Filed 6/12/17 P. v. Villaneda CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. LUIS VILLANEDA, Defendant and Appellant.	B268868 (Los Angeles County Super. Ct. No. KA099258)

APPEAL from a judgment of the Superior Court of Los Angeles County, Douglas Sortino, Judge. Affirmed.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Marc A. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

After a jury trial, defendant and appellant Luis Villaneda (defendant) was convicted of second degree murder (Pen. Code, § 187, subd. (a)[1]) for the killing of victim Gonzalo Robles. On appeal, defendant makes the following claims of reversible error: (1) the prosecutor committed misconduct in three different respects at trial; (2) defendant was handcuffed during closing argument; and (3) the trial court denied defendant's petition for disclosure of juror information. We affirm the judgment.

BACKGROUND

I. Factual Background

A. Prosecution Evidence

Robles, his girlfriend Jennifer Yepez, and Monica Dominguez lived in a house on a piece of property located in West Covina. Defendant and his girlfriend lived in the "back house" of that property. Son Tran and his girlfriend, Trinh Nguyen, lived in a garage on the property. Elizabeth Laplant and Geoffrey Brooks were the owners of the property, and they also resided there.

During the summer of 2012, people would come from the street in the middle of the night, jump the wall, and head to defendant's room on the property. The occupants of the front house were upset about this foot traffic.

In the evening of August 29, 2012, Robles, Yepez, and Dominguez approached defendant at Laplant's direction and told defendant he needed to pay rent owed to Laplant. They also told

---

[1] All statutory citations are to the Penal Code unless otherwise indicated.

defendant that he needed to stop having so many people visit his home. Defendant appeared angry and said they lacked the authority to confront him. Yepez and defendant exchanged profanity. During the exchange, Yepez knocked defendant's phone out of his hand after defendant indicated he was on the phone with a gang member who would help defendant harm them.

Defendant and the others then went to Laplant's residence on the property. After discussing the issues between Laplant and defendant, they all shared methamphetamine provided by defendant, which apparently resolved the dispute.

After leaving Laplant's residence, defendant went to the room shared by Tran and Nguyen. He told Tran and Nguyen about his encounter with Robles, Yepez, and Dominguez, and he said they had disrespected him. Before leaving the room, defendant took a knife he had previously loaned Tran and Nguyen.

In the morning of August 30, 2012, defendant called his friend Ryan Munns and described the prior evening's argument. Defendant was upset that the "women" had disrespected him. Defendant then told Munns "he needed to get out of the house before he did something stupid." Munns suggested they go to the gym and agreed to come by later that day.

Munns came to defendant's house at about noon and went to defendant's room. Munns and defendant then walked to the main house on the property. Defendant, who was extremely angry about the prior night's events, intended to demand an apology from Robles, Yepez, and Dominguez. Either defendant or Munns, or both, loudly knocked on the door, and then one of them struck the door so hard that it broke.

Robles, Yepez, and Dominguez came outside and confronted defendant and Munns. Robles commented that defendant had "brought backup." Defendant demanded an apology, but Robles laughed at him. Defendant then exchanged profanity and insults with Dominguez and Yepez.

For his part, Munns called Yepez a "bitch." In turn, Yepez yelled at Munns, and Munns told her to "get the fuck out of my face." In response, Robles told Munns, if "you hit my girl . . . I'll beat the shit out of you." Munns then dropped his keys and sunglasses and dared Robles to hit him. The two men then engaged in a fistfight. Robles knocked Munns down, and then Munns struck Robles.

Meanwhile, defendant took a knife out of his pocket. While displaying the knife, defendant said to Yepez, "you're not so hard now." He also said, "Your boyfriend is not so tough." According to Yepez, defendant lunged at her with the knife, which grazed her right above the waist. During this exchange with defendant, Yepez yelled out that defendant had a knife. By this point, Robles stopped fighting with Munns and turned his attention to defendant and Yepez.

Yepez took out her phone and loudly described Munns' appearance, as if she was speaking to the police. Upon hearing her, Munns said he was leaving, suggested defendant leave as well, and fled. In the meantime, Robles moved towards Yepez and repeatedly told defendant to drop the knife. Defendant refused and told Robles "Come on, come on."

Dominguez tossed Robles her knife. Robles cut defendant in the shoulder. Defendant then stabbed Robles in the heart. Robles fell to the ground and died moments later. After stabbing Robles in the heart, defendant said, "That's what you get."

Defendant immediately fled the property, threw away the knife, and called Munns to pick him up. Munns picked up defendant and tried to convince defendant to go to the hospital because defendant was bleeding. Defendant refused, saying the hospital was "too close to the incident." Munns instead dropped defendant off with defendant's father. Defendant was located and arrested a few hours later.

B. Defendant's Evidence

In the defense case, defendant presented the testimony of several witness (including defendant) in an attempt to establish that Robles was the aggressor and that defendant acted in self defense.

Defendant testified that the day before the stabbing, Robles called him and said Laplant wanted defendant to vacate his room. Later that day, when defendant returned home, Robles, Yepez, and Dominguez were in the yard. Yepez slapped defendant's telephone out of his hand, and Yepez, Robles, and Dominguez laughed about it. Robles also told defendant that Laplant was evicting him. During the exchange, Yepez and Dominguez called defendant a "bitch."

The following day, defendant was still angry about the events of the day before. Defendant admitted that he told Munns that he wanted to "smoke them out with a bowl and light them on fire," but he testified that it was just a stupid comment.

After Munns arrived at defendant's place, defendant and Munns went to Laplant's residence. Defendant knocked on the door. Dominguez opened and then immediately shut the door. Munns kicked the door and called Dominguez a bitch.

Robles then came out and asked defendant why they banged on the door. Munns and Robles began to fight. Robles fell to the ground, and defendant held his knife by his side. According to defendant, he did not lunge at anyone with it.

Yepez said, "He has a knife. He has a knife." Robles walked toward defendant, and Dominguez gave Robles a knife. Robles attacked defendant, stabbing him in the left shoulder. Defendant then stabbed Robles. Robles approached defendant with the knife again. Afraid for his life, defendant again stabbed Robles, who fell to the ground. Defendant left.

As part of the defense case, additional witnesses testified, each stating, inter alia, that defendant did not stab Robles until after Robles had possession of a knife during the altercation.

II. Procedural Background

Defendant was charged in a three-count information. Count One charged defendant with the murder of Robles in violation of section 187, subdivision (a). Count Two charged defendant with assault with a deadly weapon with respect to Yepez, in violation of section 245, subdivision (a)(1). Count Three charged defendant with the attempted murder of Yepez, in violation of sections 664 and 187. As to counts one and three, the information alleged that defendant personally used a deadly weapon in violation of section 12022, subdivision (b)(1). The information also alleged that defendant had served a prior prison term as defined by section 667.5, subdivision (b).

At trial, the jury found defendant not guilty of first degree murder, but guilty of second degree murder with respect to Robles. The jury also found the deadly weapon allegation to be true. With respect to counts two and three, the jury found

defendant not guilty. The prosecutor dismissed the prior prison term allegation.

Ultimately, the trial court sentenced defendant to state prison for a term of 16 years to life, consisting of a term of 15 to life on count 1, plus an additional year for the deadly weapon enhancement. Defendant timely appealed.

DISCUSSION

I. Prosecutorial Misconduct

Defendant contends that the prosecutor committed misconduct in three respects: (1) misrepresenting the burden of proof in her closing and rebuttal arguments; (2) stating in her closing argument, without any supporting evidence, that victim Robles had saved the lives of Yepez and Dominguez from defendant; and (3) making an argumentative comment when cross-examining defendant. We reject such claims.

A. Applicable Law

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct "so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" [Citation.]' [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 819.)

When the claim of misconduct focuses on the prosecutor's comments made during argument, the defendant must "'show that, "[i]n the context of the whole argument and the instructions" [citation], there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' [Citation.]" (*People v. Cortez* (2016) 63 Cal.4th 101, 130 (*Cortez*).

To preserve a claim of prosecutorial misconduct, the defendant must object at the time the claimed misconduct occurs and request a curative admonition to the jury or instruction. (*People v. Tully* (2012) 54 Cal.4th 952, 1010; *People v. Thomas* (2012) 54 Cal.4th 908, 938-939.) An objection on a different ground may not be sufficient to preserve a claim of misconduct. (*People v. Dykes* (2009) 46 Cal.4th 731, 766-767.) "'The primary purpose of the requirement that a defendant object at trial to . . . prosecutorial misconduct is to give the trial court an opportunity, through admonition of the jury, to correct any error and mitigate any prejudice.' [Citation.]" (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1328.) "A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. [Citations.]" (*People v. Hill*, *supra*, 17 Cal.4th at p. 820.)

B. Alleged Misstatements of the Burden of Proof

1. Background Facts

The prosecutor began her closing argument by asking the jury to "apply the law to the facts of this case," and said "it's a big

responsibility. It's solely your responsibility. It doesn't matter what I say." Later, referring to a scenario she described during jury selection concerning "pink glitter, Superman, and a pink tutu,"[2] the prosecutor said:

"That's something you will have to try to be, reasonable and logical, in your task in finding the truth because Superman in a tutu logically does not exist.

"Superman in a tutu has no place in this trial. Superman in a tutu is not going to help you know the truth about how and why Mr. Robles was killed. Use your common sense. Use your reason and logic. That's going to lead you to the truth."

The prosecutor continued: "In this trial we have done a lot to make sure you get all the evidence you can;" "you can determine what you believe and what you don't believe;" and, "You have to decide is a witness just mistaken now or are they lying now?" The prosecutor then said:

"Your responsibility as jurors in finding the truth is to reject what is unreasonable. You have to reject Superman in a tutu. You may want to accept it. You may want to believe it. You might hope that that's the truth, but you must reject what is unreasonable. You must accept what is reasonable. You have to use your common sense and logic in finding the truth."

The prosecutor proceeded to state that defendant's version of events did "not make sense," discussed why self-defense did not apply in the case, and also said: "The Law, as well as your

---

[2] The record on appeal does not contain the reporter's transcript for the proceedings involving jury selection when the prosecutor may have discussed pink glitter, Superman, and a pink tutu.

decision in this case, has to be based on reason. The law is also based on reason." The prosecutor continued:

"The truth is, this case is not about speculation. It's not about the poor little defendant that felt bullied.

"This case is about justice and the truth and the law. And the truth in this case and the law in this case say that the defendant is guilty."

In his closing argument, defendant's counsel said:

"As you know, the People have the burden of proof. They have to prove this case beyond a reasonable doubt and to an abiding conviction.

"That has to be done on each and every count.

"It has to be done on each and every case whether it's a murder case or whether it's a simple misdemeanor. It's the same standard.

"It's the same standard that is applied each and every time, and it will be applied in this particular case.

"You will apply that standard, and your job—your purpose for being here is to make sure that that standard is applied to the facts in this particular case. If there is anything that needs to be done by you, you have to determine what the facts are and you have to determine [the] facts beyond a reasonable doubt.

"That's the standard that's applicable in this case, and that's the standard that's applicable in all cases."

Defendant's counsel then described the prosecutor's interpretation of the stabbing as simply "guessing," and told the jury "that is not the standard of evidence." Defendant's counsel told the jury he did not want them to reach a guilty verdict and then "wake up in the middle of the night in a panic . . . hyperventilating" upon realizing they had made the

wrong choice. He reminded the jury, "You are the triers of facts, not [the prosecutor]." Defendant's counsel also repeatedly asked the jury to use its common sense in evaluating the evidence: "you have been asked to use your common sense. Use it. Don't leave it in the parking lot," "Don't lose sight of your common sense. Don't lose sight of reality," and, "Don't lose your common sense." Thereafter, defendant's counsel made numerous additional comments on the burden of proof, including: "Put the facts together. Use your common sense," "when somebody is not giving you all the truth, you have doubts and then it becomes reasonable doubt," and "consider what a reasonable person in a similar situation with similar knowledge would have believed."

At the commencement of the prosecutor's rebuttal argument, she reminded the jury that the burden of proof was "beyond a reasonable doubt," and said the interpretation of the evidence by defendant's counsel was "unreasonable." She continued:

"Is there really a question in your mind after hearing all of these witnesses, their prior statements and their in-court testimony, is it really so hard to know what happened and why it happened? The law does not require that a play by play is known by you. That is not required by the law. You do not need to account for every second of action by the parties. The elements that you have need to be satisfied and that's it. They need to be satisfied by the burden of proof and that is it. You don't need to have a video replay of the events for you to know what happened and for you to come to a determination of the truth."

The prosecutor told the jury that it was the judge's job to describe the law, again cited the burden of proof as beyond a reasonable doubt, and said that it was the jury's task to

determine the facts based on evidence and to apply the facts to the law. The prosecutor then said:

"I like to talk about the Lady Justice is what she's called. Originally she was referred to as Justitia, J-U-S-T-I-T-I-A. Now, her name is Lady Justice. She's blindfolded, and a lot of people joke about that because the law is blind and can't see. But that's not what the blindfold means. The blindfold is to symbolize objective [sic] and impartiality. That is how you need to be in this case. The scales that she carried in her hand measure the strength of a case and its opposition. They weigh in the balance, one side or the other, because that is the system that we have. It's adversarial. There's one against another and it's a fluid balance because you determine beyond a reasonable doubt. You determine exactly what that balance is that convinces you beyond a reasonable doubt. It's not a set number. It probably changes from jury to jury a little bit. But that's for you to decide."

After describing the defense characterization of the evidence as unreasonable, the prosecutor said:

"Lady Justice tells you that even a defendant can lie, and you must reject what is unreasonable. You have to reject it. Just because the defense says it, doesn't make it true. Just because the defense says it, doesn't make it relevant. Just because the defense wants you to believe it, doesn't make it believable.

"Don't be fooled by any witness, any attorney or the defendant. This is your responsibility, to use your reason and common sense. Justice relies upon you."

The prosecutor continued:

"Reasonable doubt is proof that leaves you with an abiding conviction not certainty. Like the defense said, abiding conviction, a belief that the charge is true. It need not eliminate

all possible doubt. Everything is open to some doubt. . . . [¶] It is not about any imaginary doubt."

After explaining why the defense version of events was not credible, the prosecutor said, "This is about the evidence. It's not about me. I wasn't there." The prosecutor concluded her argument by repeatedly reminding the jury that it could find defendant guilty only if convinced beyond a reasonable doubt.

2. Forfeiture

Throughout the entirety of the prosecutor's closing argument and rebuttal, defense counsel never objected on any ground to any statement, illustration, or argument by the prosecutor concerning the burden of proof, let alone made even a suggestion or hint that the prosecutor had engaged in misconduct. Defendant has therefore forfeited the claim he now makes on appeal concerning purported misconduct in connection with the prosecutor's arguments concerning the burden of proof. (*People v. Seumanu, supra,* 61 Cal.4th at p. 1328; *People v. Tully, supra,* 54 Cal.4th at p. 1010; *People v. Thomas, supra,* 54 Cal.4th at pp. 938-939.)

In holding that defendant has forfeited this claim of misconduct, we reject defendant's contention that his failure to object should be excused because an objection would have been futile. (See *People v. Jackson* (2016) 1 Cal.5th 269, 367 ["A defendant's 'failure to object and request an admonition waives a misconduct claim on appeal unless an objection would have been futile or an admonition ineffective.' [Citation]") In claiming futility, defendant merely states in a conclusory fashion that objections and requests for admonitions would have been "ineffective" because "the prosecutor kept making improper

statements on the standard of proof throughout her argument." We are unpersuaded. The prosecutor continued to make the statements defendant now complains of because defendant never objected to any of them as they were made. Assuming *arguendo* such statements were improper, nothing in the record suggests the prosecutor would have defied the trial court and continued to make them if the trial court had sustained an objection to them. Moreover, there is nothing in the record to suggest the jury would not have followed an admonition by the trial court to follow its instructions of law concerning the burden of proof and disregard any argument by the prosecutor to the contrary. (*People v. Archer* (1989) 215 Cal.App.3d 197, 204 ["[T]he jury is presumed to consist of intelligent persons who are fully able to understand, correlate and follow the instructions given to them"].)

Accordingly, we conclude defendant has forfeited his claim of prosecutorial misconduct concerning the prosecutor's statements regarding the burden of proof.

3. Ineffective Assistance of Counsel

Defendant argues in the alternative that, if we conclude defendant forfeited his misconduct claim by failing to object, we should nonetheless reverse because defense counsel was constitutionally ineffective by failing to object on this ground. (See *People v. Centeno* (2014) 60 Cal.4th 659, 674 (*Centeno*) ["'A defendant whose counsel did not object at trial to alleged prosecutorial misconduct can argue on appeal that counsel's inaction violated the defendant's constitutional right to effective assistance of counsel.' [Citation]")

In order to establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance

fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218 (*Ledesma*)) "Unless a defendant establishes the contrary, we shall presume that 'counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy.' [Citation]" (*Ledesma, supra,* 43 Cal.3d at p. 746.) When the record on appeal is silent as to why counsel did not act in the manner challenged, defendant bears the burden of demonstrating that there was "no conceivable tactical purpose" for counsel's omission. (*Centeno, supra,* 60 Cal.4th at p. 675.) Our Supreme Court has long recognized that "a mere failure to object to evidence or argument seldom establishes counsel's incompetence." (*People v. Ghent* (1987) 43 Cal.3d 739, 772.)

Here, defendant fails to show that his counsel was constitutionally ineffective by failing to object. Defendant merely surmises that the absence of an objection must have been error because his counsel "could not have wanted jurors to believe [defendant] could be found guilty based on a lesser standard of proof." While defendant undoubtedly supposes correctly his counsel did not want the jury to apply a lower burden of proof, that supposition does not address the pertinent question of whether the lack of an objection to the prosecutor's comments was for some tactical purpose. Defendant actually answers that question himself when positing in his opening brief that "an objection and request for admonition for the prosecutor's comments would have been harmful because it would have called more attention to them, making the prejudice worse." (See

People v. Fernandez (2013) 216 Cal.App.4th 540, 565 [recognizing a reasonable trial strategy to refrain from objecting to prosecutor's remarks in closing argument because counsel did want the remarks emphasized to the jury].) While we do not necessarily agree an objection and admonition would have made matters worse for defendant, we recognize a decision not to object for fear of that effect was a reasonable and "conceivable tactical purpose." We therefore conclude defendant has failed to meet his burden of establishing his counsel was ineffective. (*Centeno, supra,* 60 Cal.4th at p. 675.)

We additionally note that defense counsel might also not have objected because he reasonably concluded the prosecutor's statements regarding the burden of proof were not improper. Unlike *Centeno*, where our Supreme Court found defense counsel constitutionally ineffective for failing to object where "the problems with the prosecutor's comments were not difficult to discern" (*Centeno, supra,* 60 Cal.4th at p. 675), the purported impropriety of the prosecutor's statements is not so clear in this case.

Defendant claims the prosecutor's statements regarding the burden of proof "essentially directed the jurors that they could find [defendant] guilty by rejecting what they found unreasonable, accepting what they decided was reasonable, and finding the evidence tipped in favor of the prosecution." More specifically, defendant contends the prosecutor's reference to Lady Justice and her scales "conveyed the impression that a lesser standard of proof, e.g., preponderance of the evidence applied, and that it was enough to find [defendant] guilty if the scale tipped in favor of the prosecution, e.g., 51 percent or more of the evidence was there." Defendant further contends the

prosecutor's comments "diluted the prosecutor's burden of proof by arguing that the jury's rejection of what it found unreasonable and acceptance of what it found reasonable sufficed for proof of [defendant's] guilt."

We do not find defendant's interpretation of the prosecutor's comments as improper so readily discernible. In referencing "Lady Justice," the prosecutor said, "The scales that she carried in her hand measure the strength of a case and its opposition. They weigh in the balance, one side or the other, because that is the system that we have. It's adversarial. There's one against another and it's a fluid balance because you determine beyond a reasonable doubt. You determine exactly what that balance is that convinces you beyond a reasonable doubt." Contrary to defendant's interpretation, the prosecutor's illustration merely informed the jury that, in weighing the evidence of defendant's guilt, at some point the scales may tip so far as to constitute proof beyond a reasonable doubt. Thus, while the prosecutor's reference to the scales of justice was perhaps inartful or even unwise (see *People v. Katzenbeger* (2009) 178 Cal.App.4th 1260, 1269 (*Katzenberger*) ["[P]erils undoubtedly attend a prosecutor's attempt to reduce the concept of guilt beyond a reasonable doubt to a mere line on a graph or chart . . . ."]), it was not legally incorrect or clearly misleading. More to the point, the analogy as phrased by the prosecutor was not so easily discernible as improper such that defense counsel was constitutionally ineffective for failing to object to it.

Likewise, we do not find so easy to discern as improper the prosecutor's comments that the jury should reject what is unreasonable and accept what is reasonable. We recognize that it is error for a prosecutor to leave the jury "with the impression

that so long as her interpretation of the evidence was reasonable, the People had met their burden." (*Centeno, supra*, 60 Cal.4th at p. 672.) But our Supreme Court has held explicitly that a prosecutor's comments asking the jury to "accept the reasonable and reject the unreasonable" does not improperly lessen the prosecution's burden of doubt. (*People v. Romero* (2008) 44 Cal.4th 386, 416.) That is all the prosecutor communicated here. Nothing about the prosecutor's argument as a whole could be construed as telling the jury it could convict merely by finding the prosecution's view of the evidence reasonable. Indeed, throughout her closing argument and rebuttal, the prosecutor consistently reminded the jury that the burden of proof was beyond a reasonable doubt, and she correctly reiterated in her rebuttal the court's instruction that "reasonable doubt is proof that leaves you with an abiding conviction."[3]

Moreover, the prosecutor's use of the image of Superman, glitter, and a pink tutu may have been a confusing and misguided attempt to illustrate the concept of what is unreasonable. (See *Katzenberger, supra*, 178 Cal.App.4th at p. 1269 ["[W]e caution prosecutors who are tempted to enliven closing argument with visual aids that using such aids to illustrate the 'beyond a reasonable doubt' standard is dangerous and unwise."]) But we do not find that the Superman illustration misled the jury as to the prosecution's burden of proof. (Cf. *id.* at

---

[3] The trial court instructed the jury pursuant to a modified version of CALCRIM No. 220, stating in relevant part: "Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true." During his closing argument, defense counsel similarly stated that the prosecutor had "to prove this case beyond a reasonable doubt and to an abiding conviction."

p.1267-1268 [eight-piece puzzle depicting the Statue of Liberty "inappropriately suggest[ed] a specific quantitative measure of reasonable doubt" where the puzzle depicted "an easily recognizable iconic image" and the prosecutor argued "this picture is beyond a reasonable doubt" while showing six of the eight pieces assembled].) Indeed, even a flawed example of what is unreasonable does not necessarily convey erroneously what constitutes proof beyond a reasonable doubt. (See *People v. Romero, supra,* 44 Cal.4th at p. 416 ["The prosecution must prove the case beyond a reasonable doubt, not beyond an unreasonable doubt."])

Accordingly, we find that defense counsel's lack of objection to any of the prosecutor's arguments concerning the burden of proof fell well within the wide range of professional competence that is deemed constitutionally effective. (*Ledesma, supra,* 39 Cal.4th at p. 746.)

C. Alleged Misrepresentation of the Evidence

Defendant contends that the prosecutor committed misconduct by arguing, without any evidentiary basis in the record, that Robles saved the lives of Yepez and Dominguez. Specifically, the prosecutor said during her closing argument: "The truth is, Gonzalo Robles saved the lives of Jennifer Yepez and Monica Dominguez that day. In so doing, he lost his own life."

Defendant did not object to this statement as prosecutorial misconduct or request that the trial court admonish the jury to disregard it. Defendant therefore forfeited the claim he now makes that this comment constituted misconduct. (*People v. Seumanu, supra,* 61 Cal.4th at p. 1328; *People v. Tully, supra,* 54

Cal.4th at p. 1010; *People v. Thomas, supra,* 54 Cal.4th at pp. 938-939.) In so concluding, we reject defendant's claim that his failure to object should be excused. As noted above with respect to the prosecutor's argument regarding the burden of proof, there is no indication in the record that it would have been futile to object to this comment either. If the trial court had found merit to the defendant's objection, it could have instructed the jury to disregard the comment, stricken the comment from the record, and/or reminded the jury that arguments of counsel are not evidence—all of which we presume the jury would have understood and followed. (See *People v. Edwards* (2013) 57 Cal.4th 658, 764; *People v. Pearson* (2013) 56 Cal.4th 393, 434-435.)

We also reject defendant's claim that his counsel was constitutionally ineffective for not objecting to this comment. Contrary to defendant's contention that there was "no evidence" to support the view that Robles may have saved the lives of Yepez and Dominguez, the record indicates otherwise. Yepez testified at trial that, before fighting with Robles, defendant tried to stab Yepez and his knife actually grazed her body. Yepez further testified that Robles then told defendant to drop the knife. Dominguez also testified that Yepez yelled out that defendant had tried to stab her, which caused both Yepez and Dominguez to further engage defendant and cuss at him. Defendant himself testified that Yepez said, "Look he has a knife. He's going to stab me with it" and that Robles switched his attention to defendant upon hearing that. In addition, Munns testified that defendant was "furious" at the "women" and had stated he wanted to set them on fire. Munns also testified that he heard both Dominguez and Yepez dare defendant to stab them.

Thus, while there may have been other conflicting or contradictory evidence adduced at trial, there was ample evidence that defendant stabbed Yepez and that defendant continued to engage both Yepez and Dominguez in a hostile manner while holding the knife until Robles drew defendant's attention. From this, we find it was well within the realm of permissible argument for the prosecutor to state that Robles lost his life by intervening to save Yepez and Dominguez. (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337 ["[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom."]) It was therefore reasonable not to object to the prosecutor's characterization of the evidence, and we accordingly do not find defense counsel's lack of an objection to have been constitutionally ineffective.

D. Alleged Argumentative Comment during Questioning

During cross-examination, the prosecutor asked defendant why he pulled out a knife instead of calling 911 when Munns was fighting Robles. Defendant answered "I don't know. I was frozen. I was not in the state of mind." The following exchange then occurred:

"[The Prosecutor]: So you don't freeze until after you pull out your knife, is that what you are telling us?

"[Defendant]: Yes.

"[The Prosecutor]: How lucky for you, [defendant]."

Defense counsel objected on the ground that the prosecutor's comment was "argumentative." The trial court

sustained the objection, struck the comment, and instructed the jury to disregard the prosecutor's statement.

Defendant now contends on appeal that the prosecutor's argumentative comment about defendant's answer constituted reversible prosecutorial misconduct. Even assuming *arguendo* that defendant's objection was sufficient to preserve a claim of prosecutorial misconduct (cf. *People v. Dykes, supra,* 46 Cal.4th at p. 766 [objection on different ground insufficient to preserve misconduct claim]), and that the prosecutor's single comment could rise to the level of prosecutorial misconduct (cf. *People v. Cox* (2003) 30 Cal.4th 916, 952 [prosecutor's errors do not constitute misconduct where they do not constitute a "pattern of conduct so egregious" that renders the trial "fundamentally unfair"], overruled on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22), defendant was not prejudiced by the comment such that reversal is warranted. (*Katzenberger, supra*, 178 Cal.App.4th at 1268 ["Prosecutorial misconduct is reviewed for prejudice."])

As noted above, the trial court sustained defendant's objection to the statement and immediately struck the statement from the record while instructing the jury to disregard it. Moreover, when instructing the jury prior to deliberations, the trial court told the jury that they must disregard any testimony stricken from the record and may not consider it for any purpose. Further, the trial court instructed the jury that "[n]othing the attorneys say is evidence" and that "their remarks are not evidence." We presume the jury understood the court's multiple instructions to ignore the prosecutor's comment and followed them. (*People v. Archer*, *supra*, 215 Cal.App.3d at p. 204.) We also note that the prosecutor's comment was brief and that it was

never repeated. We thus find that even if the single comment by the prosecutor were deemed misconduct, the defendant suffered no prejudice from it.

II. Defendant Being Handcuffed During Closing Arguments

Defendant contends that the judgment should be reversed because he was handcuffed during closing argument. We conclude that defendant forfeited this claim and that the error was harmless in any event.

A. Background Facts

With about 20 minutes remaining during the prosecutor's rebuttal closing argument, defendant's counsel noticed that defendant was handcuffed to his chair. After the jury left the courtroom to deliberate, defendant's counsel advised the trial court that defendant had been handcuffed during the arguments.

The trial court immediately began an inquiry into the circumstances. The bailiff explained that defendant was handcuffed during argument because the trial court had not instructed him to take the handcuff off defendant. The trial court told the bailiff that, although handcuffing defendant is normally the procedure when they do not have a jury, defendant should not be handcuffed in the presence of the jury. Defense counsel contended, and the trial court agreed, that there was no reason defendant should have been handcuffed to the chair, as defendant had not been disruptive during trial.

In attempting to assess the potential impact of defendant's having been handcuffed, the trial court determined that only defendant's left hand, the hand furthest from the jury, was

handcuffed to the arm of the chair. Defendant had been seated approximately 25-30 feet from the jury. The jury was to the defendant's right side, and defendant's right hand was not handcuffed.

Defense counsel stated he did not know if the jury observed the handcuff on defendant. Defense counsel indicated he only noticed the handcuff about 30 minutes after he had sat down next to defendant upon finishing his closing argument. Defense counsel also explained that, upon noticing the handcuff, he moved in closer to the defendant and closer to the table, "blocking what [he] believe[d] to be any potential view of the handcuff." Indeed, defense counsel stated his opinion that "if there was any view, it was very slight" because the table was situated such that defendant's hand was below the table.

The trial court confirmed the observation that defendant's hands were below the table throughout. The trial court stated it never saw the handcuff on defendant, even though the trial court looked around the entire courtroom periodically. The trial court explained that defendant was already seated in that position before both he and the jury entered the courtroom.

The prosecutor stated that she never noticed the handcuff either. The prosecutor indicated that she was facing defendant throughout her presentation of argument and at one point directly referred to defendant and said to "look at him." However, the prosecutor explained that she was "not searching for his hands" and was "oblivious" to the handcuff.

The trial court concluded the inquiry by directly asking defense counsel and the prosecutor whether either had anything else to add. Both responded that they did not.

B. Analysis

"Under California law, 'a defendant cannot be subjected to physical restraints of any kind in the courtroom while in the jury's presence, unless there is a showing of a manifest need for such restraints.' [Citation.] Similarly, the federal 'Constitution forbids the use of visible shackles . . . unless that use is "justified by an essential state interest"—such as the interest in courtroom security—specific to the defendant on trial.' [Citation.]" (*People v. Virgil* (2011) 51 Cal.4th 1210, 1270.) When a defendant fails to object to restraints, he forfeits his claim on appeal. (*People v. Williams* (2015) 61 Cal.4th 1244, 1259.)

Here, in the midst of the prosecutor's rebuttal closing argument, defense counsel noticed defendant was handcuffed to his chair, but he did not immediately alert the trial court. Only after the jury retired to deliberate did defense counsel raise the fact that defendant had been handcuffed to his chair during closing argument. Yet, while stating that it was "totally inappropriate" for defendant to have been handcuffed, defense counsel never asked for any sort of relief, such as an admonition to the jury or a mistrial. Indeed, as the trial court conducted its immediate inquiry into what had occurred, defense counsel candidly admitted: (1) that he did not know whether the jury saw the handcuff; (2) that any view of the handcuff was at best "very slight"; and (3) that he personally blocked the jury's view once he noticed the handcuff. Moreover, at the close of the trial court's inquiry, the trial court specifically asked whether defense counsel wanted to add anything else to the discussion. Defense counsel stated that he did not. Defense counsel did not ask for the trial court to make any further inquiry and did not object to the trial court's conclusion of the inquiry without taking any further

investigative or remedial action. We thus hold that the failure to object and request any relief from the trial court forfeited defendant's claim of error on appeal.

Even assuming the mere raising of the issue and calling defendant's shackling "totally inappropriate" could be deemed sufficient to preserve his claim for appeal, we find that any error was harmless. There is no evidence the jury ever saw the handcuff on defendant, who was seated 25-30 feet away, with both hands under the table and his side with the handcuff facing away from the jury. When not obstructing the jury's view of defendant with his own body, defense counsel believed any view of the handcuff was only "very slight." Neither the trial court nor the prosecutor ever saw the handcuff, despite facing the defendant and having every opportunity to see the handcuff had it been in view. Indeed, it took defense counsel nearly half an hour to notice the handcuff even while seated next to defendant. We thus conclude that the error in leaving defendant's left hand shackled during argument before jury was harmless. (*People v. Anderson* (2001) 25 Cal.4th 543, 596 ["[W]e have consistently held that courtroom shackling, even if error, was harmless if there is no evidence that the jury saw the restraints, or that the shackles impaired or prejudiced the defendant's right to testify or participate in his defense."])

III. Petition for Disclosure of Juror Information

After he was convicted and the jury was discharged, defendant filed a petition to unseal juror identifying information to investigate whether any juror had seen the handcuff on defendant during closing arguments. The trial court denied the

petition. We hold the trial court did not abuse its discretion in so doing.

A. Applicable Law

After a jury's verdict in a criminal case is recorded, jurors' identifying information (names, addresses, and telephone numbers) is sealed. (Code Civ. Proc., § 237, subds. (a)(2) & (3).) Discovery of jurors' identifying information "is a sensitive issue which involves significant, competing, public policy interests." (*People v. Rhodes* (1989) 212 Cal.App.3d 541, 548; *People v. Tuggles* (2009) 179 Cal.App.4th 339, 380.) To protect those interests, there are procedures in place by which a defendant may "petition the court for access to personal juror identifying information within the court's records necessary for the defendant to communicate with jurors for the purpose of developing a motion for new trial or any other lawful purpose." (Code Civ. Proc., § 206, subd. (g); *People v. McNally* (2015) 236 Cal.App.4th 1419, 1430.) Such a petition "'shall be supported by a declaration that includes facts sufficient to establish good cause for the release of the juror's personal identifying information.' Absent a showing of good cause for the release of the information, the public interest in the integrity of the jury system and the juror's right to privacy outweighs the defendant's interest in disclosure." (*People v. McNally*, *supra*, 236 Cal.App.4th at p. 1430 [quoting Code Civ. Proc., § 237, subd. (b)].)

"Good cause, in the context of a petition for disclosure to support a motion for a new trial based on juror misconduct, requires 'a sufficient showing to support a reasonable belief that jury misconduct occurred. . . .' [Citations.]" (*People v. Johnson* (2015) 242 Cal.App.4th 1155, 1162-1163.) "Good cause does not

exist where the allegations of jury misconduct are speculative, conclusory, vague, or unsupported." (*People v. Cook* (2015) 236 Cal.App.4th 341, 346 (*Cook*).)

We review the denial of a petition to disclose juror identification information under the deferential abuse of discretion standard. (*Cook, supra*, 236 Cal.App.4th at p. 346; *People v. Jones* (1998) 17 Cal.4th 279, 317.)

B. Analysis

Defendant filed a petition for disclosure of juror information to determine: (1) whether any of the jurors saw defendant handcuffed to his chair during counsels' arguments; and (2) if defendant's physical restraints were observed, whether it played "any part" in the jury deliberations. At the hearing on defendant's petition, the trial court stated: "I just don't think there's a prima fascia case made because I just don't believe the jury saw anything based on the positioning of [defendant], where [his] had was [located], [and] the distance from him to the jury box. And I think I made a fairly complete record. And I just don't think they saw anything. I don't think there's been a prima fascia case made. [¶] And also, in any event, I think the defense waived it. Since I offered, I said to [defendant's counsel], is there anything else you would like me to do or words to that effect. . . . And he indicated no, so there was never any affirmative request for either a mistrial or an admonition to the jury . . . ." After entertaining further argument, the trial court denied the petition.

For the reasons stated by the trial court during the hearing on defendant's petition, we hold that the trial court acted well within its discretion to deny the request for disclosure of juror

information. Defendant failed to meet his burden of providing sufficient evidence to support a reasonable belief that jury misconduct occurred. Defendant made no showing that any juror observed the handcuff, and there is no reason to believe based on the trial court's thorough inquiry that any juror would have seen it. Accordingly, any belief that the jury saw the handcuff is unsupported by the record and speculative, which cannot constitute good cause to justify release of juror identifying information. (*Cook*, *supra*, 236 Cal.App.4th at pp. 345-346.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KIN, J.*

We concur:

KRIEGLER, Acting P. J.

---

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

BAKER, J., Concurring

I concur in the result reached by the majority. I write separately to set forth my views concerning the misstatement of law claims defendant Luis Villaneda (defendant) raises in connection with the prosecution's summation and rebuttal argument. (I join fully in the majority's rationale for rejecting defendant's remaining misconduct claims, as well as his other claims of error.)

I agree that defendant's failure to raise a contemporaneous objection at trial forfeited his contention that the prosecution during closing argument misstated its burden of proof. Anticipating a forfeiture issue, defendant argues his attorney's failure to make such an objection constitutes ineffective assistance of counsel warranting reversal. The majority correctly states the standard of review for evaluating such a claim on direct appeal—a standard our Supreme Court has described as "particularly difficult" to meet. (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) In my judgment, a faithful application of that standard turns out to be critical to the proper resolution of the contention that the prosecution misstated the law. I will briefly explain why.

As explained in *People v. Carter* (2005) 36 Cal.4th 1114 and legion other cases, it is defendant's burden to establish he received constitutionally inadequate assistance of counsel. (*Id.* at p. 1189.) If the appellate record "'sheds no light on why counsel

acted or failed to act . . .,'" a reviewing court on direct appeal must reject an ineffective assistance of counsel claim "'unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation.'" (*Ibid*; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Boiling defendant's argument down to its essentials, he identifies two points made by the prosecution during closing argument that he believes misstated its burden of proving him guilty beyond a reasonable doubt. The first was the prosecution's exhortation during summation that jurors "must reject what is unreasonable. You must accept what is reasonable. That is your duty. You have to use your common sense and logic in finding the truth." The second involved the prosecution's invocation of the image of "Lady Justice" during rebuttal argument. The prosecution stated: "She's blindfolded, and a lot of people joke about that because the law is blind and can't see. But that's not what the blindfold means. The blindfold is to symbolize objectiv[ity] and impartiality. That is how you need to be in this case. You are justice in this case. The scales that she carried in her hand measure the strength of a case and its opposition. They weigh in the balance, one side or the other, because that is the system that we have. It's adversarial. There's one against another and it's a fluid balance because you determine beyond a reasonable doubt. You determine exactly what that balance is that convinces you beyond a reasonable doubt. It's not a set number. It probably changes from jury to jury a little bit. But that's for you to decide."

When evaluating a claim that the prosecution has misstated the law in closing argument, we must decide how jurors likely understood the challenged remarks in the context in

which they were made. (*People v. Cortez* (2016) 63 Cal.4th 101, 130-131 [defendant must show "[i]n the context of the whole argument and the instructions, there was a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner"], internal quotation marks and citation omitted.) The majority accepts defendant's position that the remarks he challenges would have been understood as statements regarding the prosecution's burden of proof. I, however, see the issue somewhat differently.

As to the first point made by the prosecution during closing argument (the statements about rejecting what is unreasonable and accepting what is reasonable), I do not believe jurors would have reasonably understood the point as a comment on the burden of proof at trial. Rather, the remarks arose in context of the prosecution's discussion of how the jury should evaluate evidence and the believability of witnesses. In that context, I believe the point was proper argument, and the ineffective assistance of counsel claim predicated on that aspect of the prosecution's summation fails for that reason. (*People v. Centeno* (2014) 60 Cal.4th 659, 672 [citing precedent "approv[ing] the prosecutor's argument that the jury must '"decide what is reasonable to believe versus unreasonable to believe" and to "accept the reasonable and reject the unreasonable"'"]; *People v. Dickey* (2005) 35 Cal.4th 884, 915.)

As to the second point, however, (the invocation of the image of Lady Justice) the context of the prosecution's remarks provides far less assurance that the jury would not have understood the remarks as a troubling mischaracterization of the standard of proof that must be met to convict defendant. True, the excerpt of the prosecution's argument I have quoted arose in

the course of the prosecution's appropriate warning to jurors that they must be impartial in reaching a decision—a warning that both preceded and followed the comments concerning the scales of justice. But the prosecution does make a specific reference to the burden of proof while discussing Lady Justice and her scales.

In my view, there are obviously grounds on which defense counsel could have objected to the prosecution's use of the Lady Justice image to describe the beyond a reasonable doubt standard of proof. As commonly imagined and depicted (a Google image search would tend to confirm this), the scales Lady Justice holds are often closely balanced, even if one is shown to outweigh the other. If imagery can ever be appropriate to describe the beyond a reasonable doubt standard (the majority rightly cautions against it), the image of closely balanced scales would nevertheless be an entirely inapposite representation of the beyond a reasonable doubt formulation that is the highest standard of proof known to California law. (See *People v. Centeno*, *supra*, 60 Cal.4th at pp. 669-670 [disapproving use of image in the shape of California]; *People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1266-1267 [disapproving use of puzzle pieces forming the Statute of Liberty].) Not only did the prosecution invoke this inapposite image, it exacerbated matters by simultaneously telling the jury that the beyond a reasonable doubt standard was a "fluid balance" and that it was for the jury to "determine exactly what that balance is." This advisement would have tended to (1) reinforce the idea that the beyond a reasonable doubt standard of proof for conviction could be tantamount to an imagined picture of closely balanced scales and (2) undermine the trial court's instruction that the jury must define proof beyond a reasonable doubt as proof that would leave

the jury with an abiding conviction that the charges against defendant were true.

Although there was a clear basis to object, I agree it is conceivable defendant's attorney might have made a tactical choice to refrain from objecting. While the context of the challenged Lady Justice comments does not assuage my concern that the jurors may well have understood the remarks in an improper or erroneous manner, it is possible that counsel for defendant at trial could have decided that the brief reference to Lady Justice's scales in context of a discussion of the need to be impartial (and in light of the overall content of the prosecution's closing argument) was not likely to prompt the jurors to misapply the law.

On direct appeal, however, we do not know what defense counsel's actual reasons were for opting not to object during the prosecution's rebuttal argument. Because I believe it is possible (I reserve judgment on whether it is likely) that the absence of an objection could have been a reasonable tactical choice, I agree defendant's ineffective assistance of counsel argument does not carry the day. Precedent makes clear that such claims are better resolved on habeas review, where presumably there would be a fuller record of the reasons for counsel's actions (or omissions). (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 267 ["[C]laims of ineffective assistance are often more appropriately litigated in a habeas corpus proceeding"].) Should we again confront the issue in a habeas proceeding with a more developed record, the

"particularly difficult" standard of review that now applies will apply no longer.

BAKER, J.