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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

THE PEOPLE, Plaintiff and Respondent, v. MARCUS DELL GRANT, Defendant and Appellant.	B280057 (Los Angeles County Super. Ct. No. TA139078)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed and remanded.

Laura S. Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., Stephanie A. Miyoshi and William Shin, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Marcus Dell Grant (defendant) was convicted by a jury of the first degree murder of Jose Avila (Pen. Code, § 187)[1] and the attempted murder of Jose's father, Federico Avila (§§ 187, 664).[2] The jury found true the allegations that the attempted murder was willful, deliberate and premeditated. The jury also found true the allegations defendant committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). In addition, the jury found true the allegations that defendant personally used and personally and intentionally discharged a firearm in the commission of the offenses, causing great bodily injury and death to Jose (§ 12022.53, subds. (b), (c) & (d)), and the allegations that a principal personally used and personally and intentionally discharged a firearm in the commission of the offenses, causing great bodily injury and death to Jose (§ 12022.53, subds. (b), (c), (d) & (e)(1)).

The trial court sentenced defendant to a total term of 85 years to life in state prison, consisting of a term of 25 years to life for the murder conviction plus 25 years to life for the section 12022.53, subdivision (e) firearm enhancement and a term of 15 years to life for the attempted murder conviction plus 20 years to life for the section 12022.53, subdivision (c) firearm allegation.

Defendant filed a timely notice of appeal. He initially raised four claims of error, all involving prosecutorial misconduct during closing argument. In a supplemental brief, defendant requested that we remand this matter to permit the trial court to

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[1] Further undesignated statutory references are to the Penal Code.

[2] We refer to Jose and Federico Avila by their first names for the sake of clarity.

exercise its newly acquired discretion to impose firearm enhancements imposed pursuant to section 12022.53.

Defendant has forfeited his claims of prosecutorial misconduct by failing to object and request an admonition in the trial court. Defendant claims, in the alternative, that his counsel's failure to object constituted ineffective assistance of counsel. We remand the matter to permit the trial court to exercise its discretion under section 12022.53 and affirm the judgment in all other respects.

BACKGROUND

On November 14, 2015, sometime after 9:00 p.m. Federico was sitting with his 15-year-old son Jose on the front porch of their house on Keene Avenue in Compton. Federico saw two African-American men wearing sweatshirts walk by the house. The men turned and walked back toward the Avila house. One of them fired two shots. One bullet struck Jose in the head and killed him. Federico was not hit. Police later recovered two expended .45-caliber casings from the scene.

After the shooting, Federico observed the larger of the two men peek over the gate to his front yard. Federico later identified the larger man as Laurence Hunter. He was not able to identify the other man.

Police obtained video from security cameras at neighboring houses. The video confirmed that two men were involved in the shooting. Police identified the larger of the two men as Hunter. Further investigation revealed that Hunter associated with defendant and with Jonathon Mayo.

Police interviewed Mayo and Hunter. Mayo eventually told police that he saw defendant with a handgun on the day of the shootings, and that defendant said he wanted to "bust on the

B13s."[3] Hunter agreed. The two men left Steven Jordan's house for about an hour. After they returned, Mayo overheard defendant say, "I busted on the B13s."[4] Hunter eventually admitted he accompanied defendant to the Avila residence but claimed that he did not know what defendant intended to do. According to Hunter, defendant pulled out a gun and suddenly started shooting.

Hunter and defendant were charged with the murder of Jose and the attempted murder of Federico. Despite having made an incriminating pretrial statement, Hunter appeared prepared to go to trial. On the eve of trial, however, Hunter entered into a plea agreement. As part of that agreement, Hunter testified for the prosecution at trial. Mayo, who was not charged in connection with the shootings, testified as a prosecution witness.

Mayo testified that a few days before the shooting, defendant told Mayo that he had purchased a "burner" gun. Mayo also testified that on the day of the shooting, he walked with Hunter to the home of Jordan.[5] As they walked down Keene Avenue, Hunter, an admitted member of the CPP gang, yelled out derogatory statements about rival gang Barrio 13. Mayo denied being a CPP gang member.

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[3] The Barrio 13 gang is sometimes referred to as B-13's or B13's in the record.

[4] Police interviewed Mayo twice. The first interview occurred while Mayo was out of jail on a work release program. The second interview occurred in county jail.

[5] Jordan denied being a Campanella Park Piru (CPP) gang member.

While Mayo and Jordan were playing video games, defendant arrived at the house. According to Hunter, defendant was an associate of CPP; defendant would have to do shootings to become a member. Mayo noticed that defendant was wearing a gray hooded sweatshirt that read "Rosecrans Entertainment." At some point, Mayo noticed defendant holding a black semiautomatic handgun, which looked like the type of gun carried by police. Defendant said, "Let's go bust on some B-13's." Mayo understood "bust" to mean shoot. Hunter replied, "Yeah, let's go."

According to Hunter, defendant had a black .45-caliber handgun in his waistband. Hunter did not remember what defendant was wearing. Hunter himself put on a sweatshirt and pulled up the hood. The two men left Jordan's house. According to Hunter, he intended to act as "backup." If defendant did not fire his gun for some reason, Hunter would have fired the gun.

The two men went to Keene Avenue to look for Barrio 13 members. As the men walked by a house that was known as a Barrio 13 gathering spot, they noticed that there were people outside. Hunter and defendant returned to the house and stopped in front of it. Defendant fired two shots over the gate, which was about five feet tall. Defendant and Hunter then fled. They went back to Jordan's house.

Mayo was still at Jordan's house when Hunter and defendant returned. They were walking quickly and were out of breath. Mayo heard sirens and a helicopter. He asked Hunter and defendant what had happened, and they replied, "Nothing happened, don't worry about it." Later Mayo overheard defendant and Hunter bragging about "busting on some B-13s" on a porch. Defendant left Jordan's house about 30 to 60 minutes after his return. Hunter spent the night at the house.

Los Angeles County Sheriff's Department Detective Nikolai Vavakin testified for the prosecution as a gang expert; Vavakin worked on a task force targeting the CPP gang. He explained that the gang had about 130 members; the common activities of the gang included tagging, robberies, shootings, and murder.

Vavakin explained that CPP and Barrio 13 were rivals. Barrio 13 controlled the north side of Compton while CPP controlled the west side. Aprilia Avenue, where Jordan's house was located, was in CPP territory. According to Vavakin, the house was known as a CPP gang hangout. Keene Avenue, where the Avila residence was located, was also in CPP territory. Some Barrio 13 members had a "pass" to live on Keene Avenue, however.

Vavakin opined that Hunter was a member of CPP. Vavakin opined that defendant was an "associate" of both the CPP gang and the West Side Piru (WSP) gang. CPP was originally a subset of WSP but Vavakin considered them to be part of the same gang. Vavakin's opinion about defendant was based on defendant's WSP tattoos, gang moniker of "Hot Boy," and presence at known CPP hangout. Vavakin also opined that Jordan was an associate of CPP and Mayo was a member of CPP. Vavakin acknowledged that Mayo might no longer be an active CPP member.

In response to a hypothetical question based on the facts of this case, Vavakin opined that the shooting was done in association with and for the benefit of a criminal street gang. In Vavakin's opinion, the shooting benefited CPP because it boosted the gang's standing among other gangs and the people who lived in the neighborhood.

Defendant offered an alibi defense through the testimony of his father, Manuel Grant.[6] Manuel testified that he received a phone call from defendant on November 14, 2015, and in response drove to Carson, where he picked defendant up about 7:30 p.m. The two men picked up defendant's girlfriend and then returned to the Grant residence in Hawthorne. They arrived home about 9:00 p.m. Defendant and his girlfriend went upstairs to defendant's bedroom. Manuel did not see defendant until the next morning.

In rebuttal, the prosecution offered expert testimony showing that defendant's cell phone connected with a tower near the Avila residence at 9:06 p.m. and 9:10 p.m. on the day of the shooting. The expert opined that if the cell phone were located in Hawthorne, it would not use a tower near the Avila residence, which was 5.9 miles from the Grant residence in Hawthorne.

Manuel testified in surrebuttal that defendant did not have a cell phone in November 2015 and the cell phone number at issue was for a phone belonging to defendant's sister, who was 10 years old at the time of the shootings.

DISCUSSION

Defendant initially made four claims on appeal, all involving the prosecutor's remarks during closing argument. He contended the prosecutor inaccurately minimized the benefits of Hunter's plea agreement, argued without supporting evidence that Hunter and defendant would be housed together in prison, improperly described the impact of the crime on Federico and the rest of the Avila family, and chilled jury deliberations by urging jurors to report their fellow jurors for misconduct.

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[6] We refer to Manuel Grant by his first name for the sake of clarity.

Defendant did not object to any of these remarks or request curative admonitions. We find that defendant forfeited his prison housing and victim impact claims by failing to object. We consider his claim that counsel's failure to object constituted ineffective assistance of counsel and find that defense counsel made a reasonable tactical decision not to object to those arguments but to address the remarks in defense closing argument.

An objection to the prosecutor's description of the plea agreement would have been futile, and so we consider the merits of that claim. We find no misconduct on the prosecutor's part. An admonition to correct the prosecutor's request for the jurors to report misconduct would have likely been ineffective, and so we consider the merits of that claim. We conclude that defendant has not shown any prejudice from the remarks.

While this appeal was pending, defendant filed a supplemental brief in which he contends this matter should be remanded to permit the trial court to exercise its newly acquired discretion to strike section 12022.53 firearm enhancements. We agree.

1. The Prosecutor Did Not Misleadingly Minimize the Benefit of Hunter's Reduced Sentence Under the Plea Agreement

Defendant contends that the prosecutor committed misconduct in closing argument by inaccurately minimizing the benefit Hunter would receive for testifying truthfully against defendant. The prosecutor argued that Hunter was "facing anywhere between 31 years to 139-years-to-life, and that's decided by the judge." Defendant maintains the agreement provided an "either or" choice: Hunter would get 31 years if he testified truthfully or 139-years-to-life if he did not. Defendant

contends the harm from the prosecutor's argument was exacerbated by the trial court's error in sustaining the prosecutor's objection to defense counsel's attempt to provide an accurate description of the agreement in defense closing argument.

a. Defendant Has Not Forfeited His Claim by Failing to Object

Defendant acknowledges that he did not object to the prosecutor's argument, but contends that any objection would have been futile. We agree.

" 'As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1219; see *People v. Thompson* (2010) 49 Cal.4th 79, 120-121.) It is well settled, however, that a "defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile." (*People v. Hill* (1998) 17 Cal.4th 800, 820.)

The trial court sustained the prosecutor's objection that defense counsel was misstating the plea agreement in the defense's closing argument. The trial court's ruling indicates that the court believed that the prosecutor's characterization of the agreement was accurate and any objection by defense counsel would have been overruled. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1184, fn. 27 [failure to object excused where court's denial of motion to modify verdict demonstrated that objection by defense counsel to prosecutor's closing argument almost certainly would have been overruled]; *People v. Zambrano* (2004) 124

Cal.App.4th 228, 237 [court's ruling on a similar objection showed that earlier objection would have been futile].)

b. The Terms of the Plea Agreement Gave the Trial Court the Authority to Determine If Hunter Testified Truthfully and to Select Hunter's Sentence If He Testified Falsely

The trial court's understanding of the plea agreement, as reflected in its decision to sustain the prosecutor's objection, was accurate. The record as a whole reflects that the prosecutor, Hunter, and the court all agreed that Hunter would only receive the 31-year sentence if the court determined that Hunter testified truthfully. If the court determined that Hunter had not testified truthfully, the court had the option to impose a sentence up to the maximum term of 139 years to life.

When the court first discussed the plea agreement with Hunter, the court stated its understanding that if the court found that Hunter testified truthfully, the court would sentence Hunter to the 31-year term offered by the prosecutor. The court calculated that Hunter's maximum exposure if convicted on counts 1 through 3, would be 139 years to life pursuant to the "Three Strikes" law. The court opined that there was "zero likelihood" that the court would grant a motion to strike Hunter's prior conviction. The court explained that "[i]f [Hunter] chooses to get up on the stand and lie, then I'll sentence him to 139-years-to-life. *Or potentially, I should say*. That's the maximum that he can have. So that's how this court would handle that." (Italics added.) The prosecutor replied, "Fine." Hunter agreed that he understood.

Later the same day, the court held a hearing to finalize the plea agreement. The court repeated that the prosecutor's offer was for 31 years if the court determined that Hunter testified

truthfully. The court added that if the court determined that Hunter testified untruthfully, "the court can then sentence you, at least to counts 1 through 3, to the maximum of 139-years-to life." Hunter stated that he understood, and his counsel stated that he had nothing to add. The prosecutor agreed that the court's statement reflected the agreement and confirmed she had nothing to add.

The written plea agreement likewise reflects the court's option to sentence Hunter up to the maximum term. Paragraph 6 of the agreement states that Hunter's failure to testify truthfully "will subject him to being sentenced to the maximum sentence of one hundred and thirty-nine years to life." Paragraph 7 states: "Should the Court determine that the Witness has not testified truthfully, the Witness understands that . . . the Court may sentence the Witness *up to* the maximum sentence of one hundred and thirty-nine years to life." (Italics added.)

During a subsequent discussion on the admissibility of the terms of the plea agreement, the prosecutor noted that Hunter was "facing a minimum of 31 years determinate or up to 139-years-to-life." In responding, defense counsel argued that the defense "should be able to inquire as to the full extent of the bargain [Hunter] received. And I think the truth of it is that he is—from 31 years to potentially 139-years-to-life."

In light of these discussions, it appears that it was defense counsel who inaccurately characterized the agreement when he argued that the agreement provided for "one or the other," that is either 31 years or 139 years, and "not anywhere in between." Defense counsel was mistaken in asserting in his closing argument that the prosecutor's argument that Hunter "can get sentenced anywhere in between" 31 years and 139 years was incorrect. Defense counsel's error was understandable, given

that defendant was not a party to the plea agreement; defense counsel was not present for all of the discussions of that agreement, and Hunter's trial testimony about the agreement was inconsistent. We find that the trial court properly sustained the prosecutor's objection to the argument.

On appeal, defendant argues that Hunter could not be sentenced "anywhere" between the two extremes. Defendant is technically correct. The Penal Code prescribes the terms of convictions of murder and attempted murder and for true findings on gang and weapons enhancement allegations. These requirements limit the possible alternate sentence options available to the court. The prosecutor's use of this term was unlikely to have been understood literally by jurors, who had no reason to be aware of the details of California sentencing law. The prosecutor's remarks are most reasonably understood as indicating that the trial court was not required to sentence Hunter to the maximum term if he testified falsely.

c. The Prosecutor Did Not Create a Misleading Impression of the Benefits of the Plea Agreement

During closing argument, a prosecutor must avoid referring to facts that are not in evidence. (*People v. Linton* (2013) 56 Cal.4th 1146, 1207.) Here, the written plea agreement was not entered into evidence, and so the only actual evidence of the agreement's terms came from Hunter's testimony. That testimony was inconsistent.

During direct examination, the prosecutor asked Hunter, "So as part of this leniency offer, you left it to the judge's discretion to sentence you, anywhere from either 31 years on the voluntary manslaughter or up to 139-years-to-life on the murder, attempted murder, and felon with a firearm; is that correct?" Hunter replied, "Yes." When cross-examined by defense counsel,

Hunter testified that he believed he would receive 31 years and that "no matter what" he would get "at least 31 years." He then testified that he would get 139-years-to-life if he did not testify truthfully. Hunter agreed with defense counsel that he had "two options: either 31 or 139-to-life."

"[P]rosecutors have wide latitude to present vigorous arguments so long as they are a fair comment on the evidence, including reasonable inferences and deductions from it." (*People v. Leon* (2015) 61 Cal.4th 569, 606; *see People v. Sandoval* (2015) 62 Cal.4th 394, 439.) Here, the prosecutor argued that Hunter was "facing anywhere between 31 years to 139-years-to-life, and that's decided by the judge." That is a fair comment on Hunter's testimony on direct examination.

Defendant argues, in effect, that even if the prosecutor was technically correct that Hunter could be given a sentence somewhere between 31 years and 139 years to life, the prosecutor used that possibility to give the jury the false impression that Hunter could not count on receiving any benefit from the plea agreement and the agreement, in any event, did not necessarily represent a drastic reduction from the sentence he would otherwise receive.

When a claim of misconduct is based on the prosecutor's statements in closing argument, the defendant must show that, in the context of the entire argument and the instructions given, there is a reasonable likelihood the jury construed or applied the challenged remarks in an objectionable fashion. (*People v. Rangel, supra*, 62 Cal.4th at p. 1219; *People v. Mendoza* (2016) 62 Cal.4th 856, 905.)

Here, there is no reasonable likelihood that the jury would have understood the prosecutor's remarks in an objectionable manner. The prosecutor initially stated only that Hunter was

"facing anywhere between 31 years to 139-years-to-life, and that's decided by the judge," a somewhat vague description of the agreement. In rebuttal closing, the prosecutor added that the sentence "can be anywhere in between, depending on what the judge feels is appropriate, *based on [Hunter's] testimony*." (Italics added.) These remarks, when considered together, convey the contingent nature of the plea agreement. Both when Hunter entered into the plea agreement and throughout trial, Hunter could not count on receiving 31 years in prison for his testimony.

It was undisputed that Hunter had to satisfy the trial judge that he had testified truthfully to receive any benefit under the plea agreement. As defense counsel brought out on cross-examination of Hunter, there was no pretrial agreement as to what was the "truth." It was generally agreed that the trial court would determine whether Hunter testified truthfully, and so it was at least theoretically possible that Hunter could tell the truth but not be believed by the court. Thus, Hunter was taking a risk when he entered into the plea agreement, and this risk was fairly reflected in the prosecutor's closing argument.

Defendant attempts to buttress his claim that the prosecutor created a misleading impression of the agreement by pointing to the prosecutor's argument following the prosecutor's discussion of the terms of the agreement. Then, the prosecutor asked: "So what does [Hunter] really get? Nothing. He got nothing." In context, these remarks were not directed to the amount of time Hunter might spend in prison. They referenced the alleged dangers Hunter faced as (in the argot of prison culture) a "snitch." The prosecutor had just argued, accurately, that even if Hunter testified truthfully, he would spend at least the next 31 years in prison, where he would be marked as a "snitch." Hunter's "snitch" status, the prosecutor argued, meant

that he got no real reward—"nothing"—for agreeing to testify. We assign no misconduct to the prosecutor's inference here.

2. Defense Counsel Made a Reasonable and Effective Tactical Decision to Address the Prosecutor's Remarks About Prison During Defense Closing Argument

The prosecutor argued that Hunter would not benefit from his plea agreement because he would be labeled as a "snitch" in prison and subject to being assaulted or killed. The prosecutor added, "If defendant Grant was convicted, [defendant] would also go to prison and be in there with [Hunter,] the person who snitched on [defendant]. Now, who do you think has more to worry about? It's going to be the snitch."

Defendant contends the prosecutor committed misconduct when she argued that Hunter would be in prison with defendant and suggested that defendant would pose a threat to Hunter. He asserts there is no evidence that the two men would be housed together in prison or that defendant had ever threatened Hunter.

a. Hunter's Testimony and the Prosecutor's Closing Argument

Hunter testified that a "snitch" is "[s]omeone that tells." "Lots of things" happen to snitches, such as being "[s]hot, stabbed, anything." If a person was "green lighted," it meant the gang had put a hit out on the person. A person could be green lighted for testifying in court. Hunter was concerned about getting hurt. He began to worry about his safety when he went to jail.

Defense counsel also questioned Hunter about being "green lighted." He then asked, "So is it—is it your testimony that—that you agreed to testify against [defendant], believing that you might have a hit out on you, and you [*sic*] gonna be in the jail for

the next 30 years, and you agreed to testify against [defendant], thinking there might be a hit out on you for the next 30 years?" Hunter replied, "Yeah." Hunter testified that he had been threatened by another inmate since talking to the police on January 14, 2016. On recross-examination, Hunter stated that he was threatened by other inmates, but not by appellant.

The prosecutor's full argument was that Hunter "came in and testified. And for his reward, not only will he go to prison, he will be marked as a snitch in prison. He has already been threatened. Wherever he goes, for the next 31 years to 139-years-to-life, he will—if he makes—he will have a snitch jacket, and as you know, and you heard from him, you can be green lighted for that. That is his reward." The prosecutor continued, "And he came in here, testifying, knowing that, if defendant Grant was convicted, that the person he testified against would also go to prison and be in there with the person who snitched on him. Now, who do you think has more to worry about? It's going to be the snitch. There's a reason there's that expression, 'snitches get stitches.' But it's going to be the snitch. So what does he really get? Nothing. He got nothing."

b. Defendant Has Forfeited This Claim

A defendant may not complain on appeal of prosecutorial misconduct unless the defendant objected and requested that the jury be admonished to disregard the prosecutor's remarks (*People v. Rangel, supra*, 62 Cal.4th 1192, 1219; see *People v. Thompson, supra,* 49 Cal.4th 79, 120-121.) Only when an admonition would not have cured the harm is the claim of prosecutorial misconduct preserved for appellate review. (*People v. Thompson, supra*, 49 Cal.4th at p. 121.)

Defendant has not shown that an admonition would have been ineffective to cure any harm from the prosecutor's

statements about prison and snitches. Accordingly, defendant has forfeited this claim.

Although appellant asks us to exercise our discretion to review the prosecutor's remarks even in the absence of objection, appellant provides no reason for us to do so under the facts of this case. The mere claim that the misconduct involved a reference to matters outside the record is not a sufficient reason: the forfeiture rule applies to all forms of prosecutorial misconduct.

c. Defendant Has Not Shown Ineffective Assistance of Counsel

Defendant claims that if his counsel's failure to object resulted in a forfeiture of his claim, defendant received ineffective assistance of counsel. Defendant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, 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.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington*, *supra*, at p. 694.) " ' "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " ' " (*People v. Thomas* (1992) 2 Cal.4th 489, 530-531.)

" '[W]e accord great deference to counsel's tactical decisions' (*People v. Frye* (1998) 18 Cal.4th 894, 979), and we have

explained that 'courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight' (*People v. Scott* (1997) 15 Cal.4th 1188, 1212). 'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)" (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.) We note that our Supreme Court has repeatedly pointed out that " '[a]n attorney may choose not to object for many reasons, and the failure to object rarely establishes ineffectiveness of counsel.' " (*People v. Avena* (1996) 13 Cal.4th 394, 441.)

The prosecutor's remarks about prison housing are ambiguous. It is far from clear that reasonable jurors would understand the prosecutor as claiming Hunter and defendant would be housed in the exact same prison unit, and with defendant having some sort of physical access to Hunter. It is also unclear that jurors would understand the prosecutor as arguing that defendant himself posed a direct physical threat to Hunter. It may have been sound trial strategy for defense counsel to object to these ambiguous remarks and the comments about the dangers of being a snitch, but that was not the only sound strategy available to him. Defense counsel's decision to not object but to wait to address the prosecutor's arguments during his own argument was equally sound. A detailed rebuttal in closing argument may be more persuasive and effective in a particular case than an objection and admonishment.

Here, defense counsel made a two-pronged attack on the snitch remarks in his own closing argument. First, counsel argued that the prosecutor was trying in a number of ways to appeal to the jury's emotions, and these appeals were not helpful. One of those ways, defense counsel explained, occurred when the

prosecutor told jurors, "oh, it's going to be so dangerous for—for Laurence Hunter. In jail, it's going to [*sic*] so dangerous. He's a snitch, and he's going to be green lit. His life is in danger. How does that help you make your decision? It only makes it emotional."

Defense counsel also addressed the snitch argument in terms of the overall defense position that defendant was not involved in the shooting and Hunter was protecting someone in his gang by testifying against defendant, who was a "nobody." Counsel argued Hunter would not put his life in jeopardy for 30 years if he really believed there would be consequences. Counsel maintained, "If you were a snitch and your statements help your gang out, meaning that it shields somebody else who is from your gang, then it's not—not only are you not a snitch, you're a kind of hero." Later, counsel stated, "When you telling on your fellow homies, then that's snitching. When you telling on nobody and that nobody benefits us—so if I take any attention off of anybody from the hood and put it on somebody else, that's not a snitch."

The choice between such sound strategies is particularly in the province of trial counsel and not this court. We do not "second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight." (*People v. Scott, supra,* 15 Cal.4th at p. 1212.)

3. The Prosecutor's Remarks About the Victim's Father

Initially, the prosecutor asked jurors: "But do you think for one second that not a day passes where Mr. Federico Avila thinks to himself, 'I wish it was me. I wish it was me'? Every day. Every day he wishes it was him. Because that man right over there took the life of another person because of a gang." Later in the argument, the prosecutor repeated, "We know there were two shots fired, and Mr. Avila said, 'It missed me.' And like I said

from the outset, every day, I'm sure, he wishes that he had been slightly over to the left, to take that bullet for his son."

Defendant contends that these statements improperly and implicitly encouraged jurors to become advocates for the Avila family rather than impartial judges of the facts. Then, defendant asserts, the prosecutor made this point explicit by telling jurors, "The Avila family has been waiting 338 days for justice. Don't deny them that. Find the defendant guilty on both counts and true on all the allegations."

Defendant characterizes the statements as prohibited "victim impact" arguments and contends that the emotions arising from such an argument "are unbridled, [and] are hard to rein in." (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1206 (*Vance*).) Though he admits no objection was interposed, he now requests us to exercise our discretion to consider the merits of his claim because " ' "you can't unring a bell." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 845 (*Hill*).) We accept defendant's request, but find no merit to his claim. The prosecutor did not make a "victim impact" argument.

The prosecutor began her opening remarks by describing the events of this case as a "tragedy" for all involved, even to an extent for the jurors. Indeed they were. Federico was sitting right next to his son on the porch when the bullets whizzed by, narrowly missing him and fatally injuring his son. The prosecutor repeated Federico's comment, which was properly admitted at trial, "It missed me." She made two comments about what she apparently thought he meant by that statement—that Federico wished he were dead rather than his son. Given Federico's testimony, the prosecutor's passing reference might well have appeared in context as a reasonable inference from the state of the evidence. " 'A prosecutor may vigorously argue his

case, marshalling the facts and arguing inferences to be drawn therefrom.' " (*People v. Sandoval* (1992) 4 Cal.4th 155, 183.)

Further, though perhaps better left unsaid, the comments were not of the nature condemned as victim impact statements. The "victim impact" form of prosecutorial misconduct described by defendant and condemned in *Vance*, involves the prosecutor inviting "the jury to put itself in the victim's position and imagine what the victim experienced." (*Vance*, *supra*, 188 Cal.App.4th at p. 1188 [prosecutor vividly and at length described what it might have been like for the murder victim to have been suffocated, and asked the jury to "relive" the victim's emotional and physical suffering].) This form of misconduct can also occur when the prosecutor invites jurors to imagine how they would feel if the victim was one of their family members. (See *People v. Jackson* (2009) 45 Cal.4th 662, 692 [prosecutor improperly urged jurors " 'to "think about how you would feel if [the victim] were your baby, your daughter, your wife, your sister" ' "].)

The prosecutor in this case issued no such invitation. She did not ask the jury to imagine how it must have felt for Federico to sit next to his son, watch him collapse from a bullet wound, hold him in his arms as he gasped his last few breaths of life, hoping against hope he survived, only to tragically learn his son was dead. She did not ask jurors to imagine how they would feel if they survived while one of their family members was killed.

Instead, what the prosecutor did is describe what she believed were the thought processes of Federico after the crimes: a feeling of regret that he had survived while his son had been killed, and a wish that he could reverse that outcome. Even if these remarks might have had the potential for invoking sympathy for Federico, the prosecutor had already made it clear to the jury that it should not decide the case based on emotions,

stating "while you may have sympathy or empathy, you promised to not let that interfere with your . . . deliberations."

We also find no prejudice. The remarks were brief. "[A] few [such] remarks in a much longer closing argument" generally will not prejudice the defendant. (See *People v. Seumanu, supra*, 61 Cal.4th at p. 1344 [considering prosecutor's brief victim impact statements in case with strong evidence of guilt].) The remarks do not come close to the degree of pervasive emotional haranguing in the cases cited by defendant, which result in incurable prejudice. (*Vance, supra*, 188 Cal.App.4th at pp. 1194-1195; *Hill, supra,* 17 Cal.4th at p. 845 [constant and outrageous misconduct by the prosecutor involved "childish and unprofessional and . . . outrageous and unethical" actions including an "unceasing denigration of defense counsel before the jury"].)[7]

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[7] Neither do we find counsel was ineffective for failing to interpose an objection. Out of an abundance of caution, defense counsel might have objected and requested an admonition to the jury repeating that the case should not be decided on the basis of sympathy or emotion. Given the brevity of the prosecutor's remarks and the overall context in which they were made, however, it was a reasonable tactical decision for defense counsel not to object to the remarks and to address the comments in his own closing argument. (See *People v. Thomas*, *supra*, 2 Cal.4th at pp. 530-531 [courts presume that challenged action might be sound trial strategy].) Defendant has not overcome that presumption.

During closing argument, defense counsel acknowledged the emotional nature of the evidence in the case and told jurors that their most difficult task could be to "disassociate" themselves from those emotions. Counsel continued, "Now, the District Attorney tells you the same. She said, yes, you must grade this

4. Defendant Has Not Shown Prejudice from the Prosecutor's Suggestion That Jurors Report Misconduct by Fellow Jurors During Deliberation

During closing argument, the prosecutor reminded jurors that during voir dire they had "promised to leave [their] biases outside." The prosecutor added, "You promised that, if someone wasn't following the law and was bringing up biases and things they didn't disclose—fully disclose or was refusing to consider the evidence, based on some sort of prejudice for one side [*sic*] the other, that you would tell. Because we want you to use your common sense, and it's your common sense that will bring you to a just verdict."

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case absent emotions, but then she oftentimes tells you—three or four times she says that, if Mr. Avila could have changed places with his son, he would have did it in a heartbeat . . . . How does that help you decide who shot his son? It does not help you in any way. It just makes it emotional." Counsel reminded jurors that it was indeed their job to "shake off the emotion, to divorce yourself from any compassion or empathy that you feel for anybody in the case" including Mr. Hunter or defendant. Jurors should engage in a "detached, unemotional analysis of the evidence, and [to] make a determination on whether or not the prosecution has given . . . sufficient evidence to reach to the level of proof beyond a reasonable doubt."

By choosing to address the issue of the emotional impact of the evidence directly with the jury and to acknowledge the suffering of the Avila family, defense counsel created an opportunity to build rapport with jurors. Defense counsel's sympathetic approach also supported the overall defense strategy that defendant was innocent and Hunter was blaming defendant for the shooting in order to protect someone else. We declined to find counsel ineffective for choosing this tact instead of interposing an objection.

Defendant contends the prosecutor's remarks were improper and unnecessarily chilled the deliberative process by suggesting that jurors should inform the court if another juror was not following the law or had biases that they did not disclose during voir dire.

a. Defendant Has Not Forfeited This Claim

Defendant did not object to the prosecutor's remarks. It is, however, difficult to imagine an effective and appropriate admonition to counteract the prosecutor's remarks.[8] Accordingly, as defendant requests, we exercise our discretion to review a claim of error in the absence of an objection.

b. Defendant Has Not Shown Prejudice

Our Supreme Court has disapproved a pattern jury instruction that conveyed an obligation similar to the one referred to in the prosecutor's remarks in this case. Former CALJIC No. 17.41.1 told the jury that " 'should . . . any juror refuse[] to deliberate or express[] an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.' (CALJIC No. 17.41.1 (1998 new) (6th ed. 1996).)" (*People v. Engelman* (2002) 28 Cal.4th 436, 439 (*Engelman*).) The court found the instruction to have the potential to curtail deliberations. (*Id.* at p. 440.) The court also found the instruction to be unnecessary because "[i]nstructions other than . . . CALJIC No. 17.41.1 are adequate to guard the jury against misconduct without focusing unduly upon the deliberative process." (*Id.* at p. 448.)

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[8] It would, at best, be awkward for the trial judge to instruct the jury *not* to report perceived misconduct.

The Supreme Court held that giving the instruction was not error, however (*Engelman, supra,* 28 Cal.4th at p. 449), and "the instruction does not infringe upon defendant's federal or state constitutional right to trial by jury or his state constitutional right to a unanimous verdict." (*Id*. at pp. 439–440.) The court found no grounds for reversal. (*Ibid*.) It was "caution" that led the court "to conclude that in the future the instruction should not be given in criminal trials in California" (*id*. at p. 440) and to exercise its "supervisory power" to "direct that CALJIC No. 17.41.1 not be given in trials conducted in the future" (*id*. at p. 449).

More recently, the Supreme Court considered whether comments by the court and the prosecutor urging jurors to bring misconduct by fellow jurors to the court's attention were objectionable on the same grounds as former CALJIC No. 17.41.1. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1055 (*Barnwell*).) The court did not directly address this issue, but simply noted that in *Engelman* the court had made clear that "even the giving of a formal jury instruction on these topics would not have infringed upon defendant's federal or state constitutional rights to trial by jury or his state constitutional right to a unanimous verdict." (*Barnwell, supra*, at p. 1055.)

Respondent's arguments that the prosecutor's remarks were "proper" under *Engelman* and *Barnwell* are not well taken. As our Supreme Court made clear in those cases, telling a jury to report misconduct by fellow jurors is unnecessary and risks intruding into the deliberative process. A prosecutor's remarks, however, may have less potential for intrusion than a formal instruction from the trial court judge. (See *Barnwell, supra*, 41 Cal.4th at p. 1055.)

Defendant contends that the error was structural and reversible per se. Defendant argues that the remarks by their nature result in a miscarriage of justice and the consequences of the remarks are necessarily unquantifiable and indeterminate. He asserts the remarks therefore constitute structural error.

"An error is ' "structural," and thus subject to automatic reversal, only in a "very limited class of cases," ' such as the complete denial of counsel, a biased decision maker, racial discrimination in jury selection, denial of self-representation at trial, denial of a public trial, and a defective reasonable-doubt instruction." (*People v. Mil* (2012) 53 Cal.4th 400, 410.) At a minimum, these errors are all of constitutional dimensions. The prosecutor's remarks in this case are not. (See *Barnwell, supra,* 41 Cal.4th at p. 1055.) Further, as the reasoning of our Supreme Court in *Barnwell* and *Engelman* shows, remarks about reporting juror misconduct do not "by their nature" result in a miscarriage of justice. In both cases, the court found a directive to report juror misconduct did not require reversal. It was simply "caution" that led the court "to conclude that in the future the instruction should not be given." (*Engelman, supra*, 28 Cal.4th at p. 440.)

Defendant has pointed to nothing that suggests jury deliberations were chilled.[9] He has not shown prejudice from the prosecutor's otherwise inadvisable remarks.

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[9] We note that no such indications occurred in this case. After a juror failed to appear for a second day of deliberations, an alternate was substituted. Jurors deliberated for the remainder of the morning, resumed deliberations after lunch and then heard two sets of testimony readback. They then reached a verdict.

5. There Is No Cumulative Error

Defendant contends the cumulative prejudice from the prosecutor's misconduct during closing argument violated his right to a fair trial and due process of law. He asserts reversal is required.

We have found only one instance of cognizable error by the prosecutor, and that error was not prejudicial. There is no error or prejudice to accumulate.

6. Remand Is Appropriate to Permit the Trial Court to Exercise Its Discretion Under Section 12022.53

On January 1, 2018, Senate Bill No. 620 (2017–2018 Reg. Sess.) took effect, which amends section 12022.53, subdivision (h), to remove the prohibition against striking the gun use enhancements under this and other statutes. (Stats. 2017, ch. 682, § 2.) The discretion to strike a firearm enhancement under section 12022.53 may be exercised as to any defendant whose conviction is not final as of the effective date of the amendment. (See *In re Estrada* (1965) 63 Cal.2d 740, 742–748; *People v. Brown* (2012) 54 Cal.4th 314, 323.) Defendant's conviction was pending on appeal in this court and so was not final on January 1, 2018. (See *People v. Vieira* (2005) 35 Cal.4th 264, 305-306 ["a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal"]; *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 ["A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari have expired."]; see also *Bell v. Maryland* (1964) 378 U.S. 226, 230 ["The rule applies to any such [criminal] proceeding which, at the time of the supervening legislation, has not yet reached final disposition in the highest court authorized to review it."].) Defendant requests that we

remand this matter to permit the trial court to exercise its discretion.

The Attorney General relies on *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) to argue remand is unwarranted because there is no reasonable possibility the court would exercise its new discretion to strike the firearm enhancement. In *Gutierrez*, the trial court sentenced the defendant to the maximum possible sentence, which included an enhancement for a prior strike conviction and two other discretionary enhancements. (*Id*. at p. 1896.) While the defendant's appeal was pending, the Supreme Court held that trial courts have discretion to strike prior convictions under the Three Strikes law in the furtherance of justice. The Court of Appeal, however, declined to remand for resentencing. The court reasoned it was obvious the trial court would not exercise its newfound discretion given it increased the defendant's sentence beyond what it believed was required by the Three Strikes law and stated the maximum sentence was appropriate. (*Ibid*.)

The trial court recognized that the only discretion it had in sentencing defendant was the decision whether the sentence for count 2 should run concurrent or consecutive to the sentence for count 1. The court was faced with a choice of 85 years to life if it imposed consecutive sentences and 50 years to life if it imposed concurrent sentences. The court found the higher of the two sentences to be more appropriate. The court said nothing to indicate that it would find a sentence, which fell between the two terms, to be inappropriate; the court's reticence is understandable since the court had no discretion to impose such a sentence. We interpret the court's statements to suggest the court may be inclined to strike one or more of the firearm enhancements on remand. As a result, we reverse that portion of

defendant's sentence related to the firearm enhancements and remand this matter for the trial court to exercise its newly granted discretion under subdivision (h) of section 12022.53.[10]

On remand, the trial court may strike the firearm enhancement(s) or strike only the punishment for the enhancement(s). (§ 1385, subdivision (a); *In re Pacheco* (2007) 155 Cal.App.4th 1439, 1443–1446.) "In determining whether to strike the entire enhancement or only the punishment for the enhancement, the court may consider the effect that striking the enhancement would have on the status of the crime as a strike, the accurate reflection of the defendant's criminal conduct on his or her record, the effect it may have on the award of custody credits, and any other relevant consideration." (Cal. Rules of Court, rule 4.428(b).) If the trial court exercises its discretion to strike only the punishment, the gun enhancement will remain in the defendant's criminal record, and may affect the award of custody credits. Specifically, subdivision (c)(22) of section 667.5 provides that a violent felony includes "[a]ny violation of Section 12022.53." As a violent felony, the defendant would be entitled to a maximum of 15 percent worktime credits. (§ 2933.1, subd. (a).)

DISPOSITION

The matter is remanded to allow the trial court to exercise its discretion to strike the firearm enhancements under section

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[10] Although the trial court stated at defendant's sentencing hearing that the court was staying the "lesser" firearm enhancements, and the gang enhancement for the murder conviction, this is not reflected in the abstract of judgment. On remand, the court should correct the abstract of judgment to fully reflect its imposition and stay of the any remaining "lesser" firearm enhancements and the gang enhancement.

12022.53, subdivision (h). The judgment is affirmed in all other respects.

ROGAN, J.*

I CONCUR:

BIGELOW, P. J.

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

Rubin, J. – Concurring:

The line between forceful advocacy and prosecutorial misconduct in a criminal case is often hard to identify. But it exists. In my view, that line was crossed here by the prosecutor's call that the jury should consider that Mr. Avila, the murder victim's father, undoubtedly wished he could take his murdered son's place. Before providing the prosecutor's summation verbatim, I turn to some well-established principles.

" 'It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." [Citation.]' " (*People v. Redd* (2010) 48 Cal.4th 691, 742.) "It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial." (*People v. Fields* (1983) 35 Cal.3d 329, 362.)

More to the point, our Supreme Court has consistently held that, " 'During the guilt phase of a capital trial, it is misconduct for a prosecutor to appeal to the passions of the jurors by urging them to imagine the suffering of the victim. "We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." ' " (*People v. Vance* (2010) 188 Cal.App.4th 1182, 1192, citing *People v. Jackson* (2009) 45 Cal.4th 662, 691, *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; *People v. Mendoza* (2007) 42 Cal.4th 686, 704*; People v. Arias* (1996) 13 Cal.4th 92, 160; *People v. Pensinger* (1991)

52 Cal.3d 1210, 1250; *People v. Millwee* (1998) 18 Cal.4th 96, 137.)

In *People v. Vance, supra,* 188 Cal.App.4th 1182, the First District reversed a first degree murder conviction because of prosecutorial misconduct of the type at issue here – imploring the jury to consider the crime's impact on the victim and the victim's family. Justice Richman, writing for the court, described this form of argument in this manner: "There is a tactic of advocacy, universally condemned across the nation, commonly known as 'The Golden Rule' argument. In its criminal variation, a prosecutor invites the jury to put itself in the victim's position and imagine what the victim experienced. This is misconduct, because it is a blatant appeal to the jury's natural sympathy for the victim." (*Id.*, at p. 1188.) The rule prohibits equally an appeal to the jury's sympathy for the victim and for the victim's family. (*Id.* at p. 1193.)

The *Vance* court canvassed decisions in a number of states, both criminal and civil cases, and concluded this prohibition against placing the jury in the shoes of the victim was "universal." (*People v. Vance, supra,* 188 Cal.App.4th at p. 1198.)[1]

It is true that the misconduct in *Vance* was pervasive and represented a major part of the prosecution argument. In the present case, the offending argument was shorter, but it was repeated and dramatically conjured up a parent's indescribable pain with which most

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[1] "California's condemnation also applies to civil cases 'in which counsel asks jurors to put themselves in the plaintiff's shoes and ask what compensation they would personally expect.' " (*People v. Vance*, *supra*, at p. 1199, quoting *Cassim v. Allstate Ins. Co* (2004) 33 Cal.4th 780, 797. See also *Janice H. v. 696 North Robertson, LLC* (2016) 1 Cal.App.5th 586, 603–604.)

if not all of the jurors could easily identify. It no doubt had its desired impact.

Almost from the start, the prosecutor exhorted the jury to consider this case through the eyes of Mr. Avila, the father, who was sitting next to his son when the son was murdered. "But do you think for one second that not a day passes where Mr. Federico Avila thinks to himself, 'I wish it was me. I wish it was me'? Every day. Every day he wishes it was him. Because that man right there took the life of another because of a gang."[2] And to bring home the point one more time, a few minutes later the prosecutor said: "Attempted murder: The defendant took at least one direct but ineffective step towards killing another person, and the defendant intended to kill that person, that's Mr. Avila, Federico Avila [father]. We know there were two shots fired, and Mr. Avila said, 'It missed me.' *And like I said from the outset, every day, I am sure, he wishes he had been slightly over to the left, to take that bullet for his son."* (Italics added.)[3]

This was prosecutorial misconduct.

Respondent on appeal acknowledges *People v. Vance* but contends it is not helpful to defendant. Respondent's Brief points to language in the *Vance* opinion that the prosecutor there "asked the jury to 'relive in

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[2] The argument was strategically placed. The Reporter's Transcript records the quoted language 4½ pages from the beginning of the prosecution's summation. The argument thus played on the jury's senses throughout almost the entirety of the prosecutor's argument on the evidence.

[3] The majority correctly observes, defendant did not object to the argument at either point. Although, I agree that a stern admonition might have ameliorated the effect of the argument on the jury, in my view the misconduct was so apparent we should address the merits. Although finding forfeiture, the majority, too, addresses the merits.

your mind's eye and in your feeling' what the victim experienced the night he was murdered." And, "defendant's violence 'touched various people.' " Respondent's Brief concludes: "Here, in contrast, the prosecutor did not ask the jury to relive the victims' experiences, nor does she discuss the suffering of the victim's family. As such, *Vance* does not establish that misconduct occurred in this case."

The two sentences are remarkable because respondent is simply wrong. The prosecutor "did ask the jury to relieve the victims' experience." Federico Avila was a victim of attempted murder, for which defendant was convicted. The prosecutor asked the jury to consider his experience in such a painful way that the prosecutor said she was sure that Mr. Avila would have wanted to take the bullet for his son. And not to parse words, Mr. Avila was not only a victim he was part of the family of the other victim (his son). It is incorrect for the respondent to argue, as it does, that the prosecutor did not "discuss the suffering of the victim's family."

Ultimately, I concur in the majority's result in this case. No matter how emotionally charged, the misconduct, in my view, was ultimately harmless. The evidence against defendant was overwhelming, and I have no doubt that, without the objectionable summation, defendant would have been convicted.

Having reached that conclusion, I considered writing a brief concurrence that even if one were to assume misconduct, the error was harmless. I went further because the issue of prosecutorial misconduct is an important topic in modern criminal jurisprudence. The reluctance of some courts to address misconduct was noted in a report on prosecutorial misconduct by the Northern California Innocence Project. (Ridolfi and Possley, Northern California Innocence Project, Santa Clara University of Law (Oct. 2010) Preventable Error: A Report on Prosecutorial

Misconduct in California 1997–2009, p. 39 (*Preventable Error*).) The report found 282 cases between the years 1997 and 2009 in which the Court of Appeal "declined to address allegations of prosecutorial misconduct and, as a result, the prosecutors' actions were never scrutinized." (*Id.* at p. 38.) In cases where the court "bypassed the critical analysis of prosecutorial misconduct," the court focused only on the subject of the ultimate fairness of the trial and thus did not "provide guidance as to whether the conduct amounted to misconduct . . . ." (*Id.* at p. 39.)

As noted in the report, "[p]rosecutorial misconduct is a critical issue for the integrity of the criminal justice system." (Ridolfi, *Preventable Error* (Oct. 2010) at p. 41.) A court's reluctance to call a prosecutor's actions misconduct when it has occurred blurs the legal principles governing misconduct even where, as here, appellate courts have clearly drawn the line. Although I agree with the majority that defendant failed to demonstrate prejudice, in my view the court should nevertheless make clear that misconduct did occur.

RUBIN, J.