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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD WHEELER, Defendant and Appellant.	B275786 (Los Angeles County Super. Ct. No. BA432690)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

Law Office of Jerome Bradford and Jerome Bradford for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey,

Supervising Deputy Attorney General, and Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.

In May 2016, a jury convicted James Edward Wheeler (Wheeler) of fleeing a pursuing peace officer's motor vehicle while driving recklessly (Veh. Code, § 2800.2), a felony (count 1), and hit-and-run driving resulting in property damage (Veh. Code, § 20002, subd. (a)), a misdemeanor (count 2). The trial court sentenced Wheeler to a term of 16 months in state prison.

On appeal, Wheeler claims that the trial court violated his right to due process under the federal and state constitutions by acting in a biased manner. We disagree. Accordingly, the judgment is affirmed.

BACKGROUND

I. The reckless driving incident

On January 3, 2015, at approximately 3:00 a.m., while on patrol, two Los Angeles police officers observed a white Ferrari "doing doughnuts"—that is, "doing circles in the middle of an intersection."

The officers activated the blue and red lights on the roof of their squad car, a Ford Explorer, and sounded the vehicle's siren. The Ferrari came to a stop in front of the police vehicle for a few seconds, before driving away at a high rate of speed. The police officers pursued the fleeing Ferrari and a short, high-speed chase ensued. Although the police officers' pursuit of the Ferrari was only "a little over a mile" in length, and lasted only about one minute, the

Ferrari reached speeds between 60 and 100 miles per hour—in the words of one officer, the Ferrari pulled away from the officers' Explorer "like only a Ferrari can." The chase ended when the Ferrari crashed into a cement planter in front of a gas station at the intersection where the police had first spotted the Ferrari doing doughnuts.

The police saw Wheeler exit the Ferrari from the driver's door and then begin running away. After a brief foot chase, the police cornered Wheeler in a house's backyard. Initially, Wheeler acted "aggressive," moving towards the officers in a "fighting stance" and then, after being subdued, refusing to be handcuffed. Once he was handcuffed, however, Wheeler acted in a polite manner, a "model arrestee," according to one of the arresting officers.

At the station, after being read his rights, Wheeler admitted to doing doughnuts in the intersection, panicking upon seeing the police car, fleeing the scene, crashing his car, and then fleeing on foot. At no time during his station house interview did Wheeler mention sleepwalking, sleepdriving, or that he had been diagnosed with a sleep disorder. According to the interviewing officer, a police sergeant, Wheeler was "extremely polite, respectful and 100 percent took responsibility for his actions and actually used the words . . . , 'I take responsibility for what I did tonight.' "

II. The trial

On September 14, 2015, an initial trial resulted in a hung jury, the final ballot being 11 to 1 in favor of a guilty verdict.

In the spring of 2016, the trial court presided over a second jury trial. In his defense, Wheeler called two witnesses: a girlfriend, who lived with him from 2012–2015; and a sleep medicine physician, Dr. Victoria Zvonkina (Zvonkina). Wheeler's girlfriend testified that, on occasion, Wheeler engaged in sleepwalking behavior, including driving while in a "dazed" sleeplike state, and that on at least one occasion before his arrest, in November 2014, he spun the car in "doughnut style" while in a sleeplike state. Based on a review of Wheeler's existing medical records only—that is, she did not talk to Wheeler's parents or bed partners, perform a physical, neurological or psychiatric evaluation of Wheeler, or conduct any diagnostic tests, including any sleep lab studies—Zvonkina opined that Wheeler suffered from parasomnia or sleepwalking. Zvonkina further testified that it is "accepted in the medical community without dispute" that sleepdriving may occur while someone is sleepwalking.

On May 4, 2016, after approximately three and a half hours of deliberation, the jury returned a verdict finding Wheeler guilty on both the reckless driving (felony) charge and the hit and run—property damage (misdemeanor) charge.

On June 24, 2016, the trial court sentenced Wheeler to 16 months for the reckless driving felony charge and six months for the misdemeanor hit and run, with the sentences to run concurrently.Wheeler timely appealed.

DISCUSSION

I. Wheeler's forfeiture of his claims on appeal

The People contend that Wheeler forfeited his judicial bias claim in two ways. First, the People expressly argue that Wheeler failed to object on grounds of judicial bias to each of the alleged instances of misconduct at issue in this appeal. Second, the People implicitly suggest that Wheeler forfeited his bias claim by failing to support it on appeal with proper legal argument. Of the two arguments, the second is more compelling.

A. WHEELER RAISED THE ISSUE OF BIAS AT TRIAL

"As a general rule, judicial misconduct claims are not preserved for appellate review if no objections were made on those grounds at trial. [Citations.] However, a defendant's failure to object does not preclude review 'when an objection and an admonition could not cure the prejudice caused by' such misconduct, or *when objecting would be futile*." (*People v. Sturm* (2006) 37 Cal.4th 1218, 1237, italics added.) In *People v. Sturm*, our Supreme Court observed that where there was "evident hostility between the trial judge and defense counsel," it would be "unfair to require defense counsel to choose between repeatedly provoking the trial judge into making further negative statements about defense counsel and therefore poisoning the jury against his client or, alternatively, giving up his client's ability to argue misconduct on appeal." (*Id.* at p. 1237.)

The record here indicates that while there may not have been evident hostility between Wheeler's counsel and

the trial judge, there was, on occasion, an undeniable tension between the two that grew out of or existed because of claims of judicial bias. For example, prior to the presentation of evidence, the trial court made a reference to defense "games" and gamesmanship in connection with Wheeler's sleepwalking defense, to which defense counsel took exception even though the court explained that it was using "games" interchangeably with "tactics." Later in the trial, during the direct examination of Wheeler's girlfriend, defense counsel asked her what Wheeler had told her about the instant incident of doughnutting; the People objected on hearsay grounds and the trial court sustained the objection. Wheeler's counsel then repeatedly asked to make an offer of proof and the trial court repeatedly denied those requests. Defense counsel then requested a sidebar with the trial court and the following colloquy ensued:

"The Court: Do not ever again bully me or talk to me or try to talk on top of me in front of the jury, or I will admonish—

"[Defense Counsel]: You're talking—

"The Court:—or I will admonish—and you've just done it again.

"[Defense Counsel]: Fine, your honor. No problem.

"The Court: I will admonish you. And if you do it again I will consider sanctions. You know that there are no speaking objections. You've intentionally made speaking objections.

"[Defense Counsel]: No, I didn't.

"The Court: You are intentionally trying to get your client's—

"[Defense Counsel]: No, I didn't, your Honor.

"The Court:—version of what happened before the jury. I have given you more opportunities than most judges would or should have to put on your defense. Now put on your defense and don't try to finagle a way to get your client's testimony before the jury.

"[Defense Counsel]: Your honor, you have indicated before this trial started that there was gamesmanship and that, you know—there was gamesmanship and, you know the defense games. And I felt like that was inappropriate. . . . [¶] Obviously you are influencing or injecting your[self] in this case, which is inappropriate. And in my opinion I am going to ask for a mistrial.

"The Court: Denied."[1]

During the direct examination of the defense's only other witness (Zvonkina), at another side bar, Wheeler's counsel again raised the need for a mistrial due to judicial bias. Wheeler's counsel requested the side bar because the trial court had just sustained an objection by the People to a hypothetical question that was purportedly improper

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[1] On appeal, Wheeler does not challenge either the trial court's evidentiary ruling or the denial of the motion for a mistrial.

because it was not based on the facts in evidence.[2] During the side bar, while the jury was present, the trial court noted that Wheeler had another possible reason for fleeing the police besides being in a parasomnic state, namely that he was on "felony probation" at the time. Wheeler's counsel took immediate umbrage at the reference to his client's probationary status: "I think that for the court to even bring that up at this point is improper. And I think that the court should grant a mistrial right now. I don't think that should be said in the presence of a jury. I think that's improper." Although defense counsel did not press the court for a ruling on this second motion for a mistrial, he did return to the alleged impropriety of the trial court's "felony probation" comment later that same day immediately following the noon recess.

While it would have been far more prudent for Wheeler's counsel to have made an immediate and express objection to each instance of alleged judicial bias or to have availed himself of the statutory procedures to litigate the issue of a judge who refuses to recuse himself or herself for alleged judicial bias (see Code Civ. Proc., § 170.3), we conclude on this record that the issue of judicial bias was raised below in a timely manner sufficient to preserve the

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[2] The People concede that the trial court's evidentiary ruling on the hypothetical question was, in fact, in error—that is, defense counsel's question was based on facts in evidence.

issue for appellate review. In other words, we hold that, given the record here, it was not unreasonable for Wheeler's counsel to have refrained from objecting on grounds of bias to each of the court's purportedly objectionable remarks and actions.

B. WHEELER'S FAILURE TO MAKE PROPER LEGAL ARGUMENTS

In his opening brief, Wheeler identifies eight incidents at trial that purportedly reflect the trial court's judicial bias against him. Those eight incidents are described and discussed over the course of just 13 pages. In those 13 pages, however, there is a marked deficit of supporting legal authority. Wheeler relies upon a grand total of three sources: two California cases; and the bench notes for one jury instruction. Moreover, these three authorities are all cited in support of only one alleged incident of judicial bias—that is, the remaining seven instances of purported bias are not supported by any meaningful legal discussion or even by the citation of any legal authority whatsoever—no cases; no statutes; no treatises; no law review articles; not even any practice guide commentary. This is patently insufficient.

A touchstone legal principle governing appeals is that "the trial court's judgment is presumed to be correct, and the appellant has the burden to prove otherwise by presenting legal authority on each point made and factual analysis, supported by appropriate citations to the material facts in the record; otherwise, the argument may be deemed forfeited. [Citations.] [¶] It is the appellant's responsibility

to support claims of error with citation and authority; this court is not obligated to perform that function on the appellant's behalf." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655–656.) "[A]n appellant must present argument and authorities on each point to which error is asserted or else the issue is waived." (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867.) Matters not properly raised or that are lacking in adequate legal discussion will be deemed forfeited. (*Keyes*, at pp. 655–656.)

In other words, it is not this court's role to construct theories or arguments that would undermine the judgment and defeat the presumption of correctness. Rather, an appellant is required to present a cognizable legal argument in support of reversal of the judgment. "When an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary." (*Landry v. Berryessa Union School Dist*. (1995) 39 Cal.App.4th 691, 699–700.) "Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, [they are] waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99.)

Accordingly, we hold that Wheeler forfeited his judicial bias claim on appeal. However, out of an abundance of caution, we have reviewed the entire record in this case and will address the merits of Wheeler's claim.

II. Guiding legal principles and standard of review

A criminal defendant "has a due process right to an impartial trial judge under the state and federal

Constitutions. [Citations.] The due process clause of the Fourteenth Amendment requires a fair trial in a fair tribunal before a judge with no actual bias against the defendant or interest in the outcome of the case." (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) The comments of the trial judge about witnesses, evidence and its importance or lack thereof, and indications of hostility toward or displeasure with defense counsel can all negatively impact a defendant's right to a fair trial. The jurors "rely with great confidence on the fairness of judges, and upon the correctness of their views expressed during trials." (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233.) Indeed, jurors "are apt to give great weight to any hint from the judge as to his opinion on the weight of the evidence or the credibility of the witnesses." (*People v. Robinson* (1946) 73 Cal.App.2d 233, 237.) Judges have a "duty to maintain a strictly judicial attitude and to refrain from comment or other conduct which borders upon advocacy." (*People v. Campbell* (1958) 162 Cal.App.2d 776, 787.) Accordingly, a judge should not criticize the defense's theory. (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1238.) Although a trial court has the duty and discretion to control the conduct of a trial, (*People v. Fudge* (1994) 7 Cal.4th 1075, 1108; see Pen. Code, § 1044), it " 'commits misconduct if it persistently makes discourteous and disparaging remarks to defense counsel so as to discredit the defense or create the impression it is

allying itself with the prosecution.' " (*People v. Sturm*, *supra*, 37 Cal.4th at p. 1233.)

On the other hand, adverse judicial rulings, impatience, and criticism do not demonstrate bias absent some extrajudicial source. (*Liteky v. United States* (1994) 510 U.S. 540, 555; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1111–1112.) Indeed, " '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' " (*People v. Snow* (2003) 30 Cal.4th 43, 78.) "[M]ere expressions of opinion by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias." (*People v. Guerra*, at p. 1111; *Liteky v. United States*, at p. 551)

In reviewing a claim of judicial bias or misconduct, " ' "[o]ur role . . . is not to determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial." ' [Citation.] We make that determination on a case-by-case basis, examining the context of the court's comments and the circumstances under which they occurred. [Citation.] Thus, the propriety and prejudicial effect of a particular comment are judged by both its content and the circumstances surrounding it." (*People v. Abel* (2012) 53 Cal.4th 891, 914.)

III. The trial court did not demonstrate bias

Wheeler offers eight examples of what he contends was judicial bias. We consider each in turn.

A. DISBELIEF IN THE SLEEP-DRIVING DEFENSE?

Wheeler argues that before any evidence was presented the trial court displayed a bias against Wheeler's sleepdriving defense by making repeated references to "the game" of finding ways for a defendant to avoid testifying and being cross-examined. However, when the trial court's comments are read in the proper context, it is evident that there was no bias. The portion of the transcript upon which Wheeler relies is just a small part of an extended discussion that the trial court had with the parties over whether the defense could present its sleep expert without first having a fact witness—either the defendant or a family member or friend, someone who had personal knowledge of the defendant's sleepwaking or sleepdriving—testify about Wheeler's sleepwalking and sleepdriving habits.[3]

In the prior trial, before a different judge, Wheeler had been able to have his expert testify without another defense witness providing a factual foundation. The judge for the second trial, however, had a different opinion about the required foundation for the defense's expert, not about the

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[3] Ultimately, the trial court ruled that a factual foundation was needed for Zvonkina's testimony and the defense called Wheeler's girlfriend. On appeal, Wheeler does not challenge that evidentiary ruling.

sleepdriving defense. The trial court repeatedly tried to make this distinction clear to the defense: "The lack of scientific certainty doesn't deprive the medical opinion of its evidentiary value. [¶] . . . I don't think that the lack of certainty in this evidence of sleep syndrome . . . deprives it of evidentiary value. It has evidentiary value. That's really not the issue. [¶] The issue is that there is no foundation for the doctor's opinion which make[s] the opinion irrelevant. [¶] . . . [¶] I don't believe you've cooked this [defense] up. And I don't believe that this is concocted with this doctor coming down. I believe he really has whatever this disorder is. [¶] But what I am seeing is that you're reluctant to put on anybody else—no family, no friends to support it, no defendant to support it, nothing to support it. [¶] You can't do that tactically in my opinion as a defense attorney and then bring on an expert. It's just not—It's not the rules of evidence."

In addition, the trial court repeatedly explained that when it used the term "the game" it was using the term merely as a shorthand description for standard but entirely proper criminal defense tactics, tactics that the judge herself had used for 13 years when she was a defense attorney.

Throughout this extended discussion about the rules of evidence as they apply to expert testimony, there is nothing in the record before us indicating that the trial court was anything but polite and patient toward all the parties and their counsel. Accordingly, we hold that the trial court did

not show disbelief in Wheeler's defense prior to the presentation of evidence.

B. IMPROPER INQUIRY INTO DISCOVERY OF WHEELER'S WHEREABOUTS?

Wheeler contends the "trial judge improperly interjected herself into the case and aligned herself . . . with the Prosecutor by seeking discovery of information concerning [his] whereabouts knowing [he] would not testify." We disagree.

As Wheeler concedes, the trial court's question regarding his whereabouts before the doughnutting episode was posed during the extended discussion outside the presence of the jury over the factual foundation necessary for Zvonkina's testimony. A contextual reading of the trial court's question about Wheeler's whereabouts clarifies that the trial court was not seeking discovery for the People. Rather, it was trying to determine if there was an available fact witness who could provide the necessary foundation for the defense's expert:

"The Court: Were there other people—

"[Defense Counsel]: Witnesses? I don't recall specifically.

"The Court: That's critical.

[¶] . . . [¶]

"[Defense Counsel]: The other thing is we have peace officers. We may not have someone that was in a car with him or was with him, you know, two hours before or even five minutes before, but we have—

"The Court: Where was he before?

"[Defense Counsel]: We have peace officers.

"The Court: But where was your client right before this happened?

"[Defense Counsel]: Your Honor, I'm not putting that—I'm trying the case. I'm not volunteering evidence and violating attorney-client privilege here.

"The Court: Okay.

"[Defense Counsel]: I understand that. We're going forward one way or the other. But I have attorney-client privilege.

"The Court: I understand. But I'm just telling you that from what I understand your client comes from Northern California. He stays down here temporarily. I'm assuming he stays with a friend or other people and is not by himself.

"[Defense Counsel]: I understand. But I'd like to make a record, Your Honor. Your Honor, I don't think it's relevant for purposes of this trial. And I'm not certainly at liberty to even go there.

"The Court: Okay."

As the above-cited colloquy makes plain, there was nothing biased about the trial court's inquiry into Wheeler's whereabouts. It is firmly established that " ' "it is the right and duty of a judge to conduct a trial in such a manner that the truth will be established in accordance with the rules of evidence." ' . . . 'Courts are established to discover where lies the truth when issues are contested, and the final responsibility to see that justice is done rests with the

judge.' " (*People v. Carlucci* (1979) 23 Cal.3d 249, 255; *People v. Mendez* (1924) 193 Cal. 39, 46.) In other words, "[w]ithin reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination." (*People v. Santana* (2000) 80 Cal.App.4th 1194, 1206.) Here, when read in context, the court's question about Wheeler's whereabouts is nothing more than an attempt to help ensure that justice is being done by making sure the defense has the necessary witnesses to support its theory of the case. Moreover, when Wheeler's counsel raised the attorney-client privilege, the trial court appropriately elected not to press the issue.

In short, we hold that the trial court's inquiry into Wheeler's whereabouts does not show bias against the defense or an alliance with the prosecution.

C. IMPROPER MENTION OF WHEELER'S FELONY PROBATION STATUS?

Wheeler contends that, at a sidebar conference held during his counsel's direct examination of Zvonkina, the trial court, in a "loud" tone of voice, referred to Wheeler's felony probation status. Wheeler argues that the trial court "had no relevant reason under the circumstances to raise [his] felony probation status other than to further demonstrate and convey her personal [d]isbelief in [his] defense."

We find Wheeler's argument unpersuasive as it is at odds with the record in two important respects. First, the trial court expressly identified the reason why it mentioned Wheeler's felony probation status: it provided an alternative

reason for why Wheeler first fled from the police in his car and then, after crashing his car, fled from them on foot: "I'm listening to all of [Zvonkina's testimony about sleepdriving], and I guess it's a subject for cross-examination. But I'm having some concerns about the—[¶] How should I put this? [¶]—My role in making sure that the jurors hear everything that should be touched upon in making an objective and fair decision here. [¶] So what I'm hearing is a doctor opine that these actions are—I'm sure she's going to say consistent with somebody who is in—what's it called? A parasomnic state. [¶] . . . [¶] But I'm asking myself, well aren't they also consistent with someone who is fleeing the police for a different reason?" As previously noted and as noted by the trial court in the passage quoted above, the court has "a duty to see that justice is done and to bring out facts relevant to the jury's determination." (*People v. Santana*, *supra*, 80 Cal.App.4th at p. 1206.) Accordingly, there was nothing untoward in the trial court's reference to Wheeler's felony probation status.

Second, while trial judges must be " 'exceedingly discreet' " in what they say and do in the jury's presence, and must avoid comments that convey to the jury that the judge does not believe a witness's testimony (*People v. Sturm*, *supra*, 37 Cal.4th at pp. 1237–1238), the evidence regarding the purportedly loud tone that the trial court used when referencing Wheeler's probationary status is, at best, inconclusive.

During the sidebar, defense counsel did not complain about the trial court's tone of voice. In fact, when the trial court noted that it was "talking in a very soft voice," Wheeler's counsel did not disagree, arguing instead that regardless of the tone of voice used the mere mention of his client's status was "improper" in "the presence of a jury." Moreover, during the sidebar, it was the trial court who had to repeatedly caution defense counsel to lower his voice.

Later, after a recess, when Wheeler's counsel renewed his objection to the trial court's mention of his client's probation status at another sidebar, defense counsel stated that both his client and his client's girlfriend heard the trial court's reference to Wheeler's status. Upon hearing defense counsel's statement, the trial court immediately asked her clerk, who was "probably two feet away" from where sidebar took place, if she had heard the discussion; the clerk stated that she "could not hear what was going on. There was a whisper."

Although the trial court advised the jury following their verdict that they could now "talk to the attorneys," there is no evidence that defense counsel asked any of the jurors immediately after the trial concluded if they had heard the trial court's reference to Wheeler's felony probation status.[4]

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[4] It should be noted that a few days after the verdict and prior to sentencing, Wheeler, pursuant to Code of Civil Procedure sections 206 and 237, petitioned the court for the

Although the trial court subsequently denied the defense's postverdict petition to disclose the jurors' personal

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release of juror personal information so that his counsel could investigate the trial court's reference to his felony probation status. Any such petition must, among other things, be supported by a "sufficient showing" that the petitioner made "diligent efforts . . . to contact the jurors through other means." (See *People v. Rhodes* (1989) 212 Cal.App.3d 541, 551–552; see also *People v. Carrasco* (2008) 163 Cal.App.4th 978, 990 [*Rhodes*'s good cause showing survived enactment of Code Civ. Proc., § 237].) Wheeler's petition did not establish that any efforts were made to contact the jurors through any other means. The trial court, without any explanation, denied the petition.

On appeal, Wheeler makes an off-hand and half-hearted challenge to the trial court's ruling on his petition, stating merely that the trial court gave "no reason or basis" for denying the petition. With a few exceptions (e.g., rulings on demurrers and motions for summary judgment), a trial court is generally not required to set forth the reasons or grounds for granting or denying a motion. (See Code Civ. Proc., §§ 472d, 437c, subds. (f)–(g).) A trial court's denial of a petition for access to juror identification information is reviewed for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1097.) Here, Wheeler has not provided any factual grounds or any legal argument explaining how and why the trial court purportedly abused its discretion by denying his petition. Accordingly, we decline to consider his claim. (*Landry v. Berryessa Union School Dist.*, *supra*, 39 Cal.App.4th at pp. 699–700; *Jones v. Superior Court*, *supra*, 26 Cal.App.4th at p. 99.)

information, Wheeler declined to challenge that ruling on appeal.

In short, on the record before us, we cannot conclude that the trial court's reference to Wheeler's felony probation status in the presence of the jury was born of bias.

D. SUSTAINING AN EVIDENTIARY OBJECTION AS A MANIFESTATION OF ILL WILL?

Wheeler maintains that when the trial court improperly sustained an objection by the prosecution to a hypothetical that defense counsel had posed to Zvonkina, it "clearly conveyed [the trial court's] disbelief in Appellant's Defense and [the trial court's] alignment with the Prosecution."

There is no dispute that the trial court erred when it sustained the objection. As noted earlier (above), the People freely concede that the hypothetical as originally posed to Zvonkina was based on facts in evidence. What is in dispute is whether the trial court's failure to recall whether the police officers testified that Wheeler took an "aggressive" stance when cornered in the backyard is evidence of judicial bias or evidence of something no more sinister that an imperfect memory. The facts strongly suggest the latter.

On April 27, 2016, the first witness, Officer Marco Diaz, testified that when cornered in the backyard Wheeler "turned around in an aggressive manner, [with his] fists c[ock]ed . . . and coming toward us"; in other words, Wheeler took a "fighting stance" when initially confronted by the arresting officers. Later that same day, another one of the

arresting officers, Christian Wecker, testified; he too stated that Wheeler took a "fighting stance," but did not use the word "aggressive."[5]

By the time, Wheeler's counsel posed the contested hypothetical question to Zvonkina on May 2, 2016, several days had passed since the arresting officers had testified and, moreover, several other witness had testified. Critically, the court's confusion did not involve the fundamental substance of the police officers' testimony about Wheeler's conduct in the backyard prior to being arrested; rather, it was limited to only whether one or both the officers used the word "aggressive": "I don't remember the word aggressive' being used." The trial court's confusion may have been exacerbated by the fact that defense counsel argued at the resulting sidebar that both officers had used the word "aggressive."

Based on this record, we hold that the trial court's ruling did not convey—clearly or otherwise—disbelief in Wheeler's sleep-driving defense or alignment with the prosecution. The fact that the court's ruling was erroneous is of no significance. "[A] trial court's numerous rulings against a party—even when erroneous—do not establish a charge of judicial bias, especially when they are subject to review." (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1112.)

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[5] During his cross-examination of Officer Wecker, defense counsel used the word "aggressive."

E. IMPROPER ADMISSION OF ZVONKINA'S TOTAL FEES?

Wheeler contends that the trial court "improperly allowed the Prosecution to question the Defense Expert regarding her fees from the first trial."[6] Wheeler further contends that the admission of this evidence was "misleading and potentially harmful to the jury's belief of Defense Expert and demonstrates further [the trial court's] alignment with the Prosecution."

As a preliminary matter, we note several salient points. First, the trial court is vested with "broad discretion" with respect to the admission of evidence. (*People v. Williams* (1997) 16 Cal.4th 153, 196–197.) Second, "[e]xcept as otherwise provided by statute, *all* relevant evidence is admissible" (Evid. Code, § 351, italics added) and "relevant evidence" means "evidence, including *evidence relevant to the credibility of a witness* or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210, italics added.) Third, " '[t]he scope of cross-examination of an expert witness is especially broad . . . .' [Citations.] 'A party "may cross-examine an expert witness more extensively and searchingly than a lay witness, and the prosecution [is] entitled to attempt to discredit the expert's opinion. [Citation.] . . . The prosecutor

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[6] The trial court allowed the prosecution to use Zvonkina's fees from the first trial so long as the first trial was not referred to as a "trial," only as a "prior proceeding."

may properly cross-examine a witness to show bias . . . that would bear on the question of the credibility of the witness." (*People v. DeHoyos* (2013) 57 Cal.4th 79, 123.) Fourth, it is well established that among the ways a prosecutor may impeach a defense expert is by showing the jury how much money the expert earned while testifying on the defendant's behalf. (See *People v. Gray* (2005) 37 Cal.4th 168, 215; *People v. Price* (1991) 1 Cal.4th 324, 457.) In fact, Evidence Code section 722, subdivision (b) expressly provides that the "compensation and expenses paid or to be paid to an expert witness by the party calling him is a proper subject of inquiry by any adverse party as relevant to the credibility of the witness and the weight of his testimony."

Wheeler has not directed us to and we are not aware of any California case law holding that, following a hung jury, it is improper to include the expert's fees from the first trial when cross-examining him/her at the second trial on the total amount fees billed to the defendant. Accordingly, we hold that the trial court's ruling with respect to Zvonkina's fees was not the result of judicial bias.

F. IMPROPER ADMONISHMENT OF DEFENSE COUNSEL?

Wheeler claims that the trial court improperly "chastised defense counsel, before the jury, during cross-examination of Officer Diaz." (Initial capitalization omitted.) Wheeler bases his claim on the following exchange during his defense counsel's recross-examination:

"[Defense Counsel]: Approximately how many days you work a week, Officer Diaz?

"[The Prosecutor]: Asked and answered.

"The Court: Sustained.

"[Defense Counsel]: I think you testified you work three to four days a week.

"The Court: I don't see the relevancy. It's not—doesn't respond to what was brought up.

"[Defense Counsel]: Well, if the court allows me.

"The Court: No, I'm not.

"[Defense Counsel]: I'll connect it up.

"The Court: No.

"[Defense Counsel]: May I approach, your Honor?

"The Court: No."

Wheeler's claim is without merit, both factually and legally.

During his initial cross-examination of Officer Diaz, defense counsel asked Officer Diaz essentially the same exact question that he asked on his recross: "And how many days a week would you work patrol?" In fact, defense counsel's follow-up statement cited above shows that he was aware of Officer Diaz's prior answer of "three to four [days] a week." Even if the question of Officer's Diaz's hours had not been asked and answered previously, defense counsel's question was outside the scope of the prosecution's redirect examination. The prosecution's redirect was focused on a narrow subject: how long the Ferrari and the police vehicle were facing one another in the intersection and Officer's Diaz's report and prior testimony about that subject.

At worst, the court's terse comments indicate a mild frustration with defense counsel's failure to focus his questions on the subject of the prosecution's redirect examination and a valid desire to move the trial forward as expeditiously as possible. The trial court's refusal to allow defense counsel to take a somewhat meandering approach to the presentation of evidence does not indicate bias. (See *People v. Brown* (1993) 6 Cal.4th 322, 337 [judge's "understandable frustration with counsel's conduct did not reasonably suggest he would be biased against counsel or defendant"]; *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303 [trial court's orders "do not suggest bias . . . only frustration and a desire to manage a complex case"].)

Accordingly, we hold that the trial court's rulings with respect to the recross examination of Officer Diaz were not a biased or otherwise improper chastisement of defense counsel.

G. UNSOLICITED JURY INSTRUCTION?

Wheeler argues that when the trial court, sua sponte, included CALCRIM 360 among the jury's instructions, it conveyed to the jury its "disbelief" in his defense expert, Zvonkina. We disagree.

CALCRIM No. 360 offers guidance to the jury with regard to out-of-court statements upon which an expert relied in reaching his/her opinion, and provides as follows: "<Insert name> testified that in reaching (his/her) conclusions as an expert witness, (he/she) considered [a]

statement[s] made by <insert name>. [I am referring only to the statement[s] <insert or describe statements admitted for this limited purpose>.] You may consider (that/those) statement[s] only to evaluate the expert's opinion. Do not consider (that/those) statement[s] as proof that the information contained in the statement[s] is true."

The trial court explained to counsel for both parties that it "always give[s] this instruction." As a result, the trial court, relying on CALCRIM 360, instructed the jury as follows:

"The Court: And yesterday we heard from an expert witness. And I wanted to make sure that everybody understands that when an expert witness relies upon the records and statements from other people to form their opinion as an expert witness, it's a little bit of an odd distinction, but I'm going to try to explain it to you. [¶] The reports and such that the expert is relying upon are not being admitted for the truth of what is in their reports but only as to what the expert relied upon in coming up with their expert opinion. [¶] So in other words, an opinion is only as good as the facts that go[ ] [in]to how that opinion is created. And it's up to you to figure out whether the facts are correct or not."

The bench notes to CALCRIM 360, upon which Wheeler relies, state that "[a]lthough the court has no sua sponte duty to give this instruction, it should be given if appropriate under the circumstances. [Citations.] [¶] This instruction should *not* be given if *all* of the statements relied

on by the expert were admitted under applicable hearsay exceptions." (Italics added.)

Here, Zvonkina testified that in reaching her opinion she relied on a number of out-of-court statements, including, among other things, lectures on sleep medicine delivered at professional medical conferences and peer-reviewed articles published in scientific and medical journals. Zvonkina also testified that she relied on Wheeler's medical records, which, according to her, indicated that he was diagnosed with two separate sleep disorders: parasomnia and sleep apnea. Our review of the record indicates that none of the research or medical records upon which Zvonkina relied was admitted into evidence. Since none of the out-of-court statements were admitted, the trial court's instruction to the jury based on CALCRIM 360 was entirely consistent with the bench notes for CALCRIM 360.

As a result, we hold that the trial court's instruction was not done to "cast . . . doubt on the Appellant's defense" and did not convey to the jury the trial court's purported "align[ment] with the Prosecution."

H. IMPROPER CHASTISEMENT DURING CLOSING?

Wheeler contends that the following exchange during his counsel's closing argument "conveyed to the jury an impression that the Court disbelieved Appellant's defense and/or the testimony of the Defense Expert":

"[Defense Counsel]: [The prosecutor] doesn't have an expert that testified that on these circumstances this person absolutely is awake. Do you believe he couldn't afford it? Or

are you to believe that an attorney working for an outfit as big as the largest prosecuting agency in the world couldn't send a copy of the police report to a medical sleep medicine expert at UCLA or another hospital and get their opinion? [¶] And then when you get their opinion, you decide for yourself whether it's going to help your case or hurt your case to put them on the stand. I think it would be naïve of this jury to believe that he never sought an opinion, especially once I give him my expert report, and he knows what she's going to testify.

"[The Prosecutor]: I'm sorry, Your Honor. That implies I sought an opinion, got it and didn't turn it over, which I object to.

"The Court: Sustained.

"[Defense Counsel]: He doesn't have to call an expert. As attorneys, we can consult with experts.

"The Court: The subject has already been gone over and over and over.

"[Defense Counsel]: All right."

Wheeler's contention that the trial court's "over and over and over" comment showed bias is not well-taken. The comment, at worst, shows, not bias, but irritation only. The court's comments were well within the boundaries of the permissible. As our highest court has stated, " '[i]t is well within [a trial court's] discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior.' " (*People v.*

Snow, *supra*, 30 Cal.4th at p. 78.) While the trial court's comment may be seen as a rebuke, it was hardly a harsh one or one that showed disbelief in the defense's theory of the case or the opinion of its expert.

Accordingly, we hold that the trial court's "over and over" comment was not improper.

I. CUMULATIVE PREJUDICE?

Wheeler argues that even if each of the purported errors on their own were not sufficient to mandate a retrial, the cumulative effect of the errors so infected the trial that he was denied due process.

We are unconvinced. The trial court here did not " ' "withdraw material evidence from the jury's consideration, distort the record, expressly or impliedly direct a verdict, or otherwise usurp the jury's ultimate factfinding power." ' " (*People v. Harris* (2005) 37 Cal.4th 310, 350.) Moreover, none of the judge's remarks at issue in this appeal indicated "anything other than the proper exercise of reasonable control over a judicial proceeding, to keep it within the issues and to keep it moving." (*Crisci v. Sorce* (1957) 150 Cal.App.2d 96, 99.)

In addition, the trial court instructed the jury not to be influenced by bias or sympathy (CALCRIM No. 200), not to speculate as to why the court made specific rulings (CALCRIM No. 222), and to determine on its own the credibility and believability of witnesses (CALCRIM No. 226). The jurors are presumed to have followed these instructions. (*People v. Harris*, *supra*, 37 Cal.4th at p. 350.)

Furthermore, the evidence against Wheeler was overwhelming. There was no dispute that he was the driver of the Ferrari. In fact, there was uncontroverted testimony that shortly after his arrest and after being *Mirandized*,[7] Wheeler confessed and took full responsibility for driving recklessly while fleeing from police and crashing his car and, in the process, damaging someone else's property. The only real dispute was whether he was asleep at all critical times—that is, was he asleep when he was doing doughnuts in an intersection; asleep when he stopped doing doughnuts after the police turned on their car's lights and sounded its siren; asleep while he fled from the police in a high-speed chase that involved a number of hard right turns; asleep when he crashed his car; asleep when he fled from the police on foot and hopped over a fence into a home's backyard; and asleep when he turned and aggressively confronted the police. While there was evidence that Wheeler had been diagnosed previously with parasomnia and some evidence that he had engaged previously in some aggressive but limited sleepwalking behavior and possibly one sleepdriving or drowsydriving incident where the car "spun," there was no evidence that Wheeler had ever engaged in a such a sustained series of physically-demanding and complicated acts similar to those with which he was charged and remained asleep. Moreover, Zvonkina testified that all of the documented cases of sleepdriving involved people driving

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[7] *Miranda v. Arizona* (1966) 384 U.S. 436.

routes that they "take essentially day in and day out for their entire lives." There was, however, no evidence that Wheeler had ever done doughnuts in that particular intersection before or that he had ever driven the largely circular route he drove during the police chase or that he had ever ran down the same alley and hopped the same fence before. In fact, there was no direct evidence that Wheeler was even asleep immediately before the incident. The best that the defense could do in this regard was show that the incident occurred at a time that was consistent with when Wheeler typically falls asleep.

Under these circumstances, it is not reasonably probable that the jury would have reached a different result had the trial court not made the challenged statements and rulings. Accordingly, even if the trial court's comments were improper and conveyed bias, which we conclude they did not, the judgment is still not subject to reversal under either the federal constitutional standard of error (*Chapman v. California* (1967) 386 U.S. 18, 24), or the state test of *People v. Watson* (1956) 46 Cal.2d 818, 836.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.