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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ERIC WALLACE, Defendant and Appellant.	B268813 (Los Angeles County Super. Ct. No. TA130128)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kelvin D. Filer, Judge. Affirmed as modified.

Mark L. Christiansen, 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, Senior

Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

BACKGROUND

On September 4, 2013, the body of Juan Acosta, Sr., (Juan Sr.)[1] was found in the driver's seat of a red Dodge Caravan minivan. He had been shot multiple times in the neck.[2] Anthony Acosta (Anthony), Acosta Sr.'s son, was found in the front passenger seat of the van, suffering from multiple gunshot wounds, including one to his right hand and one to his abdomen. Juan Acosta, Jr., (Juan Jr.), Acosta Sr.'s other son, was found around the corner from the van, suffering from a gunshot wound to the right side of his back. Before being transported to the hospital, Anthony told deputies that he, his brother, and his father had been shot by someone named Bone.[3]

The next morning, detectives interviewed Anthony at the hospital. Anthony described seeing Bone shoot at him. Detectives also obtained Anthony's cell phone and found

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[1] We refer to all the Acostas by their first names for the sake of clarity, intending no disrespect.

[2] Juan Sr. died as a result of his wounds. Bullets found at the crime scene and those recovered from Juan Sr.'s body were fired from the same gun.

[3] Anthony had known Bone for about three years. Bone lived in the same area as Anthony's grandmother and had previously dated Anthony's mother.

several text messages between Anthony and Bone. Detectives determined that Bone's phone number belonged to Eric Wallace (Wallace). Anthony positively identified Wallace from a six-photo array as Bone. Wallace's friend identified Wallace as Bone and testified that the phone number belonged to Wallace. In his calls from jail, Wallace tried to get others, including his mother, to say that he was not called Bone and did not use that phone number. However, in at least one recorded jail call, Wallace slipped up and identified himself as Bone.

Text messages between Anthony and Wallace discussed a drug deal. Anthony told detectives he was selling Wallace two kilograms of cocaine.[4] The last text messages between the two before the shooting were from Wallace to Anthony confirming that a third party to the transaction had arrived and repeatedly urging Anthony: "Bruh come on he here." The Acostas arrived at 126th Street, between Wilmington Avenue and Willowbrook Street, where they met Wallace and the second male. Juan Sr. was in the driver's seat of the van. Juan Jr. was in the front passenger seat. Anthony was in the back passenger seat

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[4] Anthony had stolen the cocaine from his uncle, Alejandro Torres-Lopez (Torres), who sent Anthony threatening text messages after he discovered the theft. Torres was in Laughlin, Nevada when the murder took place and there was no evidence to suggest Torres committed the crimes or hired someone to commit the crimes. Nor was there any known link between Torres and Wallace.

behind his father. Wallace told Juan Sr. to drive around the corner to 124th Street and Anzac Avenue in order to finish the transaction.

After moving to the new location, Wallace and the second male met the Acostas on foot. Wallace got into the van through the rear passenger door and sat next to Anthony in the back passenger seat. The second male waited outside the van. The two kilograms of cocaine were inside a backpack, which sat on the floor of the van between Anthony and Wallace. Wallace showed Anthony part of the money for the deal, then reached over his right side and brandished a gun. Wallace then turned and pointed the gun in Anthony's direction, firing and hitting Anthony in the right hand. Wallace next fired the gun at Juan Sr. By this time, Juan Jr. had escaped from the van and was running northbound up the street. Wallace fired the gun in Juan Jr.'s direction. Wallace then got out of the van and fired at Anthony again, this time hitting him in the stomach. Wallace ran north on Anzac Avenue, carrying the backpack containing the two kilograms of cocaine. Believing that his brother and father had been killed, Juan Jr. continued running away from the location and called the police.

On September 18, 2013, law enforcement spotted Wallace driving in the area of 126th Street and Wilmington Avenue. When deputies tried to pull over Wallace, he refused to stop and a pursuit began. Wallace crashed his car into a fence, ran into his brother's house, and refused to

leave while helicopters and police surrounded the home. Wallace surrendered several hours later.

Wallace's first trial ended in a hung jury. Wallace was retried approximately eight months later.[5] After the retrial, a jury found Wallace guilty of the murder of Juan Sr., a violation of Penal Code section 187, subdivision (a) (count 1).[6] The jury also found Wallace guilty of the attempted willful, deliberate and premeditated attempted murder of Anthony, a violation of sections 664 and 187, subdivision (a) (count 2). As to both counts, the jury found Wallace personally and intentionally discharged a handgun causing great bodily injury within the meaning of section 12022.53, subdivision (d). The jury could not reach a verdict as to the attempted murder of Juan Jr. (count 3) and the trial court declared a mistrial on that count.

The trial court sentenced Wallace to state prison for 87 years to life. The court ordered Wallace pay an $80 court security assessment (§ 1465.8, subd. (a)(1)), a $60 criminal conviction assessment (Gov. Code, § 70373), a $10,000 restitution fine (§ 1202.4, subd.(b)), and imposed but stayed a parole revocation fine in the same amount (§ 1202.45).

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[5] We have cited transcripts and filings from Wallace's retrial when recounting the facts of the underlying offense.

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

DISCUSSION

I. Right to Counsel Claim

In April 2014, before Wallace's first trial, retained defense counsel Stephen Kahn (Kahn), filed a motion to continue the trial date pursuant to section 1050. Kahn attached a declaration stating that Wallace had retained an additional attorney, Jonathan Stein (Stein), who would be joining the case as cocounsel, as well as a new investigator. According to Kahn, both the investigator and new cocounsel needed to review all the discovery in the case. Kahn thus requested the court grant "a new 0/30 in approximately 30 days."

Newly-hired investigator Ken Sheppard (Sheppard) also filed a declaration in support of the motion. According to Sheppard, he had received the available evidence in the case six days ago. He also believed that evidence regarding pertinent cell phone numbers had not yet been provided to the defense. Sheppard also contended he needed more time to locate three essential witnesses and visit seven locations in order to properly complete his investigation of the shooting.

At the motion hearing, Kahn stated that Wallace no longer wanted to retain him and that another attorney (Salerno) would be substituting in to serve as Stein's cocounsel. At the outset, the court observed that the purpose of section 1050 is "to protect the welfare of the people of the state of California, that is both witnesses, victims and others interested." "Those require a detailed specific set of facts

that can be shown by evidence presented at the time of the hearing of the motion if that's found to be sufficient." However, the court noted, "[t]he only allegations that I heard here as it relates to any good cause finding are that [Wallace] wants another lawyer. No, he wants two other lawyers and he wants to hire another P.I. There are no details, facts or anything." The court then denied the motion to continue as well as the request to have Stein join the case as cocounsel.

Two weeks later, yet another attorney, Michael Cavalluzzi (Cavalluzzi), sought to substitute in as Wallace's attorney. When questioned by the court, Wallace confirmed that he no longer wanted Kahn as his counsel and instead wanted Cavalluzzi to serve as his attorney of record.[7] Following that assurance, the court allowed the substitution. At Cavalluzzi's request, the court also continued the trial date until June 15, 2014. Cavalluzzi assured the court he would be ready that date. Wallace's first trial eventually took place at the end of July 2014. Cavalluzzi represented Wallace at that first trial, which ended in a mistrial in August 2014 after the jury was unable to reach a verdict. Cavalluzzi also represented Wallace during the subsequent retrial, which took place in April 2015.

In his opening brief, Wallace claims that the trial court's refusal to allow Stein to join the case back in

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[7] The record is silent as to why Wallace wanted Cavalluzzi, rather than Stein, to serve as his attorney.

April 2014 violated his constitutional rights. Wallace also appears to contend that the trial court erred in refusing to grant Stein's requested continuance. Wallace then circles back to his first claim, claiming that "[t]his case is not about being forced to trial before preparation, nor is it about denial of a continuance, nor is it about a judge making appointment of new counsel contingent on a date of trial, nor even about an advance ruling on a future continuance; it is about the right to retain counsel of choice."

Wallace's claim is moot. As noted by the People, Wallace is challenging a trial court ruling that took place before his *first* trial when his second trial is the relevant proceeding here. "An action that involves only abstract or academic questions of law cannot be maintained. [Citation.] And an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events. A reversal would be without practical effect, and the appeal will therefore be dismissed." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814.)

In an attempt to sidestep this incontrovertible, and claim-ending fact, Wallace maintains that he is protesting the denial of his right to counsel of choice "throughout the entire appealed proceedings." (Italics omitted.) However, Wallace has never explained why he decided not to retain Stein for his retrial. Because Wallace did not seek to substitute Stein for Cavalluzzi at that second trial, the trial

court could not, and indeed did not, impede his right to counsel of choice.[8]

The Sixth Amendment guarantees a criminal defendant the right to assistance of legal counsel. (*United States v. Gonzalez–Lopez* (2006) 548 U.S. 140, 144.) A criminal defendant who does not require appointed counsel also has a Sixth Amendment right to the counsel of his or her choice. (*Ibid.*; accord, *People v. Ortiz* (1990) 51 Cal.3d 975, 982 [right to counsel of choice is among "the most sacred and sensitive of our constitutional rights"].) The United States Supreme Court has long recognized that "a defendant should be afforded a fair opportunity to secure counsel of his own choice." (*Powell v. Alabama* (1932) 287 U.S. 45, 53.) "In addition, counsel, 'once retained, [must be] given a reasonable time in which to prepare the defense.' [Citation.] Failure to respect these rights constitutes a denial of due process." (*People v. Courts* (1985) 37 Cal.3d 784, 790.)

None of these rights were implicated or impeded in this case, however. The trial court did not address, let alone obstruct, Wallace's choice of counsel prior to his second trial. Indeed, Wallace made clear prior to his *first* trial that he had chosen Cavalluzzi to serve as his counsel—a choice the trial

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[8] Nor did Wallace raise this claim in his motion for a new trial, which he filed after his second trial. Wallace was represented by yet another private attorney at this point in the proceedings.

court accommodated rather than hindered by providing Cavalluzzi with the continuance he had requested.[9]

II. Prosecutorial Misconduct Claim

During closing argument, defense counsel tried to explain away evidence demonstrating that Wallace's cell phone was near the scene of the shooting when the murder took place. Counsel noted that Wallace was connected to several different addresses near the shooting location. According to counsel, Wallace's girlfriend, brother, and mother all lived "within the radius of those cell calls" and Wallace "could have just as easily have been at [his girlfriend's house] and his phone would have pinged at that location or at any of these other addresses and his phone would have pinged at the same location."

Therefore, counsel argued: "Now, given that the circumstantial evidence can lead to a conclusion that Mr. Wallace could have been at any of those locations, you must adopt the conclusion that points to innocence. [¶] You must adopt the conclusion that he was at one of the other places and not at the murder location because that's how circumstantial evidence works. [¶] So if it was just as reasonable that he was at his brother's house which is where Anthony Acosta says that he saw him, if it is just as reasonable that he was at that location as it is that he was

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[9] Although Wallace now claims he was "forc[ed] . . . into the arms" of an attorney he did not want, he expressly informed the court that Cavalluzzi was his preferred counsel.

on Anzac, you must adopt the conclusion that he was at his brother's house."

In his rebuttal, the prosecutor responded as follows: "Now, the cell towers place the phone that was being used to set up the whole drug deal, the phone that the evidence shows [Wallace] had and was using, it places it in the crime scene. [¶] And yet he says, hey, you know, he has family that lives there. So you must—he said you must find him for a reason toward innocence, for not guilty." "I want to point out something," he later continued. "The People have the burden in this case. What that means is the burden is on the People. The defense doesn't have to do a single thing. They don't have to prove the case beyond a reasonable doubt. [¶] But what we do know is . . . that defense has presented. Who did they call? They call Luz Cannon, Maria Baltazar (sic) and the DNA Mr. Edmonds.[10] And same obligation or

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10 Luz Cannon lived near the crime scene. She testified that on the night of the shooting, she saw Juan Sr.'s van parked in front of a reputed "drug house." According to Cannon, a Hispanic man got out of the van and went to the house's side gate, where a hand to hand transaction took place. The van left but returned about a half hour later. A small, dark vehicle then approached the van. Cannon heard three "pops," which she thought were fireworks. The dark car then drove away. Maria Baltazar (actually Bazan) also lived hear the crime scene. She testified that on the night of the shooting, she heard gunshots and then saw a dark car speed down the street. Bryan Edmonds worked in the Los Angeles County Sheriff's Department crime lab. Edmonds

responsibility to provide meaningful testimony, right. Free subpoena of the court, may choose what witnesses to present. Failure to call logical witnesses. Okay, you heard from some people, right. You hear from Luz Cannon. You heard from Maria Baltazar (sic). [¶] But let's see. Who lived in that area? Mom. Hey, did you hear from mom? Mom, I was there. He was there with me. No. Did you hear from brother who lived in the area? I was there. He was there with me. No. [¶] I mean, these are just logical witnesses. But since the burden is on myself, we'll go through all the evidence."

Wallace contends that the prosecutor "overstepped his duty and misled the jury, penalized [his] right to a public trial, and engaged in tactics which made that trial unfair." (Capitalization omitted.) At the outset, we note that Wallace forfeited this claim by failing to object to the alleged misconduct during trial. Furthermore, the claim is meritless.

A. *Wallace Forfeited the Claim*

"To preserve a misconduct claim for review on appeal, ' "a defendant must make a timely and specific objection and ask the trial court to admonish the jury to disregard the improper argument." ' " (*People v. Forrest* (2017) 7 Cal.App.5th 1074, 1081.) A defendant "will be excused from the necessity of either a timely objection and/or a request for

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helped process the crime scene but was not told that suspects may have been inside the van when the shooting occurred.

admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.) "The underlying purpose of this requirement is to ' " 'encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had' " ' " (*Forrest*, at p. 1081.) " 'The objection requirement is necessary in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal.' " ' " (*Ibid.*) "Indeed, it would be ' " 'unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial.' " ' " (*Ibid.*, italics omitted.) Here, defense counsel neither objected to the prosecutor's rebuttal argument nor requested an admonition. On appeal, Wallace does not contend that doing so would have been futile, thereby excusing the failure to object. As a result, Wallace's prosecutorial misconduct claim has been forfeited. (*People v. Jasmin* (2008) 167 Cal.App.4th 98, 116.)

Anticipating this conclusion, Wallace argues that trial counsel was ineffective for failing to object to the prosecutor's argument. To prevail, Wallace must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable possibility that but for the counsel's errors, the result would have been different. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.) "[D]eciding whether to object is inherently tactical, and the

failure to object will rarely establish ineffective assistance." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 502.) More importantly, we cannot address such a claim on direct appeal unless the reasons for the challenged act or omission appear on the record or there simply could be no rational tactical basis for counsel's conduct. (*People v. Pope* (1979) 23 Cal.3d 412, 426, disapproved on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.)

As discussed below, Wallace's prosecutorial misconduct claim is without merit. The prosecutor's rebuttal was not improper. Therefore, objecting to the argument would have been ineffectual at best. Counsel has no duty to make frivolous or futile objections. (*People v. Weaver* (2001) 26 Cal.4th 876, 931.) As a result, Wallace cannot show that counsel's failure to object amounted to deficient performance. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 616; *People v. Diaz* (1992) 3 Cal.4th 495, 562.) Nor has Wallace demonstrated a reasonable possibility that but for counsel's alleged error, the result of the trial would have been different.

B. *The Claim is Meritless*

It is improper for the prosecutor to misstate the law, and in particular to attempt to reduce or shift the People's burden of proof. (*People v. Marshall* (1996) 13 Cal.4th 799, 831.) Improper comments violate the federal Constitution when they constitute " ' " 'a pattern of conduct "so egregious that it infects the trial with such unfairness" ' " ' " that it denies the defendant due process. (*People v. Hill*, *supra*, 17 Cal.4th at p. 819.) Even where the improper comments fall

short of this test, they may constitute misconduct under state law if they involve " ' " ' "the use of deceptive or reprehensible methods" ' " ' " in an attempt to persuade the court or jury. (*Ibid*.) If a charge of prosecutorial misconduct is based on a prosecutor's argument to the jury, we must decide whether there is a reasonable likelihood the jury construed or applied any of the challenged statements in an objectionable manner. (*People v. Cole* (2004) 33 Cal.4th 1158, 1202–1203.) We must consider the challenged statements in the context of the argument as a whole to make its determination. (*Id*. at p. 1203.)

Wallace claims that the prosecutor improperly engaged in burden shifting by commenting on defense counsel's failure to call Wallace's mother or brother as alibi witnesses. The prosecutor's remarks were nothing more than a comment on Wallace's failure to call logical witnesses. While a prosecutor may not suggest that "a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence," (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340), comments on the state of the evidence or on the defense's failure to call logical witnesses, introduce material evidence, or rebut the People's case are generally permissible. (*People v. Medina* (1995) 11 Cal.4th 694, 755.) Indeed, "[a]s for the prosecutor's reference to witnesses not called, it is neither unusual nor improper to comment on the failure to call logical witnesses." (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1275.) Additionally, "a prosecutor is justified in making comments in rebuttal . . . which are fairly

responsive to argument of defense counsel and are based on the record." (*People v. Hill* (1967) 66 Cal.2d 536, 560.)

Defense counsel plainly argued that Wallace could have been at a nearby, but wholly innocuous, location at the time of the shooting. In rebuttal, the prosecutor simply pointed out that the people who could confirm this, such as Wallace's mother or brother, could be expected to testify if Wallace were indeed with them at the time. Such argument is permissible "where a defendant might reasonably be expected to produce such corroboration." (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.) While a prosecutor may not suggest a defendant has a duty or burden to prove his innocence, the prosecution did not do so here. Indeed, the prosecutor repeatedly emphasized that the burden of proof remained with the People. The prosecutor merely replied to points raised by defense counsel and noted that Wallace had the same opportunity to produce would-be percipient witnesses to the alleged defense factual scenario. Defense counsel opened the door to this response.

In *People v. Bradford*, *supra*, 15 Cal.4th at p. 1339, our Supreme Court concluded that the prosecutor did not commit misconduct during closing argument by making "brief comments" noting the absence of evidence contradicting the prosecution's evidence and the defense's failure to present material evidence or alibi witnesses. The court explained: "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that

a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*Id*. at p. 1340.) The prosecutor's statements regarding Wallace's failure to present witnesses fell entirely within these boundaries. Because "the prosecutor did not cross the critical line, . . . there is no reasonable likelihood the jurors would have understood the prosecutor's argument as imposing any burden on defendant." (*People v. Young* (2005) 34 Cal.4th 1149, 1196.)

Wallace next contends that his conviction must be reversed because his mother—one of the potential alibi witnesses discussed above—was allowed to remain in the courtroom to watch the trial only if she chose not to testify. The trial court granted the prosecutor's motion to exclude all potential witnesses from the courtroom. Wallace's mother was in court when the trial court's exclusion order was discussed and thus knew she had two options—testify as a witness or watch the trial, but not both. She chose to watch the trial. According to Wallace, however, the prosecutor "used[d] this exercise of the right to a public trial as evidence against [Wallace] to require him to have produced a witness or undergo an adverse inference."

The United States Constitution and the California Constitution guarantee a criminal defendant the right to a public trial, including the right to have friends and relatives present during the proceedings. (See U.S. Const., 6th & 14th amends.; Cal. Const., art. I, § 15; *Presley v. Georgia* (2010) 558 U.S. 209, 210, 214–215; *In re Oliver* (1948) 333 U.S. 257,

271–272, & fn. 29 [special concern assuring attendance of defendant's family members & friends].) Here, however, the prosecutor did not prevent anyone from attending Wallace's trial. Rather, before trial began, the prosecutor simply asked that the court exclude any potential witnesses from the courtroom—a routine request from both the prosecution and defense prior to any criminal trial. Indeed, the exclusion of a defendant's family members has long been upheld against a right to public trial challenge when those persons were witnesses at trial. (*People v. Sprague* (1879) 53 Cal. 491, 493.) Thus, Wallace's claim that the prosecutor "deliberately excluded" his mother and brother from being witnesses if they attended the trial is without merit.

III. Prejudicial Testimony Claim

During cross-examination, defense counsel asked Detective Ernest Magana how he located Wallace in order to arrest him. The following exchange then occurred:

"[Defense counsel:] Did you use department resources to locate addresses that might be connected to Mr. Wallace?

"[Detective Magana:] We attempted to, yes.

"[Defense counsel:] And were you able to locate an individual by the name of Erika Stinson?

"[Detective Magana:] Who?

"[Defense counsel:] Erika Stinson.

"[Detective Magana:] I believe if that's the girlfriend that he had at the time that lived on 53rd, yes.

"[Defense counsel:] Are you aware of a departmental document that has the name Erika Stinson and lists her address and connects her to Eric Wallace?

"[Detective Magana:] I believe that was some type of crime or domestic violence that happened between the two and she was—

"[Defense counsel]: Your Honor—

"[Detective Magana]: This is on the report that gave her name and her address.

"[Defense counsel]: I'm going—

"The Court: The answer is nonresponsive, so the answer is stricken. Just listen to the question and answer just that question."

At the close of evidence, the trial court again instructed the jury not to consider any stricken testimony. When subsequently denying Wallace's motion for a new trial, the trial court stated: "I struck the evidence, advised the jury they are not to consider it. I also indicated to them in closing instructions that they are not to consider evidence that had been stricken by the court and I think it's safe to assume the jury followed the court's instructions, and I think also the point [the prosecutor] makes in regards to any prejudice as to that one statement coming in, that there was none."

On appeal, Wallace contends this testimony was prejudicial and that the trial court's effort to "control the damage" by telling jurors to disregard the testimony was futile. Conversely, Wallace complains that because the testimony was stricken and jurors instructed not to consider

the testimony, defense counsel could not conduct further cross-examination regarding this document.

A. *Wallace Forfeited the Claim*

The trial court quickly stepped in to forestall Detective Magana's answer, struck what little had been said from the record, and instructed the jury to disregard the testimony. Defense counsel neither objected to Detective Magana's testimony when it was first elicited nor sought a more punitive remedy from the court. Wallace has thus forfeited his claim on appeal. (*People v. Bryant, Smith and Wheeler* (2014) 60Cal.4th 335, 416–417 [defendant forfeited claim that court improperly allowed witness testimony]; *People v. Banks* (2014) 59 Cal.4th 1113, 1197, overruled on other grounds by *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3 [same]; *People v. Lightsey* (2012) 54 Cal.4th 668, 719 [although witness improperly mentioned defendant's prior imprisonment, his failure to object forfeited claim].)

Although Wallace did eventually cite this incident when moving for a new trial, this was only after the jury had returned a guilty verdict. Objections must be made contemporaneously. (*People v. Trujillo* (2015) 60 Cal.4th 850, 856 [defendant must preserve claims of trial error by contemporaneous objection to raise on appeal].) This is required in criminal cases because a "contrary rule would deprive the People of the opportunity to cure the defect at trial and would 'permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a

conviction would be reversed on appeal.' " (*People v. Rogers* (1978) 21 Cal.3d 542, 548.)

No contemporaneous objection was made here. Thus, the claim is arguably forfeited. Nevertheless, it appears the trial court anticipated that an objection was forthcoming and quickly interrupted in order to prevent the admission of potentially inadmissible evidence. The trial court's vigilance rendered an objection unnecessary. While this does not obviate the requirements that must be met when preserving a claim on appeal, it does preclude a determination that Wallace has forfeited the claim.[11] Thus, out of an abundance of caution, we will address the merits of the claim.

B. *The Claim is Meritless*

Detective Magana's answer was in response to defense counsel's question on cross-examination. Thus, Wallace cannot reasonably claim that any prosecutorial misconduct took place here. However, a witness's volunteered statement can provide the basis for a finding of incurable prejudice. (See *People v. Rhinehart* (1973) 9 Cal.3d 139, 152, overruled on other grounds in *People v. Bolton* (1979) 23 Cal.3d 208, 213–214.) Nevertheless, a jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith. (*People v. Sims* (1976) 64 Cal.App.3d 544, 554–555.) It is only in the exceptional case that "the improper subject matter is of such

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[11] Conversely, the trial court's quick response and appropriate remedy undercuts the argument that any reversible error occurred.

a character that its effect . . . cannot be removed by the court's admonitions." (*People v. Seiterle* (1963) 59 Cal.2d 703, 710.)

This is not the exceptional case. Detective Magana only alluded to "some type of crime or domestic violence that happened between the two." He did not say that Wallace was convicted, charged, or even arrested, for committing a crime. Indeed, based on this fleeting reference, Wallace could have been the victim of domestic violence, not the perpetrator. Thus, contrary to Wallace's contention, the jury did *not* hear "shocking[,] despicable information" that Wallace was a domestic violence abuser or that such abuse had been documented. Moreover, there is no evidence that the jury disregarded the trial court's express instructions. Indeed, when a trial court admonishes the jury to disregard comments or testimony, we assume the jury followed the admonition and that prejudice was therefore avoided. (*People v. Jones* (1997) 15 Cal.4th 119, 168, overruled on another point by *People v. Hill* (1998) 17 Cal.4th 800, 822.)

Even if the trial court erred in some fashion, reversal is appropriate only if it is reasonably probable that Wallace would have obtained a more favorable result had the evidence been excluded. (Evid. Code, § 353, subd. (b); *People v. Avitia* (2005) 127 Cal.App.4th 185, 194 [collecting pertinent cases].) Given the evidence the jury heard regarding the charged offense—that Wallace lured a father and his two sons to a more secluded spot so that he could shoot them all at point blank range—it is difficult to see how

Detective Magana's quickly-curtailed testimony had any appreciable effect here. Thus, Wallace cannot show that he would have obtained a more favorable result had this limited amount of evidence been excluded.

IV. Fee Collection Claim[12]

At sentencing, the trial court imposed an $80 court security assessment pursuant to section 1465.8, subdivision (a)(1), and a $60 criminal conviction assessment pursuant to Government Code section 70373. In so doing, the court informed Wallace: "There's a court operations assessment fee of $40 for each conviction, so $80 pursuant to . . . section 1465.8. That can also be collected from your prison earnings, and there's a mandatory conviction assessment fee of $30 for each conviction totaling $60. That's pursuant to Government Code section 70373[, subdivision] (a)(1). That can also be collected from your prison earnings."

Section 1465.8, subdivision (a)(1) provides: "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code." Subdivision (d) of the statute further provides that: "[T]he

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[12] Wallace's original fourth claim regarding calls he made while in jail has been abandoned.

assessments collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Trial Court Trust Fund."

Government Code section 70373, subdivision (a)(1) provides: "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense, including a traffic offense, except parking offenses as defined in subdivision (i) of Section 1463 of the Penal Code, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code. The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction." Subdivision (d) of the statute further provides that: "[T]he assessments collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Immediate and Critical Needs Account of the State Court Facilities Construction Fund."

Both Penal Code section 1465.8 and Government Code section 70373 are silent as to the party or agency responsible for the collection of these fees. Wallace contends, however, that collection should be administered by the trial court, rather than the prison system.[13] Wallace cites no direct

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[13] Wallace admits that the Department of Corrections collects victim restitution from inmate accounts. However,

authority for this proposition. However, he does note that both statutes also apply to traffic offenses—offenses which presumably would not lead to jail time. Thus, Wallace reasons, the Department of Corrections cannot be responsible for the collection of these fees.

Nevertheless, both statutes also carve out an exception to this rule, explicitly stating that "parking offenses as defined in subdivision (i) of Section 1463, involving a violation of a section of the Vehicle Code or any local ordinance adopted pursuant to the Vehicle Code" are *not* subject to the statutes' fees. Section 1463, subdivision (i) defines a parking offense as "any offense charged pursuant to Article 3 (commencing with Section 40200) of Chapter 1 of Division 17 of the Vehicle Code, including registration and equipment offenses included on a notice of parking violation." In turn, Vehicle Code section 40200, subdivision (a) covers "[a]ny violation of any regulation that is not a misdemeanor governing the standing or parking of a vehicle under this code, under any federal statute or regulation, or under any ordinance enacted by local authorities is subject to a civil penalty."

These minor parking violations are not treated as infractions within the criminal justice system; instead they are treated as civil offenses subject to civil penalties and administrative enforcement. (*Tyler v. County of Alameda*

Wallace contends, this is allowed only because the agency has specific statutory authority to do so.

(1995) 34 Cal.App.4th 777, 780.) Wallace's premise is thus incorrect. The Department of Corrections has *not* been tasked with collecting fees in cases that could not possibly lead to jail time. Penal Code section 1465.8 and Government Code section 70373 have specifically carved out an exception barring the agency from doing so. If the statutes allowed for the collection of civil or administrative penalties, then the court system would appear better suited to collect those fees. But the statutes have specifically exempted such penalties from their purview, thus rendering the Department of Corrections the more appropriate collection agency here.

V. Ten Percent Interest Claim

At sentencing, the prosecutor requested $10,903.70, plus 10 percent interest, in victim restitution pursuant to section 1202.4,subdivision (f). The trial court told Wallace, "I'm going to order you pay direct restitution $10,903.70." The minute order and abstract of judgment both reflect this restitution award, but also included the requested 10 percent interest.

Wallace contends that the clerical error imposing 10 percent interest on the restitution award must be corrected. The People have conceded the issue. Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Because the trial court did not orally pronounce an additional 10 percent interest on the

restitution award, the abstract of judgment must be corrected to strike this additional amount.

DISPOSITION

The abstract of judgment shall be modified to strike the 10 percent interest added to the restitution award. The superior court is directed to prepare an amended abstract of judgment reflecting this modification and to forward a copy to the Department of Corrections and Rehabilitation. As modified the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.