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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. GEOFFREY S. BUENO, Defendant and Appellant.	B277399 (Los Angeles County Super. Ct. No. MA062308)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa Chung, Judge. Affirmed.

Elizabeth K. Horowitz, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Geoffrey S. Bueno appeals from the judgment of conviction of two counts of second degree robbery and one count of possession of a controlled substance. Appellant challenges the sufficiency of the evidence supporting one of the robbery convictions, and the exclusion of evidence that one of the victims had a prior domestic violence conviction. He also complains that his counsel was ineffective for failing to object to the prosecutor's misstatement of the law during closing arguments. Finally, appellant asserts his sentence is unauthorized because the trial court imposed a penalty assessment in conjunction with the Health and Safety Code section 11372.5 laboratory fee. As we shall explain, none of the appellant's claims have merit and, accordingly, we affirmed the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On March 5, 2014, Scotty Southwell, a Home Depot loss prevention officer observed appellant "act suspiciously" in a Home Depot; Southwell saw appellant conceal several small items of merchandise in his pockets and waistband and then select a couple of additional items and walk toward the cash registers in the front of the store. At the cash register, appellant paid for the items he held in his hands, but not the items that he had hidden in his clothing. Southwell followed appellant out of the store. Once outside, Southwell, who was dressed in plain clothes, approached appellant from the side and identified himself as "store security" and showed appellant his security badge. Appellant looked at Southwell but did not stop; he continued to walk toward the parking lot. Southwell then repositioned himself in front of the appellant to prevent his movement, and Southwell told appellant to stop and come back into the store. Southwell testified that appellant pushed him in the chest area, and then ran toward the parking lot. Southwell went into "detainment mode," chasing after

appellant. He grabbed appellant's torso from behind and knocked appellant down. On the ground, appellant cursed, thrashed his arms and kicked legs, and struggled to push Southwell off. Southwell told appellant to stop resisting and to put his hands behind his back, but appellant continued to resist, saying, "Get the fuck off me. Let me go." Southwell testified that appellant used significant force to prevent him from making an arrest. Southwell stated that he felt in fear for his safety because he could not subdue appellant alone and did not know whether appellant was armed.

Home Depot supervisor Mario Fernandez witnessed part of the encounter between appellant and Southwell. Before appellant left the store, Southwell had asked another employee to inform Fernandez that Southwell was going to apprehend a burglary suspect outside of the store and that Southwell needed Fernandez to witness the detention.[1]

Fernandez observed Southwell approach appellant outside the store. Fernandez also saw appellant swing his right hand out toward Southwell, but he could not recall whether he saw appellant strike or push Southwell. Fernandez then lost sight of Southwell and appellant for a few moments, and Fernandez ran out of the store to follow them. Fernandez saw Southwell struggling with appellant on the ground as appellant continued to resist—kicking and thrashing his arms and legs—trying to get away from Southwell. Southwell asked Fernandez to hold appellant's legs so that Southwell could place handcuffs on appellant. As he tried to hold appellant's legs, Fernandez told appellant to stop resisting, but he did not cooperate, and kicked Fernandez. Fernandez said he held appellant's legs until appellant "kicked me off." Fernandez assisted Southwell in placing the handcuffs on appellant.

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[1] Home Depot policy required the presence of an employee to witness store security personnel detain a suspected shoplifter.

Fernandez felt nervous and afraid during the encounter because he did not know what would happen and did not want to get hurt.

Appellant continued to resist even after he was placed in handcuffs and on his feet, and therefore, two additional employees were summoned to assist Southwell to escort appellant back into the store. A search of appellant resulted in the discovery of store merchandise in his pockets and waistband. The value of the items appellant stole totaled $99.98.

Appellant was arrested and charged with two counts of robbery in violation of Penal Code section 211 against Scotty Southwell (count 1) and Mario Fernandez (count 2), and one count of possession of a controlled substance (methamphetamine) in violation of Health and Safety Code section 11377, subdivision (a) (count 3).[2] The information further alleged that appellant had committed two strike priors per Penal Code section 667, subdivision (d), and section 1170.12, subdivision (b), and two serious felonies per Penal Code section 667, subdivision (a)(1).

During appellant's trial, the prosecutor played a video from the store's surveillance camera that showed part of the encounter between Southwell and appellant. The video showed Southwell and appellant struggling on the ground and Fernandez's efforts to assist Southwell, but it did not capture the initial interaction between appellant and Southwell. Appellant presented testimony from an eyewitness who was walking in the Home Depot parking lot at the time of the incident. The witness observed appellant walking quickly away and saw Southwell tackle him to the ground, but she did not see the initial encounter between them.

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[2] Appellant suffered injuries during the struggle with Southwell and he was taken to the hospital. At the hospital, a small baggie containing a usable amount of methamphetamine was found in appellant's possession, which gave rise to the drug possession charge against appellant.

The jury returned guilty verdicts on all of the counts. The trial court sentenced appellant to 47 years to life, as follows: On count 1, applying the two prior strikes, the court imposed 25 years to life, plus 10 years for two priors pursuant to Penal Code section 667, subdivision (a)(1), which came to 35 years to life. On count 2, the trial court struck the two prior strikes and imposed the low term of 2 years, plus 10 years for the two Penal Code section 667, subdivision (a)(1) priors, which came to 12 years, to run consecutive to count 1. On count 3, the trial court imposed 365 days in county jail, to run concurrently. The trial court also imposed criminal conviction assessments, security fees, and restitution fines and a $50 crime laboratory fine under Health and Safety Code section 11372.5, plus penalty assessments.

Appellant timely filed a notice of appeal.

DISCUSSION

A. Sufficient Evidence Supports the Robbery Conviction Alleged in Count 2

Appellant asserts the evidence that he exerted force and inflicted fear is insufficient as to the second count of robbery in which Fernandez is the alleged victim. He claims that Southwell was the only victim in this case, and that the force and fear to accomplish the taking was directed only at Southwell, not Fernandez. As discussed below, we disagree.

1. Standard of Review

" 'The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.' " (*People v. Johnson (*1980) 26 Cal.3d 557, 576.) This court views the "evidence in the light most favorable" to the verdict, and presumes the existence of every fact the jury might reasonably deduce from it. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) We do not "substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "[T]he testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions." (*People v. Leigh* (1985) 168 Cal.App.3d 217, 221.)

2. Applicable Legal Principles

Penal Code section 211 defines robbery as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished

by means of force or fear." (Pen. Code, § 211.)[3] A defendant who does not use force or fear in the initial taking of the property may nonetheless be guilty of robbery if he uses force or fear to *retain* it or carry it away in the victim's presence. (*People v. Gomez* (2008) 43 Cal.4th 249, 256, 264; *People v. Estes* (1983) 147 Cal.App.3d 23, 27.) " 'Gaining possession or . . . carrying away' includes forcing or frightening a victim into leaving the scene, as well as simply deterring a victim from preventing the theft or attempting to immediately reclaim the property." (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771.)

3. Evidence of Force and Fear

Although in general it is not necessary that a robbery is accomplished using force *and* fear, here because the information alleged that appellant used force *and* fear to rob Fernandez, we review the evidence supporting the conclusion that appellant employed both.

As for the element of force, the evidence was sufficient for the jury to conclude that appellant's use of force while attempting to retain Home Depot merchandise was directed not just at Southwell, but also at Fernandez. When appellant kicked Fernandez the robbery was in progress; Southwell could not subdue appellant alone and appellant had not reached a place of relative safety

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[3] Employees, such as Southwell and Fernandez, can be victims of robbery based on constructive possession of the employer's property. (*People v. Jones* (1996) 42 Cal.App.4th 1047, 1053.) And more than one employee may possess the property at the same time. (*People v. Miller* (1977) 18 Cal.3d 873, 881, superseded by statute on other grounds as recognized by *People v. Young* (1982) 98 Cal.App.3d 953.) In addition, where two persons in joint possession of a single item of property are subjected to force or fear, two robbery convictions are proper. (*People v. Ramos* (1982) 30 Cal.3d 553.)

required for the robbery to be complete. Fernandez testified that had appellant not used force while retaining the merchandise, Fernandez would not have grabbed appellant's legs. In addition, appellant's directed force at Fernandez. As he tried to hold appellant's legs, Fernandez told him to stop resisting, but appellant did not cooperate. In response, appellant kicked Fernandez in the hands and on his legs. From this evidence the jury could reasonably infer that appellant was aware of Fernandez's efforts to subdue him, and that appellant specifically directed his kicks at Fernandez, intending to break free of his grasp. This use of force to resist being restrained by Fernandez supports the verdict on count 2.

Concerning the element of fear, the victim need not testify that he or she was afraid or that the defendant made an express threat. (See *People v. Mungia* (1991) 234 Cal.App.3d 1703, 1709, fn. 2; *People v. Morehead* (2011) 191 Cal.App.4th 765, 774–775.) There need only be evidence from which it can be inferred that the victim felt fear and that the fear allowed the crime to be accomplished. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 946.) Here, appellant's conduct caused Fernandez to experience fear. Fernandez testified that he released appellant's legs because he was afraid and did not want to be injured when appellant kicked him. Fernandez's reaction in response to appellant's conduct is sufficient to support a finding that appellant used fear to commit the robbery. (*People v. Garcia* (1996) 45 Cal.App.4th 1242, 1246, overruled on another ground by *People v. Mosby* (2004) 33 Cal.4th 353, 365, fn. 2.)

We conclude that the prosecution presented evidence from which a rational trier of fact could have found beyond a reasonable doubt that appellant's use of force and fear to retain Home Depot property was directed at Fernandez. The jury's guilty verdict as to count 2 is supported by substantial evidence.

B. The Trial Court Did Not Err in Excluding Evidence of Southwell's Prior Misdemeanor Domestic Violence Conviction

Before trial, appellant sought an order allowing him to impeach Southwell with evidence that Southwell had suffered a Penal Code section 273.5 misdemeanor domestic violence conviction in 2004. The prosecutor opposed the request, arguing that Southwell's 2004 conviction was remote and irrelevant. The trial judge excluded the 2004 conviction under Evidence Code section 352. The judge stated: "I have done a [section] 352 balancing. Yes, a misdemeanor [section] 273.5 is a crime of moral turpitude, but I have also taken into consideration remoteness, and that's noting the [section] 243[4] arrest, which is not a conviction. But with no other contact, I find it to be unduly remote. [¶] Separate and apart from the remoteness issue, it . . . does not bear as close a relationship to veracity and truthfulness as [Southwell's] testifying here in a different capacity as a loss prevention officer. [Section] 273.5, just by definition, involves more a domestic violence incident involving violence. So for those reasons, the court is excluding it under [section] 352."

A witness may be impeached with any prior conduct involving moral turpitude subject to the trial court's exercise of discretion under Evidence Code section 352. (*People v. Clark* (2011) 52 Cal.4th 856, 931-933.) In particular, when determining whether to admit a prior conviction for impeachment purposes, the trial court should consider, among other factors, whether it reflects on the witness's honesty or veracity, whether it is near or remote in time, whether it is for the same or similar conduct as the

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[4] The prosecutor disclosed that although Southwell had been arrested in 2010 for violating Penal Code section 243, subdivision (e)(1) (misdemeanor battery against a cohabitant), no case had been filed in that matter.

charged offense, and what effect its admission would have on the defendant's decision to testify. (*People v. Green* (1995) 34 Cal.App.4th 165, 183.) The trial court's discretion to admit or exclude impeachment evidence is broad and a reviewing court ordinarily will uphold the trial court's exercise of discretion. (*People v. Collins* (1986) 42 Cal.3d 378, 389.)

Here, appellant argues that he should have been permitted to present evidence of Southwell's 2004 prior domestic violence conviction to impeach Southwell because it was probative on the credibility of Southwell's assertions that appellant pushed Southwell during their initial encounter and that Southwell used force to detain appellant only in reaction to the initial push. We disagree.

Although domestic violence is a crime of moral turpitude (*People v. Rodriguez* (1992) 5 Cal.App.4th 1398, 1401-1402), that alone does not make it ipso facto admissible. The court must balance its relevance against prejudice and undue consumption of time. Here, the crime was committed 12 years earlier and therefore was not highly relevant to Southwell's credibility at the time of trial. Thus, appellant has not demonstrated that the trial court abused its discretion in excluding it.

C. Appellant Has Not Demonstrated Prejudicial Error Based on His Lawyer's Failure to Object to the Prosecutor's Misstatement of the Law

Appellant contends the prosecutor committed misconduct during closing argument when she told the jury that: "If you find the defendant not guilty of robbery, then you start deliberating on petty theft. But if you find the defendant guilty of robbery, you stop there. You do not consider the lesser included of petty theft."

Appellant claims that the prosecutor's statement effectively instructed the jury not to consider the lesser included offense unless and until it found appellant not guilty of robbery and

therefore violated the law set forth in *People v. Kurtzman* (1988) 46 Cal.3d 322, 329. In *Kurtzman*, the California Supreme Court held that a jury may not be instructed that they must consider offenses in a certain sequence. (*Ibid.* [the court may not "prohibit a jury from considering or discussing the lesser offenses before returning a verdict on the greater offense"].) Even assuming that the prosecutor's statement ran afoul of *Kurtzman* and thus constituted prosecutorial misconduct (*People v. Marshall* (1996) 13 Cal.4th 799, 831, italics omitted [a prosecutor commits misconduct by misstating the law]), appellant's counsel did not object to the prosecutor's statement or request the court admonish the jury to disregard it.

A defendant cannot complain on appeal of error by a prosecutor unless he or she objected on the same ground in a timely fashion in the trial court and requested that the trial court admonish the jury to disregard the error. (*People v. Jones* (2003) 29 Cal.4th 1229, 1262.) The only exception is for cases in which a timely objection would have been futile or ineffective to cure the harm. (*People v. Green* (1980) 27 Cal.3d 1, 34.) Nothing in the record suggests that an objection by appellant's counsel would not have been sustained and followed immediately by an admonition to the jury to disregard the prosecutor's remark or that this remedy would not have cured any possible prejudice. Accordingly, a timely objection was required; and appellant's counsel's failure to do so forfeits his claim of prosecutorial misconduct on appeal.

Recognizing the forfeiture problem, as an alternative to his claim of prosecutorial misconduct, appellant urges us to conclude that his counsel's failure to object to the prosecutor's misstatement of the law constituted ineffective assistance of counsel. To prevail on this claim, appellant must establish his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's deficient performance,

the result of the trial would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-687 (*Strickland*); *People v. Williams* (1997) 16 Cal.4th 153, 215.)

" ' The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.' [Citation.]" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) And in considering a claim of ineffective assistance of counsel, it is not necessary to 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.' " (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, *supra*, 466 U.S. at p. 697.) It is not sufficient to show the alleged errors may have had some conceivable effect on the trial's outcome; the defendant must demonstrate a " 'reasonable probability' " that absent the errors the result would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218, 233.)

In this case, even if counsel had no valid tactical reason for failing to object to the prosecutor's misstatement of the law and request an admonition, we would reject appellant's ineffective assistance of counsel claim because he has failed to demonstrate a reasonable probability that the outcome of his trial would have been different absent that error.

Appellant's complaint does not concern objectionable instructions given by the trial court or comments made by the trial court under the cloak of its authority. Instead, this case involves statements by a prosecutor. " '[A]rguments of counsel "generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence [citation], and are likely viewed as

the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law." [Citation.]' " (*People v. Katzenberger* (2009) 178 Cal.App.4th 1260, 1268, quoting *People v. Mendoza* (2007) 42 Cal.4th 686, 703.) Here, the trial court properly instructed the jurors that if they believed the attorneys' comments on the law conflicted with the court's instructions, then the jurors were required to follow the court's instructions. The trial court subsequently instructed the jury pursuant to CALCRIM No. 3517: "If all of you find the defendant is not guilty of the greater crime, you may find him guilty of a lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of that lesser crime. A defendant may not be convicted of both the greater and lesser crime for the same conduct. . . . *It is up to you to decide the order in which you consider each crime and the relevant evidence,* but I can accept the verdict of guilty of a lesser crime only if you have found the defendant not guilty of the corresponding greater crime." (Italics added.) "When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]" (*People v. Osband* (1996) 13 Cal.4th 622, 717.) We presume that the jury followed the trial court's instructions and conclude that the instructions clarified any misstatement of the law by the prosecutor.

Given that the instructions and the fact that evidence that appellant committed second degree robbery—the greater offense—was strong, no reasonable probability exists that the outcome of appellant's trial would have been different absent his counsel's error. In short, on this record, appellant has failed to carry his

burden of demonstrating prejudice as a result of the ineffective assistance of his trial counsel.

D. The Trial Properly Imposed Penalty Assessments on the Health and Safety Code Section 11372.5 Laboratory Fee

The trial court imposed a $50 laboratory analysis fee pursuant to Health and Safety Code section 11372.5, as well as a penalty assessment on the fee. Appellant argues that the trial court erred in applying the penalty assessment to the Health and Safety Code section 11372.5 laboratory analysis fee. We disagree.

Health and Safety Code section 11372.5, subdivision (a) provides: "Every person who is convicted of a violation of [the offenses enumerated therein including Health and Safety Code section 11378] shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense. The court shall increase the total fine necessary to include this increment. [¶] With respect to those offenses specified in this subdivision for which a fine is not authorized by other provisions of law, the court shall, upon conviction, impose a fine in an amount not to exceed fifty dollars ($50), which shall constitute the increment prescribed by this section and which shall be in addition to any other penalty prescribed by law."

Penalty assessments must be applied to "every fine, penalty, or forfeiture" imposed by the trial court in a criminal case. (See Pen. Code, § 1464; Gov. Code, § 76000.) Thus, if the laboratory analysis fee mandated by Health and Safety Code section 11372.5 is a "fine, forfeiture[] and other money[]" rather than a nonpunitive fee, then the trial court in this case properly apply penalty assessments to that fee.

In *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1153 (*Talibdeen*), the California Supreme Court implicitly assumed that the laboratory analysis fee imposed by Health and Safety Code

section 11372.5 was a punitive fine to which penalty assessments were required, holding that the assessment of such penalties is mandatory. (*Id.* at p. 1157 (conc. opn. of Werdegar, J.).)

Notwithstanding *Talibdeen*, a split of authority exists among the appellate courts on whether the laboratory analysis fee is subject to a penalty assessment. In *People v. Watts* (2016) 2 Cal.App.5th 223, 229, 237 (*Watts*), the Court of Appeal, First Appellate District, Division One, held that the laboratory analysis fee imposed pursuant to Health and Safety Code section 11372.5 is a fee, rather than a fine, penalty or forfeiture, and thus was not subject to penalty assessments. And Division Seven of this court in *People v. Vega* (2005) 130 Cal.App.4th 183, 191-195 (*Vega*) agreed and noted that the Legislature's choice of the word "fee" or "fine" did not determine whether the laboratory analysis fee was intended as "punishment," observing that the legislative purpose of the laboratory analysis fee was to offset administrative costs imposed on local jurisdictions, not to punish convicted defendants. (*Id.* at p. 195.)

In contrast to *Vega* and *Watts,* in *People v. Sharret* (2011) 191 Cal.App.4th 859, 869 (*Sharret*), the Division Five of this court held that the laboratory analysis fee was punitive. Among other considerations, the *Sharret* court relied on the fact that the fee is imposed only upon a criminal offense, and does not apply in other contexts, that separate fees are imposed for each conviction and thus the fee "is assessed in proportion to a defendant's culpability," and that the fee is mandatory and has no ability to pay requirement. (*Id.* at p. 870.) The court further noted that the fund into which the fee is deposited is earmarked for criminal investigations, which has no civil purpose, and there is no evidence that the enacting legislation "was a mere budget measure" like other statutory fees. (*Ibid.*)

Sharret is the more persuasive of the two conflicting lines of authority. First, it comports with the California Supreme Court's implied finding in *Talibdeen*, and in general, even dicta from the California Supreme Court is to be followed. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169.) Second, *Sharret* thoroughly analyzed the fines and fees which may or must be imposed upon conviction and the cases interpreting them, finding numerous reasons for concluding that "the Legislature intended the [Health and Safety Code] section 11372.5 criminal laboratory analysis fee to be punitive." (*Sharret*, *supra*, 191 Cal.App.4th at p. 869.) Contrary to *Vega's* description, the fee is not flat. Although it is tied to the number of offenses committed by a defendant, rather than the seriousness of each crime, it is still imposed in proportion to culpability. Moreover, even if as suggested in *Vega* that one purpose of Health and Safety Code section 11372.5 is to offset the cost of testing drugs confiscated from persons convicted of certain drug offenses, this does not mean the Legislature did not have more than one purpose in enacting Health and Safety Code section 11372.5. A fine and fee system can serve as deterrence, punishment, and help mitigate the effects of crime. These goals are not mutually exclusive; such multiple purposes do not show a legislative intent to exempt the laboratory analysis fee from otherwise mandatory penalty assessments. Accordingly, we follow *Sharret* and conclude that the laboratory analysis fee under Health and Safety Code section 11372.5 to be a "punishment" such that the trial court properly imposed penalty assessments against appellant based on the fee.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

LUI, J.