Filed 4/18/12 P. v. Robinson CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KEEVEN ROBINSON, Defendant and Appellant.	B227751 (Los Angeles County Super. Ct. No. NA080633)
In re KEEVEN ROBINSON, on Habeas Corpus.	B233127

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed as modified.

PETITION for Writ of Habeas Corpus. Writ denied.

Heather J. Manolakas, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Mary Sanchez and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Keeven Robinson appeals the judgment entered following his conviction by jury of two counts of robbery in which he personally used a firearm and, with respect to one count, personally inflicted great bodily injury. (Pen. Code, §§ 211, 12022.53, subd. (b), 12022.7, subd. (a).)

On appeal, Robinson contends the prosecutor committed misconduct, the trial court made erroneous evidentiary rulings and failed to appreciate its discretion to impose a concurrent subordinate term, and Robinson is entitled to one additional day of presentence custody credit. In a petition for writ of habeas corpus, which this court has ordered to be considered concurrently with the appeal, Robinson asserts defense counsel rendered ineffective assistance in failing to object in the trial court to preserve various of the errors Robinson seeks to raise on appeal.

We accept the People's concession Robinson is entitled to an additional day of presentence custody credit. However, Robinson's remaining contentions lack merit. We therefore affirm the judgment as modified to provide for one additional day of presentence custody credit and deny the petition for writ of habeas corpus.

FACTS AND PROCEDURAL BACKGROUND

1. *The first trial*.

Robinson initially was charged with four counts of robbery, one count of attempted robbery and one count of assault with a firearm committed in four different incidents. At Robinson's first trial, a jury found him not guilty of robbery and attempted robbery in counts 1 and 2, allegedly committed on November 25, 2008, and not guilty of robbery and assault with a firearm allegedly committed against Jose Mejia and his wife, Adoneas Barillas, in counts 8 and 9 on December 27, 2008. The jury could not reach a verdict on count 6, the robbery of Errol Wooden, and count 7, the robbery of Jose Torres, both of which allegedly occurred on December 27, 2008, in separate incidents. The jury voted 7-5 in favor of not guilty as to count 6 and 8-4 in favor of a not guilty as to count 7.

The People retried counts 6 and 7 and Robinson was convicted of both counts as indicated above. During the rebuttal phase of the second trial, the prosecution presented the testimony of Mejia and Barillas, the victims in counts 8 and 9, as to which Robinson

was acquitted at the first trial. The robbery of Mejia occurred approximately five minutes before the robbery of Torres and about two blocks away.

2. *The prosecution's evidence at the second trial*.

a. *The robbery of Wooden (count 6)*.

On December 27, 2008, at 6:20 p.m., Errol Wooden was walking from a 7-Eleven to his apartment near Third Street and Lime Avenue in Long Beach, California. As Wooden turned into the alley behind his building, Robinson confronted him with a stainless steel gun and demanded property. Robinson hit Wooden twice in the head with the gun and took Wooden's wallet, credit cards, gold necklaces and cell phone.

The blows rendered Wooden unconscious. Wooden was taken to the hospital where he received two stitches on one side of his head and three on the other. About an hour after the robbery, at the hospital, Wooden described the robber to a Long Beach police officer as a Black male wearing black clothing.

The day after the robbery, Wooden identified Robinson in a photographic lineup as "the guy who said give me your wallet." Wooden also identified Robinson at trial, stating, "I have no doubt. That is the man." Wooden testified, "I got a good look at [the robber's] face when he raised his . . . arm to hit me with the weapon." Four months after the incident, a CAT scan revealed Wooden had a skull fracture.

Xiomara Martinez witnessed Wooden's robbery and called 911. She spoke to officers when they arrived at the scene but was not contacted again until March 2010.[1] Martinez saw "an older man on the floor and two people hovering over him." "One was . . . right on top of him, . . . and the other one was standing behind him." One of the two men wore a dark hooded sweater and jeans. Martinez could not see what the other individual was wearing or the face of either man.

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[1] Martinez did not testify at Robinson's first trial.

b. *The robbery of Mejia/assault upon Barilla (former counts 8 and 9).*

On December 27, 2008, at approximately 8:20 p.m., Mejia and his wife, Barillas, were approached by a male who pointed a gun at them and demanded money as they were about to leave their home between 20th and 21st Street on Pasadena Avenue in Long Beach. The assailant took $50 and 40 Mexican pesos from Mejia's wallet, discarded the wallet and then walked toward Pacific Coast Highway. Mejia followed in a car and saw the male rob another individual in a church parking lot on Pasadena Avenue near 20th Street. The victim in that robbery immediately drove from the scene.

Mejia told the police the robber was approximately 6 feet tall and wore a black sweater with a hood and dark nylon pants. Shortly after the robbery, Mejia was taken to two field show-ups but did not identify the suspect in either show-up and did not choose Robinson in the second show up because the robber had darker skin and wore a different type of pants.

Barillas testified she told Long Beach Police Officer Roque at the scene the person who robbed her husband was tall and thin and he wore dark blue or black clothing with a blue or black beanie. Barillas admitted that, after she viewed Robinson at the second field show-up, she signed an admonition card which indicates she stated, "Yes, it is him." However, at trial Barillas claimed she said it was him "more or less" because he was dressed all in black and was of similar size.

Barillas admitted that, when she last appeared in court, she testified she was afraid of retaliation if she identified anyone. Barillas denied she told Detective Morales she lied the first time she went to court and testified Robinson was not the person who robbed her husband.

On cross-examination, Barillas admitted she had difficulty distinguishing among African American men dressed in hooded sweatshirts.

Detective Abel Morales testified he served a subpoena at the Mejia residence on July 6, 2010. When he did, Barillas told him she lied about not being able to identify the suspect the first time she came to court and said she was afraid of retaliation.

Long Beach Police Officer Jennifer Riordan, nee Roque, testified Barillas signed the admonition form and agreed the statement was accurate.

c. *The robbery of Torres (count 7).*

On December 27, 2008, at about 8:30 p.m., within 10 minutes of the Mejia robbery and approximately two blocks away, Jose Torres was returning to his home on 19th Street near Pasadena Avenue. As he opened the door of his vehicle, Robinson, who was wearing a dark hooded sweatshirt, pointed a gun at Torres's head and demanded money. Torres looked at Robinson, saw his face and said, "Don't shoot." After Torres gave Robinson $2 from his pocket, Robinson told Torres not to look at him, then patted Torres down, looked through his wallet and walked away.

At 8:30 p.m., Torres flagged down Long Beach Police Officer Christopher Castillo, who was responding to the Mejia robbery. Castillo took Torres to two field show ups. In the second showup, Torres identified Robinson as the individual who robbed him based on Robinson's facial hair and clothing. Torres told Officer Castillo, "That's the guy that robbed me." Torres also identified Robinson at trial. The field show-ups occurred so quickly after Torres flagged Officer Castillo down that Torres never gave Castillo a full description of the suspect before he identified Robinson in the show up.

d. *Arrest of Robinson.*

At 8:25 p.m., on December 27, 2008, Long Beach Police Officer Mario Aeillo received a report of the Mejia robbery which described the suspect as a Black male wearing all dark clothing armed with a handgun. Aeillo turned north onto Pasadena Avenue from Pacific Coast Highway, then received a report, at approximately 8:31 p.m., of a second robbery, the Torres robbery, at 19th Street and Pasadena Avenue. The suspect in the second robbery was described as wearing a hooded sweatshirt and dark pants.

As he received the second report, Aeillo saw a male wearing dark clothing run from 19th Street and Pasadena Avenue and then lost sight of him. Aeillo turned right on 19th Street, then south toward Pacific Coast Highway. After turning west on Pacific Coast Highway, Aeillo saw Robinson walking west on Pacific Coast Highway towards Pasadena Avenue and detained him at approximately 8:33 p.m. Robinson was wearing a dark blue hooded sweatshirt pulled up over his head, black pants and white shoes. Under the hooded sweatshirt, Robinson was wearing a black beanie. Robinson was not breathing hard or sweating. Shortly thereafter, the field show-ups were conducted.

e. *Investigation*.

Police officers searched Robinson and the immediate area but did not find a gun. At the time of his arrest Robinson had 10 one dollar bills, a glass crack pipe, no jewelry and no Mexican pesos.

On December 29, 2008, Robinson waived his rights and told Long Beach Police Detective Rudy Romero that he panhandled to obtain money to buy crack cocaine, he smoked about $10 worth of crack every few hours and he was on his way to buy crack when he was stopped by the police. Robinson stated he slept in a nearby abandoned house. When Romero said various witnesses had identified him, Robinson said he was stopped because he is Black and all Blacks look alike. When Romero told Robinson one of the persons who identified him was an elderly Black male who had been injured, Robinson placed his hands in front of him, put his forehead on his hands and shook his head side to side. As Romero escorted Robinson to jail, Robinson asked, "'So what am I looking at? Twenty years?'"

The robbery of Wooden on Lime Avenue occurred approximately a mile and a half from the robbery of Torres on Pasadena Avenue.

3. *Defense evidence at the second trial*.

Robinson testified in his own defense that he earned up to $500 a week panhandling. Immediately prior to his arrest, Robinson was at a liquor store on Pacific Coast Highway where he panhandled. He walked down Pacific Coast Highway intending to purchase drugs on Pasadena Avenue and then walk to the abandoned building where

he lived. Robinson denied he ever entered the residential neighborhood north of Pacific Coast Highway. Robinson also denied he had been in the area of Wooden's robbery on the day he was arrested but he recalled panhandling at the 7-Eleven mentioned by Wooden two or three weeks earlier. When he was arrested, Robinson had a glass crack pipe in his shoe which he gave to Officer Aiello to prevent having an additional charge added.

Robinson told Detective Romero he had been at a Jack in the Box an hour before he was arrested and he would be on the restaurant's security tape.

On cross-examination, Robinson admitted he had never previously mentioned the 7-Eleven. Robinson also admitted he was not sure where he was at 6:30 p.m. on December 27, 2008. Robinson testified his primary mode of transportation was walking and that he stayed in the area of the abandoned house.

CONTENTIONS

Robinson contends the prosecutor committed misconduct in eliciting testimony in violation of orders of the trial court, asking argumentative questions, misstating the evidence, referring to evidence outside the record, casting aspersions on defense counsel and presenting a theory of guilt at the second trial which was inherently irreconcilable with the theory of guilt presented at the first trial. Robinson further contends the trial court made erroneous evidentiary rulings, the matter must be remanded for resentencing because the trial court was unaware of its discretion to impose a concurrent term on count 7, and Robinson is entitled to one additional day of presentence custody credit.

In a petition for writ of habeas corpus, which this court has order to be considered concurrently with the appeal, Robinson asserts defense counsel rendered ineffective assistance in failing to object to the prosecutor's misconduct or the trial court's evidentiary rulings and in failing to advise the trial court of its discretion to impose a concurrent term on count 7.

DISCUSSION

1. *The prosecutor did not commit misconduct.*

a. *General principles.*

" 'Under the federal Constitution, a prosecutor's behavior deprives a defendant of his rights "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 that falls short of that standard "may still constitute misconduct under state law if it involves the use of deceptive or reprehensible methods to persuade the trial court or the jury." [Citations.]' [Citation.] 'In addition, " '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. [Citation.]' " [Citation.] Objection may be excused if it would have been futile or an admonition would not have cured the harm. [Citation.]' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1350.)

b. *Eliciting evidence in violation of court order.*

(1) *Uncharged robberies.*

(a) *Background.*

At trial, defense counsel requested an order directing Detective Romero not to mention "there were twenty robberies being investigated." The prosecutor responded the People wished to introduce evidence of uncharged robberies to support Romero's modus operandi testimony. The trial court noted Robinson was not charged with those robberies and directed the prosecutor to "stick to this case." The trial court indicated Romero could testify about similarities shared by the two charged robberies but could not testify, for example, that robberies with the same modus operandi ceased after Robinson's arrest.

Robinson contends the prosecutor violated this order by asking Detective Romero a series of questions designed to elicit testimony regarding the uncharged robberies. The prosecutor asked whether there was "any" modus operandi that connected these cases, and then asked Romero to describe the "M.O." The trial court overruled defense counsel's objections on the grounds of lack of foundation and improper question.

Romero thereafter testified he was assigned to investigate robberies committed on December 27, 2008, and he tried to put together a modus operandi to see if the crimes had been committed by the same person. Romero indicated the suspect in each case was described as a tall, thin, Black male between 6 feet and 6 feet 3inches, wearing a dark beanie, a dark hooded sweatshirt and dark pants, and "armed with a chrome, silver-colored semi-automatic handgun often described as a .9-millimeter." Also, the suspect took only money and property and, except for cell phones, never took electronics.

When the prosecutor asked if a robbery committed on the same date as the Wooden and Torres robberies in the 2000 block of Pasadena Avenue (the Mejia robbery) fit the "same M.O.," defense counsel objected. At the side bar, the trial court asked why the prosecutor could not inquire about the Mejia robbery, given that the defense previously had indicated it intended to call Mejia as a witness.

Defense counsel replied that, if the prosecutor opened this area, the defense would ask Mejia what property was taken from him. The trial court indicated that, based on Robinson's intention to present evidence related to the Mejia robbery, "both Mr. Mejia and detective [Romero] can be questioned about how and what method of operation was used in order to commit a robbery and what was taken."

The prosecutor then indicated Romero had not yet responded to the pending question and withdrew it, stating the People would wait until Mejia testified "in order to pursue this line of questioning."

Thereafter, on cross-examination, defense counsel asked Detective Romero whether Wooden or Torres had described the robber as wearing a beanie and Romero conceded neither had. When defense counsel asked if the police report in the Wooden or the Torres robbery described the attacker as tall and thin, Romero testified he did not recall but stated he found that information in "the reports that I was investigating."

When defense counsel asked Romero to limit his answer to the police reports in the Wooden or the Torres robberies, the prosecutor argued, at the side bar, the defense had opened the door to evidence of the uncharged robberies. The trial court responded defense counsel had "opened no door. Basically, your detective did not follow the

court's instructions. You were allowed to talk about M.O.'s involving two crimes that were charged here. And . . . it's apparent that he talked about M.O.'s involving other crimes, so your detective is the one that opened the door, not [defense counsel]."

(b) *No misconduct appears.*

Robinson contends the prosecutor committed misconduct by eliciting evidence the trial court had ruled inadmissible. (*People v. Friend* (2009) 47 Cal.4th 1, 33; *People v. Crew* (2003) 31 Cal.4th 822, 839.) Robinson argues Detective Romero's testimony indicated Robinson was involved in other robberies in the area and there may have been multiple assailants working together. Also, because the description of the robber given by Wooden and Torres varied from the description Detective Romero testified he had garnered from police reports related to the offenses he was investigating, the jury could have concluded it was unlikely the police arrested the wrong individual. Robinson asserts the issue is not forfeited because defense counsel's objections at the beginning of this line of questioning were overruled and any further objection or a request for an admonition would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) Alternatively, if defense counsel's objections were inadequate, Robinson claims defense counsel rendered ineffective assistance.

The record indicates Detective Romero testified vaguely about other robberies when discussing a possible modus operandi. On cross-examination, defense counsel elicited from Romero the ways in which the individual who robbed Wooden and Torres differed from the composite description Romero assembled from the police reports he was investigating. After defense counsel cross-examined Romero, the trial court apparently determined Romero's modus operandi testimony necessarily had been based on crimes other than the robbery of Wooden and Torres. Nonetheless, the prosecutor did not elicit evidence of any other specific robbery or that Robinson had an accomplice. Rather, the prosecution only presented evidence of the charged robberies and the Mejia robbery, which defense counsel conceded was appropriate. Consequently, no prosecutorial misconduct appears.

Moreover, the fact the individual who robbed Wooden and Torres did not fit the description of the suspect Romero had compiled was beneficial to the defense. Thus, even assuming misconduct, there is no reasonable probability Robinson would have achieved a more favorable result absent the error.

(2) *Evidence of drug paraphernalia*.

Prior to trial, defense counsel moved to exclude evidence related to Robinson's possession of a crack pipe at the time of his arrest. After the prosecutor represented the People would not refer to the pipe, the trial court stated it was "not going to be introduced." However, during the People's case, the prosecutor elicited from Officer Aiello that Robinson had a crack pipe in his possession when he was arrested.

Robinson contends the prosecutor elicited this evidence in violation of the trial court's order to prejudice Robinson in the eyes of the jury.

Putting aside Robinson's failure to object at the time of Aeillo's testimony (*People v. Stanley* (2006) 39 Cal.4th 913, 952), Robinson was not prejudiced by evidence indicating he possessed a crack pipe at the time of his arrest as it corroborated his defense that he was in the area of the robberies to purchase crack cocaine. Indeed, Robinson himself testified on direct examination that, when he was arrested, he had a "crack pipe" which he took everywhere he went.

c. *Asking argumentative questions*.

Robinson contends the prosecutor committed misconduct by asking a number of argumentative questions designed to make statements regarding the witnesses' credibility. (See *People v. Chatman* (2006) 38 Cal.4th 344, 384.)

(1) *Asking Robinson if he reviewed the transcript of the first trial*.

On cross-examination, the prosecutor asked Robinson if he had reviewed the transcripts of the first trial "to make sure that you testify to the same thing." The trial court sustained defense counsel's objection on the ground the question was argumentative.

Given that the trial court sustained defense counsel's objection, no prejudicial error appears. (See *People v. Dykes* (2009) 46 Cal.4th 731, 764 ["because the trial court sustained objections to the argumentative element of the prosecutor's questioning, we assume any prejudice was abated"].)

In any event, "all persons who testify in a criminal case, including the accused, . . . are equally subject to the principle of impeachment . . . ." (*People v. Wheeler* (1992) 4 Cal.4th 284, 292, fn. 4; *People v. Wagner* (1975) 13 Cal.3d 612, 618 ["When a defendant testifies in his own behalf, his character *as a witness* may be impeached in the same manner as any other witness."].) The prosecutor's question fell within the broad permissible scope of cross-examination. No prosecutorial misconduct appears.

(2) *Asking if it were important for Robinson to have an alibi.*

The prosecution asked Robinson, "it's important for you as an alibi to be able to state that you were somewhere besides Lime Avenue at 6:30, . . . you realize that, right?" The trial court sustained defense counsel's objection on the ground the question was argumentative. The prosecutor then elicited from Robinson that he was "not sure where [he was] at around 6:30 p.m. on December 27th of 2008."

Robinson claims the prosecutor asked these questions to convey to the jury the prosecutor's belief Robinson was lying. However, the trial court sustained defense counsel's objection to the alibi question. Thus, no prejudice can be shown. (See *People v. Dykes, supra,* 46 Cal.4th at p. 764.) In any event, prosecutor's question fell within the broad permissible scope of cross-examination and nothing in these questions or the answers they elicited was unduly prejudicial to Robinson.

(3) *Asking questions of defense investigator O'Brien.*

Robinson claims the prosecution posed a series of argumentative questions to Rudy O'Brien, the defense investigator, about distances he measured, the conversion of "miles to yards to feet" and the accuracy of the measurements. Robinson claims the prosecutor's questions amounted to comments on O'Brien's credibility.

Assuming the prosecutor was commenting on O'Brien's credibility, the prosecutor was entitled to do so. (See *People v. Alfaro* (2007) 41 Cal.4th 1277, 1328-1329.)

Moreover, Robinson fails to explain how the prosecutor's questions of O'Brien constituted misconduct. In any event, the testimony in issue related to distances O'Brien measured and there was no disagreement among the parties with respect to the various distances involved in this case. Therefore, even assuming misconduct, Robinson is unable to show prejudice.

(4) *Asking Barillas if she previously admitted lying*.

The prosecutor asked Barillas, "did I inquire of you with Detective Romero present whether or not what you had said to Detective Morales about how you lied in court last time was true and that you were concerned as to what would happen to you?" Defense counsel objected. The trial court asked Barillas whether she had expressed concern to the prosecutor about her safety the previous day and she responded in the negative. The prosecutor then asked: "Ms. Barillas, you didn't sit with me in the reception area down on the third floor, with your husband there and your pastor there and Detective Morales, and tell me to my face that you were afraid for your safety and the safety of your family?" The trial court indicated the question was argumentative and sustained its own objection.

Robinson contends the prosecutor's argumentative question was designed to convey information to the jury Barillas would not provide.

Putting aside the fact the trial court sustained its own objection to the question, thereby abating any possible prejudice (*People v. Dykes, supra*, 46 Cal. 4th 731), the prosecutor was entitled to probe Barillas's credibility and to cross-examine her regarding the recantation of her field showup identification.

d. *Misconduct during closing argument*.

(1) *Misstatement of the evidence*.

(a) *Barilla is a racist.*

The prosecutor argued Barillas was "absolutely not credible" and "lied to you under oath." Also, "defense counsel . . . point[ed] out an absolute racist remark that [Barillas] made, all Blacks look alike[,] to you, to anger you, to get you thinking, well, that's why they picked out my client."

Robinson contends the prosecutor's argument grossly misstated the evidence. Robinson asserts Barillas's admission she had difficulty making cross-racial identifications does not indicate racism. Robinson notes CALCRIM No. 315 instructs the jury to consider cross-racial identification as one of the relevant factors when evaluating eye-witness identifications. Robinson concludes the prosecution's inflammatory comment had no basis in the facts presented at trial.

A prosecutor "enjoys wide latitude in commenting on the evidence, including the reasonable inferences and deductions that can be drawn therefrom." (*People v. Hamilton* (2009) 45 Cal.4th 863, 928.) Here, Barillas steadfastly refused to identify Robinson as the person who robbed her husband, even though she identified him in a field show-up shortly after the robbery. Given the broad latitude accorded a prosecutor in argument, it was not unfair, deceptive or reprehensible for the prosecutor to argue defense counsel elicited a racist remark from Barillas. Moreover, "there is no reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1019.) Barillas's testimony was only marginally relevant to the charged offenses. Any misstatement of the evidence did not prejudice Robinson.

(b) *Barillas changed her testimony*.

Robinson contends the prosecutor falsely and unfairly argued Barillas changed her testimony after speaking to the defense investigator because Barillas thought the defense investigator was a police officer and he told her Robinson was not the robber.

In fact, the prosecutor argued: "So Rudy O'Brien, what did [Barillas] finally say about him? Not only is she threatened, harassed by him, but he's the one – and she believes he's a . . . police officer. [¶] She doesn't know who to trust. Who does he work for? . . . He's the one who tells her, you know what, the defendant wasn't the one who robbed your husband. Why? Because he's homeless, he's on drugs, he didn't have a gun, he was coming from somewhere else. [¶] Ms. Barillas thinks, wow, now a police officer is telling me that my I.D. is wrong of the defendant. And now I'm looking at these perjury issues."

The prosecutor was permitted to comment on Barillas's testimony that she thought the defense investigator was a police officer. (*People v. Hamilton, supra,* 45 Cal.4th at p. 928.) In any event, as previously noted, Barillas's testimony was only marginally relevant to the charged offenses. Any misstatement of the evidence could not have caused Robinson undue prejudice.

(c) *Martinez identified Robinson.*

Robinson contends the prosecutor falsely argued Xiomara Martinez identified Robinson when, in fact, Martinez testified she could not see the faces of either individual she saw standing near the fallen Wooden.

The prosecutor stated: "Xiomara Martinez. How many people did she see? Two. The Defendant, *who Mr. Wooden identifies as the person who is robbing him* and knocked him to the ground, and then a second person."

Thus, the prosecutor did not argue Martinez "identified" Robinson. Rather, the prosecutor argued Wooden identified Robinson and, based on Martinez's testimony, a second person was present. Because the prosecutor's argument plainly refers to Wooden's identification of Robinson, the prosecutor did not misstate evidence.

(d) *Robinson read police reports.*

Robinson contends the prosecution improperly argued Robinson's testimony was not credible because Robinson "read[s] police reports, even though initially he denies reading police reports." Robinson claims this was a misstatement in that the evidence showed Robinson read only one police report which was generated after the first trial and it did not relate to the crimes.

The prosecutor did not misstate the evidence. On cross-examination, Robinson at first testified he had not read the police reports in this case. However, almost immediately thereafter he admitted he read a police report about an officer making contact with Barillas. Thus, the prosecutor's argument derived from Robinson's testimony at trial and was not a misstatement of the evidence. The prosecutor properly could argue Robinson's lack of candor in this area suggested he was not telling the truth in other areas of his testimony. "[A]ll persons who testify in a criminal case, including

the accused, . . . are equally subject to the principle of impeachment . . . ." (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 292, fn. 4; *People v. Wagner*, *supra*, 13 Cal.3d at p. 618.)

e. *Evidence outside the record.*

Robinson contends the prosecution stated facts outside the record during closing arguments in a manner that constituted misconduct. (*People v. Valdez* (2004) 32 Cal.4th 73, 133.)

(1) *Robinson did not intend to admit he previously had been at the 7-Eleven mentioned by Wooden.*

The prosecutor argued: "Now, the defendant also admitted that he had been down to that same 7-Eleven that Mr. Wooden had been to, he admitted that during direct with his attorney. I submit to you that something slipped, he didn't mean to do that because it was the first time he's ever mentioned that." "Everything else was he stayed up around that area of P.C.H., he never went down to 4th Street near Lime Avenue, he couldn't have committed that robbery against Wooden because that's a mile and a half away. He walks everywhere." "[N]ow he's placed himself down near Lime Avenue and 4th Street, not on the day of the crime, of course, he's not going to slip up like that, but he makes his way up and down Atlantic."

Robinson claims this argument implied the prosecutor had information outside the record which showed Robinson purposely had concealed information. However, the prosecutor's comment was accurate based on Robinson's testimony at trial that he did not tell any of the investigating officers he previously had been to the 7-Eleven. The prosecutor properly could argue this admission had unintended implications when considered in the context of Robinson's testimony that his primary mode of transportation was by foot and he rarely left his neighborhood. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 292, fn. 4.)

(2) *Facts/law defense argument.*

In rebuttal argument, the prosecutor stated defense counsel had argued the case was about race, "crooked cops," and a "set up." "In trials[,] sometimes the defense, if the facts are on their side, will argue the facts to a jury. If the law is on the defense's side, they will argu[e] the law to the jury. And if neither the facts nor the law is on the side of the defense, then the police are lying, then that's the argument. This is all a set up. The police are lying, this is all one big conspiracy."

Robinson contends the prosecutor's argument advised the jury to find Robinson guilty based on the prosecutor's experience, implying the police never made a mistake or fabricated information.

Robinson's contention overlooks defense counsel's numerous attacks on the credibility, integrity and competence of the investigating officers. Specifically, defense counsel argued Robinson unjustly had been stopped and thereafter none of the officers checked Robinson's story or "listened to his plea," perhaps because he "just appeared to just be a criminal, and we're looking for somebody out here because we know some black boy in dark clothing is doing some robberies."

Defense counsel also compared Robinson's situation to one defense counsel had recently faced when counsel was stopped by a police officer for no reason while driving a rented van. The officer accused counsel of drinking and driving, then speeding. When defense counsel told the officer he was a criminal defense attorney and he suspected he had been stopped because he was in a rented car, the officer released him without a citation. Also, when defense counsel attended UCLA, he was stopped by police officers "every time I pulled into any part of Westwood . . . ." As a result of these experiences, defense counsel "thought to myself, unlike [Robinson], how can I make sure that this crooked cop does not stop other folks and do this sort of thing to them . . . ."

Later defense counsel argued, "And we all know in this case shortcuts were taken by the people who are sworn to protect us, and to protect all of us, not just protect the affluent who pay[] tickets, but to take care of the poor who have to live on the fortunes of others . . . ."

A prosecutor has wide latitude in commenting on defense counsel's tactics. (See *People v. Redd* (2010) 48 Cal.4th 691, 736; *People v. Bemore* (2000) 22 Cal.4th 809, 846.) The prosecutor's comments in this case fall within the permissible scope of that latitude. In any event, as the prosecutor noted in the remarks that follow Robinson's partial quotation of the prosecutor's argument, the issue in this case was identification, which was determined by the testimony of Wooden and Torres, not the police officer witnesses. Consequently, even assuming the remark constituted misconduct, which it did not, Robinson is unable to show prejudice.

f. *Casting aspersions on defense counsel.*

Robinson contends the prosecutor's comment that the defense always argues the police are lying when neither the law nor the facts is in their favor also was a personal attack on defense counsel and constituted misconduct because it implied defense counsel had little regard for the truth and was willing to present whatever argument was necessary to provide a defense. (*People v. Hill, supra*, 17 Cal.4th at p. 832; *People v. Sandoval* (1992) 4 Cal.4th 155, 184.) The comment also improperly implied defense counsel did not believe Robinson's testimony. (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) Robinson concludes the prosecutor's remark was an attempt to prejudice the jury against defense counsel and Robinson.

The prosecutor did not attack defense counsel personally. Rather, his comment was about what "the defense" sometimes does. Further, as noted above, the prosecutor was entitled to respond to defense counsel's attacks on the integrity and credibility of the investigating officers. In the context of the prosecutor's entire argument, there is no reasonable likelihood the jury interpreted this remark as a personal attack on the integrity of defense counsel. (*People v. Young* (2005) 34 Cal.4th 1149, 1192.)

g. *Barillas represented by counsel*.

Robinson contends the prosecutor improperly argued Barillas was represented by counsel during the second trial because she was not telling the truth. Specifically, the prosecutor argued, "So I presented [Barillas] to you, but if you'll remember this, I presented her as a hostile witness. I did not expect her to be honest. I did not expect her to tell you the truth. She was here with an attorney advising her the whole time." Robinson claims this was an improper attack on Barillas' credibility. Even if the jury were aware of the presence of another attorney, they could not have known the reason for counsel's presence.

However, the record reflects Barillas was represented by an attorney in these proceedings and the presence of the attorney is noted in the reporter's transcript. Thus, the prosecutor's argument was a reasonable inference from the record and certainly did not constitute misconduct. In any event, because Barillas's testimony related only to the Mejia robbery, as to which Robinson already had been acquitted, Robinson cannot show prejudice.

h. *Vouching*.

Robinson contends the prosecutor improperly vouched for the credibility of Detective Romero. The prosecutor noted defense counsel had argued "the investigation was inept in some way because Detective Romero didn't run around checking surveillance cameras. [¶] Well, Detective Romero is a fine, fine law enforcement officer. He covered all the angles. He told you when the defendant was giving him the statements, he never said he was at a Jack in the Box where there are surveillance cameras during the time of the robbery, go check it. I was at this liquor store. [¶] He's talking about panhandling in locations around the area. Detective Romero would have gone out there. He would have checked those things. [¶] Guess who else could have gone out there? Rudy O'Brien, defense investigator. He's been showing up at Mejia and Barillas's house five times, ten times, going all over the place."

Robinson claims the prosecutor's comment implied the prosecutor had information outside the record which indicated Detective Romero is a "fine, fine law enforcement officer" and would have investigated any information he had been provided.

Also, the prosecutor argued: "[a]ny day, ladies and gentlemen, I'll put those two witnesses before you, and I submit to you Detective Romero is credible, the defendant is not." Robinson claims this comment is an attempt to bolster the credibility of Romero by implying the prosecution had additional information which made this statement true.

A prosecutor cannot "vouch for the strength of their cases by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it." (*People v. Huggins* (2006) 38 Cal.4th 175, 206-207.) Similarly, it is misconduct " 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.]" (*People v. Bonilla* (2007) 41 Cal.4th 313, 336.)

However, the prosecutor in this case did not vouch for Detective Romero. As previously noted, defense counsel's argument attacked the credibility and competence of the investigating officers, repeatedly implying the officers had conducted a shoddy and incomplete investigation. Considered "in the context of the argument as a whole" (*People v. Dennis* (1998) 17 Cal.4th 468, 522), the prosecutor did not vouch for Detective Romero or indicate he had any personal information that Romero was worthy of belief. Rather, the argument was tailored to the facts of this case and responded to the defense argument the investigation was flawed at the outset by the unlawful detention of Robinson and the subsequent failure of the police to investigate possible exonerating evidence. (*People v. Martinez* (2010) 47 Cal.4th 911, 957.)

i. *The prosecutor did not present a conflicting theory of guilt at the second trial.*

Robinson claims in the first trial, the prosecution's theory of guilt was that Robinson committed a series of robberies between November 25, and December 27, 2008. He contends that, at the second trial, the prosecutor presented an alternative and irreconcilable theory of guilt, namely, that multiple assailants working together committed the robberies. Robinson notes at the second trial only, the prosecution presented the testimony of Martinez who saw two men standing over Wooden.

Robinson asserts the prosecution's decision to introduce this new theory of guilt was not made in good faith as the prosecutor did not believe Robinson may have had an accomplice and there was no "new significant evidence" that justified a change in the prosecution's theory of guilt. (*In re Sakarias* (2005) 35 Cal.4th 140, 162.) Rather, the prosecutor proceeded in this fashion to allow the jury to avoid having to reconcile the witnesses' conflicting statements. Robinson also contends the prosecutor's use of such a theory constituted misconduct. (*Id.* at 159.)

Robinson claims it is reasonably probable a more favorable verdict would have been reached without the prosecutor's misconduct and, to the extent defense counsel failed to raise this issue below, Robinson claims defense counsel was ineffective for not objecting.

In re Sakarias, the case on which Robinson relies, held "the People's use of irreconcilable theories of guilt or culpability, unjustified by a good faith justification for the inconsistency, is fundamentally unfair, for it necessarily creates the potential for – and, where prejudicial, actually achieves – a false conviction or increased punishment on a false factual basis for one of the accuseds." (*In re Sakarias, supra*, 35 Cal.4th at pp. 159-160.)

However, *Sakarias* involved facts that are in no way comparable to the facts of this case. In *Sakarias*, at the separate trials of Sakarias and his codefendant Waidla, the prosecutor "attributed first to Waidla alone and later to Sakarias alone . . . a series of blows to the victim's head . . . . These two theories are irreconcilable; that Waidla alone

inflicted each of these wounds, as the prosecutor maintained at his trial, and that Sakarias alone also did so, as the prosecutor maintained at his trial, is not possible. One or the other theory (or both, if each man inflicted some but not all of the wounds) must be false." (*In re Sakarias, supra,* 35 Cal.4th at p. 160.)

The prosecutor in Robinson's case did not present a conflicting theory of guilt at the second trial. Although Martinez testified at the second trial, but not the first, that she saw two men near Wooden at the time of the robbery, the prosecutor did not base the People's case on a theory of multiple assailants. "Variations in emphasis where, as here, the underlying theory of the case was consistent at both trials, does not amount to inconsistent and irreconcilable theories." (*People v. Richardson* (2008) 43 Cal.4th 959, 1017, citing *In re Sakarias, supra,* 35 Cal.4th at p. 161, fn. 3.)

Robinson claims Detective Romero testified about the "additional twenty . . . uncharged robberies that occurred in the same area and within the same time period as the charged robberies." Robinson further asserts Romero attributed these robberies to multiple suspects working together.

These assertions misstate the record. Although the prosecutor apparently had evidence indicating Robinson likely had been involved in a series of armed robberies in the area, the trial court prevented the prosecutor from presenting this evidence to the jury. As previously noted, the prosecutor presented evidence only of the robberies of Wooden, Mejia and Torres. Detective Romero testified vaguely about other robberies when discussing a possible modus operandi. However, the prosecutor did not elicit evidence of any other robbery or suggest Robinson had an accomplice

Further, the prosecutor mentioned Martinez's testimony only briefly at the end of final argument as follows: "Xiomara Martinez. How many people did she see? Two. The defendant, who Mr. Wooden identifies as the person who is robbing him and knocked him to the ground, and then a second person."

This reference to the presence of a possible accomplice does not warrant the conclusion the People prosecuted Robinson in the second trial under a theory of guilt that was fundamentally inconsistent with the theory of guilt presented at the first trial. The

prosecutor's theory at both trials was that Robinson personally committed the robberies. In accordance with this theory, the jury found Robinson personally used a firearm in the robbery of Wooden and the robbery of Torres and that he personally inflicted great bodily injury upon Wooden.

Robinson also argues the prosecutor, while reading an excerpt from the preliminary hearing transcript during the examination of Wooden, failed to omit language indicating Robinson at one time had been identified as "defendant number one," suggesting there previously had been additional defendants However, nothing in this circumstance suggests a due process violation or prosecutorial misconduct.

Finally, we note that, at one point during the trial, the trial court advised the prosecutor not to argue the Torres robbery and the Mejia robbery were "not" connected because the People had argued they "were" connected in the first trial and the change in theory from trial to trial might constitute grounds for reversal. However, the prosecutor made no such argument.

In sum, this claim fails whether considered in the context of a due process violation or prosecutorial misconduct.

j. *The cumulative effect of the claimed errors does not require reversal.*

Robinson contends that, even if each separate act of misconduct is insufficient to warrant reversal, the collective effect of the prosecutor's misconduct infected the trial with such unfairness as to make the conviction a denial of due process. (*People v. Hill, supra*, 17 Cal.4th at pp. 819, 845-846.) Robinson notes that, in addition to the matters discussed above, the prosecution also commented on defense counsel's opening statement and failure to produce a promised witness and the fact that Robinson did not request a line-up. Defense counsel objected to both instances of misconduct and the objections were sustained but these additional acts show the pervasiveness of the prosecutor's misconduct. The prosecutor's repeated acts of misconduct tainted the trial and made any request for an admonition futile. (*See People v. Hill, supra*, at p. 821.) Alternatively, defense counsel's failure to object and request an admonition constituted ineffective assistance.

Because there was no prosecutorial misconduct, there could not have been any cumulative effect of prosecutorial misconduct that caused prejudice to Robinson. (See *People v. Bennett* (2009) 45 Cal.4th 577, 618.)

Further, even assuming the prosecutor somehow committed misconduct, Robinson fails to demonstrate prejudice. The trial court instructed the jury it could only determine the facts from the evidence presented at trial, the comments of the attorneys were not evidence and the jury was required to follow the law as it was given in the instructions and not as stated by the attorneys. We presume the jury followed these instructions and disregarded any statements that were not based on the evidence produced at trial. (*People v. Smith* (2007) 40 Cal.4th 483, 517-518.)

Also, Robinson could not have been prejudiced in light of the overwhelming evidence of guilt. (*People v. Hinton* (2006) 37 Cal.4th 839, 872.) As to each robbery, the victim positively identified Robinson. Wooden got a "good look" at Robinson's face during the robbery, he positively identified Robinson in a photographic lineup the day after the robbery and he positively identified Robinson at trial, stating, "No, I have no doubt. That is the man."

Torres saw Robinson's face during the robbery and positively identified Robinson in a field show-up that took place shortly after the robbery. Torres told Officer Castillo, "That's the guy that robbed me." Additionally, Robinson displayed remorse and resignation to the prospect of prison when Romero informed him Wooden had been injured. Robinson's defense, that he was in the area to buy crack cocaine, did not preclude his commission of the Torres robbery. The jury convicted Robinson as charged in less than three hours.

k. *No ineffective assistance of counsel appears.*

Because Robinson's contentions fail on the merits, Robinson is unable to show prejudice from defense counsel's failure to object specifically. We therefore reject Robinson's claim of ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 697 [80 L.Ed.2d 674] [in examining an ineffectiveness claim, "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. . . . If 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. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

2. *Assertedly erroneous evidentiary rulings.*

a. *Asking whether Robinson "had gotten to know" crack dealers.*

Robinson contends the trial court should have sustained defense counsel's objection to the prosecution's question asking Robinson whether some of the "crack dealers" from whom Robinson purchased crack had "gotten to know" him. Robinson claims drug use was minimally probative and the question was designed to evoke an emotional bias against Robinson by associating him with criminals. Robinson asserts this evidence should have been excluded under Evidence Code section 352 as unduly prejudicial.

However, Robinson testified he was in the area of 19th Street and Pasadena Avenue to purchase crack cocaine. When a defendant chooses to testify concerning the charged crimes, the prosecutor can probe the testimony in detail and the scope of cross-examination is very broad. (*People v. Chatman*, *supra*, 38 Cal.4th at pp. 382-383; *People v. Mayfield* (1997) 14 Cal.4th 668, 754.) Given Robinson's defense, the prosecutor was entitled to question Robinson on this topic to test his testimony. Thus, the trial court properly overruled defense counsel's objection.

b. *The trial court's ruling on the admissibility of uncharged offenses evidence was not prejudicial.*

Robinson contends the trial court erroneously overruled defense counsel's objection when the prosecutor initially questioned Detective Romero regarding the modus operandi of numerous uncharged robberies the trial court had ruled inadmissible.

Robinson's contention overlooks that, after the parties conferred at the side bar, the prosecutor noted the detective had not yet answered the pending question and withdrew it. In any event, Detective Romero's modus operandi testimony was so indistinct the trial court did not conclude its order regarding uncharged offenses had been

violated until cross-examination by defense counsel revealed Romero had included in his modus operandi testimony descriptions of suspects that were not found in the police reports related to the Wooden robbery or the Torres robbery. The trial court thereafter enforced its order requiring the People to "stick to this case."

Because the People did not introduce evidence of uncharged offenses other than the Mejia robbery, which the defense agreed was appropriate, the trial court's ruling on the objection at issue did not unduly prejudice Robinson.

c. *Hearsay objections to Aeillo's testimony*.

Robinson contends the trial court erroneously sustained hearsay objections to questions defense counsel asked Officer Aiello seeking to elicit: (1) whether Robinson said he was a panhandler and he was coming from Martin Luther King Boulevard and Pacific Coast Highway; (2) whether Robinson told Aiello he wanted to leave while he was being detained; (3) whether Robinson told Aiello to let him go because Robinson did not do anything; and, (4) whether Robinson panhandled at the liquor store at Martin Luther King and Pacific Coast Highway every day. Defense counsel attempted to elicit this information not to prove the truth of the matters asserted but to show Robinson's demeanor when he was arrested, his cooperation with police and whether the police were investigating instead of merely detaining Robinson.

However, defense counsel never proffered an exception to the hearsay rule in response to the prosecutor's hearsay objections. In any event, as to several of the exchanges, defense counsel eventually elicited the desired information. Furthermore, as to every question, the information ultimately came into evidence from Robinson himself during his testimony. Moreover, the questions all related to collateral points of minimal importance and Robinson fails to explain how he could have been prejudiced by the trial court's rulings.

d. *Asking whether O'Brien told Barillas defense counsel sent him*.

The court sustained a hearsay objection when defense counsel asked Barillas, after she indicated she was scared of defense investigator O'Brien because he was harassing her, whether O'Brien told her defense counsel had sent him. Robinson claims defense

counsel did not ask this question to prove the truth of the matter asserted, i.e., whether defense counsel actually sent O'Brien, but to establish what Barillas believed with regards to the subpoena and her bias based on her beliefs.

Initially, it appears the trial court properly sustained the prosecutor's hearsay objection because the question was designed to prove the truth of the matter asserted, i.e., whether defense counsel actually sent O'Brien. However, notwithstanding this ruling, the circumstances surrounding Barillas's testimony were fully explored by both sides and the answer Robinson sought eventually was elicited from Barillas. Finally, even assuming an abuse of discretion in the trial court's ruling, Robinson fails to explain how he could have been prejudiced by the omission of such an irrelevant point.

3. *The record indicates the trial court was aware of its discretion to impose a concurrent subordinate term.*

The prosecution's sentencing memorandum asked the trial court to impose the maximum possible term of 22 years and four months with a consecutive sentence on the second robbery count and the enhancements. Defense counsel argued Robinson had a minimal record that did not include violence and asked the trial court to impose the "minimally acceptable [term of imprisonment] under the law."

The trial court responded the "[m]inimum would be 18 years, four months" and asked, "[s]o, you are asking for 18 years, four months, the minimum?" Defense counsel responded affirmatively.

The trial court thereafter sentenced Robinson to a total term of 20 years and 4 months in state prison, imposing the middle term of 3 years on count 6, rather than the upper term of 5 years requested by the People. The trial court stated it would impose a consecutive sentence as to count 7 and the enhancement allegation associated with it, "because this involved [a] different victim, at [a] different occasion." The consecutive terms consisted of 1 year for robbery (one-third the middle term of 3 years) and 3 years and 4 months for the firearm enhancement (one-third the 10-year term).

Robinson contends the record affirmatively shows the trial court did not realize the scope of its discretion to impose a concurrent subordinate term. (*See People v. Fuhrman* (1997) 16 Cal.4th 930, 945; *People v. Belmontes* (1983) 34 Cal.3d 335, 348 fn. 8.) He notes the trial court repeatedly indicated the minimum term it could impose was 18 years and 4 months "under the law." Because such a term cannot be attained without imposing a consecutive term on count 7, Robinson concludes the trial court incorrectly believed a consecutive subordinate term was mandatory. Robinson requests remand for a new sentencing hearing. (*People v. Rodriguez* (2005) 130 Cal.App.4th 1257, 1263.)

Alternatively, Robinson contends defense counsel provided ineffective assistance in failing to request a concurrent term and in indicating the minimum term was 18 years and 4 months in prison. Robinson asserts the error was prejudicial because the trial court did not impose the maximum term, thereby indicating it was inclined to be lenient. In addition, Robinson did not, as argued by respondent, have a "lengthy" criminal record.

This claim fails because the record does not support Robinson's assertion the trial court affirmatively misunderstood the scope of its sentencing discretion. Rather, given that this case involved separate robberies committed against different victims at separate times, it essentially was a foregone conclusion the trial court would impose a consecutive subordinate term.

The trial court's "under the law" statement is too slender a reed to support Robinson's claim the trial court was unaware it could impose a concurrent term on count 7. Indeed, by expressly stating a reason in support of the imposition of a consecutive term on count 7, the trial court demonstrated it was aware the decision to impose a consecutive term on count 7 required a statement of reasons. We therefore reject Robinson's claim of sentencing error and the related assertion of ineffective assistance of counsel.

4. *Robinson is entitled to one additional day of presentence custody credit.*

At sentencing, Robinson was awarded 620 actual days of time served and 93 days of conduct credit for a total of 713 days.

Robinson notes he was arrested on December 27, 2008, and was sentenced on September 8, 2010. He claims that, counting the day of his arrest and the day of sentencing (*see People v. Smith* (1989) 211 Cal.App.3d 523, 526), he served 621 actual days of custody and was entitled to presentence custody credit of 714 days.

The People concede the point and it appears their concession is appropriate. We shall order the abstract of judgment corrected to reflect one additional day of presentence custody credit.

DISPOSITION

The judgment is affirmed as modified to reflect 621 actual days of custody, 93 days of conduct credit and total presentence custody credit of 714 days. The trial court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting the modification.

The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.