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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL DELGADO, Defendant and Appellant.	B277801 (Los Angeles County Super. Ct. No. BA445599)

APPEAL from a judgment of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Carlo Andreani, 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, Joseph P. Lee and Michael Katz, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant Daniel Delgado of assault with a deadly weapon and attempted robbery, based on evidence that he hit a bicyclist with his car and then tried to grab the victim's belongings. Appellant claims the trial court erroneously admitted two pieces of evidence: a prior misdemeanor conviction of an eyewitness and police officer testimony about a statement from a paramedic at the scene. We conclude that the court did not abuse its discretion in permitting the prosecution to impeach the witness by asking about misdemeanor misconduct. On the other hand, we find that the officer's testimony regarding the paramedic's statement was irrelevant and therefore its admission was in error. However, any error from the admission of either piece of evidence was harmless. We therefore affirm.

PROCEDURAL HISTORY

Appellant was charged by information with one count of assault with a deadly weapon, a car (Pen. Code, § 245, subd. (a)(1); count one) and one count of attempted second degree robbery (Pen. Code, §§ 664, 211; count two). The information further alleged as to both counts that appellant personally used a car as a deadly weapon (Pen. Code, § 12022, subd. (b)(1)), and that he had a prior strike conviction (Pen. Code, §§ 667, subd. (d), 1170.12, subd. (b)), prior serious felony convictions (Pen. Code, § 667, subd. (a)(1)), and several prior prison terms (Pen. Code, § 667.5, subd. (b)).

The jury found appellant guilty as charged and further found the deadly weapon allegation true. Appellant waived trial on his prior convictions and subsequently admitted one prior strike conviction, one prior serious felony conviction, and two prior prison terms.

The court struck the prior prison terms and deadly weapon enhancements. The court sentenced appellant to a term of 13 years on count one and stayed imposition of the sentence on count two pursuant to Penal Code section 654. Appellant timely appealed.

FACTUAL BACKGROUND

The following evidence was adduced at trial.

A. *Victim's testimony*

On March 11, 2016, U.S.C. student Randy P.[1] was riding his bicycle near the campus. Around 3:00 that afternoon, he rode to a nearby Bank of America to cash his paycheck. As he was getting his money inside the bank, he noticed two men watching him in a way that made him nervous. Randy identified one of the men at trial as appellant. He was no longer comfortable taking his money home, so he went to an ATM outside the bank and deposited the cash into his account. Randy then rode his bike across the street to get something to eat. After about 15 minutes, he began to ride home.

As Randy neared the intersection of Raymond Avenue and 37th Place, he was struck by a car and knocked off his bike. He fell to the ground, hitting his elbow. He testified that he did not see the car approach from behind; afterward, he sat on the ground shocked and in pain. He became frightened when he saw the driver emerge from the car that had hit him and he recognized the driver as appellant, one of the men who had been watching him in the bank. Appellant approached Randy.

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[1] Pursuant to California Rules of Court, rule 8.90(b)(4), we refer to victim Randy P. by his first name. No disrespect is intended.

Randy's account of the next part of the incident varied somewhat, and he admitted that he did not remember all of the details because he was in shock and "everything happened so fast." On direct, he testified that once he recognized appellant, he felt an "adrenaline rush" and started to get up to get away. Appellant reached him either when he was still on the ground or getting up. Randy testified that appellant made contact with him but he did not remember the details; he did remember that he took out his phone intending to call the police and appellant said something like, "What are you doing?" Appellant also said "Where's the money?" or something similar. Appellant tried to get the phone away from Randy but Randy resisted. Randy also attempted to record the incident on his phone. After that, appellant called to the passenger in the car and said something about pulling out a gun. Appellant also made a motion at his waist "like he's going to get a knife or a gun." Randy saw the passenger begin to exit the car and recognized him as the second man from the bank. Randy testified, "[T]hat's when I ran."

After the prosecutor showed Randy the police report to refresh his recollection, Randy also recalled that appellant reached into Randy's pockets while he was on the ground. As Randy got up, appellant was "trying to wrestle me" and to "take my stuff, like, my phone and any other things I have."

After Randy began to run away, appellant started to run after him, but then stopped, went back to his car and bent its license plate up. Appellant then got back into the car and left the scene. Randy called 911. The recording of his 911 call was played for the jury. In the call, Randy told the operator that he "just got hit by a car and the car looks like a hit and run." He requested paramedics and reported that "the dude is trying to hit

me as well . . . I was trying to pull up my phone to call the cops he try to hit me or fight me when I try to take a picture of his car he again try to fight me so I have to ran away."

The prosecutor played surveillance footage from a nearby home, which showed some of the incident, including the initial collision. He also played the video Randy took with his phone. The phone video captured the vehicle's license plate. It also showed appellant getting back into his car and driving in reverse up the street. In the video, Randy can be heard stating, "These people just crashed me right now. And they tried to do . . . to run away as you can see." Randy also stated he was going to call the police.

A few days later Randy identified appellant from a photo lineup as the driver who hit him. A few weeks later, he identified Gregory Saldivar as the passenger from another photo lineup.[2]

On cross-examination, Randy acknowledged that he did not tell the 911 operator that appellant tried to rob him. He told the operator only that it was a hit and run because he "was trying to get an ambulance" for himself. He also did not mention a robbery on his cell phone video.

Randy acknowledged that he told the officers that he "possibly" blacked out and when he came to, appellant was going through his pockets. However, at trial, he denied that he blacked out. He confirmed that he told the police that appellant was going through his pockets and trying to rob him. According to Randy, he told the police that appellant was wrestling with him and "was trying to take my stuff."

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[2] Saldivar was charged together with appellant but they were not tried together. Saldivar is not a party to this appeal.

B. *Testimony from eyewitness Vivas*

Luis Vivas testified that he owns a nearby property equipped with surveillance cameras, and he was on the street at the time of the incident. He saw Randy on the ground and the driver, whom he identified as appellant at trial, get out of the car. Vivas saw appellant trying to lift Randy from the ground and it seemed to him at that moment that appellant was trying to help the victim.

Vivas testified that when he came to court for the preliminary hearing a few months before trial, he saw someone pointing a cell phone at him and he thought that person might be taking pictures of him. He told the investigating detective that he was concerned for his safety. He left without testifying that day. He claimed that the second time he came to court, he saw the same person who had been trying to take his picture. Vivas also said he had concerns for his safety at trial.

Vivas acknowledged he told the officer at the scene that he saw the entire incident. However, at trial, Vivas said he did not see the impact, but heard it and saw Randy on the ground.

The prosecutor impeached Vivas with prior misdemeanor and felony misconduct, which we discuss more fully below. The prosecutor also confronted Vivas with his prior statements to the police that he saw the vehicle swerve into the victim from behind, the collision appeared intentional, and the victim was not in the way of traffic. He denied these statements, but then claimed he concluded that the collision was intentional "after seeing the impact." When asked whether he told the police that he saw appellant immediately checking Randy's pockets while Randy was on the ground, Vivas said he saw appellant trying to grab Randy's phone. Although he claimed at trial that he thought

appellant was trying to help the victim, he admitted that he had not included this in his statement to the police at the scene. He explained, "Afterwards that was my conclusion [that appellant was helping], but at the beginning what I thought was what I said." Vivas testified that he used the word "help" to describe appellant's conduct because appellant "was grabbing [Randy.] But seeing the things that happened, I saw that he was grabbing. He was trying to grab the phone from him." Vivas also testified that Randy was trying to take out his phone and appellant was asking Randy "to please not call the police."

Vivas testified that after appellant checked Randy's pockets, the passenger in the car grabbed the bicycle and placed it out of the way of traffic. He also heard appellant say "I have a gun," while reaching for his waistband, which caused Randy to run. Vivas then saw appellant folding the front license plate on his car in half, obscuring the plate number.

C. *Police officers*

Los Angeles Police Department Officer Rosie Powers testified that she and her partner, Officer Claudia Benitez, responded to the 911 call for "ambulance hit and run felony." When they arrived, Randy was in an ambulance being treated by rescue personnel. Powers testified that she was told by a paramedic that Randy had been robbed, so she upgraded the crime broadcast from a hit and run to a robbery. We discuss this evidence further below.

Power next spoke with Vivas, who said he had seen the entire incident and also had surveillance footage from his residence. Vivas told Powers that the victim was riding southbound on Raymond Avenue on his bicycle. Vivas saw the vehicle "quickly approaching behind [Randy] and swerved to the

west which is to the right and struck [Randy] causing him to crash and fall off of his bicycle." Vivas stated that the collision appeared to be intentional. He told Powers that the driver "immediately exited his vehicle, approached [Randy] and began checking his pockets." According to Powers, Vivas heard appellant "shout that he had a handgun and to -- and he was going to grab the handgun." Vivas saw appellant reaching for his waistband and "simulating a handgun." Vivas did not tell Powers that appellant was trying to help Randy up or that he heard appellant say, "please don't call the police."

Powers later spoke to Randy while he was being treated in the emergency room for "severe" leg pain. Randy told her that after he was hit he "possibly blacked out" and when he awoke, appellant was going into his pockets. Randy did not report that appellant had asked him, "where's the money?" Officer Benitez also testified and confirmed her partner's testimony.

Officer John Hackman ran the license plate number from the car, which had been captured on Randy's cell phone video. It was registered to appellant. On April 6, 2016, he and his partner found the car while searching near an address associated with appellant. The car had paper license plates, but the officers verified that it was the same vehicle using the Vehicle Identification Number. When appellant approached the vehicle, the officers arrested him. Saldivar also was arrested at the scene.

DISCUSSION

Appellant raises claims of error regarding admission of two pieces of evidence: Vivas's prior misdemeanor conviction and Officer Powers's testimony relating a paramedic's report that the incident was a robbery.

We review the trial court's rulings on the admissibility of evidence for abuse of discretion. (See *People v. Waidla* (2000) 22 Cal.4th 690, 725; *People v. Poggi* (1988) 45 Cal.3d 306, 318–319.) "'[A] trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.'" (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.)

I. Admission of Misdemeanor Conviction

Appellant asserts that the trial court erred in allowing the prosecutor to impeach Vivas with a prior misdemeanor conviction. We find no abuse of discretion and further, that any error would be harmless.

A. *Factual background*

After Vivas testified that appellant was trying to help Randy up from the ground, the prosecutor asked whether Vivas had a criminal record. Defense counsel objected under Evidence Code section 352.[3]

At sidebar, the prosecutor indicated he planned to offer evidence of two prior convictions as crimes of moral turpitude—a 2010 felony conviction for hit and run causing death or injury (Veh. Code, § 2001, subd. (a)), and a 2002 misdemeanor conviction for corporal injury to a spouse (Pen. Code, § 273.5). Defense counsel objected that the misdemeanor "would have to be by way of impeachment of the underlying offense, not conviction." The court responded, "Actually, under the current law if he denies that he committed - - okay. You have to ask him, 'Did you commit a spousal battery or corporal injury to spouse?' If he says

[3] All further statutory references herein are to the Evidence Code unless otherwise indicated.

no, then the conviction is admissible. And if he says yes, that's where you leave it." Defense counsel again objected under section 352, arguing that "the probative value of the misdemeanor domestic violence is outweighed by the prejudice." The court overruled the objection, noting that "it is a crime or an act involving moral turpitude and the People are entitled to impeach him with it."

Resuming questioning, the prosecutor asked Vivas, "in 2002, did you commit a misdemeanor violation of Penal Code section 273.5, inflicting corporal injury on a spouse or cohabitant?" Vivas responded, "Yes. It was an accident." When asked whether he committed the felony hit and run, he responded, "Yes. I was accused of that, but I never had - - I never hit somebody. It was an accident with my wife." The prosecutor asked whether Vivas had been convicted of the felony, which he confirmed.

During closing argument, the prosecutor said that Vivas "has a felony conviction for hit and run and also a misdemeanor domestic violence conviction." Defense counsel did not object.

B. *No error in admission of prior misdemeanor*

Appellant contends the trial court erred in admitting evidence of Vivas's prior misdemeanor conviction to impeach his testimony. He argues that the evidence of conviction was inadmissible hearsay. Further, even if admissible, appellant asserts that the evidence should have been excluded as more prejudicial than probative under section 352.

A trial court has broad discretion "to admit or exclude acts of dishonesty or moral turpitude 'relevant' to impeachment," including conduct underlying a misdemeanor conviction. (*People v. Wheeler* (1992) 4 Cal.4th 284, 288 (*Wheeler*), superseded by

statute on other grounds, as stated in *People v. Duran* (2002) 97 Cal.App.4th 1448, 1460.) However, "the fact of conviction of a misdemeanor remains inadmissible under traditional hearsay rules" when offered to prove the witness committed the misconduct and thereby impeach a witness's credibility. (*Wheeler*, *supra*, at pp. 288, 297.)

As an initial matter, the Attorney General asserts that appellant did not raise a specific hearsay objection in the trial court and therefore has forfeited his ability to do so on appeal. We find that appellant did not forfeit his hearsay objection. While appellant's counsel did not use the word "hearsay" in the trial court, he did identify the hearsay issue by objecting that the prosecutor could admit evidence of the underlying misdemeanor offense, but not the conviction. As such, this case is distinguishable from those in which counsel forfeited an objection by raising entirely different grounds below. (See, e.g., *Wheeler, supra*, 4 Cal.4th at pp. 297, 300 [finding forfeiture where defendant argued for first time on appeal that even if misdemeanor offense was admissible, the conviction was inadmissible hearsay]; *People v. Green* (1980) 27 Cal.3d 1, 22 [objection that questions were leading does not preserve argument that the evidence was impermissible evidence of other crimes], overruled on other grounds by *People v. Martinez* (1999) 20 Cal.4th 225, 234; *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1103, fn. 11 [hearsay objection did not preserve objection under section 352].) Appellant sufficiently raised the specific ground of his objection so as to preserve it for appeal. (See § 353; *People v. Holt* (1997) 15 Cal.4th 619, 666-667 [a claim of the erroneous admission of evidence is preserved for appeal if the timely objection alerted the trial court to the nature of the

anticipated evidence and the basis on which exclusion was sought and afforded the opposing party an opportunity to establish its admissibility].)

Next, we conclude that the trial court did not err in permitting the prosecution to ask Vivas about his commission of the underlying misdemeanor offense. Appellant acknowledges that evidence of Vivas's prior conduct was admissible. (See *Wheeler, supra*, 4 Cal.4th at p. 295.) However, he contends that the prosecutor's question—"did you commit a misdemeanor violation of Penal Code section 273.5, inflicting corporal injury on a spouse or cohabitant?"—suggested that Vivas had been convicted of that conduct. He cites no authority supporting that contention.[4] We are not persuaded. The question posed to Vivas asked whether he *committed* certain criminal conduct. It did not suggest Vivas was *convicted* of that crime. After Vivas answered affirmatively, the prosecutor moved on to asking about his prior felony conduct. Finally, the prosecutor specifically asked whether Vivas had been convicted of the felony; he did not pose the same question with respect to the misdemeanor.

Appellant also argues that the trial court failed to exercise its discretion to exclude the prior conviction as more prejudicial than probative under section 352. Based on the trial court's statement that the prosecution was "entitled" to impeach Vivas with the prior crimes, appellant concludes that the court did not properly weigh all due considerations under section 352.

"'[A] court need not expressly weigh prejudice against probative value or even expressly state that it has done so, if the record as a whole shows the court was aware of and performed its

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[4] We also note that appellant did not object to this question during trial.

balancing functions under Evidence Code section 352.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 438.) Here, we are satisfied from the record that the court properly performed its balancing functions under section 352. The court heard arguments from both parties at sidebar and expressly overruled appellant's section 352 objection, noting the probative value of the misdemeanor conduct as an act involving moral turpitude. Further, none of the court's statements suggested a belief that it did not have discretion to exclude the evidence.

Appellant also suggests that the misdemeanor conduct had little probative value because "it was an accident." But there was no suggestion at the time of appellant's objection, and the court's ruling, that Vivas's conduct was accidental; Vivas declared as much afterward, in response to the prosecutor's questioning. Nor would a claim by the witness of accidental misconduct necessarily mean that conduct was irrelevant. Thus, we conclude that the court "consciously exercised its discretion under Evidence Code section 352, and it did so soundly." (*Wheeler, supra*, 4 Cal.4th at p. 297; see also *People v. Prince* (2007) 40 Cal.4th 1179, 1237 ["The court referred to the high probative value of the evidence, and we properly may infer that the court determined that the probative value outweighed any undue prejudice."].)

In sum, we conclude the trial court did not abuse its discretion in admitting the conduct underlying Vivas's prior misdemeanor conviction to impeach his credibility.[5]

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[5] For the same reasons, we reject appellant's argument that the admission of the misdemeanor conviction violated his due process rights. (See *People v. Partida* (2005) 37 Cal.4th 428, 439 (*Partida*) ["[T]he admission of evidence, even if erroneous under

C. *Harmless error*

Additionally, any error on this issue was harmless under the "reasonable probability" standard of prejudice set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). "Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional *Watson* test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*Partida, supra*, 37 Cal.4th at p. 439.)

Defense counsel argued at trial that appellant's collision with Randy was accidental and appellant tried to help, not rob, Randy afterward. On appeal, appellant suggests that Vivas's testimony at trial was critical to this argument, as Vivas stated he thought appellant was trying to help Randy get up from the ground and was pleading with Randy not to call the police. Consequently, appellant suggests that the prosecution's impeachment of Vivas's credibility damaged his argument.

Appellant has not demonstrated prejudice. First, even absent the asserted error relating to Vivas's misdemeanor conduct, the prosecution impeached Vivas with his prior felony conviction. Thus, any effect of prior misconduct on Vivas's credibility would have remained regardless of the asserted error here. Second, the prosecution's primary focus in impeaching Vivas was not to discredit him entirely, but to suggest that his original statements at the scene of the collision were more truthful than his testimony at trial. To this end, during closing argument, the prosecutor discussed Vivas's purported fear of testifying repeatedly, but mentioned his prior convictions only

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state law, results in a due process violation only if it makes the trial fundamentally unfair. [Citations.]"].)

once. Absent use of the misdemeanor, this argument would have remained largely unchanged.[6]

Finally, there was significant evidence supporting Vivas's initial statements to the police and undermining appellant's theory of the case. Randy testified unequivocally and consistently that he recognized both appellant and Saldivar as the men watching him in the bank. The collision itself and parts of the following scuffle were recorded and played for the jury, allowing the jurors to determine whether they agreed with Vivas's initial assessment that it appeared appellant intentionally hit Randy. And although Vivas claimed at trial that he initially thought appellant was trying to help Randy, he also admitted to key statements he made to the police officers, including that appellant was going through Randy's pockets, grabbing for Randy's phone, and said that he had a gun. These statements were confirmed by the officers at trial. As such, we

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[6]Appellant suggests that the prosecutor exploited any error by referring to a misdemeanor "conviction" during closing. Appellant did not object to this statement at trial. Moreover, the prosecutor's fleeting reference in a lengthy closing argument was harmless, given the circumstances we have discussed here. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 803; see also, e.g., *People v. Pensinger* (1991) 52 Cal.3d 1210, 1250 [improper comment in closing argument held harmless error because it was "isolated" and "not repeated"].) The jury was instructed that statements of counsel were not evidence; absent some contrary indication in the record, we presume the jury followed these instructions. (See *People v. Boyette* (2002) 29 Cal.4th 381, 436; *People v. Morales* (2001) 25 Cal.4th 34, 47 ["we presume that the jury relied on the instructions, not the arguments, in convicting defendant"].)

conclude appellant would not have received a more favorable outcome absent the purported error.

II. Admission of Statement Regarding Robbery Broadcast

Appellant also contends the trial court improperly admitted hearsay testimony from Officer Powers that she upgraded the crime broadcast to a robbery based on a statement from a paramedic at the scene that Randy had said he was robbed. He further asserts that he was prejudicially harmed by this testimony and the prosecution's reference to it in closing argument. We conclude that the evidence was admitted in error, but the error was harmless.

A. *Factual background*

Officer Powers testified that before speaking to Randy at the scene, she sent out an updated broadcast to other police officers, reporting the crime as robbery. The prosecutor asked what led her to "upgrade the call to a robbery?" Defense counsel objected on hearsay grounds. The court overruled the objection, reasoning, "It goes to her state of mind and will be admitted for that purpose only." As Powers began to explain, defense counsel again objected that the answer called for multiple hearsay and the court reiterated that, "it's not being offered for the truth of the matter asserted, only to explain her conduct. And it will be admitted for that purpose only." Powers then testified that she had been told by a fire department paramedic that the victim had been robbed. Based on that information, she sent out the updated broadcast "because the potential of the suspects still being in the area and possibly committing more of those crimes is highly likely. So I put out that information for my fellow

brethren officers to, you know, locate the vehicle and possibly the suspects."

In closing, the prosecutor noted that Randy had not mentioned a robbery in his 911 call or in the video he recorded during the incident. The prosecutor then stated that while Randy was being treated in the ambulance at the scene, "Who does he inform about what was being done, that his pockets were being checked by Mr. Delgado? The paramedics on the scene. When Officer Powers arrives . . . what do the paramedics tell her right off the bat? 'Hey, we got called out as a hit and run.' That's the 911 dispatch call. 'But this is something more. This is probably a robbery investigation of some kind.' And so what do the officers do? They put that out immediately. So what does that do? That lends credibility, the truthfulness of his testimony."

B. *Error in admission of statement*

Over appellant's objection, the trial court admitted Officer Powers's testimony for the nonhearsay purpose of establishing her state of mind and therefore explaining her decision to issue an upgraded robbery broadcast. Appellant argues this was error because the officer's state of mind was not relevant.

Evidence may be admitted for a nonhearsay purpose if it is relevant to a matter at issue in the case. (*People v. Turner* (1994) 8 Cal.4th 137, 189 ["An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute."]; *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1109-1110 (*Lucero*) [whether the evidence was "offered for a non-hearsay purpose[,] it still had to be relevant to be admissible"].)

We can see no relevance in this case to Officer Powers's state of mind regarding her reason for upgrading the crime broadcast at the scene. Testimony from a police officer relating information she received from a third party to explain why the officer acted as she did is not relevant when the good faith or reasonableness of her conduct is not at issue. (See *Lucero, supra,* 64 Cal.App.4th at pp. 1109-1110; *People v. Reyes* (1976) 62 Cal.App.3d 53, 68.) The reasonableness of the police investigation was not an issue here, nor was any police conduct in response to the broadcast. Thus, the nonhearsay purpose of the statement "had no tendency in reason to prove any disputed issue of fact" in that regard. (*Lucero, supra,* 64 Cal.App.4th at pp. 1109-1110.) The Attorney General suggests that the testimony "was relevant to explain the officers' conduct," but does not further explain how "the course of the police investigation" was an issue in this case.

Appellant also contends the evidence should have been excluded for another reason—as a "testimonial" out of court statement admitted in violation of his right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36, 59. We disagree. Any statement made by Randy to the paramedic does not implicate *Crawford*, as he testified at trial and was subject to cross-examination.[7] (*Ibid.*) Moreover, the statement made by the paramedic to Officer Powers was not offered to prove the truth of the matter—that a robbery occurred—but to explain Powers's conduct in issuing an upgraded crime broadcast. As such, the

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[7] Officer Powers testified only as to what the paramedic told her—that the witness was robbed. She did not state that the paramedic learned this information based on a statement by Randy, although that was the likely implication.

evidence was nonhearsay and not subject to the analysis in *Crawford*. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1163–1164 "there are no confrontation clause restrictions on the introduction of out-of-court statements for nonhearsay purposes"]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224-1225 [finding portions of police dispatch tape admitted for nonhearsay purpose were not subject to *Crawford* restrictions].)[8]

C. *Harmless error*

Although the admission of Powers's testimony regarding statements made by the paramedic was error, we nonetheless conclude that any error was harmless under *Watson, supra*, 46 Cal.2d at p. 836.

The court admitted the evidence for a limited, nonhearsay purpose, to explain Officer Powers's state of mind. At the time the evidence was admitted, the trial court promptly admonished the jury—twice—that the testimony was not being offered for the truth of the matter asserted. (*People v. Livingston, supra,* 53 Cal.4th at p. 1163; *Lucero*, *supra*, 64 Cal.App.4th at p. 1110.) The court also instructed the jury at the close of trial as to evidence offered for a limited purpose. We presume the jury understood and followed these instructions. (See *People v. Zavala* (2013) 216 Cal.App.4th 242, 249.)

Additionally, there was ample evidence to support the conclusion that appellant attempted to rob Randy. In addition to Randy's testimony that he saw appellant watching him withdraw money at the bank, Randy and Vivas both told the police that

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[8] We also reject appellant's due process argument, finding that the erroneous admission of Officer Powers's testimony did not render the trial fundamentally unfair. (See *Partida, supra,* 37 Cal.4th at p. 439.)

appellant was going through Randy's pockets. Both witnesses also consistently testified that appellant tried to grab Randy's phone, which Randy also reported on the 911 call.

Defense counsel argued that Randy had not mentioned the robbery in his video or 911 call, but instead reported it only after the fact; he argued that Randy lacked credibility as a result. But the evidence that Randy reported the robbery to the police while in the hospital shortly after the incident was admitted without objection. The addition of a single reference implying that Randy also told a paramedic that he was robbed, without more, does not establish prejudice to appellant. We also note that Officer Powers testified without objection that she upgraded the broadcast to a robbery. Only the follow-up question regarding her basis for doing so drew appellant's objection to the evidence at issue here. Thus, even absent the objectionable statement, the jury was presented with evidence that Powers had concluded a robbery might have occurred even before she spoke to Randy at the hospital.

Appellant also contends that the prosecution improperly argued that the robbery broadcast lent credibility to Randy's testimony claiming he was robbed, thus impermissibly using the evidence for its truth. The Attorney General counters that the prosecution's reference was taken out of context. From our reading of the record, it appears that during closing argument the prosecutor suggested the paramedic's statement could be considered for its truth; this was improper.

We note that appellant did not object below and does not contend the statement rises to the level of prosecutorial misconduct. Moreover, we do not agree that the prosecutor prejudicially exploited this evidence through a brief reference

during closing argument to the police decision to issue a robbery broadcast. The prosecutor focused most of his argument regarding Randy's credibility on the consistencies between Randy's statement to the police, his testimony at trial, and other evidence, including Vivas's testimony and the videos. We presume the jury followed the court's instructions and relied on the evidence rather than a brief remark by counsel. (See *People v. Boyette, supra,* 29 Cal.4th at p. 436; *People v. Morales, supra,* 25 Cal.4th at p. 47.) Under these circumstances, we conclude that it is not reasonably probable appellant would have had a more favorable verdict absent the evidence of an out-of-court statement made by the paramedic to Officer Powers.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.