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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DONALD RAY McCARDELL, Defendant and Appellant.	B280253 (Los Angeles County Super. Ct. No. YA086684)

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

Jamie Lee Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, and Thomas C. Hsieh, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

This is Donald Ray McCardell's second appeal following a jury conviction for assault by means of force likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)).[1] In his first appeal we reversed the judgment and remanded with directions for the trial court to grant a post-verdict motion by McCardell to represent himself and to allow him to file a motion for a new trial. (*People v. McCardell* (Aug. 24, 2015, B255006) [nonpub. opn.] 2015 WL 5004879.) McCardell filed that motion, arguing that his attorney provided ineffective assistance and that the prosecutor committed misconduct. The trial court denied the motion, and McCardell appealed again. Because the trial court did not err in denying McCardell's motion for a new trial, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Crime*[2]

In October 2012 Shandalon Rhodes was a prostitute who lived alone on the second floor of a hotel in Gardena. The lock on her hotel room door was broken, and the door could be opened from the outside without inserting a key. Rhodes had seen McCardell on several occasions at the hotel. He was often talking with a group of people sitting near the hotel entrance. Rhodes

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1 Statutory references are to the Penal Code.

2 The facts in this section come from our opinion in the previous appeal.

once gave McCardell money to buy some food. Otherwise, she had no contact with him.

One evening in October 2012 Rhodes left her hotel room to run some errands. Rhodes returned to her hotel room carrying a new dress, a package of cigarettes, a plate of food, and two beers. She opened her hotel room door and placed her purchases on the nightstand. Hearing the door close behind her, Rhodes turned and saw McCardell inside her room. She told him to leave. McCardell said, "All I need is a strong black bitch like you and I be all right," and he walked to the foot of the bed in the middle of the room. Believing McCardell wanted to have sex with her, Rhodes again asked him to leave. She walked towards the door, saying she had to go out and urging McCardell to leave.

When Rhodes reached the foot of her bed, McCardell pushed her hard onto the bed. McCardell straddled her, and Rhodes held onto her jeans as he struggled to unzip them. At some point, McCardell said, "Bitch, you real fucking disrespectful out your mouth," and he punched her three or four times in her mouth. Rhodes said, "I can't believe you're doing this to me." McCardell stopped hitting her and retrieved some towels from the bathroom and handed them to Rhodes. Rhodes examined her face in the mirror. The left side of her upper lip was split open in several places and hanging down. There was blood all over the room.

Rhodes wanted to leave the room, but McCardell stood in front of the door and said, "Bitch, you going to tell? Bitch, you going to tell somebody I'm going to go upstairs and get my shit." Rhodes understood McCardell was saying he would get his gun if she reported the attack to the police. Rhodes promised she would not tell the police, saying she needed to get help for her injuries.

McCardell left the room. Rhodes waited a minute or two before she left and crawled down the stairs to the hotel lobby.

The front desk clerk called the 911 emergency operator. Paramedics arrived, but the police did not. As the paramedics were treating her, Rhodes saw McCardell watching her. Because she feared McCardell had a gun, Rhodes falsely told the paramedics she had fallen, although at trial she insisted that a fall in her room could not have caused her injuries. The paramedics transported Rhodes to the hospital where she received 30 stitches for her injuries. Among Rhodes's injuries were a puncture wound, significant swelling around her mouth for about a month, and nerve damage. A physician told Rhodes she needed reconstructive surgery.

B. *The First Appeal*

McCardell went to trial on two charges: assault with intent to commit rape (§ 220, subd. (a)(1)) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Prosecution witnesses included Rhodes and several Gardena Police Department officers, including Officer Ryan Nigg. McCardell called Kalpesh Solanki, the owner and operator of the hotel, and Dr. Marvin Pietruszka, a pathologist who opined, based on hospital records and photographs of Rhodes's injuries, that Rhodes likely sustained her injuries from falling against a piece of furniture.

Although the jury could not reach a verdict on the charge of assault with intent to commit rape,[3] the jury found McCardell guilty of assault by means of force likely to produce great bodily injury. The jury also found true the allegation McCardell inflicted great bodily injury in committing the latter offense (§ 12022.7, subd. (a)).

The trial court conducted a bifurcated, non-jury trial on allegations McCardell had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12), and had served a separate prison term for a felony within the meaning of section 667.5, subdivision (b). During the court trial, McCardell asked to represent himself and for a continuance so he could file motions for a new trial and to dismiss the prior conviction allegations. The court denied McCardell's request to represent himself as untimely, stating the parties were "in the middle of trial."

At the conclusion of the court trial, the court found true the prior felony conviction and prison term allegations and scheduled a date for sentencing. At that point McCardell renewed his request to represent himself and to file a new trial motion. The trial court denied the request as untimely, again stating the parties were "still in the middle of trial." At sentencing McCardell did not renew his request to represent himself or advise the trial court he wanted to move for a new trial, and the trial court sentenced him to an aggregate term of 16 years.

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[3] The trial court declared a mistrial on that charge and dismissed it.

McCardell appealed, contending, among other things, the trial court erred in denying his post-verdict requests to represent himself. We agreed the trial court committed reversible error in denying McCardell's second post-verdict motion to represent himself because substantial evidence did not support the court's finding that the request was untimely. We therefore reversed the judgment and the order denying McCardell's second post-verdict motion to represent himself and remanded the matter with directions for the trial court to grant the motion for self-representation and to allow McCardell to file a motion for a new trial.

C. *Remand*

On remand McCardell waived his right to represent himself and, represented by counsel, moved for a new trial on grounds of ineffective assistance of trial counsel and prosecutorial misconduct. McCardell supported his motion with declarations from himself and Dr. Pietruszka, and the People filed written opposition. The judicial officer who had conducted McCardell's trial held an evidentiary hearing,[4] at which former trial counsel for McCardell testified.

The trial court denied the motion for a new trial. The court found there was no prosecutorial misconduct, trial counsel for McCardell did not provide ineffective assistance, and any shortcomings in trial counsel's handling of the case would not reasonably or probably have resulted in a more favorable result for McCardell. Addressing McCardell's argument his trial

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[4] The judge stated, "Having been the trial judge at the time, I am familiar with the facts of the case, and I remember the case quite vividly in great detail."

counsel had not sufficiently impeached Rhodes with inconsistencies in her testimony, the court stated: "There's no question that Ms. Rhodes was highly inconsistent in numerous areas . . . . There was really no explanation as to why she thought the incident occurred at 4:00 o'clock in the afternoon as opposed to it happening at 4:00 o'clock at night. That's just one example. But . . . as inconsistent as she was throughout her entire testimony, she is, perhaps, the most believable witness that I have had in my courtroom. The manner in which she testified, the emotion in which she testified, brought out the clarity of what occurred on that evening through her eyes. Whether her inconsistencies and lack of recollection [are] the result of mental issues, drug issues, or a combination of those issues, lifestyle, isn't clear. But what was clear to this jury and what was clear to this court was how credible Ms. Rhodes was as to what happened to her that day at the hand of Mr. McCardell. . . . Attacking Ms. Rhodes was not going to be effective." The trial court also stated Rhodes "was probably the most sympathetic witness, victim that I've had in my courtroom in 10 years."

The trial court again sentenced McCardell to an aggregate term of 16 years. McCardell again timely appealed.

DISCUSSION

McCardell contends the trial court erred in denying his motion for a new trial because his trial counsel provided ineffective assistance and the prosecutor committed misconduct. McCardell, however, has not established his attorney provided ineffective assistance because the alleged deficiencies in the performance of his trial attorney did not prejudice McCardell. In addition, McCardell forfeited his argument the prosecutor engaged in misconduct because he did not timely object in the trial court. Therefore, the trial court did not err in denying his motion for a new trial.

A. *McCardell Has Not Established His Attorney Provided Ineffective Assistance*

1. *Applicable Law and Standard of Review*

"""To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant. [Citation.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'"""" (*People v. Rices* (2017) 4 Cal.5th 49, 80, quoting *Strickland v. Washington* (1984) 466 U.S. 668, 694.) "'[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies,'" and "'[i]f it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" (*People v. Carrasco* (2014) 59 Cal.4th 924, 982; accord, *People v. Gana* (2015) 236 Cal.App.4th 598, 612-613.)

"Where, as here, the trial court has denied a motion for a new trial based on an ineffective assistance claim,[5] we apply the standard of review applicable to mixed questions of law and fact, upholding the trial court's factual findings to the extent they are supported by substantial evidence, but reviewing de novo the ultimate question of whether the facts demonstrate a violation of the right to effective counsel." (*People v. Cervantes* (2017) 9 Cal.App.5th 569, 590-591, disapproved on another ground in *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 314-315; see *People v. Ogunmowo* (2018) 23 Cal.App.5th 67, 76 ["[w]e accord deference to the trial court's factual determinations if supported by substantial evidence in the record, but exercise our independent judgment in deciding whether the facts demonstrate trial counsel's deficient performance and resulting prejudice to the defendant"].) In particular, "'[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.'" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308; see *People v. Leyba* (1981) 29 Cal.3d

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5 Although ineffective assistance of counsel is not one of the grounds for granting a motion for a new trial set forth in section 1181, "[t]he California Supreme Court has explained . . . that 'in appropriate circumstances, the trial court should consider a claim of ineffective assistance of counsel in a motion for new trial, because "*justice is expedited* when the issue of counsel's effectiveness can be resolved promptly at the trial level."'" (*People v. Watts* (2018) 22 Cal.App.5th 102, 117.)

591, 596-597 [“‘the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court,’” and on appeal “‘all presumptions favor the exercise of that power, and the trial court’s findings on such matters, whether express or implied, must be upheld if they are supported by substantial evidence’”]; *People v. Hamlin* (2009) 170 Cal.App.4th 1412, 1463 [“‘[i]t is an established principle that the credibility of witnesses and the weight to be given their testimony are matters within the *sole* province of the trier of fact’”].)

2. *The Alleged Deficiencies in Trial Counsel’s Performance*

McCardell contends the following alleged deficiencies in the performance of his trial counsel, considered individually and cumulatively, violated his right to effective assistance of counsel.

a. *Failure To Move for a Mistrial*

At the beginning of trial, having granted a motion by McCardell to exclude evidence he was on parole at the time of the alleged offenses, the trial court ordered the prosecutor to instruct her witnesses not to mention McCardell’s “parole or probation status,” which the prosecutor did. Nevertheless, on direct examination Officer Nigg stated that, when he and his partner entered McCardell’s room at the hotel to investigate the incident, his partner “observed an I.D. card, a parolee I.D. card, I believe, on, I think, the nightstand.” Asked if he recalled whether the name on the card matched the name Rhodes “had provided as the person that assaulted her, i.e., defendant McCardell,” Officer

Nigg answered, "They were the same, yes." Trial counsel for McCardell did not object, request a curative instruction, or move for a mistrial because of this testimony.[6] McCardell argues the failure to move for a mistrial was ineffective assistance.

b. *Failure To Impeach Rhodes*

McCardell argues his trial counsel's performance was also deficient because she did not make sufficient efforts to impeach Rhodes in numerous instances where Rhodes's testimony supposedly conflicted with her prior statements to police and her medical records. For example, although Rhodes told investigating officers McCardell assaulted her around midnight, she testified at trial the incident occurred at 4:00 or 5:00 p.m. Rhodes also told investigating officers McCardell straddled her chest and punched her with both fists, but at trial she testified he straddled her pelvic or hip area, tried to pull down her pants, and hit her with only his right hand. Rhodes also testified she received 30 stitches to treat the injury to her mouth, but medical records indicated she received only 16.

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[6] At the hearing on the motion for a new trial, trial counsel for McCardell testified she did not object to Officer Nigg's reference to the parolee identification card or request a curative instruction because she did not want to call the jury's further attention to it. She also testified she did not move for a mistrial outside the jury's hearing because she did not believe the court would grant the motion.

c. *Failure To Object to Speculative Testimony*

McCardell argues his trial counsel rendered ineffective assistance by failing to object to two speculative pieces of testimony. First, Officer Nigg testified that, when investigating the report of the assault, he entered McCardell's room at the hotel and that "it appeared the room had been just vacant recently or emptied." Trial counsel for McCardell did not object to this testimony, and the prosecutor cited it during closing argument as evidence McCardell hurriedly fled the hotel after assaulting Rhodes. McCardell argues the testimony was speculative because Officer Nigg had no "personal knowledge of the contents of McCardell's room before Rhodes was injured."

Second, Rhodes testified McCardell knew she was a prostitute because "everyone knew [her] profession," and during closing argument the prosecutor cited McCardell's knowledge that Rhodes was a prostitute as circumstantial evidence he entered Rhodes's room to solicit sex from her. McCardell argues Rhodes's testimony that McCardell knew she was a prostitute was speculative.

d. *Failure To Request CALCRIM No. 358*

Rhodes testified that, after hitting her, McCardell said, "Bitch, you going to tell? Bitch, you going to tell somebody I'm going to go upstairs and get my shit." McCardell argues that in light of this testimony his trial counsel should have asked the trial court to instruct the jury with CALCRIM No. 358, which cautions the jury to "[c]onsider with caution any statement made by [the] defendant tending to show [his] guilt unless the statement was written or otherwise recorded." McCardell's trial

counsel did not request the instruction, the trial court did not give it, and McCardell cites his trial counsel's failure to request the instruction as another instance of her deficient performance.

e. *Ineffective Examination of Dr. Pietruszka*

Dr. Pietruszka opined at trial that Rhodes did not sustain injuries from a hand or fist, but from falling against a piece of furniture. In a declaration in support of the motion for a new trial, he reviewed the evidence supporting this opinion and stated, "As simple and straight forward as the state of the medical evidence was, the clarity of the cause and nature of the injuries was lost by an incomplete and confusing examination by [trial counsel for McCardell] of . . . this declarant expert witness at trial, and hence this declarant was unable to present a more effective and convincing state of his established opinion." McCardell cites his trial counsel's examination of Pietruszka as another instance of her deficient performance.

f. *Ineffective Closing Argument*

McCardell argues his trial counsel's closing argument was deficient. First, he complains she conceded the great bodily injury allegation by stating, "There's no question that this woman was hurt. The photographs are not a lie. And it's a serious injury. . . . There's no question it's great bodily injury."[7] He argues this concession was improper because the injuries in the photographs in question included additional bruising caused by suturing and thus the photographs did not accurately reflect

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[7] Trial counsel continued: "The issue is somebody having an injury, somebody goes to the hospital, that's not a crime. The crime is who did it to her?"

Rhodes's initial injuries. McCardell also suggests his trial counsel improperly neglected to argue Rhodes was lying in claiming to be a prostitute and improperly conceded Rhodes was generally "truthful."

g. *Failure To Object to the Prosecutor's Misstatement of Evidence*

In her closing argument, the prosecutor stated that Dr. Pietruszka "admits, 'Well, okay, I guess after, you know, multiple, repeated punches, it could cause this type of an injury, but I would expect that it would look a little bigger.'" McCardell argues that this misstated Dr. Pietruszka's testimony and that failing to object to the statement on that ground constituted ineffective assistance by trial counsel.

3. *Any Deficiencies in Counsel's Performance Were Not Prejudicial*

A defendant "bears the burden of showing by a preponderance of the evidence that . . . counsel's deficiencies resulted in prejudice." (*People v. Centeno* (2014) 60 Cal.4th 659, 674.) "'In demonstrating prejudice, the appellant "must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel."'" (*People v. Loza* (2012) 207 Cal.App.4th 332, 350; accord, *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1146-1147.)

McCardell repeatedly concedes "the outcome of th[is] case wholly depended on the credibility of Rhodes's testimony." And the trial court found Rhodes's testimony was eminently credible—even while acknowledging there was "no question that

[she] was highly inconsistent in numerous areas." (See *People v. Hernandez* (2003) 30 Cal.4th 835, 861 [witness's testimony was "'credible despite some inconsistencies'"], disapproved on another ground in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32.) Indeed, presented with every inconsistency McCardell cites on appeal (and others), the trial judge nevertheless described Rhodes as "perhaps the most believable witness" the judge had ever had in his courtroom, based on her manner, her emotion, and the clarity of her testimony about what happened the night of McCardell's attack. (See *People v. Brewer* (2000) 81 Cal.App.4th 442, 456 [substantial evidence supported credibility determination based on witness's courtroom manner].) In particular, the judge stated that, whatever Rhodes's "inconsistencies and lack of recollection," "what was clear to this jury and . . . this court was how credible Ms. Rhodes was as to what happened to her . . . at the hand of Mr. McCardell"—i.e., that he beat her in the face, sending "blood everywhere" and causing her lip to "split in pieces" and "hang[ ] way down."

Given the trial court's credibility determination, specifically regarding Rhodes's testimony about the assault and resulting great bodily injury (see *People v. Washington* (2012) 210 Cal.App.4th 1042, 1047 ["some physical pain or damage, such as lacerations, bruises, or abrasions is sufficient for a finding of 'great bodily injury'"]), McCardell has not demonstrated prejudice. Even if his trial counsel had performed deficiently in her efforts to impeach Rhodes with the inconsistencies McCardell cites, or by failing properly to develop or address other testimony and argument relating to the cause or extent of Rhodes's injuries, there is no reasonable probability that, but for those deficiencies, individually or cumulatively, he would have obtained a more

favorable result. (See *People v. DeHoyos* (2013) 57 Cal.4th 79, 155 [where asserted errors were harmless, their cumulative effect did not warrant reversal].)

The one deficiency McCardell claims that could conceivably have prejudiced him notwithstanding Rhodes's credibility was his trial counsel's decision not to move for a mistrial after Officer Nigg referred to McCardell's parolee identification card. But a trial court must grant a mistrial only if "apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions. [Citation.] Accordingly, it would be a rare case in which the merits of a mistrial motion were so clear that counsel's failure to make the motion would amount to ineffective assistance." (*People v. Haskett* (1982) 30 Cal.3d 841, 854; see *People v. Penunuri* (2018) 5 Cal.5th 126, 149 [whether a particular incident is incurably prejudicial, warranting mistrial, "is by its nature a speculative matter"].)

Nothing in the record suggests the trial court would have found Officer Nigg's mention of McCardell's parolee identification card incurably prejudicial. (See *People v. Perez* (2018) 4 Cal.5th 421, 459 (although "[d]isclosing a defendant's prior criminality to the jury can prejudice the defendant's case," trial courts "have 'considerable discretion' to determine whether such an error warrants granting a mistrial or whether the error can be cured through admonishment or instruction"].) Indeed, the record suggests the opposite: Presented with this same argument in McCardell's motion for a new trial, the trial court rejected it.

Therefore, McCardell has not demonstrated his trial counsel's decision not to move for a mistrial prejudiced him.

McCardell cites cases where courts have held improper references to a defendant's prior conviction or parole status were incurably prejudicial, but they are factually distinguishable. For example, in *People v. Zimmerman* (1980) 102 Cal.App.3d 647 and *People v. Perez* (1978) 83 Cal.App.3d 718 the reference to a prior conviction was for the same offense for which the defendant was currently on trial. (See *Zimmerman*, at p. 658 [referring to "the inevitably prejudicial consequences where the jury learns of a prior offense which is identical or substantially similar to the crime charged"]; *Perez*, at pp. 733-734 ["[t]he great danger of prejudice lies in the recent conviction of a crime very similar in nature to that charged against defendant"].) The reference to McCardell's parole status did not identify the nature of his prior offense. In *People v. Ozuna* (1963) 213 Cal.App.2d 338 the court held that referring to the murder defendant as an "ex-convict" was incurably prejudicial because the evidence against him was not strong—in particular, there were no eyewitnesses to the murder.[8] (*Id.* at pp. 341-342.) Similarly, in *People v. Allen* (1978) 77 Cal.App.3d 924 the court, after noting an improper reference to a prior conviction is not prejudicial where the record "'points convincingly to guilt,'" held that mentioning the defendant, who testified at trial, was "on parole" incurably prejudiced him because it was "an extremely close case" that turned on a credibility determination between the defendant and his

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[8] The court noted that in the defendant's previous trial, which ended in a mistrial when the jury could not agree on a verdict, there was no reference to him as an "ex-convict." (*People v. Ozuna*, at p. 342.)

witnesses and the prosecution's witnesses. (*Id* at p. 935.) In contrast, with Rhodes's credible testimony about her assault and resulting injury, the evidence against McCardell was strong and pointed convincingly to guilt.

B. *McCardell Forfeited His Prosecutorial Misconduct Argument*

McCardell also appears to suggest that, separate and apart from any ineffective assistance of counsel argument, we should reverse on the independent ground the prosecutor's supposed misstatement of Dr. Pietruszka's testimony during closing argument was prosecutorial misconduct. "To preserve a claim of prosecutorial misconduct for appeal, however, the defendant must have raised a timely objection and requested that the jury be admonished to disregard the offending remarks." (*People v. Johnson* (2016) 62 Cal.4th 600, 652; see *People v. Fuiava* (2012) 53 Cal.4th 622, 679 ["[a] defendant generally '"'"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"'"']."] In arguing he received ineffective assistance of counsel, McCardell of course concedes his trial counsel did not timely object to or request an admonition concerning the prosecutor's supposed misstatement of Dr. Pietruszka's testimony. Therefore, McCardell forfeited his non-ineffective-assistance, prosecutorial misconduct argument.[9]

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[9] "There are two exceptions to forfeiture [of a claim of prosecutorial misconduct]: (1) [t]he objection or the request for an admonition would have been futile; or (2) the admonition would have been insufficient to cure the harm occasioned by the

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

WILEY, J.*

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misconduct." (*People v. Pettie* (2017) 16 Cal.App.5th 23, 74.) McCardell does not suggest either exception applies.

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