhart was personally familiar with the Veritracks program because he had used it daily for six years, or "several thousand" times. He also received 40 hours of training on the use of the Veritracks system, and had taken "multiple" training courses offered by STP and other software companies, as well as "several courses related to the field." Reinhart also taught the training course on Veritracks in conjunction with STP instructors and had attended "hundreds of hours" of classes related to Veritracks. He testified that only CDCR personnel who have undergone training have access to the Veritracks software.

Defense counsel objected to Reinhart's proposed testimony as hearsay. The prosecutor argued that Reinhart was qualified to testify about the GPS records because the data was owned by the CDCR and was generated electronically through the ankle bracelets. The trial court ruled as follows: "I'm going to find that they're government records. They're maintained for the government, for the Department of Corrections and Rehabilitation, with hardware that's maintained through this

other company. But they're government records maintained under contract for the Department of Corrections. [¶] He has more than adequate expertise to understand how the system works, to explain how the system works and to access the information. So, I'm going to allow it over the defense's objection. The objection is noted for the record."

Reinhart testified at trial that the CDCR ankle bracelet appellant was wearing at the time of the robbery transmitted GPS location data every minute to the Veritracks software. Reinhart had accessed and viewed appellant's GPS data on the Veritracks software, and images from the software were shown to the jury. The GPS data showed that appellant was near the Shell gas station at the time of the robbery.

B. Applicable Law

"'Hearsay evidence,' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).)

The official government records exception to the hearsay rule, embodied in Evidence Code section 1280, provides: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: [¶] (a) The writing was made by and within the scope of duty of a public employee. [¶] (b) The writing was made at or near the time of the act, condition, or event. [¶] (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

Evidence Code section 195 defines "public employee" as "an officer, agent, or employee of a public entity." "A trial court has broad discretion in determining whether a party has established these foundational requirements. [Citation.]" (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) A reviewing court may overturn the trial court's exercise of discretion "'"only upon a clear showing of abuse."' [Citations.]" (*Ibid.*; *People v. Lugashi* (1988) 205 Cal.App.3d 632, 638–639.)

C. The Foundational Requirements Were Met

Contrary to appellant's assertions, all three foundational requirements of Evidence Code section 1280 were met.

First, the GPS data was made by and within the scope of duty of a public employee. Under Evidence Code section 195, a "public employee" includes an "agent" of the public agency. Reinhart testified that the GPS data was owned by the CDCR and maintained by STP, a private company contracted to collect and maintain the data on behalf of the CDCR. Thus, STP was an agent of the CDCR within the meaning of Evidence Code sections 195 and 1280. (See e.g., *Bhatt v. State Dept. of Health Services* (2005) 133 Cal.App.4th 923, 929–930 [patient claim documents prepared by Delta Dental admissible under Evidence Code section 1280 because Delta Dental was an agent of California Department of Health Services under the Medi-Cal program].)

Second, the GPS data was made at or near the time of the event. Reinhart testified that the GPS location data received by the ankle bracelet from GPS satellites was automatically transmitted every minute from the ankle bracelet to the Veritracks software.

Third, the source of the GPS data and method and time of preparation were such as to indicate its trustworthiness.

Reinhart testified that the data was "not produced by any human hands," thus eliminating any possibility of human error. Reinhart also testified that once the GPS data is transmitted from the ankle bracelet to the Veritracks software, it is accessible only to authorized CDCR personnel with a password. All personnel granted access to the system must also undergo training on the program.

For the first time in his reply brief, appellant contends "[b]ecause no STP or Veritracks' officials testified as to the information's sources, method, and time of preparation to indicate trustworthiness, the evidence was erroneously admitted." We do not ordinarily consider arguments or contentions made for the first time in a reply brief. In any event, this same contention was rejected in *People v. Rodriguez* (2017) 16 Cal.App.5th 355, 376–377 (*Rodriguez*), and we likewise reject here. In that case, the defendant similarly contended that no adequate foundation had been laid for the report of the GPS data location from his ankle monitor because the People failed to call an expert from the company that created the tracking software and managed the servers. (*Id*. at pp. 372–373.) The *Rodriguez* court noted that this contention had already been rejected in several cases, and found that testimony by a sergeant from the sheriff's department adequately laid a foundation. (*Id*. at pp. 376–377; see *People v. Lugashi, supra*, 205 Cal.App.3d at p. 640 ["a person who generally understands the system's operation and possesses sufficient knowledge and skill to properly use the system and explain the resultant data, even if unable to perform every task from initial design and programming to final printout, is a 'qualified witness'" for authentication purposes]; *U.S. v. Espinal-Almeida* (1st Cir. 2012)

699 F.3d 588, 612–613 ["someone knowledgeable, trained, and experienced in analyzing GPS devices, was sufficient to authenticate the GPS data and software generated evidence"]; *Gross v. State of Maryland* (Md. App. 2016) 229 Md.App. 24, 35–36 [expert testimony not necessary to admit records of GPS data; officer's testimony sufficient to authenticate records].)

As explained in *Bhatt v. State Dept. of Health Services, supra*, 133 Cal.App.4th at page 929: "'"The object of this hearsay exception [Evid. Code, § 1280] "is to eliminate the calling of each witness involved in preparation of the record and substitute the record of the transaction instead. [Citations.]"'"

We conclude the trial court did not abuse its discretion in finding that Reinhart laid a sufficient foundation for the admission of the GPS data.

D. The GPS Data Was Not Testimonial

Appellant also contends the trial court erred in admitting Reinhart's testimony about appellant's specific locations at the time of the robbery because the testimony constituted case-specific testimonial hearsay and violated his Sixth Amendment right to confrontation,[3] as set forth in *People v. Sanchez* (2016) 63 Cal.4th 665.

Once again, this same contention was rejected in *Rodriguez, supra*, 16 Cal.App.5th at page 382, and once again we reject it here. *Rodriguez* first concluded that "[t]he computer-generated report of the GPS data generated by defendant's ankle monitor did not consist of statements of a person as defined by the Evidence Code, and did not constitute hearsay as statutorily

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[3] In his reply brief, appellant clarifies that he was denied the right to confront the STP officials "who received, collected, organized, retrieved, and generated the data and reports."

defined." (*Id*. at p. 381.) In reaching this conclusion, *Rodriguez* analyzed other cases, including out-of-state cases, that drew a distinction "'between computer-stored records, which memorialize the assertions of human declarants, and *computer-generated records, which are the result of a process free of human intervention*.'" (*Id*. at p. 380.) Because the defendant's ankle monitor, like appellant's here, automatically transmitted information to the software server, from which the GPS report was retrieved, there was "'no statement being made by a person regarding the data information so recorded.'" (*Id*. at p. 381.)

Additionally, *Rodriguez* found the computer-generated report of GPS data was not testimonial because the data was originally used to monitor the defendant's release. (*Rodriguez, supra,* 16 Cal.App.5th at p. 382.) Thus, the evidence was admissible in the defendant's criminal trial on the charge of willfully and unlawfully escaping from the sheriff's custody. Likewise here, although the GPS data was ultimately used by Reinhart to establish appellant's physical location during the robbery, it was not initially created for the purpose of criminal prosecution. Instead, the data was created for the purpose of monitoring the movements of a parolee. "Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial—they are not testimonial." (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 324.)

II. No Error in the Trial Court's Comments on Appellant's Right Not to Testify

Appellant contends the trial court violated his constitutional rights under the Fifth and Fourteenth Amendments by improperly commenting on his right not to testify on his own behalf.

A. Relevant Background

At the beginning of jury selection, while reading the preinstructions to prospective jurors, the trial court made several remarks concerning the jury's role. The court explained that just like a computer has an operating system, people also have "operating systems" which are used to "take in information, . . . understand it . . . evaluate that information, and then . . . make decisions based on that information." The court stated that while in trial, a juror must "take . . . off" the personal operating system and "put on your juror operating system[.]" The court explained:

"As I said, we are in the business of providing fair trials. It is the whole goal of this process to make sure that there is fundamental fairness, and if we are going to have that, we have to have you as jurors to be willing to accept this to embrace it. Whatever you do at home is fine. That's your business. It's your personal operating system. But we need you to be willing to say, you know, I can make a distinction between what I do on my own time and what I'm obliged to do as a juror. And I can accept this and I can follow these rules and I can do this."

The trial court then gave the following example:

"Suppose, you know, you are a parent. You are in your kitchen, and you heard a scuffle in the living room, and something got knocked over and there was some yelling. And you

ran into the living room, and there were your two children, and they obviously [have] been in some kind of fight.

"And you turn to them and you said, 'Okay. What happened?' And one of your children looked at you and said, 'Well, actually I think I'm going to invoke my right to remain silent. I'm not going to say anything. And you can't consider my silence in any way in determining whether I did anything wrong.'

"What do you think he would say? Something to the effect of 'I don't think so.' Right? I know that is what I would say. *And that is a perfect example*. In your personal operating system, that is, as a parent, that is totally reasonable. No child should have a right to remain silent when it's possible bad behavior involved.

"You know, you are raising kids. You are supposed to be a responsible parent. You are not supposed to say, 'Okay. Well, I'll respect your right to remain silent. If I can't find anything, then I'll just have to let it go.'

"When you come here as a juror, the juror operating hat says, 'This is an important part of due process. This is an important part of a fair trial.' So, you know, if you go home while you are—one night while you are on jury duty and that happens and your kids say, 'I'm going to invoke my right to remain silent at home.'

"As your personal operating system you can say, 'Huh-uh, I don't think so.' But when you are here, we need you to embrace these rules and accept this juror operating system." (Italics added.)

The trial court concluded its preinstructions by reminding the jurors to follow the court's instructions:

"Embrace it as a juror, in your role as a juror. Do whatever you want on your own time, but accept these rules as a juror and

help us provide fair trials. Presume the defendant to be innocent, hold the People to their burden of proof, proof beyond a reasonable doubt. Understand that if [the prosecutor] proves the case to you and she proves it beyond a reasonable doubt, you are supposed to vote guilty.

"If she doesn't prove it beyond a reasonable doubt, you are supposed to vote not guilty. Accept that. And accept the right to remain silent and respect it and all the other rules that I'll be instructing you on."

During voir dire, Prospective Juror No. 8 raised his hand when the trial court asked whether anyone had a problem with the presumption of innocence, the prosecution's burden of proof, and appellant's right to remain silent. Prospective Juror No. 8 stated, "We want to hear the truth. I mean they can't just keep silent and don't keep to the truth." The court reminded Prospective Juror No. 8 of the prior discussion about personal operating system versus juror operating system, and asked whether there would be a problem accepting the court's instructions and following them. He responded, "could be but I try." Prospective Juror No. 8 was subsequently excused for cause.

At the conclusion of jury selection, the trial court stated:

"[Appellant]'s presumed to be innocent. He does not have the burden of proof. The prosecutor does. So he has a right not to say anything. If he sits there and says nothing at all, if [defense counsel] doesn't even ask a question, you still can't vote guilty unless [the prosecutor] proves the case to you and proves it beyond a reasonable doubt."

And again, the trial court stated:

"The juror operating system, you have to accept the fact that a defendant is presumed to be innocent. He does not have to prove that he didn't do it. And he has a right to remain silent. He does not have to say anything. And if he doesn't, you can't consider it. You can't think about it. That's part of what has been determined, hopefully, by people much wiser than I am as is necessary for a fair criminal justice system. And it's something we ask all of our jurors to embrace.

"It does not mean philosophically you have to agree about it. It does not mean if you were making the rules you would include it. It just means that while you're here as jurors, doing your job, doing your duty as jurors that you will accept that's part of the whole process, that's one of the rules, and that you can accept it and follow it."

At the conclusion of trial, the jury was instructed with CALCRIM No. 355: "A defendant has an absolute constitutional right not to testify. He or she may rely on the state of the evidence and argue that the People have failed to prove the charges beyond a reasonable doubt. Do not consider, for any reason at all, the fact that the defendant did not testify. Do not discuss that fact during your deliberations or let it influence your decision in any way."

B. Applicable Law

It is well established that a defendant cannot be compelled to testify against himself. (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15.) In *Griffin v. California* (1965) 380 U.S. 609 (*Griffin*), the United States Supreme Court ruled the Fifth Amendment prohibits "comment by the prosecution on the accused's silence." (*Id*. at p. 615.) "In order that an accused not be penalized for his invocation of this fundamental right, the prosecutor may neither

comment on a defendant's failure to testify nor urge the jury to infer guilt from such silence." (*People v. Hardy* (1992) 2 Cal.4th 86, 154.) The restrictions have been extended to the trial court. (*People v. Morris* (1988) 46 Cal.3d 1, 35.) "When improper comment on a defendant's silence occurs, the error requires reversal of the judgment unless a reviewing court concludes the error was harmless beyond a reasonable doubt. [Citations.]" (*People v. Hardy, supra*, at p. 157; *People v. Vargas* (1973) 9 Cal.3d 470, 475.) "[I]ndirect, brief and mild references to a defendant's failure to testify, without any suggestion that an inference of guilt be drawn therefrom, are uniformly held to constitute harmless error." (*People v. Hovey* (1988) 44 Cal.3d 543, 572.)

C. Analysis

Appellant clarifies that he has no objection to "[t]he trial court's point that a personal operating system must be suspended and be subjected to a juror operating system." What he does object to is the court's "perfect" parent-child example of the right to remain silent, which was "inaccurate, misleading, and fundamentally unfair." Even assuming appellant did not forfeit the issue by failing to object at trial, any *Griffin* error was harmless beyond a reasonable doubt. There was nothing in the court's parent-child example that directly or indirectly suggested the jury should infer guilt from appellant's silence. To the contrary, the court repeatedly emphasized that the jury must accept the right to remain silent and respect it. If anything, the court seemed to go out of its way to make sure appellant's rights were protected. Prospective Juror No. 8, the only prospective juror who expressed any concern about following the court's instruction to accept and respect appellant's right not to testify,

was ultimately excused for cause and never became part of the final jury panel. The jury was also instructed with CALCRIM No. 355 which unequivocally stated that appellant had "an absolute constitutional right not to testify," and that the jury must not consider "for any reason at all, the fact that [appellant] did not testify." Juries are presumed to follow the trial court's instructions (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 83), and nothing in the record indicates the jury did not do so.

We find no basis for reversal due to the trial court's comments.

III. Officer Chavez's Lay Opinion Was Admissible

Appellant contends the trial court committed reversible error in permitting Officer Chavez to testify that in his lay opinion the black vehicle depicted in the surveillance video footage was a Chevrolet Impala.

A. Relevant Background

During Officer Chavez's trial testimony, the prosecutor played the Bank of America surveillance video footage and asked the officer questions about the images depicted in the video, including whether he could "tell us what we're going to see in the minutes before Mr. Redd's car enters the scene?" Officer Chavez responded, "You're going to see a black sedan." The prosecutor then asked if the officer could tell from the video what was the car's make or model. Officer Chavez responded, "You can tell it's a passenger vehicle, small vehicle, which looks to me as a Chevy Impala."

Defense counsel objected as speculative and nonresponsive. The trial court asked Officer Chavez, "Are you familiar with Chevy Impalas?" and he responded that he was. The court

overruled the objection, finding the testimony to be within the realm of lay opinion.

The prosecutor continued to ask questions about the video footage, "Officer, what do we see in the video?" and Officer Chavez answered, "The black Chevy Impala." Appellant's counsel objected on lack of foundation and the trial court sustained the objection. The court asked, "Is that what, in your opinion, appears to be a Chevy Impala?" and Officer Chavez said, "Yes."

After additional questions about the images depicted on the video, defense counsel objected to the prosecutor's line of questioning on "what the video shows." The court sustained the objection under Evidence Code section 352, finding Officer Chavez's narration of the events depicted in the video footage was cumulative.

B. Applicable Law

Lay opinion testimony is admissible if it is both rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony. (Evid. Code, § 800.) The opinion "need only be 'helpful'—rather than necessary—to understanding the witness's testimony." (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306, fn. 11.) On appeal, a trial court's admission of lay opinion testimony on identification is reviewed for abuse of discretion. (*People v. Thompson* (2010) 49 Cal.4th 79, 128.)

C. Analysis

Appellant argues that Officer Chavez's testimony was inadmissible as a lay opinion because he did not personally observe the vehicle at the time of the robbery, the opinion was not helpful to understand his testimony, the subject matter went

beyond his common experience, and his opinions were irrelevant. We disagree.

In *People v. Leon* (2015) 61 Cal.4th 569, 601, our Supreme Court upheld the admissibility of a detective's lay opinion that the person depicted in surveillance videos was the defendant. Although the detective had had no contact with the defendant before the commission of the crimes in question, he was "familiar with defendant's appearance around the time of the crimes" since "[t]heir contact began when defendant was arrested." (*Ibid*.) The court concluded that "[q]uestions about the extent of [the detective's] familiarity with defendant's appearance went to the weight, not the admissibility, of his testimony. [Citation.] . . . Moreover, because the surveillance video was played for the jury, jurors could make up their own minds about whether the person shown was defendant. Because [the detective's] testimony was based on his relevant personal knowledge and aided the jury, the court did not abuse its discretion by admitting it." (*Ibid*.)

The same is true here. Officer Chavez testified that he personally interviewed appellant after appellant was arrested driving the Impala. During the interview, appellant told Officer Chavez that the Impala belonged to him because he had purchased it from Childs. Officer Chavez showed a photograph of the Impala to Redd, who positively identified it as the getaway vehicle. In his opening brief, appellant asserts that the vehicle appeared as "a miniscule, dark object on a small video screen." Thus, Officer Chavez's opinion that the vehicle seen on the video matched the vehicle appellant was driving at the time of his arrest was helpful for the jury to fully appreciate the officer's testimony. As in *Leon*, the weight to be given to Officer Chavez's opinion was for the jury to decide. Because the video was played

for the jury, which also had photographs of the vehicle appellant was driving on the day of his arrest, they could make up their own minds about whether they agreed with Officer Chavez's opinion.

We find no abuse of discretion in the admission of Officer Chavez's lay opinion.

IV. No Error in Denial of Mistrial

Appellant contends the trial court abused its discretion in denying his motion for a mistrial.

A. Relevant Background

During the cross-examination of Officer Chavez, defense counsel asked about subpoenaed cell phone records of Childs. Officer Chavez explained that another officer had obtained the cell phone information for Childs during a "homicide investigation" she was conducting. The trial court interjected and asked, "That wasn't about this case, though; is that correct?" Officer Chavez responded, "No, your Honor, but in regards to defendant Childs, that's why she was inquiring about—. . ." Defense counsel asked for a sidebar and moved for a mistrial, stating the bell could not be unrung and that defense counsel was unaware of any murder investigation. The court denied the motion for a mistrial, then admonished the jury as follows: "All right. I'm just going to advise you, ladies and gentlemen, what he just said about the investigation of Mr. Childs has got absolutely nothing to [do] with [appellant], whether [appellant] did or didn't commit a crime in this case. [¶] You're not to consider that—what the purpose of the other officer['s] . . . investigation, you're not to consider it in any way, shape, or form, as showing that [appellant] is a bad person, had anything

to do with that . . . and do not in any way let it affect your judgment in this case."

Immediately afterward, defense counsel renewed her motion for a mistrial and asked for discovery sanctions against the prosecutor. The trial court denied the motions. Later on, defense counsel renewed her motion for a mistrial. The trial court again denied the motion, "finding that the admonition is sufficient under the circumstances."

B. Applicable Law

"'A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.]' [Citation.]" (*People v. Wallace* (2008) 44 Cal.4th 1032, 1068.) When reviewing a trial court's ruling on a mistrial motion, we determine whether there was an "abuse of discretion, and such a motion should be granted only when a party's chances of receiving a fair trial have been irreparably damaged." (*People v. Ayala* (2000) 23 Cal.4th 225, 283; see also *People v. Williams* (2006) 40 Cal.4th 287, 323.)

C. Analysis

As the People note, Officer Chavez's reference to Childs's homicide investigation was isolated and brief. Appellant does not point to any further mention of a homicide investigation being made before the jury. After Officer Chavez mentioned the homicide investigation, the trial court immediately interjected and clarified that the investigation was unrelated to the instant case. The court then promptly admonished the jury that the investigation pertained to Childs only, that it had absolutely

nothing to do with appellant, that the testimony should not be considered in any way, and that it should not affect the jury's judgment in this case. The jury presumably followed the instructions. (See *People v. Coffman and Marlow*, *supra*, 34 Cal.4th at p. 83.) Under these circumstances, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

V. There Was No Prosecutorial Misconduct

Appellant contends "[t]he prosecutor's repeated, improper comments in rebuttal closing summation that the defense lawyer's job was to confuse the jury improperly suggested that counsel presented the defense dishonestly and resorted to underhanded methods designed to prevent the truth from coming out which violated appellant's Sixth Amendment rights to counsel and to present a defense and Fourteenth Amendment Due Process right to a fundamentally fair trial."

A. Relevant Background

Appellant cites to two portions of the prosecutor's statements in rebuttal that he claims constitutes misconduct. The prosecutor began her rebuttal argument by stating: "Just like my job is to present the evidence, ladies and gentlemen, the defense has a job too. And the defense attorney's job is to try to move your attention away from the evidence, to try to confuse you and focus you on things that don't matter, on things that are irrelevant."

Later on, the prosecutor stated: " . . . And the defense attorney then [in the preliminary hearing], just like the defense attorney today, is trying to confuse the issues. Trying to confuse the issues because they don't want you to focus on what actually

happened, on what the evidence shows, on the videos, on the calls, on the G.P.S. tracking."

The People point out that the prosecutor responded to points made by defense counsel during her closing arguments. For example, the prosecutor stated: "So, the first thing I want to talk about is reasonable doubt. Now, [appellant's counsel] presented you with a document that had some different things. That's not the definition of reasonable doubt you're going to have. The definition of reasonable doubt . . . is not that it eliminates all possible doubt. You all are reasonable people. That's why you're here. And as reasonable people, your job is to put everything together. What's reasonable? And the other thing that the defense tries to do is, of course, blame the L.A.P.D. But as we know, Officer Chavez didn't put those cameras on the Bank of America. He didn't put those cameras inside the Shell station. He didn't put that G.P.S. bracelet on [appellant]."

The prosecutor also stated: "The defense really wants you to focus on [Redd]. He saw what he saw. He told the officer what he saw. He told the officer, light-skinned, female, Black. The defense keeps taking that part out. But he did say . . . the person was a Black person, was African-American. [¶] . . . [¶] . . . The defense is really hung up on the lights and the symbol [of the Impala]. We're going to talk to you about that. But I want you to remember that the one thing that there hasn't been a mistake about is that license plate number."

B. Applicable Law

"It is misconduct when a prosecutor in closing argument 'denigrat[es] counsel instead of the evidence. Personal attacks on opposing counsel are improper and irrelevant to the issues.' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 753.)

"Nevertheless, the prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account. [Citations.]" (*People v. Bemore* (2000) 22 Cal.4th 809, 846.) Thus, it "is not misconduct for a prosecutor to argue that the defense is attempting to confuse the jury" (*People v. Kennedy* (2005) 36 Cal.4th 595, 626, disapproved on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459), or to remind the jury "it should not be distracted from the relevant evidence" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1218).

"In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 978, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Ultimately, we must decide ""'whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" [Citation.]" (*People v. Ayala, supra*, 23 Cal.4th at p. 284.) "In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye, supra*, 18 Cal.4th at p. 970.) Moreover, even if misconduct occurred, reversal is not required unless it is reasonably probable the defendant would have fared better absent the impropriety. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

C. Analysis

Although not argued by the People, we find that appellant has forfeited the issue of prosecutorial misconduct. "[A]s a

general rule, to preserve a claim of prosecutorial misconduct, the defense must make a timely objection and request an admonition to cure any harm." (*People v. Frye, supra*, 18 Cal.4th at p. 969; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1154, disapproved on other grounds in *People v. Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) Appellant does not point to any place in the record showing an objection was made to the complained-of statements or that defense counsel asked for an admonition.

In any event, we find no prosecutorial misconduct. Viewing the prosecutor's argument in context, her comments regarding defense counsel's attempts to confuse the jury were proper. Defense counsel described the "faulty" identifications, the "poor" police investigation focused on guilt, and Officer Chavez "going in one direction and taking everyone there with him." Defense counsel attacked the credibility of the prosecution witnesses, including the store clerk: "When she took the witness stand, the prosecutor asked her to describe the car. She said it was a black Impala. I was genuinely surprised because I had sat there and heard her say [in the preliminary hearing], 'I don't know.' I was anticipating she was going to repeat and say, 'I don't remember.'" Defense counsel also discussed her own versions of reasonable doubt.

When it was the prosecutor's turn to argue, she went on to specifically address each of the defense arguments. She clarified the reasonable doubt instruction, explained that any deficiencies in the police investigation did not affect the state of the physical evidence demonstrating appellant's culpability, and emphasized the portions of witness testimony that were damaging to appellant. The prosecutor's comments were fair responses that described the deficiencies in the defense's tactics and factual

account. (See *People v. Frye, supra*, 18 Cal.4th at p. 978.) There is no reasonable likelihood the jury would have construed the prosecutor's remarks regarding defense counsel in an objectionable manner. (See *People v. Zambrano, supra,* 41 Cal.4th at p. 1154 [no misconduct where prosecutor described defense counsel's closing argument as a "'lawyer's game'"]; *People v. Medina* (1995) 11 Cal.4th 694, 759 [no misconduct where prosecutor told the jurors that defense counsel was "'try[ing] to get you to buy something . . . .'"]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1303, overruled on other grounds in *People v. Merritt* (2017) 2 Cal.5th 819, 831 [no misconduct where prosecutor argued that a lawyer as persuasive as defense counsel "'could maybe get [a witness] to say almost anything'"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT